King & Spalding
Client Alert

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Labor and Employment

D.C. Non-Compete Ban

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D.C. Bans Non-Compete Provisions in Employment Agreements and Employment Policies

The District of Columbia has enacted a law that will prohibit nearly all non-compete agreements between D.C. employers and D.C. employees. On January 11, 2021, Mayor Muriel Bowser signed the "Ban on Non-Compete Agreements Act of 2020" (D.C. Act 25-563) (the "Act"), which will become effective upon completion of a 30-day congressional review period unless Congress overturns it.

In taking this action, the District of Columbia joins California, Oklahoma, North Dakota, and Montana as the jurisdictions that prohibit virtually all employment-related non-compete agreements. But unlike those states' laws, the Act reaches beyond post-employment restrictions to also ban any such arrangements that apply during the term of an individual's employment.

The Council of the District of Columbia ("D.C. Council") premised its adoption of the Act upon its views that non-compete provisions depress wages, inhibit mobility and entrepreneurship, and deplete the market of jobs. The initial proposal of the law focused on prohibiting non-compete agreements with lower-wage earners, similar to the approach recently taken in states like Illinois, Maryland, and Virginia. Following a public comment period, and notwithstanding sustained proposals from councilmembers and eleventh-hour admonitions from the Mayor to identify an appropriate salary threshold, the D.C. Council ultimately—and unanimously—voted to adopt a law that applies to ***all*** employees irrespective of income level.

The Act applies to businesses "operating in the District" and their employees who "perform work in the District," subject to certain express exemptions noted below. The Act bans both (i) non-compete provisions in written agreements and (ii) employment policies that contain prohibitions on certain employee activities. Specifically, the Act bars any contractual provision or employment policy 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. Again, the Act reaches beyond post-employment restrictive covenants to also ban any non-competition provisions that apply during the term of an individual's employment.

More fully, the Act:

- **bars non-compete provisions**, as it prohibits employers from requiring or even requesting that employees sign agreements that include such provisions;
- **bans "anti-moonlighting" policies** by prohibiting employers from having policies that prevent employees from being employed by or performing work or services for another person or from operating their own business, regardless of whether such conduct is competitive with the employer;
- **bars actual or threatened retaliation against employees** for (i) refusing to sign a non-compete provision, (ii) failing to comply with a non-compete provision or policy prohibited by the Act, (iii) asking, informing, or complaining to various specified individuals or entities about the existence, applicability, or validity of a non-compete provision that employees reasonably believe is prohibited by the Act; or (iv) requesting information required to be provided under the Act;
- **requires written notice to employees within precise time frames**, as language expressly specified in the Act must be sent by no later than (i) 90 calendar days after the applicability of the Act, (ii) 7 calendar days after an individual becomes employed, and (iii) 14 calendar days after receiving a written request for such notice; and
- **applies prospectively**, as it voids any non-compete provision entered into only on or after the applicability of the Act.

Exceptions

The Act only applies to agreements between "employers" and "employees" and employment policies, so it would not apply to sale-of-business non-compete provisions with institutional sellers. The Act also excludes from its coverage "[a]n otherwise lawful provision contained within or executed contemporaneously with an agreement between the seller of a business and one or more buyers of that business wherein the seller agrees not to compete with the buyer's business," which should apply to individual sellers who are also employees of the acquired company or become employees of the buyer. The Act also does not apply to contractual provisions that restrict employees from disclosing the employer's confidential, proprietary, or sensitive information, client lists, customer lists, or trade secrets. Certain limited groups of employees are exempt, including "medical specialists."[1]

Penalties

The Act provides for both administrative penalties and damages against employers who violate it. Penalties range from $350 to $1,000 per violation (though the penalty for retaliation cannot be below $1,000). Depending upon the violation, damages can range from $500 to $2,500 for each violation to each employee, with subsequent violations assessed at a minimum of $3,000 to each affected employee. The Act also provides that individuals aggrieved by violations of the Act have a right to file a civil action or an administrative complaint with the Mayor of D.C.

[1] A "medical specialist" is "an individual who performs work in [D.C.] on behalf of an employer engaged primarily in the delivery of medical services and who: (A) Holds a license to practice medicine; (B) Is a physician; (C) Has completed a medical residency; and (D) Has total compensation of at least $250,000 per year."

Key Outstanding Questions

The full reach of the Act will not be known until regulations are enacted and the courts interpret it in litigation. Among the key issues D.C. employers will encounter include:

Coverage Issues:

- The Act does not describe what constitutes "operating in" D.C. for an employer to be covered or establish any quantitative element of "perform[ing] work" necessary for employees to be covered.
- The Act purports to cover "employees," but defines that term broadly enough to potentially include independent contractors and other non-employee service providers.

Applicability to Non-Solicit Covenants:

- While the Act expressly permits confidentiality and related provisions, it is silent with respect to non-solicit provisions.

Applicability to Forfeiture for Competition Provisions:

- The Act does not clearly indicate whether it also prohibits forfeiture-for-competition provisions (e.g., those requiring a former employee to forego certain post-employment benefits in the event they elect to engage in activities competitive with their former employer).

Applicability to Conflict of Interest and Similar Policies:

- The Act provides little guidance with respect to its ban on employment policies that prohibit employees from working for another employer, and it does not address at all how it will impact conflict of interest and similar provisions that are standard in most companies' employment policies and codes of conduct.

Employers should act now to revise their restrictive covenant practices and internal policies to be ready to come into compliance with the Act once it becomes effective. King & Spalding's labor and employment attorneys stand ready and able to help employers implement such changes.

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