Updates
March 31, 2022
Washington, D.C., Ban on Non-Competes Postponed Until October 2022

Mayor Muriel Bowser signed the District of Columbia's Ban on Non-Compete Agreements Amendment Act of 2020 (D.C. Act 23-563) (the Act) on January 11, 2021. The Act includes one of the most expansive bans on non-compete agreements in the country, but is still not enforceable in the District of Columbia over one year after its passage. The Act was set to become applicable on October 1, 2021, but D.C. Councilmember Elissa Silverman introduced an amendment (Bill 23-256) to address concerns from some members of the D.C. business community, and enforcement was delayed until April 1, 2022. The D.C. Council has now delayed enforcement again. On March 28, 2022, Mayor Bowser signed emergency legislation that pushes back the Act's applicability date to October 1, 2022. The additional delay will allow the council time to consider and vote on Silverman's amendment.

Further, the delay in enforcement also gives employers several more months to review their business practices and prepare for compliance with the Act's mandates, which are discussed below.

**Near Total Ban on Non-Compete Employment Agreements**

Under the Act, "[n]o employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement." Notably, the prohibition only applies to non-competes entered on or after the Act's applicability date, which has now been delayed until October 1; existing non-competes, and non-competes entered prior to that date are unaffected.

"Non-compete" is defined as 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." Thus, the Act not only bans provisions that prohibit work for a competitor after termination, it also calls into question anti-moonlighting policies that may be included in employment agreements, employee handbooks, or company policies.

There are some carve-outs to the ban. The ban does not apply to volunteers, babysitters, certain members of religious organizations, and medical specialists who have completed a medical residency and earn at least $250,000. The definition of "employer" expressly excludes the District of Columbia and the U.S. government. The Act also does not ban non-compete provisions included in agreements "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."

**Protections for Confidential Information Unaffected**

The Act does not limit an employer's ability to protect its confidential information, as the definition of "non-compete agreement" expressly excludes "any otherwise lawful provision that restricts the employee from disclosing the employers confidential, proprietary, or sensitive information, client list, customer list, or trade secret." The Act also does not expressly prohibit nonsolicitation covenants.

**Written Notice Requirements**

The Act includes three notice mandates. First, employers must provide the following notice in writing within 90 days of the Act's applicability date:

"No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020."

Second, the notice must be provided to all new employees within seven calendar days of their start date. Third, if an employee submits a written request, employers must provide a copy of the written notice within 14 days.

The Act directs the mayor to issue "rules requiring employers to keep, preserve and retain records related to compliance" with the Act, and employers must make those records "available for inspection or transcription." Mayor Bowser has yet to issue any such rules, and with the applicability date pushed back again, it is unclear when she will do so. While the Act is unclear about what happens in the meantime, employers would be well advised to maintain records of their efforts to comply with the Act while waiting for the mayor to promulgate specific rules.

**Anti-Retaliation Protections**

Retaliation is strictly prohibited under the Act. Specifically, employers are prohibited from taking or threatening to take any adverse action against employees who refuse to agree or fail to comply with an impermissible non-compete provision or workplace policy. Employers are also prohibited from retaliating against an employee who asks questions or raises complaints about a non-compete policy the employee reasonably believes is barred by the law.

**Enforcement and Penalties**

Employers may face both civil and administrative penalties for noncompliance with the Act. In the administrative context, the Act permits the mayor or D.C. attorney general to fine employers $350-$1,000 for each violation of the non-compete or notice provisions, and the government may assess fines of more than $1,000 for any instances of retaliation. Any employer who attempts to enforce an invalid non-compete agreement faces a minimum penalty of $1,500. The statutory penalty increases to a minimum of $3,000 per employee for subsequent violations of the Act.

Additionally, individuals alleging a violation of the Act may file a complaint with the mayor's office or a civil court action to seek to recover relief of $500 to $1,000 for each violation. The statutory penalty increases to a minimum of $3,000 per employee for subsequent violations of the Act.

**Proposed Amendment**

Councilmember Silverman's proposed amendment to the Act, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021 (Bill 24-256), would specify that "bona fide conflict of interest provisions" are permitted under the Act. Under the amendment, a "bona fide conflict of interest provision" is

"an otherwise lawful written provision or workplace policy that bars an employee from accepting money or a thing of value from a person during the employee's employment with the employer because the employer

reasonably believes the employee's acceptance of money or a thing of value from the person will cause the employer to [c]onduct its business in an unethical manner or [v]iolate applicable local, state or federal laws or rules" (punctuation altered).

The amendment would also clarify the language concerning confidentiality provisions that are excluded from the Act's definition of "non-compete provision." Under the amendment, provisions that prohibit employees from "disclosing or using the employer's confidential, proprietary, or sensitive information, client list, customer list, or a trade secret" are unaffected by the Act. The original Act did not include the "or using" language.

**Recommendations for Employers Operating in the District**

- The Act applies prospectively, so if an employer is considering entering into non-compete agreements with any applicants or employees, they should do so before the Act becomes applicable.
- Employers should ensure that their employee agreements include appropriate protections for confidential, trade secret, and proprietary information, and should consider nonsolicitation agreements with key employees where appropriate.
- Employers should use the delay in enforcement to ensure that their employment agreements, employee handbooks, codes of conduct, offer letters, and other workplace policies are in compliance with the Act when it becomes applicable.
- Employers should prepare to provide and track written notice of the Act's provisions to all employees working in the District of Columbia and should maintain records of their efforts to comply with the Act.



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