Councilmember Elissa Silverman

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend ,on an emergency basis, the Ban on Non-Compete Agreements Amendment Act of 2020 to add definitions; to clarify which provisions in workplace policies or employment agreements will not violate the law's restrictions on the use of non-compete provisions and agreements; to clarify that employers may bar an employee's use, in addition to the disclosure, of confidential and proprietary information during or after the employee's employment for the employer; to create a limited exception allowing the use of non-compete provisions with highly-compensated employees, including medical specialists, under specified circumstances; to specify what must be contained in a non-compete agreement for it to be valid and enforceable; to clarify remedies for violations of the act; to clarify how the Act relates to a collective bargaining agreement; to clarify how the law applies relative to other District laws; and to clarify rulemaking requirements.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Non-Compete Clarification Emergency Amendment Act of 2022".

Sec. 2. The Ban on Non-Compete Agreements Amendment Act of 2020, effective March 16, 2021 (D.C. Law 23-209; 68 DCR 782), is amended as follows:

(a) Title I (D.C. Official Code § 32-581.01 *et seq.*), is amended to read as follows:

"TITLE I. BAN ON NON-COMPETE AGREEMENTS

"Sec. 101. Definitions.

"For the purposes of this title, the term:

"(1) "An Act" means An Act To provide for the payment and collection of wages in the District of Columbia, approved August 3, 1956 (70 Stat. 976; D.C. Official Code § 32-1301 *et seq.*).

(2) "Compensation" means all monetary remuneration an employer may pay or promise an employee.

"(A) The term includes:

"(i) Hourly wages;

"(ii) Salary;

"(iii) Bonuses or cash incentives;

"(iv) Commissions;

"(v) Overtime premiums;

"(vi) Vested stock, including restricted stock units; and

"(vii) Other payments provided on a regular or irregular basis.

"(B) The term does not include fringe benefits other than those paid to the employee in cash or cash equivalents.

"(3) "Confidential employer information" means information owned or possessed by the employer which is not available to the general public and which the employer has taken reasonable steps to ensure is protected from improper disclosure.

"(4) "Conflict of commitment" means conduct that would compromise the ability of an employee of a higher education institution to perform employment duties for the institution because the activities risk interfering with the employee's primary duties for the institution.

"(5) "Covered employee" means an employee who is not a highly compensated employee and:

"(A) If the employee has commenced work for the employer:

"(i) The employee spends more than 50% of his or her work time for the employer working in the District; or

"(ii) Whose employment for the employer is based in the District and the employee regularly spends a substantial amount of his or her work time for the employer in the District and not more than 50% of his or her work time for that employer in another jurisdiction; or

"(B) If the employee has not yet commenced work for the employer:

"(i) The employer reasonably anticipates that the employee will spend more than 50% of his or her work time for the employer working in the District; or

"(ii) Whose employment for the employer will be based in the District and the employer reasonably anticipates that the employee will regularly spend a substantial amount of his or her work time for the employer in the District and not more than 50% of his or her work time for that employer in another jurisdiction.

"(6) "Employee":

"(A) Means:

"(i) An individual who performs work for pay in the District on behalf of an employer; or

"(ii) An individual to whom the employer has made an offer of employment and whom an employer reasonably anticipates will perform work for pay on behalf of the employer in the District.

"(B) Does not mean:

"(i) An individual employed as a casual babysitter, in or about the residence of the employer; or

"(ii) A partner in a partnership.

"(7) "Employer" means an individual, partnership, general contractor, subcontractor, association, corporation, or business trust operating in the District, or any person or group of persons acting directly or indirectly in the interest of an employer operating in the District in relation to an employee, including a prospective employer, but does not mean the District government or the United States government

"(8) "Higher education institution" means a postsecondary educational institution accredited by an agency that the United States Department of Education recognizes as an accrediting agency.

