District of Columbia Ban on Non-Competes Significantly Limited by Subsequent Amendment Act

Client Alert
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On July 12, 2022, the D.C. Council voted to significantly revise and "clarify" the expansive Ban on Non-Compete Agreements Amendment Act of 2020 (the "Act").[1] These changes materially limit the scope and reach of the controversial Act, the enforcement of which had been met with a series of delays.

Background

As discussed in a previous client alert, the Act was generally viewed to be one of the most comprehensive bans on employee non-competes to date, and created a forward-looking prohibition barring any employer operating in the District of Columbia from "request[ing] or requir[ing] any employee working in the District of Columbia to agree to a non-compete policy or agreement."[2]

The Act also contained an expansive definition of the term "non-compete" that covered any provision that "prohibits the 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."[3] Critics of the Act noted that this provision could arguably reach anti-moonlighting policies common to employment agreements and policies.

The Act further contained several notice provisions requiring employers to inform new employees of the Act's ban on non-competes, and strictly prohibited employers from retaliating against employees who refused to sign, or otherwise comply with, a prohibited non-compete policy or agreement. These Act was given teeth by the threat of civil or administrative penalties for non-compliance.

Related Services

Non-Compete & Trade Secret

Trade Secret & Non-Compete Specialty Team

Delays and July 2022 Changes

The Act was set to become enforceable on October 1, 2021, but was delayed until April 1, 2022 following an amendment styled the Non-Compete Conflict of Interest Clarification Amendment Act of 2021 (the "Amendment Act"). [4] In light of a request by the D.C. Council's Committee on Labor and Workforce Development to provide additional time to consider the proposed amendment, and to work with business leaders regarding the amendment, the Ban on Non-Compete Agreements Applicability Emergency Declaration Resolution of 2022 was signed by District of Columbia Mayor Muriel Bowser, delaying enforcement again.

On July 12, 2022, the Council passed the Amendment Act, sending it to Mayor Bowser on July 21, 2022. Mayor Bowser's response is due on August 4, 2022, and it is expected that the Amendment Act will be signed into law, becoming effective on October 1, 2022.

Among its key provisions, the Amendment Act excludes many "highly compensated employees" as well as "broadcast employees"[5] from the ban on non-competes. Notably, the Amendment Act does permit employers to enter into non-competes with highly compensated employees, subject to certain statutorily defined restrictions (e.g., the NDA must be in writing, specify the functional and geographical scope of the restriction, and cannot exceed certain time limits).

The Amendment Act also redefines "covered employees" as those who "spend more than 50% of his or her work time for the employer working in the District" or whose employment is based in the District, spends a substantial amount of his or her work time in the District, and does not work in another jurisdiction for 50% of their work time. Taken together, these modifications would exclude many employees who travel to the District for work-reasons (e.g., for employment activities related to national politics), but are not employed full-time there.

The Amendment Act also modified the "anti-moonlighting" provisions contained in the Act, making clear that prohibitions must reflect a reasonable belief of an employer that the employee's work for another would result in a disclosure of confidential or proprietary information, constitute a violation of an established conflict of interest rule, constitute a "conflict of commitment if the employee is employed by a higher education institution" or impair the employee's ability to comply with a law, regulation, contract, or grant agreement.

Among other things, the Amendment Act preserves much of the notice and anti-retaliation requirements found in the Act, as well as the ability to impose penalties for non-compliance.

Other Attempted Bans and Takeaways

As discussed in numerous Butzel Client Alerts, there has been a recent uptick in state and federal efforts to substantially limit, or even ban, non-compete agreements. These bans are often met with strong business resistance, as was the case here, are often tailored to reflect the concerns of those constituencies. Butzel and its Non-Compete/Trade Secret team continues to track and analyze legislation regarding non-compete agreements and other restrictive covenants, and continues to

advise businesses on how to navigate the ever-changing legal landscape here.

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[1] D.C. Law 23-209; D.C. Official Code § 32-581.01 *et seq.*

[2] *Id.* at § 102(e)(2). Notably, certain employers (e.g., the federal government or District of Columbia) and certain categories of employees were exempted from the Act. *Id.* at § 101(3).

[3] *Id.* at § 101(5).

[4] D.C. Bill 24-256.

[5] This term is defined by the Amendment Act to mean "an on- or off-air creator (such as an anchor, disc jockey, editor, producer, program host, reporter or writer" or legal entities that own or operate a television station or network, a radio station or network, a cable station or network, satellite-based services similar to a broadcast station or network, or "any other entity that provides broadcasting services such as news, weather, traffic, sports, or entertainment programming."