

August 2021

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## *Employers Take Note: D.C. Non-Compete Applicability Act Delayed until April 2022*

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On August 10, 2021, the D.C. Council approved the city's 2022 budget, which funded the Ban on Non-Compete Agreements Amendment Act of 2019 (the "Act"), but also changed the Act's applicability date to April 1, 2022. The Mayor is expected to sign the council-approved budget and then send it to the United States Congress for final approval.

### **Delay to Allow for Amendments**

The delay in implementation allows the D.C. Council to move forward on proposed amendments to the law, which are still pending. One key pending amendment would create an exception to the non-competes ban for "a bona fide conflict of interest provision" and add a retaliation provision, as described in [our previous Client Alert](#).

Specifically, it would enable employers to use "a bona fide conflict of interest provision," which is defined as "an otherwise lawful written provision or workplace policy that bars an employee from accepting money or a thing of value from a person during the employee's employment with the employer because the employer reasonably believes the employee's acceptance of money or a thing of value from the person will cause the employer to (A) [c]onduct its business in an unethical manner; or (B) violate applicable local, state, or federal laws or rules."

The amendment also adds a provision prohibiting employers from retaliating against employees for "asking the employer whether the employee's acceptance of money or a thing of value from another person during or after the employee's employment for the employer violates the employer's workplace policy."

In addition, the proposed amendment would clarify that employers may bar an employee's use, in addition to the disclosure, of confidential, proprietary, or sensitive information including client lists, customer lists, or trade secrets during or after the employee's employment with the employer.<sup>1</sup>

### **Potential Other Amendments**

During the July 14 public hearing on the proposed amendments, another D.C. Councilmember proposed additional changes to the amendment, although this proposal has not yet been published. It is not clear when the new proposed changes will be published, or if they will exactly mirror what was proposed during the hearing, but the proposal is noteworthy.

Councilmember Brooke Pinto proposed limiting the Act to allow for targeted non-competes for certain categories of employees. First, under the Pinto proposal, an employee with broad access to confidential information could be prohibited from moonlighting if that simultaneous employment would cause confidential information to be exposed or used by a competitor, and employers could ban moonlighting for employees who are uniquely identified with their employer or its brand. Second, the Pinto proposal would permit the use of a non-compete for employees making more than \$80,000 per year as long as the non-compete is limited to six months or less. However, employers would be required to pay the full salary for six months for an employee if the non-compete keeps the employee from a job entirely (capped at \$150,000 less any signing bonus).

## Conclusion

While the final language of the Act is still uncertain in light of the pending Amendment (and possible additional proposed amendments), employers can take some comfort in the D.C. Council's most recent vote, which confirms that the applicability date of the Act will be no earlier than April 1, 2022 (subject to signature by the Mayor and final approval by Congress, which is expected). This provides clarity for employers who have been contemplating changes to policies and agreements in light of the Act's sweeping restrictions. Though the timing of the Act's applicability is now clear, the ultimate language of the Act is not.

Paul Hastings is monitoring all developments and will provide updates when they are available, including [updates on President Biden's recent executive order and its impact on the D.C. Non-Compete Act](#).

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<sup>1</sup> This change is reflected in the amendment's addition of the italicized term below, so the law would specifically state that the term "non-compete provision" does not include "[a]n otherwise lawful provision that restricts the employee from disclosing *or using* the employer's confidential, proprietary, or sensitive information, client list, customer list, or a trade secret, as that term is defined in section 2(4) of the Uniform Trade Secrets Act of 1988." (emphasis added).

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