District of Columbia Delivers Lethal Blow to Non-Competes

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On January 11, 2021, Washington, D.C. Mayor Muriel Bowser signed the Ban on **Non-Compete Agreements Amendment Act of 2020** (the ?Act?) into law ? one of the most restrictive laws on employer/employee non-compete agreements in the country. Unique to the District of Columbia, after it was signed by the Mayor, the Act was sent to the United States House of Representatives and the United States Senate for a period of 30 days of congressional review. During the congressional review period, Congress may enact a joint resolution disapproving the Act. Then, if President Biden approves the joint resolution of disapproval (also during the 30-day review period), the Act is prevented from becoming law. If the congressional review period expires and no joint resolution disapproving the Act has passed and been approved by the President, the Act automatically becomes law and goes into effect immediately. It is unlikely that Congress will disapprove of the Act, and, as such, it is likely to become law next month.

Employers and Employees Subject to the Act

The Act broadly applies to any ?individual who performs work in [D.C.] on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on behalf of the employer in [D.C.].? The Act does not apply to volunteers of charitable, educational, religious or nonprofit organizations, elected or appointed religious officers, ?casual babysitters? and ?medical specialists,? which the Act further defines as licensed physicians who work in D.C. and make at least $250,000 per year. The Act applies to any employer that operates in the District of Columbia, even if its principal place of business is located outside the District.

Prohibitions and Requirements of the Act

If the Act survives the 30-day congressional review period, which it is likely to do, D.C. will join a growing number of states that make it illegal for employers to require employees to sign non-compete agreements. Unlike the prohibitions in states like **Virginia** that are limited to certain ?low wage? workers, in D.C., the Act?subject to the very limited exceptions discussed above?bans non-compete agreements for all employees working in D.C. The Act prohibits employers from requiring or requesting that any employee sign an agreement that includes a non-compete provision, or even from having a

workplace policy ?that prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee?s own business.? Surprisingly, the Act allows employees to moonlight or operate their own business while they are employed by their current employer, but it prohibits all post-employment restrictions on an employee?s ability to work for a new employer. It will be interesting to see how D.C. Superior Courts reconcile this portion of the Act with common law fiduciary obligations that every employee has to his or her employer.

The Act does not prohibit employers from binding their employees to agreements preventing the disclosure of confidential information or from soliciting customers or employees. In addition, the Act does not prohibit non-compete agreements used in the context of a sale of a business.

Employer Obligations and Penalties

The Act prohibits employers from retaliating or threatening retaliation against an employee who fails to comply or refuses to comply with an unenforceable non-compete provision, or for asking or complaining about an unenforceable non-compete provision or workplace policy. In addition, employers will have an obligation to provide their D.C. employees with the following statement (a) within 90 days of the effective date of the Act, (ii) seven (7) calendar days after an individual becomes an employee and (iii) within 14 calendar days after receiving a written request from an employee for the following statement: ?
No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.?

Penalties for violating the Act range from $350 to $3,000 per employee, depending on the severity of the violation. The Act allows employees to file civil or court actions against their employers for violations. Prevailing employees will also be entitled to their attorneys? fees and costs under Section 8 of the D.C. Wage Act, which is expressly incorporated into the Act.

Employers should remember that enforceability of non-compete agreements is based on state and local laws ? laws that frequently change. In that regard, employers are cautioned to take special care to ensure that their agreements are not only enforceable, but even merely permitted, under applicable law. Employers are encouraged to consult with labor and employment attorneys to comply with these state and local non-compete laws.

Related People

- Yiorgos L. "George" Koliopoulos ? 757.473.5320 ? gkoliopoulos@williamsmullen.com
- Laura D. Windsor ? 804.420.6466 ? lwindsor@williamsmullen.com

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