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Good News for D.C. Employers: D.C. Council Narrows Proposed Broad Ban on Non-Competes

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Since December 2020, when the D.C. City Council unanimously passed the Ban on Non-Compete Agreements Amendment Act of 2020 (the "Act"), which sought to impose one of the broadest prohibitions against employee non-compete agreements in the country, the impending law has been the subject of heavy opposition to its enactment by the D.C. business community. After multiple legislative postponements of the effective date to allow for debate and possible modification, on July 12, 2022, the D.C. City Council passed the Non-Compete Clarification Amendment Act of 2022 (the "Amended Act"), scaling back the near total ban on non-competes originally created by the Act. The Amended Act now limits non-competes only to "highly compensated employees" (as defined), and clarifies that employers can prohibit an employee's use, in addition to disclosure, of employers' confidential and proprietary information both during and after employment. Once the Mayor signs the Amended Act, it is slated to take effect on October 1, 2022.

Key Takeaways from Amended Act

- Employees are covered if (i) they spend (or, in the case of new hires, are reasonably anticipated to spend) over 50% of their work time for an employer in the District, or (ii) their work for an employer is based in the District, they regularly spend a substantial amount of their work time for that employer in the District, and they do not spend more than 50% of their work time for that employer in another jurisdiction.
- Employers are prohibited from imposing non-compete provisions on covered employees whose total compensation is less than $150,000 per year, or, in the case of medical specialists, whose total compensation is less than $250,000 per year. "Compensation" is defined to include a covered employee's annual salary or hourly wages, as well as bonuses, commissions, overtime premiums, vested stock, and other payments provided by an employer to the employee. It does not include the value of any non-cash "fringe" benefits that are not paid to the employee in cash or cash equivalents. These amounts increase beginning in calendar year 2024 in accordance with the Consumer Price Index.
- A "medical specialist" is a licensed physician who is primarily engaged in the delivery of medical services and who has completed a medical residency.
- "Non-compete provisions" are those contained in a written agreement or workplace policy that prohibit an employee from performing work for another for pay or from operating the employee's own business. Thus, a non-compete provision can include an anti-moonlighting policy in an employee handbook or agreement, subject to the limitations described below.
- "Non-compete provisions" **do not include** those: (i) contained in an agreement between a seller and purchaser of a business which prohibit the seller from competing with the buyer for a period of time post-sale; (ii) that restrict an employee from disclosing, using, selling or accessing the employer's confidential or proprietary information; or (iii) that prohibit an employee from being paid for performing work for another person or entity during the employee's employment because the employer reasonably believes such engagement will result in the disclosure of the employer's confidential or proprietary information, pose a conflict of interest, constitute a conflict of commitment if the employee is employed by an institution of higher education, or impair the employer's ability to comply with federal or local law or regulation, a contract or a grant agreement.
- "Non-compete provisions" **also exclude** "long term incentive" provisions, defined to include such things as bonuses, equity compensation, stock option shares or units, phantom stock, stock appreciation rights, and other

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

Essential Components of Enforceable D.C. Non-Competes

Once the Amended Act becomes law, employers can enforce non-compete agreements against highly compensated employees only if they satisfy the following statutory requirements:

- The agreement specifies the roles, services, industries or competing entities the employee is restricted from performing work on behalf of;
- The agreement contains a clear geographic limitation on its restrictions;
- For employees other than medical specialists, the duration of the restriction is 365 days or less following the employee's separation from employment;
- For medical specialists, the duration of the restriction is 730 days or less following the employee's separation from employment; and
- The employer presents the non-compete provision in writing to the employee at least 14 days before the employee starts work or at least 14 days before the employee is expected to sign the agreement.

Non-compete provisions inconsistent with the requirements of the Amended Act will be deemed void as a matter of law and unenforceable. The Amended Act contains strict anti-retaliation provisions which include, as protected activities, such things as an employee inquiring about, refusing to agree to or comply with a non-compete provision or non-compete agreement prohibited by the Amended Act, and requesting a copy of a non-compete agreement the employee executed.

Employers that impose non-compete provisions on their highly compensated employees also are required to provide a specific statutory notice to such employees whenever a non-compete provision is proposed. Additional notice requirements apply to those employers with workplace policies that include one or more exceptions to the definition of "non-compete provision" (including, for example, prohibitions on moonlighting during employment where a risk exists that such side work will pose a conflict of interest or a disclosure or use of the employer's proprietary or confidential information).

The law will be administered and enforced by the Offices of the Mayor and the Attorney General, with administrative penalties assessed for each violation in an amount no less than $350 and no more than $1,000; except that the penalty for each violation of the anti-retaliation provisions will be no less than $1,000 and no more than $2,500. Penalties increase for subsequent violations. An employee aggrieved by a violation of the Amended Act may file a complaint with the Mayor or pursue a civil action against the employer.

The restrictions on non-compete agreements are not retroactive such that existing non-compete agreements are not subject to the law. However, other aspects of the Amended Act are immediate such that workplace policy restrictions will apply to existing policies and practices as of the effective date.

If you have any questions regarding the topics discussed in this article, please contact **Amy L. Bess** at +1 (202) 312 3361, **Frederic T. Knape** at +1 (312) 609 7559 or any Vedder Price attorney with whom you have worked.

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