"(9) "Highly compensated employee" means an employee~~:~~

"(A) Who is reasonably expected to earn from the employer, in a consecutive 12-month period, compensation greater than or equal to the minimum qualifying annual compensation; or

"(B) Whose compensation earned from the employer in the consecutive 12-month period preceding the date on which the proposed term of non-competition is to begin is greater than or equal to the minimum qualifying annual compensation.

"(10) "Long term incentive" means 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.

"(11) "Medical specialist" means a highly compensated employee is engaged primarily in the delivery of medical services, and who:

"(A) Holds a license to practice medicine;

"(B) Is a physician;

"(C) Has completed a medical residency; and

"(D) Receives total compensation in the amount equal to or greater than $ 250,000.

"(12) "Minimum qualifying annual compensation" means:

(A) Beginning with the calendar year in which this title becomes applicable:

"(i) $150,000 or

"(ii) $250,000, if the employee is a medical specialist.

"(B) For the calendar year beginning January 1, 2024, and each calendar year thereafter, an amount equal to the previous calendar year's minimum qualifying annual compensation, increased in proportion to the annual average increase, if any, in the Consumer Price Index for All Urban Consumers in the Washington Metropolitan Statistical Area published by the Bureau of Labor Statistics of the United States Department of Labor for the previous calendar year adjusted to the nearest whole dollar.

"(13) "Non-compete agreement" means a contract between an employer and employee that has one or more non-compete provisions.

"(14) "Non-compete provision" means a provision in a written agreement or a workplace policy that prohibits an employee from performing work for another for pay or from

operating the employee's own business. The term "non-compete provision" does not include an otherwise lawful provision:

"(A) Contained within or executed contemporaneously with an agreement between the seller of a business and one or more buyers of that business wherein the seller agrees not to compete with the buyer's business;

"(B) That prohibits or restricts an employee from:

"(i) Disclosing, using, selling, or accessing the employer's confidential employer information or proprietary employer information;

"(ii) Accepting money or a thing of value for performing work for a person other than the employer, during the employee's employment with the employer, because the employer reasonably believes the employee's acceptance of money or a thing of value under such circumstances will:

"(I) Result in the employee's disclosure or use of confidential employer information or proprietary employer information;

"(II) Conflict with the employer's, industry's, or profession's established rules regarding conflicts of interest;

"(III) Constitute a conflict of commitment if the employee is employed by a higher education institution; or

"(IV) Impair the employer's ability to comply with District or federal laws or regulations; a contract; or a grant agreement.; or"

"(C) That provides a long term incentive.

"(15) "Proprietary employer information" means information unique to an employer that is compiled, created, or solicited by the employer, including customer lists, client

lists, and trade secrets as that term is defined in section 2(4) of the Uniform Trade Secrets Act of 1988, effective March 16, 1989 (D.C. Law 7-216; D.C. Official Code § 36-401(4)).

"(16) "Retaliate" means to take an adverse action, including a threat, verbal warning, written warning, reduction of work hours, suspension, or termination against one or more employees.

"(17) "Term of non-competition" means the period of time specified in a non-compete provision during which the employee's work for a person other than the employer is prohibited.

"(18) "Workplace policy" means the rules and restrictions, whether written or as a matter of practice, implemented by an employer to govern the conduct of the employer's employees.

"Sec. 102. Prohibition on non-compete provisions for covered employees.

"(a)(1) Beginning October 1, 2022, no employer may require or request that a covered employee sign an agreement or comply with a workplace policy that includes a non-compete provision.

"(2) A non-compete provision that violates paragraph (1) of this subsection contained in an agreement between a covered employee and an employer that was entered into on or after October 1, 2022 shall be void as a matter of law and unenforceable.

