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Washington, D.C.’s Partial Ban on Employee Non-Compete Agreements Takes Effect October 1, 2022.

Insights
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Effective October 1, 2022, employers will face significant limitations in their ability to use non-compete agreements with employees based in Washington, D.C. (the “District”). Under the District’s “Ban on Non Compete Agreements Amendment Act of 2020” (the “Act”), employers cannot prevent most District-based employees who make less than $150,000 per year from competing after they leave employment, and can only prevent such employees from competing during their employment on certain grounds. Employers can restrict most District-based employees who make more than $150,000 per year to a one year post-termination non-compete provision, but a number of specific requirements must be met in order to comply with the new law. Employers that have, or intend to hire, employees based in the District should take immediate steps to familiarize themselves with these changes and the various notice requirements under the Act, so that they are in compliance with the Act.

What constitutes a non-compete agreement under the Act?

The Act defines a non-compete agreement as “a provision in a written agreement or a workplace policy that prohibits an employee from performing work for another for pay or from operating the employee’s own business.”

The following agreements and policies are excluded from the Act, even when they contain non-compete provisions:

1. Sale or purchase of a business;

2. Agreements to not disclose, use, sell, or access the employer's confidential or proprietary information; and

3. Provisions that restrict a current employee from performing work for other companies or individuals where the current employer reasonably believes there is a risk of disclosure of the employer's confidential or proprietary information, or that performing such work conflicts with the employer's or industry's established rules regarding conflicts of interest.

Who may be required to sign a non-compete agreement under the Act?

The Act bans the use of non-compete agreements with employees who make less than $150,000 per year and either "spend or are reasonably expected to spend more than 50% of their work time in D.C.," or work for a District-based employer and do not spend a majority of their time working elsewhere.

The $150,000 per year compensation threshold applies to all District-based employees other than medical specialists. Employers can only enter into post-termination non-compete agreements with medical specialists who are based in the District and who make more than $250,000 per year. Beginning in 2024, these salary thresholds will increase under a formula tied to changes in minimum wage and cost-of-living.

What constitutes an enforceable non-compete agreement under the Act?

Employees who meet the compensation threshold may be bound to a post-termination non-compete agreement so long as the following requirements are met:

1. Terms of the non-compete agreement clearly define:
   a. What actions the employee is prohibited from taking.
   b. The geographic limitations; and
   c. How long the limitations will last (which cannot exceed 1 year).

2. Notice:
   a. The non-compete agreement must be provided to the employee at least 14 days before the employee's first day of work, or at least 14 days before the employee is expected to sign the agreement.
   b. The following specific notice must accompany the agreement: "The District's Ban on Non-Compete Agreements Amendment Act of 2020 limits the use of non-compete agreements. It allows employers to request non-compete agreements

from highly compensated employees, as that term is defined in the Ban on Non-Compete Agreements Amendment Act of 2020, under certain conditions. [**Name of employer**] has determined that you are a highly compensated employee. For more information about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of Columbia Department of Employment Services (DOES)."

Employees whose compensation does not meet the Act's threshold may not be prohibited from competing after they leave employment. Further, their employment agreement should only prohibit competition during employment on permitted grounds. Your Gunderson Dettmer attorney can assist you with this.

Additional notice requirements.

An employer with a workplace policy that meets an exception to the definition of non-compete agreement under the Act (such as confidentiality and proprietary information agreements or conflict of interest policies), must provide a written copy of the policy/relevant provisions to an employee:

1. Within 30 days after the employee's acceptance of employment with the employer;
2. Within 30 days after October 1, 2022; and
3. Any time such policy or relevant provision changes.

Penalties for retaliation and other violations of the Act.

The Act protects a range of employee actions related to non-compete agreements, such as refusing to sign an agreement that does not comply with the law. Companies may not threaten or retaliate against employees taking these protected actions. If an employee based in the District raises questions about a non-compete provision or there is any type of dispute regarding a non-compete agreement, you should contact your Gunderson Dettmer attorney before responding to ensure that your actions comply with the law.

Employees may sue for alleged injuries resulting from violations of the Act. Employers are also subject to increasing civil fines and penalties for violations of the Act.

The Act does not apply retroactively.

The Act applies to agreements signed on, or after, October 1, 2022.

Next Steps

Employers who anticipate entering into non-compete agreements with employees in the District after October 1, 2022, should contact their Gunderson Dettmer attorney to discuss the potential risks and best paths forward.

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