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Employers Take Note: Washington D.C. Is Poised to Enact the Nation's Broadest Prohibition on Employee Non-Compete Agreements

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On January 11, 2021, Washington, D.C. Mayor Muriel Bower signed a bill to ban virtually all prospective non-compete agreements between employers and employees in the District, including agreements that would prohibit employees from moonlighting with other employers. The Ban on Non-Compete Agreements Amendment Act of 2020 (the "Act") will take effect after Congress has permitted it to pass a 30-day review period[1] and signed off on its inclusion in the District's Fiscal Year 2022 budget.[2] If enacted and funded, the law would constitute one of the nation's broadest bans on future employee non-compete agreements; however, it would not invalidate existing, already signed non-compete agreements.

Scope of Coverage

The Act's applicability is broad and it has very few exceptions. It generally applies to all employees who perform work in the District on behalf of any employer, regardless of that employer's size. However, because it is limited to "employees," it should not apply to independent contractors.[3] The Act also contains a small set of specific carve outs for certain types of workers, including:

- Volunteers;
- Religious employees;
- "Casual babysitters"; and
- Medical specialists practicing primarily in D.C. and making over $250,000 per year.

These exempted categories of workers are not considered "employees" for purposes of the Act and do not need to be provided with the notice that employers must provide to employees (discussed in more detail below). The Act also does not prohibit non-competes arising in connection with the sale of a business, where the seller agrees not to compete with the buyer's business. Outside of these few exceptions, however, all employers and employees within the District will be covered.

Notably, the Act does not address whether it applies to employees who may be working from their home in the District (due to the COVID-19 pandemic or otherwise), even though their place of work ordinarily is outside of the District.

The Act Will Ban Virtually All Non-Compete Agreements, Including Agreements Restricting Moonlighting

As currently written, the Act would prohibit private employers from restricting their employees' ability to subsequently *or simultaneously* work for any other employer, including direct competitors. These restrictions extend both to workplace agreements and to workplace policies.

With respect to workplace agreements, the Act prohibits employers "from requiring or requesting that an employee sign an agreement that includes a non-compete provision." The term "non-compete provision" is defined as "a provision of a written agreement between an employer and an employee that prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee's own business." Thus, as written, the Act not only prohibits employer restrictions on an employee's *future* employment, but also the employee's *contemporaneous* employment (often referred to as moonlighting).

In addition, the Act prohibits employers from maintaining workplace policies that prohibit an employee from: "being employed by another person; performing work or providing services for pay for another person; or operating the employee's own business."

The Act's restrictions on non-compete agreements apply only prospectively. Under Section 102(b)[4] of the Act, any non-compete provision contained in an agreement that was entered into before the applicability of the Act will likely remain enforceable.

Notice Requirements

Once the Act takes effect, employers will have a limited window in which to provide notice of the Act to both new and current employees. The prescribed notice text states as follows:

> No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.

This text must be provided to current employees no later than:

- Ninety calendar days after the applicability date[5] of the Act;
- Seven calendar days after an individual becomes an employee of the employer; and
- Fourteen calendar days after the employer receives a written request for such statement from the employee.

The Act prescribes additional notice requirements for employers seeking to enter a non-compete agreement with a medical specialist who might otherwise be exempted from the Act. Under Section 103(a) of the Act, a particular written notice[6] must be provided "to the medical specialist at the same time the employer provides the proposed non-compete provision to the medical specialist."

Anti-Retaliation Provisions

The Act contains express anti-retaliation provisions. Specifically, it prohibits employers from taking adverse action against an employee for:

- The employee's refusal to agree to a non-compete provision;
- The employee's alleged failure to comply with a non-compete provision or a workplace policy made unlawful by the Act;
- Asking, informing, or complaining about the existence, applicability, or validity of a non-compete provision or a workplace policy that the employee "reasonably believes" is prohibited under the Act; or
- Requesting from the employer the information required to be provided to the employee (i.e., the notice requirement described above).

"Retaliation" under the Act includes "tak[ing] an adverse action, including a threat, verbal warning, written warning, reduction of work hours, suspension, or termination against one or more employees or medical specialists."

Enforcement Provisions

Aggrieved employees may file complaints of violations with the Mayor or may file "[a] civil action in a court of competent jurisdiction." Violations of the Act can then result in fines and statutorily imposed liability. Fines for violations will be no less than $350 and no more than $1000 per violation. On top of that, however, employers will face statutory liability to employees for violations of the Act:

- Liability for Attempting to Contract: Initial liability for employers that attempt to have employees sign a non-compete agreement or that attempt to promulgate a non-compete policy will be statutorily liable to all affected employees for between $500 and $1,000 for first time violations; subsequent violations will yield liability of "not less than $3,000."
- Liability for Attempted Enforcement: Employers that attempt to actually enforce non-compete agreements will be statutorily liable for "not less than $1,500" for first time violations, and "not less than $3,000" for subsequent violations.
- Liability for Retaliation: Finally, employers that engage in prohibited retaliatory acts will be statutorily liable for between $1,000 and $2,500 dollars for first time violations, and "not less than $3,000" for subsequent violations.

