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Got Employees in DC? Don't Overlook the Requirements of D.C.'s New Non-Compete Law

By Jessica Summers

For more than two years now, DC has been in the process of rolling out one of the Nation's strictest non-compete laws.

After significant postponements and amendments, the law, in its latest amended form, went into effect on October 1, 2022.

So what do DC employers need to know going forward?

Immediate Action Required
Bottom Line – Employers that have agreements or policies (including handbook provisions) containing confidentiality or moonlighting/outside employment provisions must provide copies of these any covered DC employees as soon as possible.

As noted further below, under the new law, employers are still permitted to have policies and agreements that:

- Prohibit employees from "disclosing, using, selling, or accessing the employer's confidential employer information or proprietary employer information" (*i.e.* confidentiality or non-disclosure provisions),

OR

- That prohibit employees from performing work for another person or entity during the period of their employment (holding a second job or "moonlight"). This type of provision is permitted only if there is a reasonable belief that the outside work will result in disclosure of the employer's confidential information, conflict with industry conflict of interest rules, or impair the employer's ability to comply with any laws or contracts.

While the aforementioned types of restrictions are not considered "non-compete provisions" for the purposes of DC's new law – the law does require that employers provide employees with clear notice of these policies. Arguably, the scope of the law covers such policies that may be found in employee handbooks, other stand-alone policy documents, and even offer letters.

Specifically, the law requires that employees receive a copy of any policy or agreement containing any of these provisions: (1) within 30 days after the employee's acceptance of employment, (2) at any time that the policy changes, and (3) within 30 days of the new law going into effect.

In other words – all employers should have provided DC employees with copies of any policies or agreements containing non-disclosure or moonlighting provisions by October 31, 2022. **If your business has such documents and you have not provided fresh copies to your DC employees now is the time to do so!**

What Else to Know

The original version of DC's law broadly prohibited the use of non-competes. As amended, the version that went into effect at the beginning of this month prohibits non-competes for everyone except "highly compensated" employees. The restrictions apply to any employee who works (or a new hire who is

anticipated to work) more than 50% of the time in DC. It is important to note that this can include remote work time.

For the purposes of the new law, a non-compete provision is defined as – “a provision in a written agreement or workplace policy that prohibits an employee from performing work for another for pay or from operating an employee’s own business.” As noted above, the law makes it clear that this definition does not include non-disclosure provisions or provisions prohibiting moonlighting in certain circumstances. There are also exceptions for restrictive covenants entered into in conjunction with the sale of a business and some physicians.

Interestingly, the law is completely silent on non-solicitation provisions (prohibiting an employee from soliciting the employer’s customers or employees). There is some argument that, depending on the industry and the way the provision is crafted, certain non-solicitation terms could find themselves drifting dangerously close to prohibiting employees from performing work for another and therefore falling within the definition of a prohibited non-compete.

Employers that are attempting to use non-solicitation provisions with their non-highly compensated DC employees should work with their attorney to make sure these provisions are very carefully crafted to avoid any argument that they would constitute a prohibited non-compete provision. Additionally, while not strictly required under the letter of the law, when the employer is providing the requisite copies of any agreements or policies including non-disclosure or moonlighting provisions, it wouldn’t hurt to also include any non-solicitation agreements as well.

As the result of recent amendments (born out of heavy push back on the original law), the new law still permits employers to have non-competes for “highly compensated” DC employees. Right now, this means non-medical employees who make at least $150,000 annually, or medical specialists who make at least $250,000 annually. These thresholds will be adjusted annually for inflation starting in January 2024.

It is important to note that the employee must meet the requisite salary threshold BOTH at the time they enter into the agreement and at the time that the agreement is being enforced. For any DC employee who meets this highly compensated threshold, the non-compete must: (1) clearly set out the scope of the restriction “including what services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of”, (2) have clear geographic restrictions, and (3) not last more than 365 days after the last day of employment (or 730 days in the case of medical specialist).

The employer is also required to provide the employee with notice of the non-compete at least fourteen days before the commencement of the employment or the date on which the employee will be expected to sign the agreement. This notice must include specific disclaimer language set out in the statute.

Finally, the law includes provisions prohibiting retaliation against employees for refusing to sign or comply with, a prohibited non-compete, questioning whether a non-compete falls within the exception for highly compensated employees, or asking for information about a potentially prohibited policy or agreement.

Non-competes arising after October 1, 2022, that violate the law will be null and void. Not only that, violations of the law can result in penalties and the law gives employees a private right of action to pursue violations.

While the new DC law is the most restrictive in our area, it bears noting that both Maryland and Virginia also have laws restricting the use of non-competes. These types of laws are increasingly common across the country and employers are well advised to consult with counsel and make sure they understand the applicable laws before requiring employees to sign an agreement with any type of restrictive covenants – such as a non-compete, non-solicitation, or non-disclosure provisions.

