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Client Alert

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D.C. Developments: Expanded Paid Leave for Private Sector Employees and Revised Non-Compete Law

Effective October 1, 2022, employers with employees who provide a significant portion of their services in the District of Columbia ("D.C.") are impacted by two important changes: (i) the expansion of mandatory paid leave applicable under D.C. law to such employees, and (ii) restrictions regarding the ability to enter into and enforce non-competes with such employees.

1. D.C. Provides Expanded Paid Leave for Private Sector Employees

Effective October 1, 2022, the number of weeks of paid leave available to eligible individuals in D.C. under the Universal Paid Leave Act of 2015 (the "Act") will increase. The Act, one of the most generous paid leave laws in the country when enacted, most recently provided eligible individuals (i) eight weeks of paid parental leave[1], (ii) six weeks of paid family leave[2], (iii) six weeks of paid personal medical leave[3], and (iv) two weeks of paid prenatal leave, up to a maximum of eight weeks paid leave in any fifty-two-workweek period. Prior to October 1, 2022, such leave was funded by an increase in D.C. employer payroll taxes equal to 0.62% of each employee's wages.

Under the Act, individuals eligible for benefits generally include individuals who work in D.C. and no more than 50% in another jurisdiction. This includes individuals employed by a covered employer at the time of the application for benefits and self-employed individuals who opt into and enroll in the paid leave program. Under the Act, "covered employers" are all D.C. employers subject to D.C. unemployment insurance tax. The paid leave taken under the Act runs concurrently with (and not in addition to) leave provided under the federal Family and Medical Leave Act or the D.C. Family and Medical Leave Act. Additionally, covered employers may provide eligible individuals with more generous leave benefits than those described in the Act, but such more generous leave benefits do not

exempt the covered employer from the requirements of the Act or the payment of the payroll tax to fund such paid leave under the Act.

Under the Act, eligible individuals with an annualized weekly wage rate equal to or less than 150% of the D.C. minimum wage ($16.10 per hour in 2022) will be entitled to benefits equal to 90% of such individual's average weekly wage. Eligible individuals with an annualized weekly wage rate in excess of 150% of the D.C. minimum wage will be entitled to 90% of the amount that is 150% of the D.C. minimum wage plus 50% of the amount in excess of 150% of the D.C. minimum wage, subject to a maximum weekly benefit of $1,009.

Under the new terms of the Act, effective October 1, 2022, the Act will provide eligible individuals with: (i) twelve weeks of paid parental leave, (ii) twelve weeks of paid family leave, (iii) twelve weeks of medical leave, and (iv) two weeks of paid prenatal leave up to a maximum of twelve weeks paid leave in any fifty-two-workweek period. Additionally, D.C. employer payroll taxes for the program are reduced to 0.26% of each employee's wages.

The increase in paid leave under the Act and the reduction in D.C. employer payroll taxes is a result of a surplus in D.C.'s Universal Paid Leave Fund. The employer contribution rate for the program will be re-evaluated in March 2023.

2. D.C.'s Revised Non-Compete Law Scales Back Original Proposed Restrictions

D.C.'s non-compete law has taken effect as of October 1, 2022, in a revised form that substantially scales back restrictions originally enacted in January 2021, as we previously covered. The revised law now allows non-compete agreements only between certain D.C. employers and employees who earn annual compensation in excess of $150,000, including hourly wages, salary, bonuses or cash incentives, and the like. The new law applies to non-compete provisions entered into on or after October 1, 2022 and does not apply retroactively.

Background: The Original Act. In January 2021, D.C. enacted the "Ban on Non-Compete Agreements Act of 2020" (D.C. Act 25-563) (the "Original Act"). As written, the Original Act would have prohibited nearly all non-compete agreements between D.C. employers and D.C. employees, as it contained wide-sweeping restrictions that would have applied to all employees irrespective of income level. The Original Act further prohibited all non-compete provisions applicable *during* an individual's employment term, in addition to barring any post-employment restrictions. The Original Act's broadly restrictive reach led to the business community seeking clarifications to the law, and the Council of the District of Columbia delayed the Original Act's effective date.

The Amended Act. After hearings and discussions throughout 2021 and 2022, the "Non-Compete Clarification Amendment Act of 2022" (the "Amended Act") was enacted on July 27, 2022 and became effective on October 1, 2022. The Amended Act applies to businesses "operating in" D.C. and their employees who "perform work for pay in the District" or individuals to whom an employment offer has been made and who an employer "reasonably anticipates will perform work for pay on behalf of the employer in the District," subject to certain express exemptions. The Amended Act bans non-compete provisions in both (i) written agreements and (ii) employment policies, subject to certain exceptions as noted below. Specifically, the Amended Act bars any contractual provision or employment policy that prohibits a "covered employee" from performing work for pay for another person or from operating the employee's own business. Unlike the Original Act, the Amended Act does not expressly ban non-compete provisions that apply during the term of an individual's employment.

"Covered employees" to whom the ban applies are defined as employees who are not "highly compensated employees" and spend, or it is reasonably anticipated that they will spend, (i) more than half of their work time for the employer working in the District; or (ii) a substantial amount of work time in D.C. while also being based in D.C. and not spending more than half of their work time in another jurisdiction. "Highly compensated employees" to whom non-compete provisions may be applied are employees who are reasonably expected to, or in the twelve-month period preceding the

commencement of the non-compete term did, earn annual compensation of at least $150,000, inclusive of hourly wages, salary, bonuses or cash incentives, commissions, overtime premiums, vested stock, and other payments provided. This minimum qualifying compensation is set to be revised annually beginning on January 1, 2024.

