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Employment Counseling & Litigation

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Significant Limitations on Non-Competes in District of Columbia as of October 1, 2022

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Companies with employees in the District of Columbia ("DC") should familiarize themselves with the Non-Compete Clarification Amendment Act of 2022 (the "Act") which becomes effective October 1, 2022.

Previously, in 2020, the DC City Council sought to categorically restrict *any* employee, regardless of their salary or title, from being subject to a noncompete both during and post-employment. As initially worded, an employer could not have prevented its employee from working for a competing business during term of their employment. Based upon the way the DC budget is funded, the 2020 law was never actually implemented. In the meantime, faced with tremendous criticism from the business community, the original law recently was amended to eliminate some of the most burdensome provisions.

Under the Act, an employee must be a "highly compensated individual" to be subject to a noncompete. A highly compensated individual is an employee who is reasonably expected to earn at least $150,000 per year (or at least $250,000 for medical specialists). Compensation is broadly defined to include "all monetary remuneration an employer may pay or promise an employee", including wages, bonuses, commissions, overtime, vested stock, restricted stock units, or any other payments made in cash or cash equivalents, and excludes other fringe benefits. This threshold amount is expected to increase each year beginning 2024.

If an employer seeks to impose a post-employment noncompete on a highly compensated employee, the company must provide a copy of the agreement to the individual at least 14 days in advance. To be valid and enforceable, any such agreement must:

- specify the functional scope of the restriction, including what services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of;
- describe the geographical limitations of the work restriction; and
- be limited to no more than 365 calendar days from the date of separation (730 calendar days for medical specialists).

The Act also adds four other important exceptions to D.C.'s ban on non-competes, regardless of a person's yearly compensation:

First, the Act clarifies that confidentiality agreements are permissible. As a result, employers may require all employees to sign confidentiality agreements restricting them from using or disclosing a company's confidential or proprietary information.

Second, the Act permits employers to restrict employees from working for a competing business ***during*** the term of employment. Under certain circumstances, employers can prevent employees from simultaneously working for another company if the employer believes: 1) there will be an inevitable disclosure of confidential information; 2) there is a conflict with a profession's ethical obligations; 3) there is a conflict of commitment if the employee is employed by a higher educational institution; or 4) if the secondary employment impairs the employer's ability to comply with other legal or contractual obligations.

Third, long-term incentive agreements are also excluded from the Act. As a result, if an employer seeks to impose a noncompete, it may do so in connection with a lawful agreements involving "bonuses, equity compensation, stock options, restricted and unrestricted stock shares or units, performance stock shares or units, phantom

stock shares, stock appreciation rights and other performance driven incentives for individual or corporate achievements typically earned over more than one year."

Finally, noncompetes remain permissible in connection with the sale of a business.

Under the Act, an employer must include specifically required language in a notice together with the proposed agreement.

The Act is part of a nation-wide trend towards significantly limiting companies from imposing noncompetes on their workforce. Over the past few months, Colorado and Illinois, among other states, also have imposed significant changes to their noncompete laws.

If you have any questions about the Act or any other state's noncompete laws, please contact any member of the Lowenstein Sandler Employment Counseling & Litigation practice group.

Contacts

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