Legal Update Article

D.C. Mayor's Signature Puts Modified Non-Compete Ban on Track for October 1st Effective Date

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Related Services

Restrictive Covenants, Trade Secrets and Unfair Competition

The District of Columbia City Council has finalized amendments to implement the D.C. Ban on Non-Compete Agreements Amendment Act of 2020 effective October 1, 2022, and Mayor Muriel Bowser has signed D.C. Bill 24-256.

The City Council passed a broad ban in December 2020, but it decided in March 2022 that amendments were needed to address questions raised by the business community.

Final Bill with Amendments

The D.C. Non-Compete Clarification Amendment Act of 2022 amends the Ban on Non-Compete Agreements Amendment Act of 2020 "to clarify which provisions in workplace policies or employment agreements will not violate the law's restrictions on the use of non-compete provisions and agreements." For example, the amendments provide that employers may bar an employee's use and disclosure of confidential and proprietary information (trade secrets) during and after the employee's employment for the employer. Importantly, D.C. Bill 24-256 also provides a framework allowing the use of non-competes under certain circumstances.

In lieu of the original outright ban, D.C. Bill 24-256 now makes non-competes unenforceable only for employees earning $150,000 or less in compensation annually (or $250,000 or less for medical specialists). (Broadcast employees, as defined, are excluded.) As amended, the law permits enforcement of restrictive covenants for highly compensated employees (HCEs) — those receiving annual compensation exceeding $150,000. Included in the calculation of compensation for HCEs are hourly wages, salary, bonuses or cash incentives, commissions, overtime premiums, vested stock (including restricted stock units), and other payments provided on a regular or irregular basis. Compensation does *not* include fringe benefits other than those paid to the employee in cash or cash equivalents.

For these HCEs, the clarifications permit enforcement of non-compete agreements drafted in accordance with provided guidance, including, that for non-medical specialists, the restriction does not exceed 365 days from the date the employee separates from employment.

Even if an employee is not an HCE, the amended law more particularly defines a current "covered employee" as an employee who either:

- "Spends more than 50% of his or her work time for the employer working in the District;" or
- "Whose employment [...] is based in the District and the employee regularly spends a substantial amount of his or her work time for the employer in the District and not

more than 50% of his or her work time for that employer in another Jurisdiction."

Further, the amendment attempts to clarify when prohibitions on "moonlighting" (*i.e.,* working for a different employer while still employed) are permissible, including when the employer "reasonably believes" the circumstances will:

- "Result in the employee's disclosure or use of confidential [] or proprietary employer information;" or
- "Conflict with the employer's, industry's, or profession's established rules regarding conflicts of interest."

Cost of Noncompliance

D.C. Bill 24-256 allows employees to enforce their rights through administrative means, by submitting a complaint to the mayor's office, and by suing in court through a private right of action.

D.C. Bill 24-256 empowers the mayor's office to issue administrative fines ranging from $350 to $1,000 per violation. Further, the employer can be directly liable to an affected employee in the amount of $500 to $1,000 for a first offense, and not less than $3,000 for a subsequent offense.

Going Beyond Similar Laws in Area

Councilmember Brooke Pinto stressed in her D.C. Bill 24-256 amendment that although the threshold for HCEs was lowered during amendment negotiations to $150,000 annual compensation to include expanded cash incentives, the D.C. ban on non-competes still is one of the broadest in the country. Locally, the Virginia regulation on restrictive covenants broadly defines low-wage earners as compared to average income in the Commonwealth ($1,290 per week as of January 1, 2022; approximately $67,080 annually), whereas Maryland's restrictive covenant regulation applies to employees who earn equal or less than $15 per hour or $31,200 annually.

Next

Following Mayor Bowser's approval of D.C. Bill 24-256, the D.C. Non-Compete Clarification Amendment Act is subject to a 30-day Congressional review period under the Home Rule Act. While D.C. Bill 24-256 has finalized some provisions, there are still some unknowns heading toward the October 1 effective date.

In the meantime, employers should analyze existing compensation structures for compliance with D.C. Bill 24-256 and be cognizant of which employees might be considered highly compensated. For non-highly compensated employees, employers should review employment agreements to ensure non-compete provisions and policies are removed. Additionally, employers should prepare for the notice requirement to take effect on October 1, 2022.

Please contact a Jackson Lewis attorney with any questions about these fundamental changes in District of Columbia law or any other legal issues.

(Summer Associates Holly Fredericksen and Heather Kemp made significant contributions to the preparation of this article.)