Washington, D.C. Scales Back Ban on Non-Competes

By Nathaniel M. Glasser, Eric I. Emanuelson Jr. & Frank C. Morris Jr. on July 19, 2022

Washington, D.C. employers will not need to scrap all their non-compete agreements after all. On July 12, 2022, the D.C. Council (the "Council") passed the Non-Compete Clarification Amendment Act of 2022 (**B24-0256**) (the "Amendment"), which among other things, tempers the District's near-universal ban on non-compete provisions to permit restrictions for highly compensated employees. For further analysis on the original D.C. Ban on Non-Compete Act, please see our previous articles **here** and **here**.

The Council delayed the initial ban **several times** in response to feedback from employer groups. However, barring an unlikely veto or Congressional action during the mandatory review period, the amended ban will take effect as of October 1, 2022. We detail the key revisions to the ban below.

Non-Competes Permitted for Highly Compensated Employees and Medical Specialists

In addition to permitting non-compete agreements with medical specialists making more than $250,000 annually, the revised ban allows D.C. employers to enter non-compete agreements with almost any employee whose total compensation is or is reasonably expected to be more than $150,000 per year. The Amendment clarifies that "compensation" includes bonuses, commissions, overtime premiums, vested stock, and other payments provided on a regular or irregular basis; however, fringe benefits will not count toward the threshold *unless* they are paid in cash or cash equivalents. Beginning January 1, 2024, the threshold will increase in proportion to the annual average increase in the U.S. Department of Labor's Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area for the previous calendar year adjusted to the nearest whole dollar.

A last-minute industry-specific change carved out an exception that prohibits non-competes for any employees, other than sales representatives, who work for a television, radio, cable, satellite, or other broadcasting station or network – regardless of total compensation.

Requirements for Non-Competes with Highly Compensated Employees

The Amendment provides certain requirements for non-compete agreements between an employer and highly compensated employee executed on or after October 1, 2022. To be valid and enforceable, any such agreement must:

- Specify the functional scope of the restriction, including what services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of;
- Describe the geographical limitations of the work restriction; and
- Limit the duration of the restriction to no longer than 365 calendar days from the date of separation (730 calendar days for medical specialists).

Employers must also provide the non-compete to the highly compensated employee in writing at least 14 days before the start of employment or the execution of the agreement.

Moreover, like when proposing a non-compete with a medical specialist, employers must provide the following notice to highly compensated employees simultaneously with the proposed non-compete provision:

> *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).*

Restrictions Only Apply to Employees Who Mostly Work in D.C.

The original ban applied to agreements with any employee who performs work or prospective employee whom the employer reasonably anticipates will perform work in Washington, D.C. The Amendment clarifies that the ban only covers employees and prospective employees if (i) they spend or are reasonably anticipated to spend more than 50% of their work time working in D.C. for the employer, or (ii) their employer is based in D.C. and they "regularly" spend a "substantial amount" of work time in D.C. and not more than 50% of their work time for that employer working in another jurisdiction.

Sale of Business Exception

The Amendment preserves the carve out for non-compete agreements entered into simultaneously with the sale of a business. This means that a buyer of a business may still insist that the seller refrain from competing with the buyer.

Continued Protection of Confidential and Proprietary Information

The Amendment also clarifies that employers may bar their employees from disclosing, using, selling, or accessing the employer's confidential and proprietary information during or after employment, and excludes otherwise lawful "long term incentives" from the definition of "non-compete provision," such as bonuses, equity compensation, and other

performance driven incentives for individual or corporate achievements typically earned over more than one year

Moonlighting Ban Modifications

In a welcome change from the original total ban, the Amendment permits anti-moonlighting provisions if the employer reasonably believes the outside employment could (i) result in the disclosure or use of the employer's proprietary information; (ii) cause a conflict of interest; (iii) constitute a "conflict of commitment" for an employee of a higher education institution; or (iv) impair the employer's ability to comply with federal or District laws or another contract.

Nevertheless, employers with workplace policies that include one or more of these exceptions must provide the employee with a written copy of the provisions (i) by Oct. 31, 2022; (ii) or within 30 days of the employee's acceptance of employment; and (iii) any time the policy changes.

Preparing for October 2022

Absent unexpected opposition from the Mayor or Congress, we expect the amended ban to take effect on October 1, 2022. Employers operating in Washington, D.C. should review their standard employment agreements and employee policies and remove all non-compete provisions that could affect employees making less than $150,000 annually and appropriately address any moonlighting restrictions to make them consistent with the amended law Moreover, as we previously recommended, D.C. employers who are considering entering non-compete agreements with new hires or employees who do not meet the highly compensated employee threshold, should promptly do so, so that the agreements remain enforceable after the Act takes effect.

Please contact one of the authors or another EBG attorney for assistance with appropriate restrictive covenants under the circumstances.

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