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Washington, DC, mayor signs act broadly banning non-competition agreements

By Matthew McLaughlin and Lisa Sullivan

Last week, Washington, DC, Mayor Muriel Bowser signed the Ban on Non-Compete Agreements Amendment Act of 2020 (the Act), which — with limited exceptions — effectively bans the use of non-compete agreements against employees in the District. A non-compete agreement entered into on or after the Act's applicability date is void and unenforceable. Absent disapproval by Congress, which is unexpected, the legislation will take effect in the coming months. The Act not only contains very broad restrictions, but also places affirmative obligations on employers with Washington, DC-based employees and provides steep penalties for non-compliance.

The restrictions

The Act expressly prevents employers from requiring or requesting that an employee sign an agreement with a non-compete provision — or that employers even have an unwritten workplace policy — that prevents an employee from (i) "being employed by another person," (ii) "performing work or providing services for pay for another person," or (iii) "operating the employee's own business." This language is, on its face, susceptible to interpretation: Does the Act prevent employers from imposing any restrictions on the work of their employees or does it instead allow employers to provide some limitations on employees' activities as long as they do not categorically prevent their employees from working for a competitor? For example, many employers use non-compete agreements that do not outright ban employees from working for a competitor but, instead, only restrict the employee from performing the same or similar role for a competitor. It remains to be seen whether such a tailored restriction would be enforceable under the Act.

In addition, unlike other states that only restrict the use of post-employment non-competition restrictions, the Act defines "non-compete provision" to prohibit restrictions on an employee from "being simultaneously or subsequently employed" by another. In other words, the Act prevents employers from restricting their DC employees' competitive activities during their terms of employment, which would prohibit employers from enforcing anti-moonlighting policies within the District.

Finally, the Act prohibits employers from retaliating or threatening to retaliate against an employee for failing or refusing to comply with an unenforceable non-compete provision, or for asking or complaining about the existence of such a provision.

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Exclusions from the Act

Importantly, not all employers or employees are subject to the Act. While the Act contains a broad definition of employer that includes any individual, association, or entity "operating in the District," it excludes both the federal and DC government from its definition. Likewise, the Act broadly defines "employee" to include any "individual who performs work in the District on behalf of any employer" as well as "any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District" but, curiously, specifically excludes from its definition volunteers of charitable, educational, religious, or nonprofit organizations, elected or appointed religious officers, individuals employed as a "casual babysitter," and "medical specialists," which is further defined as a licensed physician who performs work in the District and who has "total compensation of at least $250,000 per year." While the Act requires employers to comply with procedural requirements to enforce a non-compete provision against medical specialists, the general exclusion of such physicians from the Act's restrictions is particularly noteworthy because many states have taken the opposite approach, i.e. permitting non-competition agreements except for certain professions like physicians.

The Act also expressly does not apply to non-disclosure agreements, which prohibit the use or disclosure of a company's trade secret, confidential or business information, and likely (although the Act does not specifically so provide) does not impact non-solicitation provisions, which bar the solicitation of a company's customers, prospects, suppliers or vendors, and/or prohibit the solicitation of the company's employees. The Act also does not apply to non-competition provisions imposed in connection with the sale of a business.

Affirmative employer obligations and penalties

In addition to complying with the restrictions in the Act, employers will have an affirmative obligation to provide their DC-based employees with the following language (i) within 90 days of the effective date of the Act, (ii) seven calendar days after an individual becomes an employee, and (iii) within 14 calendar days after receipt of a written request from an employee: "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."

The Act provides for administrative penalties for violations of its protections, including its anti-retaliation protections. Penalties range from $350 up to $3,000 per employee, depending on the nature of the violation.

The Act also allows an aggrieved employee to file a civil court action against an employer for violating its provisions and provides that Section 8 of the District's wage act shall apply to such actions; that section provides for an award of costs and attorneys' fees to a prevailing employee. This provision is likely to encourage the plaintiff's bar to bring claims on behalf of employees for even minor, technical violations of the Act, such as failing to furnish the requisite text above in a timely way.

Next steps for employers

Assuming Congress takes no action on the legislation, the Act will still not apply until it is included — along with its fiscal impact — in an approved budget and financial plan, which is expected later this year. In addition, the Act requires the mayor to issue administrative rules to implement its provisions, including regulations requiring employers to retain records maintained pursuant to the Act.

In the meantime, employers with employees in and around Washington, DC, should consider taking the following steps:

- Review your current restrictive covenant agreements, handbooks, written policies (and unwritten practices), and employee offer letter templates to determine whether they must be revised to comply with Act.
- Develop a plan to comply with the affirmative notice requirements outlined above to avoid potentially costly litigation.

Experienced counsel who are part of Nixon Peabody's Trade Secrets and Restrictive Covenants team are available to assist you in this analysis, and to draft the provisions needed to comply with the changes in the law.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

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