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CLIENT ALERT

D.C.'s New Ban on Non-Compete Agreements Creates Untenable Situation for Employers

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On January 11, Mayor Muriel Bowser signed "The Ban on Non-Compete Agreements Amendment Act of 2020" (the "Act"). Though some other states and municipalities have restricted the use of non-compete agreements, the District of Columbia's new ban – once it is applicable – will go further than similar laws in any other jurisdiction. With few exceptions, employers in the District of Columbia will not be allowed to include non-compete provisions in employment agreements or maintain workplace policies that prohibit employees from simultaneously working for a competitor of the employer. Employers with operations in the District of Columbia also must be aware of the notice and non-retaliation requirements, as well as the penalties for non-compliance.

The breadth of the ban is breathtaking – it covers any non-compete provision or policy that prohibits an employee from being "simultaneously or subsequently employed by another person, performing working or providing services for pay for another person, or operating the employee's own business." While the Act does ***not*** prohibit employers from utilizing confidentiality agreements or policies that prohibit an employee from disclosing the employer's "confidential, proprietary, or sensitive information, client list, customer list, or a trade secret," the Act – on its face – would invalidate common employer policies that prohibit employees from working simultaneously for employers with whom the employer competes. Notably, the Act also does ***not*** invalidate non-compete agreements executed before the effective date of the Act. The Act is silent as to non-solicitation agreements, suggesting employers can continue to require and enforce those agreements.

Employers must also be aware of the non-retaliation and penalty clauses of the Act. An employer may not retaliate against an employee who (a) refuses to sign a non-compete agreement, (b) comply with a now-unlawful provision or policy, or (c) complains or requests information about a non-compete provision or policy. An employer who violates this new law risks administrative and/or civil penalties ranging from $350-$3,000 per violation.

To ensure compliance, employers also must provide notice of this law: (1) to ***all employees*** within 90 days after the law becomes applicable; (2) to each new hire within 7 days of his or her start date; and (3) to an employee who requests information about the ban, within 14 days of the employee's request. The notice must read as follows: "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."

Notably, the Act includes both an effective date and an applicability date and neither date has passed. The Act will become law following Congress' 30-day legislative review period and publication in the District of Columbia Register. As with other District of Columbia laws, during the 30-day review period, Congress has the authority to prevent the Act from becoming law if it adopts a joint resolution disproving of the Act and if the President signs such a resolution. Congress is not likely to take that step.

Notably, the Act will not "apply" until its fiscal effect is included in an approved budget and financial plan. This is not expected to happen until the Fall of 2021, giving employers a small window to adjust their policies or request that current employees sign

a non-compete agreement. The Act also requires the Mayor to issue a Rule implementing the Act. Such rules have not yet been issued by the Department of Employment Services (DOES), but may clarify some of the remaining open questions.

On its face, the Act would seemingly prevent the following employers from maintaining the following policies:

1. A policy issued by Consulting Company A that precludes its director-level and above employees from working, at the same time, for its chief competitor (provided the employee does not share confidential or proprietary information);
2. An organizational conflict of interest policy issued by a Government Contractor prohibiting its manager of procurement from moonlighting with a vendor from whom the Government Contractor purchases important supplies.

Employers have legitimate and otherwise protectable interests in maintaining policies and agreements that, among other things, prevent serious conflict of interest concerns or the loss of talented employees to a competitor. Such policies, based on the language of the Act, would likely be unlawful if the Act is not modified.

Notably, the original version of the Act targeted only non-compete agreements and policies that affected lower-wage personnel. The ban would only have applied to employees earning up to three times the D.C. minimum wage, or $87,654. The final Act contains no such limitation and includes only the following narrow exceptions: (1) volunteers at charities, religious or educational organizations, and non-profits; (2) lay members in office at religious organizations; (3) babysitters; and (4) medical specialists.

All employers in the District of Columbia metropolitan area should monitor developments relating to the new legislation and implementation of the Act.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Trina Fairley Barlow
Partner – Washington, D.C.
Phone: +1.202.624.2830
Email: tbarlow@crowell.com

Kris D. Meade
Partner – Washington, D.C.
Phone: +1.202.624.2854
Email: kmeade@crowell.com

Rachel Lesser
Associate – Washington, D.C.
Phone: +1.202.624.2572
Email: rlesser@crowell.com