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Washington, D.C. Rolls Back Proposed Ban on Non-Compete Agreements

The Bottom Line

- Washington, D.C.'s amended law banning non-compete agreements contains an exception for highly compensated employees and no longer outright bans anti-moonlighting provisions in all instances.
- Employers should be mindful of the **total** annual compensation awarded to employees in determining whether an employee is a highly compensated employee.
- Employers should review their existing restrictive covenant agreements and employee handbooks for Washington, D.C. employees.

In the wake of heavy opposition to Washington, D.C.'s Ban on Non-Compete Agreements Amendment Act (the Act), a newly amended Act will now allow non-compete employment agreements and moonlighting restrictions in certain circumstances. The Non-Compete Clarification Amendment Act of 2022 (the Amended Act) takes effect on October 1, 2022.

The Amended Act rolls back the Act's broad ban on non-competes, permitting them with "highly compensated employees" in certain circumstances and as part of long-term incentive agreements or within sale of business agreements. The Amended Act also no longer prohibits D.C. employers from barring employees from being simultaneously employed by another employer in certain instances. Specifically, employers may restrict "moonlighting" where the employer reasonably believes the employee's simultaneous performance of work for another will result in the disclosure or use of confidential or proprietary information, lead to conflicts of interests or impair the employer's ability to comply with laws or other agreements.

Non-Compete Provisions Defined

The Amended Act defines "non-compete agreement" as a contract between an employer and employee that has one or more non-compete provisions. Further, it defines "non-compete provision" as "a provision in a written agreement or

a workplace policy that prohibits an employee from performing work for another for pay or from operating the employee's own business."

The Amended Act's Modifications and Requirements

1. Rather than impose a near-total ban on non-compete agreements, the Amended Act allows for the use of such agreements with "highly compensated employees" under certain circumstances. The Amended Act defines "highly compensated employee" as an employee, other than a broadcast employee (as defined in the Amended Act), who is reasonably expected to earn from the employer compensation greater than or equal to the minimum qualifying annual compensation (through 2023, that is $150,000 or, for a medical specialist, $250,000) in a consecutive 12-month period. It also includes an employee whose 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. It is important to note that the minimum qualifying annual compensation is not limited to base salary but rather refers to total annual compensation, including bonuses.

2. It prohibits retaliation against a covered employee for refusing to agree to, or failing to comply with, a prohibited non-compete provision or agreement. It also prohibits retaliation against a covered employee for asking or complaining about the existence, applicability or validity of a provision in an employment agreement that the employee reasonably believes is prohibited under the Amended Act.

3. It excludes from the definition of "non-compete provision" a provision executed in the sale of business context where the seller agrees not to compete with the buyer's business.

4. It excludes from the definition of "non-compete provision" a provision that provides a long-term incentive, meaning an employer may include such a provision regardless of whether the employee is "highly compensated."

5. The Amended Act does not supersede the terms of a valid collective bargaining agreement.

6. It makes void and unenforceable non-compete provisions that violate the Amended Act that were made on or after the October 1 effective date.

Coverage

The Amended Act broadly defines a covered "employer" as any entity "operating in the District" or any person or group of persons acting in the interest of an employer "operating in the District in relation to an employee," but excludes Washington, D.C. and the federal government. This

means the Amended Act covers employers headquartered outside of the District but with operations in the District. Similarly, the Amended Act broadly defines a covered "employee" as an employee who performs more than 50% of their work in D.C. or who regularly performs a substantial amount of work in D.C. and not more than 50% of work in another jurisdiction. The definition of "employee" excludes casual babysitters and partners in a partnership.

Enforceable Non-Compete Provisions

The Amended Act also specifies what must be contained in a non-compete agreement with a highly compensated employee for it to be valid and enforceable. In particular, the agreement must be in writing and specify:

- the scope of the competitive restriction, including what services, roles, industry or competing entities the employee is restricted from performing work in or on behalf of,
- the geographical limitations of the restriction and
- a term that does not exceed 365 days for non-medical specialists or 730 days for medical specialists from the date of separation.

The Amended Act also requires employers with a workplace policy that includes any exception to the non-compete definition to provide employees with written notice of the law (with text specifically dictated in the statute) within 30 days after the employee's acceptance of employment, within 30 days after October 1, 2022 and any time the employer's workplace policy regarding any exception changes. The Amended Act further requires employers to provide highly compensated employees with written notice (with text specifically dictated in the statute) of the non-compete provision at least 14 days before the individual begins employment or, if already employed, at least 14 days before the employee is required to execute the agreement containing the non-compete provision.

Enforcement

The Amended Act contains administrative penalties between $350 and $1,000 for each initial violation of the Amended Act, except that the penalty for violations of the retaliation provisions will be between $1,000 and $2,500. The Amended Act also provides that an employer will be liable for monetary relief between $500 and $1,000 for each violation of the prohibition on non-compete provisions. Penalties will increase for subsequent violations. Further, the law gives employees a private right of action or the right to file a complaint with the Mayor's office.

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For More Information

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