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Washington, D.C. Act, Effective This Week, Follows Trend of Banning Employee Non-Compete Agreements

The District of Columbia has joined several cities and states that have recently adopted legislation limiting the use of employee non-competition agreements. D.C.'s mayor recently signed the Ban on Non-Compete Agreements Amendment Act of 2020 (the "Act"). Employers who have employees working in Washington, D.C. must become familiar with the new Act, but employers in all states may want to pay attention to this growing trend, particularly because President Biden has previously expressed support for similar legislation at the federal level.

Like many of the recently adopted state laws, the Act specifically prohibits the use of a "non-compete provision" in connection with an employment relationship. A "non-compete provision" is defined by the Act as "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."

Fortunately, the Act specifically allows employers to use confidentiality agreements to protect confidential, proprietary or sensitive information, client lists, customer lists, or trade secrets. Although the Act makes no reference to non-solicitation agreements entered into in the context of an employment relationship, the legislative history implies that this alternative was purposefully left available to employers. Non-competition agreements entered in the context of the sale of a business are specifically excluded.

Notably, the Act does not apply retroactively to non-compete agreements already executed, as the Act specifically provides that a non-compete provision contained in an agreement that is "entered into on or after the applicability date of [the Act] ... shall be void ... and unenforceable." The applicability date, which differs from the "effective date," will be "the date of inclusion of [the Act's] fiscal effect in an

approved budget and financial plan” of the District of Columbia. This is expected to occur sometime in September 2021 or October 2021.¹

In addition to banning non-competition agreements, the Act prohibits the adoption and enforcement of anti-moonlighting policies that restrict an employee from working concurrently for another entity or engaging in self employment. Although the Act does not carve out an exception for second jobs that create a conflict of interest, it may still be possible for an employer to assert claims for breach of duty of loyalty or fiduciary duty in such a case. That said, the prohibition on anti-moonlighting policies applies retroactively, so employers with employees in Washington, D.C. should promptly review and revise any such policies, if they have not already done so.

Employers also must provide written notice of the Act’s provisions “within 90 days after the law goes into effect, within 7 days of hire, and within 14 days of an employee’s request.” The notice provisions apply to all employers, including those who do not currently use, and those who do not intend to use non-compete agreements in the future. Employers also have to comply with the recordkeeping requirements outlined in the Act.

The Act prohibits employers from retaliating or threatening retaliation against employees who refuse to sign non-compete agreements, fail to comply with unlawful non-compete agreements or policies, or question or discuss non-competes in the workplace. Fines can be assessed for each violation and employees may file administrative complaints or a private lawsuit if an employer fails to comply with the Act or attempts to enforce an invalid non-compete agreement.

The D.C. Act applies to employers “operating in the District” with prospective or current employees who “perform work in the District.” However, unpaid volunteers, lay members elected or appointed to office within religious organizations, babysitters, and certain medical specialists (generally those earning more than \$250,000) are exempted from all of the Act’s requirements. Non-competes between employers and the medical specialists are allowed, but only if the employer presents the proposed non-compete at least 14 days before execution of the agreement and provides a specifically proscribed written notice required by the Act. Currently it is unclear whether the Act applies to employees outside the District, but who occasionally work within it.

In light of the continued adoption of local and state laws outlawing or limiting certain post employment restrictive covenants, and given the Biden administration’s proclaimed support for possible future federal litigation on this subject, employers should immediately take action to: (1) analyze and monitor

¹ Pursuant to the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973), the Act was published in the District of Columbia Register on January 15, 2021, and transmitted to the speaker of the U.S. House of Representatives and the president of the U.S. Senate on February 1, 2021, for a mandatory 30-day period of congressional review. Without a congressional resolution disapproving the Act, the Act was projected to become law on March 15, 2021.

all applicable local and state laws and proposed legislation in this area of the law; (2) evaluate their workforce to determine the scope of restrictive covenants that is both necessary and lawful; (3) make changes to limit post-employment protections to only those employees and interests that are critical to the employer's business; (4) review and revise moonlighting, non-competition and conflict of interest policies applicable to Washington, D.C. employees; (5) update onboarding paperwork and prepare relevant notices to employees working in Washington, D.C.; (6) prepare and distribute the required notices required by the Act; and (7) adopt proper recordkeeping measures as required by the Act.

If you have questions about the Act, the trend it represents, or whether your company may need to comply with similar state or local laws outside Washington, D.C., please contact your Kutak Rock attorney or any of the attorneys in the [Employment Law Group](#) or [Unfair Competition and Trade Secrets Practice](#), and we would be happy to discuss this with you.

