

D.C. Council Proposes a Ban on Non-Compete Provisions for Both Low-Wage and Mid-Level Workers

By Scott Mirsky

SUMMARY: A D.C. Council bill proposed earlier this month, if passed, would make non-compete provisions unenforceable against employees earning less than or equal to three times the D.C. minimum wage, currently \$14 per hour. Thus, an employee would have to earn in excess of \$42 per hour before the employee could be subjected to a non-compete provision.

In recent years, non-compete provisions have come under fire as being unfair and oppressive toward low-wage workers. A non-compete provision is essentially a contract clause used by employers to restrict or bar an employee from simultaneous or subsequent employment by a competitor. Within the last year, D.C.'s neighbor to the north, Maryland, enacted a statute prohibiting employers for subjecting low-wage workers to non-compete provisions. Under the recently enacted statute, Maryland employers are barred from entering into a non-compete agreement with workers who earn less than or equal to \$15 per hour.

Now D.C. is not only trying to catch-up with Maryland, but may out-pace its sister jurisdiction by enacting its own version of legislation to restrict the use of non-compete provisions against both low-wage earners and mid-level workers. Specifically, earlier this month, the D.C. City Council introduced the *Ban on Non-Compete Agreements Amendment Act of 2019* that would prohibit employers from requiring employees to sign agreements containing a non-compete provision if the employee earns less than or equal to three (3) times the minimum wage amount and would void any such provision as a matter of law. Currently, the minimum wage in D.C. is \$14 per hour and threefold that is \$42 per hour. Essentially, employers would be required to pay workers more than \$87,360 per year (assuming an employee works 40 hours a week for each workweek in a given year) before entering into (and enforcing) non-compete provisions with employees. For an employee paid a salary or based on commissions, his/her hourly rate is determined by dividing the total amount paid each calendar quarter by the total number of hours worked in that quarter. If that amount is equal to or less than threefold the D.C. minimum wage, then a non-compete is prohibited for that worker.

Not only does the proposed law limit the use of non-compete provisions in written agreements, but it also bars employers from having a workplace policy (such as an employee manual or handbook) or even an unwritten policy, that restricts where a low-wage or mid-level employee can simultaneously or subsequently work.

While the \$42 per hour threshold for enforcement of a non-compete provision would set a high earnings bar, that figure would rise in July 2020 when D.C.'s minimum wage increases to \$15 per hour. If the bill in its current form becomes law, an employee seeking to enforce a non-compete agreement would have to compensate an employee in excess of \$45 per hour once the higher minimum takes effect in July of 2020.

Of course, even if the monetary threshold is reached, enforcement is not automatic. Non-compete provisions are routinely the subject of litigation, as such provisions are only enforceable to the extent that the provision is reasonable, narrowly tailored to an employer's legitimate business interest, and does not violate public policy.

If the D.C. bill is passed in its current form, employers will face monetary penalties for violations ranging from \$500 to \$2,000 per employee. The stiffest penalty would result in the event of employer retaliation against a low-wage or mid-level employee who chooses not to comply with an (unenforceable) non-compete provision or similar workplace policy, or if an employee complains about such provision or policy.

Moving forward, if this bill becomes law, D.C. employers will have to review all employment agreements, employee handbooks, and related policies to ensure that they are not restricting simultaneous or subsequent employment for low-wage and mid-level workers.

If you have questions regarding the drafting and enforceability of non-compete agreements, **please contact the employment attorneys at Paley Rothman**