The Act also authorizes awards for "such legal and equitable relief as may be appropriate," including but not limited to reasonable attorneys' fees and costs, back wages, liquidated damages equal to treble the amount of unpaid wages, and reinstatement of employment. *See* D.C. Code § 32-1308(a)(1)(A) (incorporated by the Act).

By incorporating by reference D.C. Code §32-1308, the Act expressly authorizes class or collective actions by aggrieved employees.[7]

Next Steps for Employers

Although the Act is not yet effective, its potential to upend the status-quo warrants the immediate attention of employers in the District. Employers should consider preparing as follows:

1. Review Standard Agreements and Policies

Employers should take stock of their existing policies and practices to see what, if anything, might warrant revision in anticipation of the law's enactment. Standard forms—such as offer letters, onboarding agreements, severance terms, and the like—are among the more likely vehicles to contain the type of language prohibited by the Act. Employee handbooks and other policy documents should also be reviewed.

2. Draft and Prepare Notice to Employees

Employers should also prepare to implement the Act's stringent notice requirements. Once the law applies, employers will have 90 calendar days to notify their existing employees of the Act. That notice must include certain text, as prescribed by the Act (quoted above).

Employers must also notify any subsequent new hires of the Act within seven calendar days of hire. Employers should begin to refine their onboarding and/or new hire procedures now to account for this new requirement.

3. Take Stock of Existing Non-Compete Agreements

As written, the Act's ban on non-compete agreements is only prospective. Thus, employers may continue to enforce non-compete agreements that are already in place once the Act takes effect. Accordingly, employers should take stock of their non-compete agreements that are currently in effect for D.C. employees and that will remain enforceable moving forward.

Employers should consider, and management should be aware, that, once the Act becomes law, employees in the same or very similar positions or roles who are new hires will not be subject to the same restrictions as those who entered into non-competition agreements before the Act.

Additional Considerations

When the Act takes effect, employers' practices will undoubtedly need to change. However, employers are not without options when it comes to protecting their interests. Below are several future options to consider.

1. Increased Reliance on Fiduciary Duties

Regardless of the Act, all employees should still have a fiduciary duty to act with loyalty on behalf of their employer. This means, among other things, that employees cannot take actions that benefit them or others to the detriment of their employer. Although it is not yet clear how the enforcement of this duty might intersect or contradict with enforcement of the Act, employers should continue to rely upon fiduciary duties to hold their employees accountable. For example, thoughtfully tailored policies that restrict an employee's use of company time, space, and equipment—on the basis that the employee should be working for only one employer while "on the clock" for that employer—should survive the Act's prohibitions. In addition, although the Act bans *comprehensive* prohibitions on employment, ambiguities in its text make it possible for more *tailored* prohibitions on the *type* of employment to

survive. For example, employers might still be able to prohibit their employees from concurrent employment that would bring disrepute to the employer, that would cause a material conflict of interest, or that would necessarily require the employee to disclose or rely upon confidential information. However, neither the District nor the Act has released clear guidance on this point. The permissible bounds of fiduciary duties in light of the Act's express prohibitions will need to be tested in the courts before their limits can be definitively described.

2. Use of Non-Disclosure Agreements Remains Critical

Despite its prohibition on non-competes, the Act expressly permits employers to enforce non-disclosure agreements that restrict an employee from disclosing the "employer's confidential, proprietary, or sensitive information, client list, customer list, or a trade secret." Employers should continue to utilize confidentiality and non-disclosure agreements; indeed, in light of tools that the Act will take away from employers, non-disclosure and confidentiality agreements are poised to become more important than ever before. It is conceivable that employers may be able to use non-disclosure and confidentiality agreements to effectively prevent employees with access to competitively sensitive information from moonlighting with direct competitors, at least where their position with the competitor would necessarily require them to utilize confidential information of the employer. With that said, as stated above, the permissible bounds of non-disclosure and confidentiality agreements will likely need to be tested in the courts before their limits can be definitively described.[8]

3. Non-Solicitation Agreements May Continue, With Caution

The Act does not speak to non-solicitation agreements. Some have theorized that the Act is worded broadly enough that it could be read to prohibit any limitations or restrictions on an employee's work for other employers, including non-solicitation agreements. On the other hand, the drafters of the Act could have expressly prohibited non-solicitation agreements, and they did not, which suggests that non-solicitation agreements will still be enforceable. On balance, employers may choose to continue to utilize non-solicitation agreements for the time being but should be aware that their continued effectiveness and permissibility have become at least somewhat less definite.