"(b) No employer may retaliate or threaten to retaliate against a covered employee for:

"(1) The covered employee's refusal to agree to a non-compete provision or non-compete agreement that is prohibited under subsection (a) of this section;

"(2) The covered employee's alleged failure to comply with a non-compete provision or non-compete agreement that is prohibited under subsection (a) of this section;

"(3) Asking, informing, or complaining about the existence, applicability, or validity of a provision in a workplace policy or employment agreement that the employee reasonably believes is prohibited under subsection (a) of this section, or making a request for a copy of such a provision, to any of the following:

"(A) An employer, including the covered employee's employer;

"(B) A coworker;

"(C) The covered employee's lawyer or agent; or

"(D) A governmental entity; or

"(4) Asking the employer for the information required to be provided to the employee pursuant to section 103a.

"Sec. 103. Limitations on non-compete provisions for highly compensated employees.

"(a) For a non-compete agreement between an employer and a highly compensated employee executed on or after October 1, 2022 to be valid and enforceable:

"(1) The agreement must specify:

"(A) The functional scope of the competitive restriction, including what services, roles, industry, or competing entities the employee is restricted from performing work in or on behalf of;

"(B) The geographical limitations of the work restriction; and

"(C)(i) If the employee is not a medical specialist, a term of non-competition that does not exceed 365 calendar days from the date the employee separates from employment with the employer; or

(ii) If the employee is a medical specialist, a term of non-competition that does not exceed 730 calendar days from the date the employee separates from employment with the employer; and

"(2) The employer shall provide the non-compete provision to the employee in writing:

"(A) At least 14 days before the individual commences employment for the employer; or

"(B) If the employer already employs the highly compensated employee, at least 14 days before the employee must execute the agreement.

"(b)(1) No employer may retaliate or threaten to retaliate against a highly compensated employee who has executed a non-compete agreement with the employer for asking for a copy of a proposed non-compete provision or non-compete agreement, or for a copy of a non-compete provision or non-compete agreement that the employee executed;

"(2) No employer may retaliate or threaten to retaliate against a highly compensated employee for:

(A) Asking the employer for the information required to be provided to the employee pursuant to section 103a; or

(B) Asking about or objecting to a proposed non-compete provision or agreement because the employee reasonably believes that the provision or agreement does not conform to the requirements of subsection (a)(1) of this section, or reasonably believes that the employer has failed to comply with the requirements of subsection (a)(2) of this section, to any of the following:

"(i) An employer, including the highly compensated employee's employer;

"(ii) A coworker;

"(iii) The highly compensated employee's lawyer or agent; or

"(iv) A governmental entity.

"Section 103a. Disclosures to employees.

"(a) An employer with a workplace policy that includes one or more of the exceptions to the definition of "non-compete provision" detailed in section 101(14) shall provide a written copy of such provisions to an employee:

"(1) Within 30 days after the employee's acceptance of employment with the employer;

"(2) Within 30 days after October 1, 2022; and

"(3) Any time such policy changes.

"(b) A highly compensated employee's employer shall provide the following notice to the employee whenever a non-compete provision is proposed to the employee:

""The District of Columbia Ban on Non-Compete Agreements Amendment Act of 2020 limits the use of non-compete agreements. It allows employers to request non-compete agreements from "highly compensated employees" under certain conditions. [Name of employer] has determined that you are a highly compensated employee. For more information about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of Columbia Department of Employment Services (DOES).".

"Sec. 104. Relief and penalties.

"(a)(1) The Mayor and Attorney General for the District of Columbia ("Attorney General") shall administer and enforce this title consistent with their respective powers and rights under section 6(a), (a-1), (b), and (c) of An Act.

"(2)(A) Any records an employer maintains pursuant to the requirements of regulations issued to implement this title shall be open and made available for inspection or transcription by the Mayor, the Mayor's authorized representative, or the Office of the Attorney General upon demand at any reasonable time. An employer shall furnish to the Mayor, the Mayor's authorized representative, or the Office of the Attorney General on demand a sworn statement of records and information on forms prescribed or approved by the Mayor or Attorney General.

"(B) No employer may be found to be in violation of subparagraph (A) of this paragraph unless the employer had an opportunity to challenge the Mayor or Attorney General's demand before a judge, including an administrative law judge.

