

## 10 Q&As on D.C.'s Non-Compete Ban

***In passing the Ban on Non-Compete Agreements Amendment Act of 2020, Washington, D.C., joins California and a handful of other states in prohibiting virtually all non-competes.***

### Key Points:

- The Act invalidates non-competes entered into on or after the Act's applicability date, which is not yet determined.
- The Act prevents D.C. employers from prohibiting D.C. employees from *simultaneously or subsequently* being employed or engaged by a competitor or other third party, subject to only a few exceptions, leaving open to interpretation the scope of businesses and workers covered by the Act.
- The Act does not prohibit a non-competes entered into by the seller upon a sale of a business, but whether any equity holder would fall within this exception is unclear.
- The Act requires D.C. employers to provide notice of the Act to existing D.C. employees within 90 days of the Act's applicability date and to new D.C. employees within seven days of hire.
- Employers who violate the Act face a range of monetary relief to affected employees and administrative penalties.

On January 11, 2021, Washington, D.C. Mayor Muriel Bowser signed the Ban on Non-Compete Agreements Amendment Act of 2020 (the Act), the latest in a string of legislation to curtail the use of non-competes, as previously reported [here](#) and [here](#). The Act imposes a blanket ban on most non-competes, similar to laws in California, Montana, North Dakota, and Oklahoma. The Act is unique, however, in prohibiting covered employers from restricting covered employees' outside business activities, whether competitive or not, during the term of employment in addition to post-employment activities, and in requiring employers to provide notice of the Act.

### 1. When Does the Act Apply?

The Act officially took effect on March 16, 2021, following a 30-day review in Congress. However, the Act's applicability date — i.e., the date the Act's non-competes ban begins to apply — is not yet certain. The Act will not apply until it is included in an approved budget and financial plan, which is a matter of discretion for the D.C. Mayor and Council. Typically, D.C. laws that are included in a budget are done so at the start of D.C.'s fiscal year, which is October 1. Thus, many observers are speculating that the Act's applicability date will likely be in October 2021. However, the D.C. Mayor or Council could choose to not include the Act in the next budget, or to include the Act earlier than expected upon passage of the budget in July.

## 2. Which Employers Are Bound by the Act?

The Act broadly binds any “employer,” defined to mean any individual, corporation, partnership, general contractor, subcontractor, association, corporation, or business trust operating in D.C., excluding the United States and D.C. governments (referred to herein as D.C. employer). However, the Act does not provide any guidance as to what it means for an employer to be “operating” in D.C. Thus, it is not clear if the Act extends to an employer whose only connection to D.C. may be, for example, that one of its employees works from home in D.C. or from time-to-time renders services in D.C., or if more employer presence in D.C. is required.

## 3. Which Employees Are Protected by the Act?

The Act protects any “employee,” which is defined as any individual who performs work in D.C. on behalf of a D.C. employer, and any prospective employee reasonably anticipated to perform work in D.C., with a few express exceptions (referred to herein as D.C. employee). The Act expressly excludes from the definition of “employee” (and would, therefore, permit non-competes with): any individual who volunteers for educational, charitable, religious, or nonprofit organizations without pay; an elected or appointed lay member of a religious organization; a casual babysitter in or about the employer’s residence; and certain medical specialists (discussed further below).

In contrast to approaches other jurisdictions have recently taken to curb non-competes, the Act does not apply solely to low-wage earners. An earlier version of the bill contemplated a minimum wage threshold, but the D.C. Council ultimately decided to extend protections to all wage earners in D.C.

Despite the Act’s use of the terms “employer” and “employee,” the Act appears to cover both common law employees and individuals engaged on an independent contractor basis in D.C.

## 4. What Non-Compete Provisions Are Banned by the Act?

The Act prohibits any D.C. employer from entering into an agreement or maintaining a workplace policy that restricts any covered D.C. employee from simultaneously or subsequently being employed by a third party, providing paid services to a third party, or operating their own business, whether such activities are competitive or not. Though some states have laws that prohibit restricting low-wage earning employees from holding other jobs during their employment, the Act is unique in prohibiting the restriction of any covered D.C. employee from performing other work while employed, whether or not such other work is competitive, and regardless of the employee’s wages, position, or access to their employer’s confidential or proprietary information.

The Act expressly permits otherwise lawful non-competes provisions contained within or executed contemporaneously with an agreement between the seller and one or more buyers of a business, wherein the seller agrees not to compete with the buyer’s business. However, the Act does not define “seller” and, therefore, it is not clear if the term “seller” would include, for example, any of the seller’s employees who sell their equity or equity interests in the business in connection with the sale, but who may not be parties to the transaction or significant stakeholders.

The Act does not invalidate non-competes provisions in agreements entered into prior to the Act’s applicability date. Non-competes entered into prior to such date continue to be governed by D.C. common law, under which the enforceability of a non-competes generally depends on the reasonableness of the covenant under the circumstances.

## 5. Does the Ban Extend to Confidentiality and Non-Solicitation Provisions?

The Act expressly permits otherwise lawful provisions that restrict employees from disclosing their employers' confidential, proprietary, or sensitive information; a client or customer list; or a trade secret.

