Insights, News & Events

5 RECOMMENDATIONS FOR D.C. EMPLOYERS AS BAN ON NON-COMPETE AGREEMENTS APPEARS TO BE POSTPONED UNTIL OCTOBER 1

Insights
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The Washington, D.C. Council just passed an emergency resolution that would postpone the applicability date of Washington, D.C.'s Ban on Non-Compete Agreements Amendment Act of 2020 – one of the nation's most restrictive pieces of legislation relating to employers' use of non-compete agreements to prevent employees from working for competitors – until October 1, 2022. This postponement, which will be sent to Mayor Bowser to sign, would provide the Council more time to consider the still-pending amendments to the Act set forth in Bill 24-256 before the Act's applicability date. What do you need to know about the Act, and what are the five most critical steps you can take now to prepare?

Background on Act

In our previous publication, we reported that D.C. passed the Act and that it became law in March 2021. However, the restrictions enumerated within the Act do not apply until the "applicability date." D.C. Councilmembers had concerns about the Act as it was written and, in May 2021, proposed Bill 24-256, the Non-Compete Conflict of Interest Clarification Act of 2022, to address those concerns.

The Bill does not propose to amend the near-complete ban on post-employment non-compete agreements, but rather attempts to amend that Act to provide employers with some reprieve as it pertains to the Act's bar on concurrent employment restrictions by allowing "bona fide conflict of interest" policies. This proposed amendment would allow employers to maintain legitimate conflict of interest policies

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that would otherwise be barred by the Act's broad prohibitions. Additionally, the proposed amendment would allow employers to restrict employees from engaging in activities for which they receive "money or a thing of value" that would cause the employer to "[c]onduct its business in an unethical manner."

Mayor Muriel Bowser signed an amendment to the Act in August 2021 which made the Act's applicability date April 1, 2022. However, as that date looms near, there has been no movement on Bill 24-256. On March 1, the D.C. Council passed an amendment to the Act previously signed by Mayor Bowser postponing the Act's applicability date to October 1, 2022.

Key Requirements Of The Act

The Act contains a number of notable restrictions that, pending Mayor Bowser's approval, would go into effect on the October 1, 2022 applicability date:

- **Sweeping prohibition on non-compete provisions.** As it is currently written, 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 other restrictive non-compete statutes, by virtue of invalidating agreements barring "simultaneous" competitive employment, as well as encompassing "prospective" employees. As discussed above, if Bill 24-256 is passed in its current form, it will amend the Act so that employers can use "bona fide conflict of interest" policies and can restrict employees from engaging in activities for which they receive "money or a thing of value" that would cause the employer to "[c]onduct its business in an unethical manner." Other key provisions of the Act, as currently written, are described below.

- **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 request 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 applicability date of the Act, expected to be October 1, 2022, 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 the employer receives 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 applicability date of the Act.

Recommendations For Employers

Even though the Act is poised to be postponed until October, employers with operations in Washington, D.C. should still take steps to ensure their adherence to the terms of the Act. 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 applicability 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 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' Insight system to gather the most up-to-date information. If you have questions, please contact the authors of this Insight, 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.