4. Consider Implications of Remote Work

As noted above, the Act does not address whether it applies to employees who are employed outside of the District, but who may work from their home located in the District. This scenario could arise in a variety of situations, including currently where employees may be working from home for an extended period due to the COVID-19 pandemic. Given the close proximity of the District to other states (Virginia and Maryland in particular, in the "DMV" area), this situation can and will arise outside of the COVID-19 context as well.

Because the Act does not address remote work and further guidance is not currently available, employers outside of the District (particularly in and around "DMV") should review current choice of law provisions in their existing non-competes and consider specifically addressing remote work, if applicable, as a benefit afforded to employees and not a method for relying on a different state's (here, the District's) non-compete laws.

5. Watch for Further Rules from the Mayor's Office and Cues from Congress

The Act instructs the Mayor to "issue rules to implement the provisions of [the Act], including rules requiring employers to keep, preserve and retain records related to compliance" with the Act.[9] So far, no rules related to implementation have been issued and timing for any such rule or rules is uncertain.

Congressional discourse and disapproval of the Act is unlikely. Democrats currently control both houses and have previously pushed for national bans on non-compete clauses. Nonetheless, any views on the Act offered by members of Congress could be telling as to whether and when a push for such a national ban on non-compete agreements might resurface with this new Congress. Indeed, in recent years, even Republican Senator Marco Rubio has shown support for a national ban on non-competes for certain low-wage workers.[10] Employers should watch carefully to see whether Congress signals support for the law, and more generally, whether there is support for similar prohibitions nationwide.

Paul Hastings is monitoring all developments, including issuance of further guidance or rules, and will provide updates when they are available.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

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[1] *See* District of Columbia Home Rule Act, D.C. Code §§ 1-201.01 *et seq.*, Pub.L. 93-198 (1973) (requiring any civil act approved by the Mayor and the Council of the District of Columbia to then pass a 30-day Congressional review period before becoming law; in the absence of Congressional veto, the act will become law).

[2] *See* Ban on Non-Compete Agreements Amendment Act of 2020, Sec. 302(a) ("This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan."). Because the exact date of inclusion of the Act in an "approved budget and financial plan" is unknown, employers wanting certainty regarding when they should comply with the new obligations under the Act may want to consider complying with all of the Act's requirements by March 15, 2021, the date the 30-day Congressional review period is projected to expire.

[3] The term "employee" is defined in Section 101 of the Act as "an individual who performs work in the District on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District." Though independent contractors are not expressly addressed in the Act, courts have interpreted other D.C. laws with similar language (including the D.C. Human Rights Act), as excluding independent contractors.

[4] "A non-compete provision contained in an agreement that was entered into on or after the applicability date of this title between an employee and an employer shall be void as a matter of law and unenforceable."

[5] Again, according to Sec. 302(a), the Act "shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan." However, because the exact date of inclusion of the Act in an "approved budget and financial plan" is unknown, employers may want to consider complying with all of the Act's requirements by March 15, 2021, the date the Act is expected to pass its Congressional review period and become law.

[6] That written notice must read: "The Ban on Non-Compete Agreements Amendment Act of 2020 allows employers operating in the District of Columbia to request non-compete terms or agreements (also known as "covenants not to compete") from medical specialists they plan to employ. The prospective employer must provide the proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision. Medical specialists are individuals who: (1) perform work on behalf of an employer engaged primarily in the delivery of medical services; (2) hold a license to practice medicine; (3) have completed a medical residency; and (4) have total compensation of at least $250,000 per year."

[7] *See* D.C. Code §32-1308(a)(1)(C) ("Actions may be maintained by one or more employees, who may designate an agent or representative to maintain the action for themselves, or on behalf of all employees similarly situated as follows: (i) Individually by an aggrieved person; (ii) Jointly by one or more aggrieved persons; (iii) Consistent with the collective action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b); (iv) As a class action; (v) Initially as a collective action pursuant to the procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b), and subsequently as a class action; (vi) By a labor organization or association of employees . . . . or (vii) By the Attorney General for the District of Columbia, pursuant to § 32-1306.").

[8] The District has not previously addressed the scope or applicability of the "inevitable disclosure doctrine," which is cognizable in some (but a dwindling number of) states as a means of protecting trade secrets when an employee's new employment would inevitably require them to rely on their previous employer's trade secrets.

[9] Ban on Non-Compete Agreements Amendment Act of 2020, Sec. 105.

[10] https://www.rubio.senate.gov/public/index.cfm/2019/1/rubio-introduces-bill-to-protect-low-wage-workers-from-non-compete-agreements#:~:text=Jan%2015%202019,negotiate%20higher%20wages%20and%20benefits.