The Act does not mention non-solicitation provisions. However, a D.C. Councilmember described non-compete and non-solicitation provisions as different concepts in a Report on the Act (the Report) issued in November 2020, which suggests that the Act's non-compete ban may not have been intended to prohibit non-solicitation provisions.

In California, court interpretations have extended that state's ban against non-competes to include customer non-solicitation covenants, and in some cases co-worker non-solicitation provisions, on the theory that those restrictions constitute "disguised" restraints against trade under California's statute banning non-competes. The decisional law of most other states differs, drawing a clear distinction between non-competes and non-solicitation provisions.

## 6. What Notice Does the Act Require?

The Act requires D.C. employers to provide all covered D.C. employees with the following notice:

*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.*

Such notice must be provided to existing covered D.C. employees within 90 calendar days of the Act's applicability date, to new D.C. employees within seven calendar days of hire, and to any employee within 14 days of receipt of their written request for such a notice statement.

The Act is silent on the method of providing notice. However, in the Report the D.C. Councilmember noted that the notice statement could be provided with onboarding materials, in introductory emails upon hire, on a company's intranet, on pay stubs, or through all such means. The Act requires the D.C. Mayor to issue rules implementing the Act, including a mandate that D.C. employers maintain records of compliance with the Act. The Act empowers the D.C. Mayor and the D.C. Attorney General to inspect such records at any time.

## 7. When Is a Non-Compete With a Medical Specialist Permitted?

The Act permits D.C. employers engaged primarily in the delivery of medical services to require certain D.C.-based medical specialists to agree to non-competes as a condition of employment, limited to medical specialists who are licensed physicians, who have completed their medical residency, and who receive annual compensation of at least \$250,000,<sup>1</sup> so long as the non-compete is provided to the medical specialist at least 14 days prior to execution, and provided the medical specialist receives the following notice with the non-compete to review:

*The Ban on Non-Compete Agreements Amendment Act of 2020 allows employers operating in the District of Columbia to request non-compete terms or agreements (also known as "covenants not to compete") from medical specialists they plan to employ. The prospective employer must provide the proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision. Medical specialists are individuals who: (1) perform work on behalf of an employer engaged primarily in the delivery of medical services; (2) hold a license to*

*practice medicine; (3) have completed a medical residency; and (4) have total compensation of at least \$250,000 per year.*

Presumably any non-compete with a medical specialist must also meet traditional standards of reasonableness and not offend public policy to be enforceable under existing D.C. common law. However, the Act does not state such rule.

## 8. What Retaliation Is Prohibited by the Act?

The Act prohibits retaliation against any covered D.C. employee or medical specialist, if applicable, for (i) refusing to agree to a non-compete provision prohibited by the Act, (ii) failing to comply with a non-compete provision or workplace policy rendered unlawful by the Act, (iii) asking, informing, or complaining about a non-compete provision or workplace policy reasonably believed to be prohibited by the Act, whether to the employer, a coworker, the employee's lawyer or agent, or a government entity, or (iv) requesting the notice statement required by the Act.

The Act defines retaliation to include any adverse action, including a threat, verbal or written warning, reduction of work hours, suspension, or termination.

## 9. What Are the Consequences of Violating the Act?

Any non-compete provision prohibited by the Act that is entered into on or after the Act's applicability date will be void and unenforceable.

Further, the Act allows aggrieved individuals to file an administrative claim with the D.C. Mayor or a civil action in court.

An employer in violation of the Act may be liable to each affected covered D.C. employee or medical specialist for the following range of relief:

- \$500-\$1,000 for an initial instance of (i) requiring an employee or medical specialist to sign an agreement containing a prohibited non-compete provision, (ii) maintaining a workplace policy in violation of the Act, or (iii) failing to provide notice as required by the Act
- \$1,000-\$2,500 for an initial instance of retaliation in violation of the Act
- \$1,500 or more for an initial instance of attempting to enforce a non-compete provision that is unenforceable and void under the Act
- \$3,000 or more for any subsequent violation of the Act

The Mayor may also assess a range of administrative penalties as follows:

- \$350-\$1,000 for each violation of the Act (other than retaliation)
- \$1,000 or more for each instance of retaliation in violation of the Act

The Act does not expressly address attorney fees or other relief.

## 10. What Steps Should D.C. Employers Take Now?

**Review** form offer letters, employment agreements, independent contractor agreements, non-compete agreements, and workplace policies applicable to covered D.C. employees, to ensure that they do not include non-compete provisions, require exclusivity during the employment or consultancy period, or otherwise violate the Act.

**Develop** a plan for providing notice of the Act to all covered D.C. employees within 90 days of the Act's applicability date.

**Update** onboarding procedures to include providing newly hired covered D.C. employees with the required notice within seven days of hire and any medical specialists with the required notice at least 14 days before executing a non-compete agreement.

**Train** human resources personnel and supervisors on the prohibitions and requirements of the Act.

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**Endnotes**

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<sup>1</sup> All values are in US\$.