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On July 27, 2022, District of Columbia Mayor Muriel Bowser signed into law long-debated amendments to the Ban on Non-Compete Agreements Amendment Act of 2020. The Non-Compete Clarification Amendment Act of 2022 scales back many of the broad restrictions on non-compete agreements in the original bill, the effective date of which was delayed due to business community opposition. The amended act will go into effect on **October 1, 2022**, barring any unlikely congressional action during the mandatory review period.

As we explained in our February 2021 and April 2022 client alerts, DC's original non-compete bill would have constituted one of the broadest statutory bans on non-compete agreements in the US. As initially signed, it would have prohibited the use and enforcement of non-compete agreements for virtually all employees working in DC. The original bill also banned anti-moonlighting policies, including policies that prohibited employees from operating their own businesses while working for an employer, and prohibited competitive activities outside employment. The new amendment scales back several of these restrictions, including limiting non-compete agreements to "highly compensated employees," clarifying protections for employers' confidential and proprietary information, and permitting certain anti-moonlighting restrictions.

Key provisions of the amendment

New definition of 'non-compete provision'

The amendment now defines a "non-compete provision" as "a provision in a written agreement or a workplace policy that prohibits an employee from performing work for another … or from operating the employee's own business." The amendment clarifies that it does **not** limit an employer's ability to, among other things:

- Restrict or prohibit employees from "[d]isclosing, using, selling, or accessing the employer's confidential employer information or proprietary employer information."
- Restrict or prohibit employees from concurrently working for another entity because the employer believes it could result in disclosure of confidential or proprietary information or otherwise pose a conflict of interest.

It also permits otherwise lawful non-compete provisions to be included in long-term incentive plans, which include bonuses, equity compensation and stock options typically earned over more than one year.

In light of this revised definition, employers will be permitted to maintain workplace policies and anti-moonlighting restrictions that prohibit outside, simultaneous employment or business activity as long as such restrictions only cover activities that conflict with the employer's, industry's or profession's established rules regarding conflicts of interest, or result in disclosure of confidential or proprietary information. Notably, the amendment is silent regarding whether employers in DC can continue to restrict post-termination solicitation of their customers, consultants, employees or contractors, and therefore appears to continue to permit such restrictions.

Non-compete compensation threshold

In line with other jurisdictions, such as Colorado and Washington state, DC will now permit non-compete agreements only for "highly compensated employees" who **make at least $150,000 per year**, with limited exceptions. Compensation is broadly defined to include hourly wages, salary, bonuses or cash incentives, commissions, overtime premiums, vested stock, and other payments "provided on a regular or irregular basis." The $150,000 threshold will increase beginning in 2024 in accordance with the Department of Labor's Consumer Price Index.

Non-compete ban still applies to covered non-highly compensated employees

Subject to limited exceptions, the amendment still bans non-compete agreements for all other non-highly compensated employees who either spend (or are anticipated to spend) more than half of their work time working in DC or – if their employment is based in DC – regularly spend a "substantial amount" of work time in

DC and not more than half their time in another jurisdiction.

Notice and other requirements

The amendment also imposes several other requirements upon employers who intend to present non-compete agreements to highly compensated employees. Effective October 1, employers must:

- Specify in the non-compete agreement the services, roles, industry or competing entities the employee is restricted from performing work for or in.
- Specify in the non-compete agreement the geographical limitations of the restriction.
- Restrict the non-compete agreement to a one-year term from the date of separation, with limited exceptions.
- Provide the non-compete agreement to the employee in writing at least 14 days before commencing employment or the date the employee must execute the agreement.
- Provide notice containing specific language that references the original bill and refers the worker to the DC Department of Employment Services for more information.

Employers must comply with an additional disclosure requirement if **any workplace policy** includes a provision that could be interpreted as a "non-compete provision," such as a prohibition on moonlighting where it would, for example, result in the employee's disclosure or use of the employer's confidential or proprietary information or constitute a conflict of interest. Employers must provide a written copy of the provision to **all employees** affected by that policy within 30 days after each employee's acceptance of employment, within 30 days after October 1, 2022, **and** any time the policy changes.

Anti-retaliation protections

The amendment reiterates that employees who inquire about, object to or even request a copy of their non-compete agreement are protected from retaliation.

Penalties and enforcement

DC's mayor and attorney general are authorized to enforce the amended ban. Employers in violation may be assessed administrative penalties of $350 to $1,000 for each violation and, for violations of the anti-retaliation provisions, penalties of at least $1,000. Penalties increase with each subsequent violation. An aggrieved employee also may pursue relief by filing a complaint with the mayor or filing a civil action.

Next steps for employers

In advance of the October 1 effective date, employers with employees working in DC should review their non-compete agreements and employment policies and prepare to comply with the amendment's requirements, which will apply to non-compete agreements entered into on or after October 1, 2022. Employers should ensure that employees meet the applicable compensation threshold and analyze whether a particular non-highly compensated employee falls within the amendment's definition of a covered employee. Employers with moonlighting or outside activities policies also should prepare to comply with the amendment's notice requirements. In addition, employers should train relevant managers and human resources staff regarding the broad anti-retaliation provisions of the amendment.

If you have questions about the amended ban or DC's treatment of restrictive covenants more generally, please contact a member of Cooley's employment group.

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