D.C. Council Amends Non-Compete Law After Backlash – What Employers Need to Know Before October 1

Insights
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After passing some of the nation's strictest regulations on employer use of non-compete agreements, the D.C. Council has backtracked on some of the law's most controversial provisions. Employers who rely on non-competes may welcome these new amendments, but the revised law still imposes significant compliance obligations on any company with employees living or working in Washington, D.C. You should review your agreements immediately, as employers only have a few weeks to ensure compliance ahead of the October 1 effective date. We previously covered the key aspects of the legislation – but here's what changed in the amended version and how you should prepare.

Why Was the Law Amended?

After passing the initial Ban on Non-Compete Agreements Amendment Act of 2020, the D.C. business community lobbied against its implementation. After receiving feedback from all sides, the D.C. Council delayed the act's effective date until April 2022 in order to further study its impact on employers. After engaging with industry groups, the D.C. Council amended the act and again delayed its implementation until October 1, 2022.

What Changed? (The Good News for Employers)

The current version of the act scales back its most onerous provisions. Specifically, it no longer imposes a total ban on the use of non-compete agreements. Instead, the ban on these restrictive covenants applies only to "covered employees" – which are defined as employees who earn less than $150,000 in yearly total compensation. Non-compete provisions will be permitted for employees above the compensation threshold, albeit with express limits on time, geography, and scope.

Some companies raised concerns about how the act would impact equity and profit-sharing compensation plans. You can still utilize such plans to recruit and retain top performers, as the amended act expressly provides that the ban on non-compete agreements does not apply to lawful long-term incentive agreements. You may continue to include non-compete restrictions as part of an agreement to provide an employee with "bonuses, equity compensation, stock options, restricted and unrestricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights and other performance driven incentives for individual or corporate achievements typically earned over more than one year."

The amended (current) version of the act also adds two other crucial exceptions to the ban on non-competes. First, the law clarifies that confidentiality agreements remain permissible. You may use such agreements to prohibit an employee from disclosing or using the company's confidential or proprietary information.

Second, the amended version scales back the restrictions on "anti-moonlighting" agreements. Under certain circumstances, you can enter agreements with employees to prohibit them from simultaneously working for other companies while they work for you. These employment restrictions may be imposed to prevent outside employment that could:

- result in inevitable disclosure of confidential information;
- conflict with a profession's ethical obligations;
- create a conflict of commitment if the employee is employed by a higher education institution; or
- impair the employer's ability to comply with other legal or contractual obligations.

What Stayed the Same? (Potential Challenges for Employers)

Even with these newly added exceptions and the narrowed scope of covered employees, the ban on non-compete agreements in Washington, D.C., will still take effect on October 1. You should note that the act also imposes notice obligations on employers, including, among others, the requirement that employers provide the non-compete to highly compensated employees in writing at least 14 days prior to the start of employment or execution of the agreement, The act also requires employers to provide a specific notice regarding the act whenever a non-compete provision is proposed to an employee.

The act includes additional obligations specific to certain professions – such as doctors and broadcast industry employees. The act also retains the anti-retaliation provisions that were part of the original act.

Drafting enforceable non-compete agreements requires wading through the act's complex provisions to ensure compliance with each of these requirements. So, employers that conduct business in the Washington, D.C., area should consult with an attorney to review any existing restrictive covenant agreements and draft updated versions, if necessary.

Does the Law Apply to You?

If you employ anyone who spends more than 50% of their work time within the District, then your restrictive covenant agreements with those employees will be subject to the act's heightened scrutiny, even if the employee does not live within the District's geographic boundaries.

Additionally, the act applies to prospective employees who may not yet work in D.C. if the employer "reasonably anticipates" that the employee will spend a substantial amount of work time in the

District.

We recommend that any company with employees working within the Beltway contact an attorney before October 1 to make sure that its legitimate business interests and confidential information remain protected to the furthest extent possible.

Nationwide Policy Trends

The D.C. legislation is the latest iteration of a nationwide trend towards limiting employer use of non-compete agreements. In the past year alone, a number of jurisdictions have passed statutory restrictions on these types of contracts, joining states like California that have long held certain employee covenants unenforceable. At the federal level, a similar bipartisan bill is making its way through Congress and could significantly impact business protection agreements nationwide.

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.

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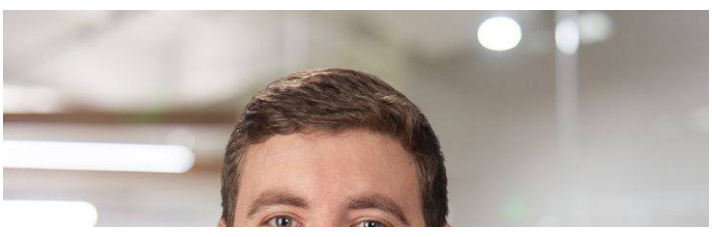

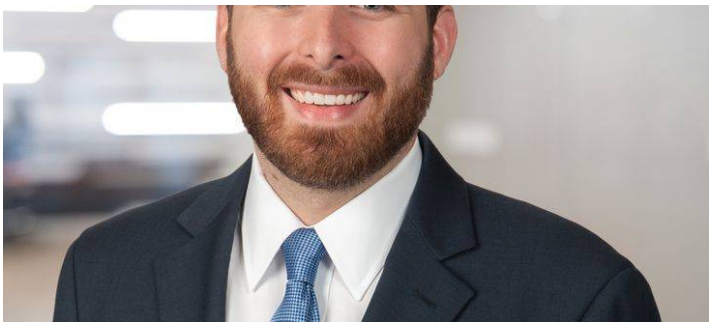

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