Employer Update

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Washington D.C.'s Non-Compete Law and Implications for Employers with Confidentiality and Conflict of Interest (e.g., Anti-Moonlighting) Policies

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In early 2020, the Council of the District of Columbia passed the Ban on Non-Compete Agreements Amendment Act of 2020 (the "2020 Act"). The 2020 Act was met with considerable opposition from employers and the business community, which contributed to the postponement of the 2020 Act's effective date and culminated in the D.C. Council's passage of the scaled back Non-Compete Clarification Amendment Act of 2022 (the "Amended Act"), which went into effect on October 1, 2022. Although the Amended Act's primary focus is prohibiting employers from entering into non-competition agreements with employees who earn less than $150,000 per year, the Amended Act also has significant implications for employers with workplace policies regarding conflicts of interest or the protection of confidential information. As explained below, an initial notice concerning such policies must be provided to all D.C.-based employees by October 31, 2022.

The 2020 Act initially banned all non-compete provisions. But its broad language also made conflict of interest or anti-moonlighting provisions illegal as an employee could not be prohibited from working for a competitor at any time, including during current full-time employment. The Amended Act dropped the prohibition on moonlighting and instead imposed notice obligations on employers with confidentiality or anti-moonlighting policies. Specifically, the Amended Act states that any employer must provide employees with notice of any "workplace policy" that prohibits an employee from disclosing, using or accessing an employer's confidential information or from accepting money from a person other than employer if that would result, in part, in the employee's disclosure of the employer's confidential information or conflict with the employer's rules regarding conflicts of interest. Employers must provide "a written copy of" confidentiality and anti-moonlighting policies to employees by October 31, 2022, within 30 days of a new employee's acceptance of an offer of employment, and any time such policies change.

For many employers, confidentiality and anti-moonlighting policies may be included in a company's Code of Conduct, Employee Handbook, or in employment agreements or offer letters provided to certain employees. All employers with D.C.-based employees that have such policies must be mindful of the Amended Act's requirements, as failure to comply with the notice provisions can lead to financial penalties that are not inconsequential – $1,000 per violation in addition to other administrative penalties.

While providing D.C.-based employees with a printed copy of such policies would clearly satisfy the Amended Act's notice requirement, the statute itself (coupled with the fact that there are no regulations or caselaw) does not provide a safe harbor for the typical process for disseminating such information in large organizations, such as:

- Sending an email to all D.C.-based employees that confidentiality or anti-moonlighting policies can be accessed via the employer's internal network systems; or
- Sending an email containing a link to the confidentiality and anti-moonlighting policies (or sending a link to the code of conduct or employee handbook with express instructions as to the page within such documents where the policies can be found).

To the extent D.C.-based employees already receive other important company information by email as described above, then there is a good argument that sharing this D.C.-required information in the same fashion should be sufficient. Of course, without clear guidance in the statute and without regulations or caselaw, this remains an open issue.

We will continue to monitor developments in this space and provide timely updates.

Employer Update is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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