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WEBSTER, CHAMBERLAIN & BEAN, LLP – NONPROFIT ALERT

D.C.'s NON-COMPETE CLARIFICATION AMENDMENT ACT OF 2022

In an important step, the D.C. Council has agreed on a compromise amendment that will make the District's Ban on Non-Compete Agreements legislation significantly less restrictive. Whereas the original bill would have been one of the most stringent in the country – banning virtually all non-compete agreements – the amended Act will now specifically exclude "highly compensated" employees from the non-compete ban and will allow for provisions designed to protect employers' confidential and proprietary information from the definition of a "non-compete provision."

Background

In December 2020, the D.C. Council passed the Ban on Non-Compete Agreements Amendment Act of 2020, which aimed to impose a broad prohibition against employee non-compete agreements.[1] The Act as originally enacted, which would have applied to any employer operating in the District as well as any employee working within the District, would have imposed a sweeping prohibition on employers enforcing any kind of non-compete agreement against employees; exceptions under this original Act were scant.

Scheduled to become effective on October 1, 2021, the Act has had its enforcement postponed repeatedly, first to April 2022 and now to October 2022. On July 12, and after much debate, the D.C. Council passed the Non-Compete Clarification Amendment Act of 2022, introduced by Councilmember Elisa Silverman, to limit the breadth of the original Act.[2] Mayor Muriel Bowser signed the legislation shortly thereafter. The Act will take effect on October 1, 2022.

Key Provisions

The amended Act has adopted a modified definition of "covered employees" in the context of non-compete agreements. A "covered employee" is an employee who either: 1. Spends more than 50 percent of his or her work time for the employer working in the District, or 2. An employee 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 percent of his or her work time for that employer in another jurisdiction. The Act's exceptions have also been altered slightly. Formerly, the ban on non-competes did not apply to medical specialists earning over $250,000 per year, religious officials, unpaid volunteers, babysitters, or the D.C. or federal government. Now, religious officials and unpaid volunteers are no longer excluded.

Under the amended Act, non-compete agreements will be permissible in the case of "highly compensated employees." The law defines such employees as those who earn $150,000 or more annually. The Act also defines "compensation" as "all monetary remuneration," which will include any bonuses, commissions, vested stocks, and overtime pay. Beginning in 2024, the minimum annual compensation level will be adjusted according to inflation. Non-compete

agreements will be considered unenforceable if held against an employee earning less than this amount, inclusive of all bonuses or other compensation as defined.

Among the Act's more significant provisions is its narrow definition of a non-compete agreement, specifically as to the issue of confidentiality or non-disclosure agreements. In this respect, the amended Act is helpful to employers: it excludes certain provisions from the definition of a non-compete provision, including provisions whereby employers can prohibit an employee's use, disclosure, access, or sale of employers' confidential and proprietary information both during and after employment. Relatedly, the Act specifies that employer prohibitions on an employee working for a different employer while still employed (commonly known as "moonlighting") are permissible where an employer "reasonably believes" the circumstances will: 1. Result in the employee's disclosure or use of confidential or proprietary employer information," or 2. "Conflict with the employer's, industry's, or profession's established rules regarding conflicts of interest."

What does this mean for nonprofits?

Even after the amendment to the Act, it is still one of the broadest bans on non-compete agreements in the country. Employers should look closely at future employee agreements and arrangements (including employee policies) in order to ensure ready compliance with the Act and make note of which employees may be considered highly compensated. For those employees that will not be considered highly compensated under the Act, employers should take the time to craft future employment agreements so as to exclude any and all non-compete provisions. Importantly, the Act still gives employers the means to protect their confidential and sensitive information.

Are there any exceptions to applicability?

As discussed above, the Act provides exceptions that allow for non-compete provisions to be enforced in the case of: medical specialists earning over $250,000 per year, babysitters, partners in a partnership, and both the D.C. and federal government.

What are the costs of non-compliance?

The Act allows employees to enforce their rights one of two ways: either through submitting a complaint to the mayor's office and undergoing an administrative adjudication or suing in court through a private right of action. If an employee chooses the former, the Act authorizes the Mayor to issue administrative fines ranging from $350 to $1,000 per violation. An employer can also be held directly liable to an affected employee for an amount ranging from $500 to $1,000 for a first offense, and not less than $3,000 for a subsequent offense.

[1] D.C. Law 23-209, available at https://code.dccouncil.us/us/dc/council/laws/23-209.
[2] D.C. Bill 24-256, available at https://legiscan.com/DC/text/B24-0256/2022.