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D.C.'s New Ban on Non-Compete Agreements – What D.C. Employers Need to Know

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On December 15, 2020, the District of Columbia Council unanimously passed the Ban on Non-Compete Agreements Amendment Act of 2020 (the "Act"). In what could be one of the broadest restrictions on efforts to limit post-employment competition in the U.S., the Act generally bans the use of non-compete provisions in employment agreements and workplace policies. The Act will likely soon become law absent any action stopping the legislation, such as the Mayor's veto or Congressional disapproval.

Which employers are impacted by the Act?

The Act defines "employer" as "an individual, partnership, general contractor, subcontractor, association, corporation, or business trust operating in the District, or any person or group of persons acting directly or indirectly in the interest of an employer operating in the District in relation to an employee, including a prospective employer." However, the Act does not apply to the District of Columbia government or the United States government as employers.

What are the prohibitions under the Act?

Under the Act, District of Columbia employers may not require or request that an employee performing work in the District sign an agreement that includes a non-compete provision. A 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." The Act's prohibition of non-compete provisions does not apply retroactively.

Accordingly, a non-compete provision in an agreement entered into before the Act's effective date remains valid and enforceable.

Additionally, the Act forbids D.C. employers from maintaining any workplace policy that prohibits an employee (while working for the employer) from: (1) being employed by another person; (2) performing work or providing services for pay for another person; or (3) operating the employee's own business. The Act does not have a grandfather clause to preserve workplace policies that were stablished before the Act's effective date. Thus, any such workplace policies in place before the law's effective date will be rendered invalid.

The Act also prohibits employers from retaliating or threatening to retaliate against employees for: (1) refusing to agree to a non- compete provision; (2) failing to comply with a non-compete provision or workplace policy made unlawful by the Act; (3) asking, informing, or complaining to an employer, a coworker, a lawyer, or a governmental entity about the existence, applicability, or validity of a non-compete provision or a workplace policy that the employee reasonably believes is prohibited by the Act; or (4) requesting information from an employer that the Act requires be provided.

Are there any exceptions to the non-compete prohibitions?

The Act does not apply to otherwise lawful provisions that restrict an individual from disclosing their employer's confidential, proprietary, or sensitive information, client list, customer list, or trade secrets. The Act also does not apply to otherwise lawful provisions contained within or executed contemporaneously with an agreement between the buyer and seller of a business where the seller agrees not to compete with the buyer's business. Moreover, the Act does not address

provisions designed to prohibit employees from soliciting customers or employees post-employment, an omission which suggests that non-solicitation provisions will remain valid under D.C. law.

The ban on non-competes also does not apply to the following individuals:

(a) Volunteers in educational, charitable, religious, or nonprofit organizations;

(b) Lay members elected or appointed to office within the discipline of any religious organization and engaged in religious functions;

(c) Individuals employed as a casual babysitter in the residence of their employer; and

(d) Licensed physicians who work on behalf of an employer engaged primarily in the delivery of medical services earning at least $250,000 per year.

Note that employers seeking to have medical specialists sign a non-compete agreement must provide the relevant document to the employee for review at least 14 days before executing the agreement along with written notice of the Act.

What are the employer notice requirements?

Employers must provide their employees with the following notice: "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 notice must be provided in writing:

(1) to existing employees within 90 days after the Act becomes law; (2) to newly hired employees within seven days of their start date; and (3) to employees who submit a written request for such a statement within 14 days after receipt of the employee's request.

What are the penalties for non-compliance?

Employers who violate the Act may face administrative and civil liability. Employees who are asked to sign a prohibited non-compete agreement or who suffer retaliation from an employer for activities prohibited by the law may file a complaint with the Mayor or pursue court action. The Mayor may assess administrative penalties of $350 to $1,000 for each violation of the Act's non-compete or notice provisions, and may assess fines of more than $1,000 for any instances of retaliation. Employers that violate the Act shall be liable for relief payable to each employee of $500 to $1,000 for each violation, and at least $3,000 to each employee for subsequent violations.

If you have any questions regarding the topics discussed in this article, please contact **Amy L. Bess** at +1 (202) 312 3361, **Aleksandra Rybicki** at +1 (202) 312 3336 or any Vedder Price attorney with whom you have worked.