Updates
October 13, 2022
The District of Columbia Implements a Modified Ban on Non-Compete Provisions

After more than a year of delays and revisions, the long-awaited Ban on Non-Compete Agreements Amendment Act of 2020 (the Act) took effect beginning October 1, 2022, following the passage of the Non-Compete Clarification Amendment Act of 2022 (D.C. Act 24-526) (the Amendment). The Amendment clarified and narrowed the original Act by scaling back the scope of the original non-compete ban. Originally, the Act attempted to restrict employers from requiring any employee, regardless of salary or position, to sign an agreement with a non-compete provision or from barring active employees from working concurrently for a competitor or competing against the employer independently. (For more information on the original Act, please see our previous post here.) However, after significant criticism from the business community, the Council of the District of Columbia passed the Amendment and set forth a limited exception allowing for the use of non-compete provisions with highly compensated employees, including medical specialists.

The Act, codified at D.C. Code Section 32-581.01- Section 32-581.05, implements the Amendment and now:

- Prohibits non-compete clauses for "covered employees."
- Permits non-compete clauses for those who earn or reasonably expect to earn $150,000 or more annually ($250,000 or more annually for medical specialists).
- Requires certain substantive and procedural protections for enforceable non-compete provisions.
- Limits the definition of "non-compete provision" to exclude confidentiality and certain anti-moonlighting clauses.
- Imposes certain disclosure obligations upon employers.

These aspects of the Act are summarized below.

Covered Employees

The Amendment prohibits the use of a non-compete agreement with any "covered employee." A "covered employee" is an employee who earns or reasonably expects to earn less than $150,000 and: (1) spends or reasonably anticipates spending more than 50% of their work time in the District of Columbia; or (2) regularly spends or reasonably anticipates spending a substantial amount of their work time for an employer in the District of Columbia, with not more than 50% of their work time for that employer in another jurisdiction.

This means that employees who earn less than $150,000 (or medical specialists who earn less than $250,000) and spend most of their work time in the District of Columbia cannot be subject to non-compete clauses. However, there are still some carve-outs to this ban. The ban does not apply to babysitters in or about the residence of the employer or partners in a partnership.

Non-Compete Provisions Permitted for "Highly Compensated Employees"

The Amendment permits non-competition agreements with any "highly compensated" employees, except for broadcast employees, which include employees in television, radio, cable, satellite, or at other broadcasting stations or networks. A "highly compensated" employee is an employee: (1) who is "reasonably expected to earn from the employer, in a consecutive 12-month period, compensation greater than or equal to the minimum qualifying annual compensation" or (2) "[w]hose compensation earned from the employer in the consecutive 12-month period preceding the date on which the proposed term of non-competition is to begin is greater than or equal to the minimum qualifying annual compensation."

The minimum qualifying annual compensation is $150,000 for nonmedical specialists or $250,000 for medical specialists, which are employees who are engaged primarily in the delivery of medical services and who (1) hold a license to practice medicine, (2) are physicians, and (3) have completed medical residencies. This minimum qualifying annual compensation threshold will remain in effect until January 1, 2024. On or after January 1, 2024, employers should monitor changes in the District of Columbia's compensation level required to constitute a "highly compensated" employee, because it will be adjusted based on increases in the Consumer Price Index (CPI).

Requirements for an Enforceable Non-Compete Provision

For a non-compete clause with a highly compensated employee to be valid and enforceable, it must satisfy certain substantive and procedural requirements.

Substantively, the agreement must: (1) specify the extent of the restriction including in what industry or entities the employee is restricted from obtaining employment; (2) set forth the geographical limitations of the work restrictions; and (3) ensure that the duration of the restriction is no longer than 365 days from the date of separation if the employee is not a medical specialist (730 calendar days for medical specialists). This is a significant new limitation on non-competes in the District of Columbia, as terms lasting longer than one year

were not prohibited under District of Columbia law prior to the Act. Instead, courts applying D.C. law engaged in a fact-driven inquiry to determine whether longer restrictions were reasonable to protect legitimate corporate interests under the circumstances.

