The District of Columbia Council passed the Non-Compete Clarification Act of 2022 (“Act”) in late July 2022, setting standards for how and when employers can use and enforce covenants not to compete. The Act notably clarifies and narrows the scope of D.C.’s Ban on Non-Compete Amendments Act passed in 2020, which (as its title suggests) banned the use of new non-compete agreements for all but certain medical employees. The new, clarified Act now allows the use of non-compete agreements for “highly compensated employees,” set at $150,000 per year in total compensation, as well as certain medical employees, and implements new substantive and procedural requirements for non-compete agreements.
Employers May Use Non-Competes for Highly-Compensated Employees

The biggest change implemented by the Act is restoring the ability of employers outside of the medical field to use non-compete agreements. Employers may now enter and enforce non-compete agreements with “highly compensated employees” making over $150,000 in total compensation. Employers can use a wide variety of forms of compensation to meet the threshold, including hourly or salary wages, bonuses, commissions, overtime, and vested equity, but may not include non-cash fringe benefits.

The Act continues to prohibit non-compete agreements for employees who do not meet this threshold. However, the Act also scales back its application to employees who do not work primarily in D.C. Whereas the original non-compete ban arguably applied to any employee who worked in D.C. for any period of time at all, the Act clarifies that the non-compete ban now applies only to employees who spend 50% or more of their time working in D.C. or who spend a “substantial” amount of work time in D.C. and do not spend more than 50% of their work time in another jurisdiction.

The Act retains and modifies the prior non-compete ban’s exception for “medical specialists.” Employers may permissibly enter a non-compete agreement with these employees if the employee is licensed to practice medicine, acts as a physician, has completed medical residency, and receives $250,000 or more in total compensation.

Certain Agreements Not Subject to the Non-Compete Ban

The Act excludes several types of agreements from its prohibition on non-competes for employees making less than the $150,000 threshold. First, non-competes remain enforceable in connection with the sale of a business. Second, the Act makes clear that non-disclosure agreements are not subject to the ban. Finally, the Act contains an interesting, though somewhat ambiguous, exclusion for agreements providing a “long term incentive,” defined as bonuses or equity-type compensation “for individual or corporate achievements typically earned over more than one year.”

Unfortunately, the Act does not clarify the prior non-compete ban’s ambiguity with respect to customer and employee non-solicitation agreements. Although these agreements impose more limited restrictions on the employee’s activity and do not in most cases prohibit the employee from working in a particular field like a non-compete does, other states that have limited or prohibited non-compete agreements have taken varying and inconsistent positions on whether those limitations also apply to non-solicitation agreements. Employers using non-solicitation agreements in D.C. should take care in structuring those clauses to avoid arguments that the non-solicitation acts in effect as a non-compete.

Requirements for Non-Competes

The Act imposes new substantive and procedural requirements that an employer must meet to enforce a non-compete against a highly-compensated employee:

1. The agreement must specify the scope and nature of the non-compete (e.g.
services, roles, competitive entities covered);

2. The agreement must specify the geographic scope of the non-compete restriction;

3. The duration of the non-compete may be for a maximum of one year for non-medical specialists or two years for medical specialists;

4. The employer must provide the non-compete agreement 14 days in advance of the employee’s start date or the date the employee is required to sign the agreement.

Employers Permitted to Limit Outside Employment

The Act also restores D.C. employers’ ability to use “moonlighting” policies that limit or prohibit employees from working with other employers. Previously, D.C.’s non-compete ban prohibited these policies, such that an employee could even work for a competitor during employment. Now, employers may restrict employees from accepting outside employment when the employer reasonably believes working for a second employer will:

1. Cause the employee to disclose confidential and/or proprietary information;

2. Conflict with industry-specific or professional rules regarding conflicts of interest; or

3. Impair the employer’s ability to comply with a contract, grant, or any law or regulation.

New Notice Requirements

The Act includes new notice requirements to employees. First, when an employer has a policy that includes one of the exclusions to the definition of “non-compete provision” (e.g. a policy limiting outside employment) the employer must provide such policy (1) within 30 days after October 1, 2022, (2) within 30 days of an employee’s first day of employment, and (3) after the employer makes a change to such policy. Additionally, employers must include a notice when presenting a highly compensated employee with a non-compete provision.

D.C. employers should carefully review the Act and update their employment agreements to ensure that they continue to have the benefit of non-compete protection after the Act becomes effective in October 2022.

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