Washington, D.C. Passes Legislation Banning Non-Compete Agreements: A 5-Step Action Plan For Employers

Insights
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Washington, D.C. Mayor Muriel Bowser just signed into law one of the most restrictive pieces of legislation in the nation relating to employers' use of non-compete agreements to prevent employees from working for competitors. The Act not only completely bans non-compete agreements for District employees, but also goes beyond the restrictions commonly contained in many other non-compete statutes by imposing strict notice and other requirements that differ from other existing laws. For example, employers will be required to provide employees with notice of the new law regardless of whether they use non-compete agreements, and are banned from preventing employees from being "simultaneously" employed elsewhere, effectively calling into question the viability of relatively common "moonlighting" prohibitions.

The legislation, titled "Ban on Non-Compete Agreements Amendment Act of 2020" and approved by the mayor on January 11, now moves to Congress for a 30-day review period, during which time federal lawmakers have the ability to adopt a joint resolution disapproving of the Act. In such an unlikely event, the Act would be sent to President Biden to sign off on the resolution. Having already stated his intention to take an aggressive stance toward minimizing employers' use of non-compete agreements, it is highly unlikely that he would agree to overturn the Act – meaning D.C. employers should begin to prepare immediately for this potentially seismic shift by reviewing our five-step action plan.

Key Requirements Of The Act

The Act, which was passed in a 12-0 vote of the District of Columbia Council on December 15, 2020, contains a number of notable requirements:

- **Sweeping prohibition on non-compete provisions.** The Act prohibits employers from requiring employees to sign agreements that contain non-compete provisions or maintaining equivalent policies. The term "non-compete provision" is defined as including a written agreement that prohibits an 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 term "employee" includes any person "who performs work in the District on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in the District." The Act goes beyond the reach of

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other restrictive non-compete statutes, by virtue of invalidating agreements barring "simultaneous" competitive employment, as well as encompassing "prospective" employees.

- **Exclusions:** The Act excludes from the definition of "employee" volunteers, certain individuals who hold office in religious organizations, babysitters, and medical specialists. The Act also does not apply to federal or District of Columbia government employers. The Act does not ban non-compete provisions in the context of the sale of a business.
- **Anti-retaliation provisions**: Employers are barred from retaliating against employees who refuse to agree to or comply with an unlawful non-compete, or who ask or complain about the validity of a non-compete or policy that the employee believes to be prohibited under the Act, or who requests information that the employer is required to provide under the Act.
- **Employers must provide a specific notice to all Washington D.C. employees.** Within 90 calendar days after the effective date of the Act, employers must provide all employees who work for the employer within the District with the following notice: **"***No employer operating in the District of Columbia may request or require any employee working in the District of Colombia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Act of 2020."* Additionally, new employees working in the District must be provided with that text within seven calendar days of their hire date, and employees who request the statement must receive it from the employer no later than 14 days after receiving the written request.
- **Employers are required to maintain records.** The Act requires the Mayor to issue rules to implement the Act, including rules requiring employers to keep and retain records relating to compliance with the Act. These rules have not yet been implemented.

Impact On Existing Agreements

There is a silver lining for District employers. Existing non-compete agreements are excluded from the Act. The Act applies only to non-compete agreements entered into ***on or after*** the effective date of the Act.

What About Confidentiality And Non-Solicitation Agreements?

Another positive that employers can take from this development is that the Act specifically provides that employers may continue to restrict employees from disclosing confidential, proprietary, or sensitive information, client lists, customer lists, or trade secrets. The Act is silent, however, regarding non-solicitation agreements.

Future Implications For Employers

Employers should be aware of the enforcement mechanisms and penalties that they may face under the Act. Penalties for violations include both administrative and civil remedies. The Mayor and the Attorney General for the District of Columbia may assess fines of $350 to $1,000 for each violation of

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the non-compete and notice requirements, and more than $1,000 for violations of the retaliation provision.

Meanwhile, aggrieved employees can file either an administrative complaint or a civil action in court, and may seek between $500 and $1,000 for each violation. Employers who attempt to enforce an agreement that is invalid under the Act will be liable to the employee for at least $1,500. Fines increase with multiple violations.

Recommendations For Employers

In response to the passage of the Act, employers with operations in Washington, D.C. should take steps to ensure their adherence to its terms. Our recommended five-step action plan includes the following:

1. **Review existing policies, offer letters, and agreements**: You should review your existing policies, offer letters, and agreements to ensure they do not include provisions that may run afoul of the Act. While you may continue to enforce previously executed, otherwise enforceable non-compete agreements, you may not continue to maintain policies that the Act has declared to be unlawful. You should review "moonlighting" or similar policies to determine their continued viability. Additionally, any agreements that you plan to distribute after the effective date of the Act should be reviewed in coordination with your legal counsel to determine whether they contain invalid non-compete provisions, and to remove such provisions.
2. **Train managers and human resources personnel**: Managers, hiring supervisors, and other personnel responsible for communication with employees about their agreements should be educated on the pertinent provisions of the Act. This will ensure timely and accurate responses to employee inquiries in accordance with the Act's requirements, and avoid retaliation that will be prohibited by the Act.
3. **Create a plan to ensure compliance with notice provisions**. You should plan to ensure you provide the notice required by the Act to employees within 90 days of the Act's effective date. More administratively burdensome are the notice requirements for new employees (seven days) and for responding to requests for copies of the notice (14 days). You should ensure that those responsible for handling such requests are aware of the timing requirements and prepared to comply with them.
4. **Develop communications plan:** You may want to consider a communications strategy for addressing the continued viability of pre-existing non-competes. Additionally, you should consider how you will treat ongoing obligations to protect and not disclose trade secrets and confidential information.
5. **Create procedures to ensure documentation relating to compliance with the Act is maintained**: Finally, you should implement effective filing and recordkeeping procedures for all employment documentation pertaining to Washington D.C. employees. This will permit you to

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readily comply with any future recordkeeping requirements implemented by the Mayor pursuant to the Act.

Conclusion

We will continue to monitor further developments related to this groundbreaking legislation, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact the author, your Fisher Phillips attorney, any attorney in our Washington, D.C. Metro offices, or any attorney in our Employee Defection and Trade Secrets Practice Group.

Stephanie Robin also contributed to the development of this legal alert.

This Legal Alert provides an overview of a specific new local law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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