The District of Columbia's Aggressive Ban on Non-Compete Agreements Likely to Take Effect in 2022

January 6, 2022 | Richard C. Van Nostrand | Articles

In December 2020, the District of Columbia Council passed and in January 2021, Mayor Muriel Bowser signed legislation entitled the Ban on Non-Compete Agreements Amendment Act of 2020 (the "DC Act").

While the effective date of the Act was delayed due to other provisions in the legislation, it appears that it is likely to take effect on April 1, 2022. The aggressive pro-employee scope of the DC Act is noteworthy and goes much farther than the many state- or local-level attempts to reform or ban non-competes, including the Massachusetts Noncompetition Agreements Act that took effect in 2018 (the "Massachusetts Act").

Is the DC Act a sign of things to come in the reform movement or is it likely to remain on the far fringe of non-compete reform? Only time will tell.

In the meantime, among the most notable provisions of the DC Act:

Outright Ban on Non-Compete Agreements. First and foremost, non-compete agreements are banned entirely in the DC Act with very limited exceptions (described below). As a result, the District of Columbia joins only a small number of other legislative bodies that have an outright ban. Presently, that exclusive club includes only California, Oklahoma and North Dakota (the latter two having enacted bans in the 19th century).

Ban on Moonlighting Restrictions. Typically, reform efforts have solely focused on narrowing or eliminating restrictions on a departing employee's ability to compete against his or her former employer. The DC Act goes one very big step further and sweeps in current employees,

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prohibiting provisions that restrict a current employee's right to engage in a competitive activity while still employed, so called "moonlighting."

Supercharged Notice Requirements. Many states, including Massachusetts, require advance notice to the employee that they will be asked to sign a non-compete agreement to avoid the "burnt bridge effect" (i.e., an employee being surprised on the first day of employment by being required to sign a non-compete or face having neither a new or old job). Rather than using notice as a defensive requirement only, the DC Act turns notice into an offensive protection, mandating that *all employers* located in the District provide notice to *all employees* as follows: "*No employer operating in the District of Columbia may request or require any employee working in the District of Colombia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Act of 2020.*"

Punishment for End Runs. In most reform statutes, the negative impact on the employer who attempts to use a non-compliant or banned agreement is lack of enforceability. The DC Act again goes further and imposes escalating financial penalties upon employers who ignore the ban, including failure to provide the required notice. Those financial sanctions are enhanced for employers who retaliate against employees who refuse to sign a banned agreement, ask about their rights or request the information mandated by the notice requirement. Further enhanced penalties arise for serial violators. When a violation occurs, an employee may seek relief either through an administrative complaint to the Mayor or via a civil action.

Special Provisions for Physicians. In contrast to Massachusetts' ban on non-compete agreements for physicians, a unique provision of the DC Act surprisingly *permits* physician non-competes provided the physician earns total compensation of at least $250,000 per year.

No Retroactive Effect. Like the Massachusetts Act, the DC Act does not have retroactive effect so agreements in place as of the effective date will arguably continue to be enforceable. Whether DC courts will enforce them in the face of this dramatic statement of public policy is a significant question (as it still is here in the Commonwealth).

Other Restrictive Covenants – NDA's. The DC Act does not impact non-disclosure agreements which are expressly excluded from the definition of "non-compete provision."

Other Restrictive Covenants – Non-solicitation Agreements. Unlike the Massachusetts Act, however, which expressly carves out customer non-solicitation agreements (among other related forms of restrictive agreements) from the definition of a non-compete, the DC Act is silent. It therefore remains to be seen whether an employee accused of violating a non-solicitation agreement could successfully defend on the basis that such an agreement constitutes a form of prohibition on the employee "performing work or providing services for pay" thereby constituting a banned and unenforceable non-compete.

Limits on Protection. As in most states, the DC Act does not ban a non-compete used in connection with the sale of a business.

Every reform effort also seems to have its unique quirks, often the product of legislative lobbying, constituent pressure or unintentionally funny drafting. The DC Act has some of its own, with carve-outs to the definition of an "employee" to whom the act and its non-compete ban applies. For example, (a) volunteers to educational, charitable, religious or nonprofit organizations and (b) lay members elected or appointed to office within the discipline of any religious organization and engaged in religious functions are not "employees" defined in the DC Act. Also excluded – "casual babysitters employed in or about the residence of the employer." Hopefully, this carve-out was intended to avoid the need to give the mandatory notice, not to subject middle-schooler Jennifer to a non-compete foist upon her by Mr. and Mrs. Abercrombie so as to avoid their secret lobster bisque recipe finding its way into the hands of the neighboring Fitches.

It is often said, for good or for bad, that legislation at the local level is the place where creativity and ingenuity can be tested (or can go to die). This theory continues to apply in the non-compete reform field. Undoubtedly, that trend will continue as legislatures attempt to find the sweet spot between (i) encouraging aspiring entrepreneurs and (ii) protecting those entrepreneurs who have succeeded in developing the better mousetrap.

