DAVIS GILBERT

# Washington, D.C. Bans Non-Compete Agreements

## The Bottom Line

- *Washington, D.C.'s new law banning non-compete agreements is sweeping in scope. Given the potential liability for violating the Act, employers should become familiar with the Act's provisions.*
- *Employers should review their existing restrictive covenant agreements for Washington, D.C. employees and review employee handbooks to ensure that any moonlighting or outside employment policies do not run afoul of the new law's prohibitions.*

Washington, D.C. passed the Ban on Non-Compete Agreements Amendment Act (the Act) on March 16, 2021, which broadly prohibits non-compete agreements and restrictions on moonlighting. Non-compete and anti-moonlighting agreements entered into with D.C. employees after this law takes effect will be void and unenforceable. This makes Washington, D.C. the most recent jurisdiction to ban non-compete agreements.

## The Act's Prohibitions and Requirements

The Act's ban is threefold:

- First, it prohibits employers from requiring or even requesting that an employee sign a non-compete agreement, which is defined as a written agreement prohibiting "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."
- Second, it precludes an employer from having a policy that prohibits an employee from being employed by another person, performing work or providing services for pay for another person, or operating the employee's own business. In other words, this prohibition eliminates employers' abilities to prevent moonlighting. As written, this would mean that an employer cannot prevent an employee from simultaneously working for another company – even a direct competitor – or from operating their own business that may compete with the employer's business.
- Third, it contains a broad anti-retaliation provision which prevents employers from, among other things, retaliating for an employee's refusal to agree to a non-compete provision or failure to comply with one.

The Act also requires employers to provide employees with written notice of the law (with text specifically dictated in the statute) no later than 90 days after its applicability, seven days after an individual becomes an employee or 14 days after an employer receives an employee's written request for the notice.

Notably, the law does not prohibit agreements that forbid employees from using or disclosing confidential information or non-competes that are executed as part of a sale of business. In addition, the law is silent as to whether employers can bar employees from soliciting employees or customers.

## Coverage and Exclusions

The Act broadly defines “employer” but excludes Washington, D.C. and federal governments. Similarly, the Act broadly defines “employee,” but excludes individuals who volunteer for educational, charitable, religious or nonprofit organizations, elected members of religious organizations, casual babysitters and medical specialists (as defined). Employers must operate in D.C. to be covered by the Act and employees must perform work in D.C. to fall under the Act’s scope. Thus, the Act only applies to D.C. employers’ agreements with D.C. employees. Unlike certain other jurisdictions that have enacted bans on non-compete agreements, the D.C. Act’s ban is not limited to low-wage workers or to certain industries.

The law is expected to go into effect in the fall of 2021.

## Enforcement

The Act contains administrative penalties between $350 and $1,000 for *each* violation. It also provides for liability in amounts ranging from $500 to $3,000 depending on the provision violated. Further, the law gives employees a private right of action which includes the potential recovery of attorneys’ fees.

## Is This a Trend?

A number of states have enacted restrictions on non-competes in recent years. For example, in 2018 Massachusetts passed its Noncompetition Agreement Act, which prohibited certain non-compete agreements. But only three states — California, North Dakota and Oklahoma — have imposed a total ban. D.C.’s new law may be evidence of a trend to prohibit these restrictions.

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