"(b)(1) The Mayor may assess an administrative penalty of no less than $350 and no more than $1,000 for each violation of this title; except, that the penalty for each violation of section 102(b) and 103(b) assessed against an employer shall be for not less than $1,000.

"(2) The Mayor may not collect an administrative penalty under this subsection unless the Mayor has provided the employer alleged to have violated this title notification of the violation, notification of the amount of the administrative penalty to be imposed, and an opportunity to request a formal hearing held pursuant to the Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), and section 8a(e) of An Act.

"(c)(1) A person aggrieved by a violation of this title may pursue relief by filing:

"(A) An administrative complaint with the Mayor setting forth facts minimally sufficient to allege a violation of this title; or

"(B) A civil action in a court of competent jurisdiction. In such action, a plaintiff shall carry the burden of proof by a preponderance of evidence.

"(2)(A)(i) The procedures set forth in section 8a(c) through (m) of An Act, shall govern the conciliation, resolution, and enforcement of an administrative complaint filed pursuant to paragraph (1)(A) of this subsection; except, that section 8a(e)(4) and (5) of An Act, shall not apply.

"(ii) Appeals of any administrative order issued under this title shall be made to the District of Columbia Court of Appeals.

"(B) Section 8 of An Act shall apply to any civil action filed pursuant to paragraph (1)(B) of this subsection.

"(d) Upon investigation by the Mayor pursuant to subsection (a) of this section or in an action to enforce this title pursuant to subsection (c) of this section, in addition to administrative penalties authorized pursuant to this section, an employer found to have violated section 102, 103, or 103a shall be liable for relief payable to an employee as follows:

"(1)(A) An employer that violates section 102(a)(1) shall be liable for each violation to each employee subjected to the violation for monetary relief in an amount not less than $500 and not greater than $1,000.

"(B) For any subsequent violation of section 102(a)(1), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than $3,000 to each affected employee.

"(2)(A) An employer that attempts to enforce a non-compete provision that is unenforceable or void as provided in section 102(a)(2) and section 103(a) shall be liable to each employee against whom the employer attempted to enforce the invalid non-compete provision for relief in an amount not less than $1,500.

"(B) For any subsequent violation of section 102(a)(2) or section 103(a), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than $3,000 to each affected employee.

"(3)(A) An employer that retaliates against an employee in violation of section 102(b) or section 103(b) shall be liable for each instance of retaliation to each employee subject to the retaliation in an amount not less than $1,000 and not more than $2,500.

"(B) For any subsequent violation of section 102(b) or 103(b), an employer that has been found liable pursuant to subparagraph (A) of this paragraph shall be liable for relief in an amount not less than $3,000 to each affected employee.

"(4) An employer that violates section 103a shall be liable for each violation to each employee subjected to the violation for monetary relief in an amount of $250.

"Sec. 104a. Collective bargaining agreements.

"Nothing in this title shall be interpreted as superseding the terms of a valid collective bargaining agreement.

"Sec. 104b. Rules of construction.

The rights, remedies, and prohibitions accorded by the provisions of this title are in addition to and cumulative of any right, remedy, or prohibition accorded by the common law, federal law, or any District statute, and nothing contained herein shall be construed to deny, abrogate, or impair any such common law or statutory right, remedy, or prohibition.

"Sec. 105. Rules.

"The Mayor, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), shall issue rules to implement the provisions of this title, including:

"(1) Annual changes to the minimum qualifying annual compensation; and

"(2) Rules requiring the preservation and retention of workplace policies, non-compete provisions, non-compete agreements, the written disclosures required by section 103a, and other records related to demonstrating compliance with this title.".

(b) Section 302 is amended to read as follows:

"Sec. 302. Applicability.

"This act shall apply as of October 1, 2022.".

Sec. 3. Applicability.

This act shall apply as of October 1, 2022.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

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