Procedurally, employers must: (1) provide a written copy of the non-compete to the employee, in writing, at a minimum of 14 days before the start of employment **or**, if the employer already employs the highly compensated employee, at least 14 days before the employee must execute the agreement; and (2) provide a statutory notice along with a copy of the agreement that includes the following specific language:

"The District of Columbia Ban on Non-Compete Agreements Amendment Act of 2020 limits the use of non-compete agreements. It allows employers to request non-compete agreements from "highly compensated employees" under certain conditions. [Name of employer] has determined that you are a highly compensated employee. For more information about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of Columbia Department of Employment Services (DOES)."

Agreements and Policies Excluded From Definition of Non-Compete Provisions

The Act clearly defines what will and will not qualify as a non-compete provision. A non-compete provision is "a provision in a written agreement or workplace policy that prohibits an employee from performing work for another for pay or from operating the employee's own business." However, the following agreements or policies are **excluded** from the definition of non-compete provision:

- **Agreements to sell a business.** An otherwise lawful provision "[c]ontained within or executed contemporaneously with an agreement between the seller of a business and one or more buyers of that business wherein the seller agrees not to compete with the buyer's business."
- **Confidential employer information and proprietary employer information.** An otherwise lawful provision that "prohibits or restricts an employee from … [d]isclosing, using, selling, or accessing the employer's confidential employer information or proprietary employer information." The term "confidential employer information" refers to "information owned or possessed by the employer that is not available to the general public and that the employer has taken reasonable steps to ensure is protected from improper disclosure." The term "proprietary employer information" refers to "information unique to an employer that is compiled, created, or solicited by the employer, including customer lists, client lists, and trade secrets" as defined by the District of Columbia's Uniform Trade Secrets Act of 1988.
- **Prohibitions during active employment with the employer.** An otherwise lawful provision that "prohibits or restricts an employee from … [a]ccepting money or a thing of value for performing work for a person other than the employer, during the employee's employment with the employer, because the employer reasonably believes the employee's acceptance of money or a thing of value under such circumstances will result in the disclosure or use of confidential or proprietary employer information, create a conflict of interest, and/or impair the employer's ability to comply with applicable laws, regulations, or contract or grant agreement."
- **Long-term incentive agreements.** An otherwise lawful provision that provides "bonuses, equity compensation, stock options, restricted and unrestricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights and other performance driven incentives for individual or corporate achievements typically earned over more than one year."

If an employer policy has any of these exceptions to a non-compete provision, the employer must provide the employee a written copy of the policy within 30 days after the employee's acceptance of employment, within 30 days after October 1, 2022, and any time such policy changes.

Enforcement

Non-compete provisions that violate the Act are "void as a matter of law and unenforceable." Penalties for noncompliance can range from $250 to "not less than $1,500." There are increased penalties for subsequent violations of "not less than $3,000" for each affected employee.

Those aggrieved by a violation of the Act may also file an administrative complaint with the mayor or a civil action in a court of competent jurisdiction.

Guidance for Employers Operating in the District of Columbia After the Act

Now that the District of Columbia's partial ban on non-compete provisions is in place, employers should:

- Identify for which roles the employer typically utilizes non-compete provisions and determine whether such positions will involve candidates or employees who spend more than 50% of their work time in the District of Columbia (including remote workers) and, if so, if they will receive more than $150,000 in total compensation (or $250,000 for medical specialists). Note that the Amendment is not retroactive and does not affect the validity or enforceability of any agreements entered into prior to October 1, 2022.
- Ensure employment agreements include appropriate protections for confidential, trade secret, and proprietary information, where appropriate.
- Revise old non-compete provisions to comport with the new substantive requirements; remove non-compete provisions from agreements that will be utilized for non-highly compensated employees; and prepare the required statutory notices.
- Establish a process to ensure that the company: (1) does not request or require any non-highly compensated employee to sign an agreement containing a non-compete provision; (2) adheres to the new procedural requirements; and (3) distributes copies of confidentiality, moonlighting, and conflict of interest policies to new hires within 30 days of accepting employment (or any time such policies are revised). Employers should also plan to ensure that they distribute copies of such policies to current employees **by October 31, 2022**.
- Provide workplace training to ensure that staff are not enforcing unwritten workplace policies that serve as an unofficial non-compete provision in violation of the Amendment.
- Monitor changes in the District of Columbia's compensation level required for qualification as a highly compensated employee.

If you have questions about this Act or how your business may be affected, please contact experienced counsel.

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