

Washington, DC, Passes Sweeping Ban on Non-Competes

February 16, 2021

Last month, District of Columbia Mayor Muriel Bowser signed the [Ban on Non-Compete Agreements Amendment Act of 2020](#), which will have significant implications for all employers with employees working in DC. The new statute joins recent non-compete legislation enacted in neighboring states Maryland and Virginia (which prohibited non-competes with certain low-wage earners), and constitutes one of the broadest statutory bans of non-compete agreements in the United States. Significantly, the act:

- **Prohibits the use and enforcement of non-compete agreements** for all employees working in DC, with limited exceptions.
- **Bans anti-moonlighting** and other workplace policies which prohibit an employee from (1) performing work for or being employed by another person (even a direct competitor) or (2) operating their own business.
- **Requires employers to provide covered employees with written notice of the act** no later than 90 days after the act takes effect, within seven days after a new employee is hired or within 14 days of any employee request, using the following written disclosure:

“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.”

This article addresses some of the frequently asked questions relating to the act.

Are existing, previously signed non-competes invalidated?

No. The act restricts only those non-compete agreements entered into after it goes into effect. Pre-existing non-competes and restrictive covenants are not impacted or invalidated by the new law.

Which employees are covered by the act?

The act applies to all employees who perform work in DC on behalf of an employer and any prospective employee who an employer reasonably anticipates will perform work on its behalf in DC.

The act does not apply to certain physicians earning more than \$250,000 annually, as well as to casual babysitters, certain elected or appointed members of religious organizations, and volunteers at educational, charitable, religious or nonprofit organizations.

Does the act allow for non-competes in the sale of a business context?

Yes. The act does not restrict a non-compete in the sale of business context, when the seller executes the non-compete contemporaneously with the agreement to sell the business.

Can an employer continue to have confidentiality agreements with employees?

Yes. The act specifically permits the use of lawful provisions to protect an employer's confidential, proprietary or sensitive information, including client or customer lists.

Does the act apply to non-solicitation restrictions?

The act is silent regarding whether employers in DC can continue to restrict post-termination solicitation of their customers, consultants, employees or contactors. Though the act appears to be focused only on non-compete provisions, it does not explicitly carve out these commonly used non-solicitation restrictions. In addition, the act's definition of "non-compete provisions" covers restrictions that prohibit employees from "performing work or providing services for another person." We expect that Mayor Bowser or the DC Department of Employment Services will provide additional guidance on this issue before or soon after the act's effective date.

What employer policies are affected by the act?

In addition to employment, non-compete and confidentiality agreements, the act also appears to impact certain commonly used employment policies. For example, the act's moonlighting provisions could affect standard duty of loyalty and conflict of interest policies which preclude competitive or conflicting employment, as well as employment policies that restrict non-work activities during business hours, on the employer's premises or on employer-provided devices.

Does the act contain anti-retaliation provisions?

Yes. The act prohibits employers from taking or threatening to take adverse action against employees who refuse to agree to or to comply with an unlawful non-compete, ask questions or complain about a non-compete or policy that they believe to be prohibited by the act or request information that the employer is required to provide under the act.

When will the act go into effect?

The exact timing of when the act will take effect remains uncertain. Since the 30-day Congressional review period has now expired, the act will become law once it is published in the DC Register, which could be as early as March 2021. However, the act will not apply until its fiscal effect is included in an approved DC budget and financial plan, which will be accompanied by a certification by DC Chief Financial Officer Jeffrey DeWitt and notice to Budget Director Jennifer Budoff of the DC Council. As of now, the act is not expected to be applicable until later this year. However, the timing of the act's effectiveness and applicability is uncertain and may change over the next few weeks and months.

What are the consequences of non-compliance?

Employers who violate the act may face both administrative and civil liabilities. The act provides that the Mayor Bowser's office or the DC Attorney General may impose fines of \$350–\$1,000 for each violation of the act, more than \$1,000 for any instances of prohibited retaliation and increased fines of no less than \$3,000 for repeat violations. Further, employees may file a complaint to seek additional relief of at least \$500 for each violation and upwards of \$3,000 if for multiple violations.

Next steps for employers

We encourage employers with employees in DC to stay apprised of further developments as the act progresses and becomes applicable law. We will continue to monitor the progress of the act, including guidance on timing from the DC Council and required implementation rules, which Mayor Bowser is expected to issue in the near-term.

In the interim, before the act becomes effective, we recommend employers contact the Cooley employment team with any questions regarding how the act will impact their non-compete agreements, employment policies and onboarding practices.

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