D.C. City Council Passes Bill Banning Non-Compete Agreements

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The District of Columbia City Council unanimously passed a bill titled " The Ban on Non-Compete Agreements Amendment Act of 2020" on December 15, 2020. As its title suggests, upon taking effect and becoming applicable, the bill would broadly prohibit D.C. employers from requiring or requesting that D.C. employees agree to non-competition provisions — and *may* impact certain commonly used non-solicitation restrictions and policies.

(There is a narrow exception for "medical specialists," which the bill defines as licensed physicians who have completed their medical residencies and make at least $250,000 annually.)

What Is On The Chopping Block?

The bill can be read to prohibit a broader set of restrictive covenants than those that employers may think of as being classic non-competition agreements. The bill states generally that employers may not require or request that their employees refrain from "(1) [b]eing employed by another person; (2) [p]erforming work or providing services for pay for another person; or (3) [o]perating the[ir] own business." Although the bill states that employers remain able to protect their confidential, proprietary, or sensitive information (including client lists, customer lists, and trade secrets), it does not explicitly carve out non-solicitation provisions. Critically, the bill seemingly not only prohibits non-competition and non-solicitation provisions that apply *after* employees leave an employer, but also prohibits such provisions — or even *policies* — preventing employees from competing *while still employed*.

Under D.C. law, employees are required to act in their employers' best interests, in accordance with their common law fiduciary duties and duty of loyalty. It remains to be seen how courts will reconcile the non-compete ban (should it become law) with the scope of those well-settled common law duties. The bill's broad ban on retaliation against an employee for "[p]erforming work or providing services for pay for another person," including "[t]he employee's alleged failure to comply with a non-compete provision or a workplace policy made unlawful by this title," may present obstacles for employers seeking to address a disloyal employee.

The bill does not apply retroactively, so restrictive covenant agreements signed prior to its enactment into law will remain in full force and effect. Covered non-competition and non-solicitation provisions signed after the bill takes effect will be void as a matter of law and unenforceable.

Notice Requirements

Should the bill become applicable, D.C. employers will be required to provide notices informing covered employees that they cannot be asked or required to agree to a non-compete policy or agreement. The required text of those notices is set forth in the bill and must be provided:

- Within 90 days of the bill's applicability date;
- Within seven calendar days of the employee's hire; and
- Within 14 calendar days after the employer receives a written request for such notice from the employee.

(Separate notice requirements apply to medical specialists.)

Multiple Avenues for Enforcement

The bill will allow employees to enforce their rights through administrative means, by submitting a complaint to the Mayor's office, and by suing in court through a private right of action.

The bill empowers the Mayor's office to issue administrative fines ranging from $350 to $1,000 per violation, and it renders the employer directly liable to an affected employee in the amount of $500 to $1,000 for a first offense, and not less than $3,000 for a subsequent offense.

Similar Laws in the D.C. Metro Area

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Practices

Restrictive Covenants, Trade Secrets and Unfair Competition

There is a trend in recent years with states in the D.C. metro area passing laws to regulate and limit restrict covenant agreements, including a 2019 Maryland law and 2020 Virginia law that prohibit restrictive covenants for lower-wage employees. But D.C.'s Ban on Non-Compete Agreements Amendment Act of 2020 goes a step further than either of those laws, placing D.C. at the forefront of prohibitions on restrictive covenants.

Next Steps

Notwithstanding potential enforcement challenges for employers posed by the anti-retaliation provisions, because D.C.'s Ban on Non-Compete Agreements Amendment Act of 2020 does not apply retroactively, employers should consider moving quickly to enter into any required non-competition agreements before the law takes effect. In addition, employers should review their non-solicitation agreements to ensure they are protecting their rights to the greatest extent possible. They also should examine their employment policies and notices and make any necessary changes.

D.C. Mayor Muriel Bowser has been vocal in her opposition to the bill, commenting as recently as December 1st that it should be withdrawn. However, given that the bill passed the D.C. City Council unanimously (with one recusal), it appears likely that even if Mayor Bowser were to veto the bill, the Council could have the votes to override that veto.

If the bill receives mayoral approval, or the Council overrides a mayoral veto, the bill will still be subject to a 30-day Congressional review period under the Home Rule Act. In addition, the fiscal effects of the bill will need to be included in an approved budget and financial plan before the bill becomes applicable. These remaining procedural steps may give employers a window to take action prior to the bill's effective date.

Please contact a Jackson Lewis attorney with any questions about these fundamental changes in District of Columbia law or any other legal issues.