In further detail, the Amended Act bars:

- non-compete provisions between an employer and a covered employee, and it prohibits employers from requiring or even requesting that covered employees sign agreements or comply with employment policies that include such provisions;
- Actual or threatened retaliation against covered employees for:
  - Refusing to sign a non-compete provision prohibited by the Amended Act;
  - Failing to comply with a non-compete provision or policy prohibited by the Amended Act;
  - Asking, informing, or complaining to various specified individuals or entities about the existence, applicability, or validity of a non-compete provision that an employee reasonably believes is prohibited by the Amended Act; or
  - Requesting information required to be provided under the Amended Act; and
- Actual or threatened retaliation against highly compensated employees for:
  - Requesting a copy of their proposed or executed agreements containing a non-compete provision; or
  - Requesting information required to be provided under the Amended Act.

The Amended Act also affirmatively requires that:

- An agreement between an employer and a highly compensated employee that has one or more non-compete provisions specify:
  - The functional scope of the competitive restriction, which includes the services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of;
  - The geographical limits of the restriction; and
  - A restricted period that does not exceed one year from the employee's separation of employment;
- If a non-compete is provided to a highly compensated employee, the employer must provide (i) the provision in writing at least 14 days before the employee begins employment or, if the employee is a continuing employee, at least 14 days before the employee must execute the agreement; and (ii) a notice as specified in the Amended Act upon proposal of the non-compete provision; and
- An employer must disclose and provide written copies to employees of any employment policies that include permissible employment restrictions (as described below) 30 days after acceptance of employment, by October 31, 2022, and any time such policy changes.

Exceptions.[4] Like the Original Act, the Amended Act excludes from its coverage sale-of-business non-competes, which are defined as "[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." This should apply to individual sellers who are also employees of the acquired company and become employees of the buyer. The Amended Act also continues to exclude contractual provisions that restrict employees from disclosing the employer's confidential, proprietary, or sensitive information, client lists, customer lists, or trade secrets. As a new exception, the Amended Act *does not* prohibit an "anti-moonlighting" provision that bars an

employee from accepting compensation for performing work during the employee's employment if the provision is based on a reasonable belief that such circumstances will result in disclosure of confidential or proprietary information, violate conflict of interest rules, constitute a conflict of commitment related to a higher education institution, or impair the employer's ability to comply with District or federal laws or regulations, or contractual agreements. The Amended Act also does not prohibit an otherwise lawful provision that provides a long-term incentive, such as bonuses, equity compensation, stock options and other performance driven incentives typically earned over more than one year.

Penalties. As with the Original Act, the Amended Act provides for both administrative penalties and damages against employers who violate it. Penalties range from $350 to $1,000 per violation of the Amended Act (although the penalty for retaliation cannot be less than $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 Amended Act also provides that individuals aggrieved by violations have a right to file a civil action or an administrative complaint with the Mayor of D.C.

Key Outstanding Questions. Although the Amended Act scales back the prohibitive reach of the Original Act, the Amended Act remains a significant restrictive covenant law. While revisions clarified certain aspects of the law, regulations and court interpretations will ultimately flesh out the full reach of the Amended Act. Key issues that remain and that D.C. employers may likely encounter include:

Coverage Issues:

- The Amended Act does not define what constitutes "operating in" D.C. for an employer to be covered, although it has provided quantitative guidelines by which employees are deemed to be covered under the law.
- The Act purports to cover "employees" and consistently refers to employees in the context of performing work for "employers," but the term may be argued by some to be broad enough to potentially include independent contractors and other non-employee service providers.

Applicability to Non-Solicitation Covenants:

- Despite expressly permitting confidentiality and related provisions, the Amended Act remains silent with respect to non-solicitation provisions pertaining to either customers or employees.

Exceptions Regarding Long-Term Incentive Plans and Forfeiture for Competition Provisions:

- Although the Amended Act states the definition of "non-compete provision" does not include "an otherwise lawful provision that provides a long-term incentive," it is not clear whether that means all non-compete provisions in any long-term incentive plans are permissible or whether the exception more likely was intended to apply less broadly, such as to only forfeiture-for-competition provisions, in which restrictions require former employees to forego certain post-employment benefits in the event they elect to engage in competitive activities with their former employers.

3. Conclusion

We recommend D.C. employers carefully consider these changes in analyzing their employment and benefits practices and policies in D.C. and that affect their D.C. employees, including (i) whether any updates are required regarding paid leave notices, practices or programs to reflect the increase in mandated paid leave benefits described above, and (ii) whether any revisions to existing form non-compete provisions or agreements or employment policies and onboarding materials are required to comply with the new non-compete restrictions on a go-forward basis.

ABOUT KING & SPALDING

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[1] Under the Act, parental leave must be taken within one year of the birth of a child, placement of a child for adoption or foster care or placement of a child where the eligible individual legally assumes and discharges parental responsibility.
[2] Under the Act, family leave constitutes care or companionship to a family member who has a diagnosis or occurrence of a serious health condition.
[3] Under the Act, personal medical leave constitutes a diagnosis or occurrence of a serious health condition of the eligible individual himself or herself.
[4] Certain limited groups of employees are exempt from the Amended Act or have different limitations applied to them, including medical specialists. A "medical specialist" is a "highly compensated employee who is engaged primarily in the delivery of medical services and who: (i) holds a license to practice medicine; (ii) is a physician; (iii) has completed a medical residency; and (iv) receives total compensation in the amount equal to or greater than $250,000."