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ALERT

D.C. Employers Are Potentially Weeks Away from a Near-Total Ban on Non-Compete Agreements

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D.C. Mayor Muriel Bowser signed the Ban on Non-Compete Agreements Amendment Act of 2020 (the Act) into law on January 11, 2021. The law, which has already survived the mandatory 30-day congressional review under the Home Rule Act, is subject to a budgetary review and will go into effect as of "the date of inclusion of its fiscal effect in an approved budget and financial plan." This is not expected to happen until sometime in the fall of 2021, but once the Act is included in such a plan, all employers will be required to comply with its provisions.

If the Act becomes law, D.C. will become one of several jurisdictions (*e.g.*, Illinois, Maryland, Virginia, California, and Washington) that have statutorily limited the scope and enforceability of non-compete agreements. The D.C. Act is significantly more aggressive than measures other states have undertaken in recent years to curtail restrictions on trade because it is effectively a near-total ban on agreements or policies that limit an employee's right to work for other employers both during *and* after employment.

Prohibitions and Requirements

The Act broadly prohibits D.C. employers from requiring or requesting that employees or prospective employees who will work in the District agree to sign an agreement or abide by a workplace rule or policy restricting their simultaneous (*i.e.,* moonlighting) or subsequent employment or provision of services. The Act also prohibits retaliation against employees or prospective employees who challenge or refuse to agree to abide by an agreement or workplace policy that

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the individual reasonably believes to be prohibited. These prohibitions would apply to virtually all employees, with few exceptions (babysitters, certain medical professionals, and instances where the seller of a business agrees not to compete with the buyer).

The Act contains a notice requirement, which requires employers to provide notice using specific text that sets out employees' rights and remedies under the Act no later than ninety (90) calendar days after the effective date of the Act; or seven (7) calendar days after an individual becomes an employee; or fourteen (14) calendar days after the employer receives a written request for such a notice from an employee.

Administration, Enforcement, and Penalties

The Act is not retroactive, and accordingly, it will only apply to agreements entered into after the effective date of the Act. The Act will be administered and enforced by the Mayor and Attorney General and provides for enforcement by filing an administrative complaint with the Mayor or a civil action in a court. Employees are not required to file an administrative complaint before proceeding to civil litigation.

Concerning penalties, the Act provides that the Mayor may assess an administrative penalty of "no less than $350 and no more than $1,000 for each violation of [the Act]; except that each violation of [the Act's anti-retaliation provisions] assessed against an employer shall be for not less than $1,000." For civil actions, the Act authorizes statutory penalties that range from $500 to $3,000 per violation. Civil claimants may also be awarded "such legal and equitable relief as may be appropriate," including, but not limited to, back wages, liquidated damages equal to treble the amount of back wages, and reasonable attorneys' fees and costs.

Key Issues and Considerations

The text of the Act raises several issues and unanswered questions. One key issue that could lead to inadvertent violations is the Act's broad definition of the term "non-compete provision." The Act defines a non-compete provision as an agreement that prohibits an individual's employment or provision of services ***during and after*** their employment. This means employers may need to revise or remove provisions that purport to require employees to agree to refrain from accepting conflicting employment during their employment term or requiring employees to devote their full or substantially full efforts to completing their duties with a given employer. Employers will also need to carefully review and evaluate policies that broadly prohibit providing services to current, former, or prospective clients to determine whether they are so overbroad that they effectively prohibit employees from being "employed by another person [or] performing work or providing services for pay for another person."

The Act also broadly defines an employee as "an individual who performs work in the District on behalf of an employer . . ." Whether or not this might encompass individuals hired as independent contractors is a matter of interpretation. Courts have interpreted other D.C. laws with similar language, such as the D.C. Human Rights Act (D.C.HRA), as excluding independent contractors from legal protections and remedies based in part on analogies to similar federal laws (in the case of the D.C.HRA, by analogy to Title VII of the Civil Rights Act of 1964). However, there is no federal non-compete law that courts could look to for guidance when attempting to interpret the Act.

The Act also leaves open the potential for a battle over the applicability of the election of remedies doctrine, which generally bars civil actions alleging violations of certain D.C. statutes that were filed subsequent to a pending or concluded administrative action (effectively a prohibition on "double-dipping"). Unlike other District statutes that create administrative and civil avenues for relief (*e.g.*, the D.C.HRA), the Act does not contain provisions that expressly prohibit employees from filing an administrative claim and later filing a civil action based on the same set of facts. The Act merely provides that "a person aggrieved by a violation [of the Act] may pursue relief by filing" and an administrative complaint "or" a civil action. General principles of statutory interpretation strongly suggest that the D.C. Council's use of the term "or" requires employees to choose between filing an administrative complaint or a civil action, but the Council's failure to include specific election of remedies language (as it has done in multiple, earlier enacted laws) will undoubtedly be seized upon by employees who are dissatisfied with the speed or outcome of their initial filing.

The Act expressly exempts non-disclosure and confidentiality agreements from its scope. That carveout will be particularly meaningful for employers in industries where pricing and other highly confidential information are critical to their success. The exemption raises the question of whether an employer could effectively bar a worker from engaging in competitive employment by arguing that working for a competitor would necessarily require the disclosure of confidential or proprietary information. Such arguments will likely require the D.C. courts to finally determine the applicability and scope of the inevitable disclosure doctrine. The doctrine allows a plaintiff (typically a former employer) to establish trade secret misappropriation by demonstrating that a worker's new employment will inevitably cause them to rely on the plaintiff's trade secrets. The lone opinion from the U.S. District Court for the District of Columbia that discusses the doctrine merely provides that D.C. courts have not addressed the doctrine and that the federal district court could not rule out the possibility that doctrine might apply under DC law. It may still prove difficult for government contractors to use agreements and policies that protect confidential information as a bar on subsequent employment given the government's strong interest in program continuity and the fact that confidential information is often made available to other contractors and government employees during the performance of a contract.

Employers should also note that the Act expressly authorizes class or collective actions by aggrieved employees through its incorporation by reference of D.C. Code § 32-1308. That means employers may face class or collective actions brought in the name of all employees within the company who were presented with a non-compete provision or who were subjected to a non-compete policy in violation of the Act.

The Act instructs the Mayor to "issue rules to implement the provisions of [the Act], including rules requiring employers to keep, preserve, and retain records related to compliance with [the Act]." Accordingly, there may yet be more requirements and legal nuances if the Act is implemented.

Next Steps for Employers

There is still a chance that the Act will not survive the Congressional approval processes, but that outcome seems less likely under the Biden Administration. Employers should be aware of the potential implementation of the Act, and should immediately contact counsel to identify, review, and make appropriate revisions to all written agreements and policies. Employers should also begin developing plans to train managers to ensure

that they provide accurate information and avoid claims of retaliation; create plans to ensure compliance with the Act's notice and recordkeeping requirements; and evaluate current and potential policies directed at protecting confidential and proprietary information.