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Recent Legislative Developments Affecting Washington, DC Employers

Part 4 – Hiring/Onboarding

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Seyfarth Shaw LLP

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Agenda

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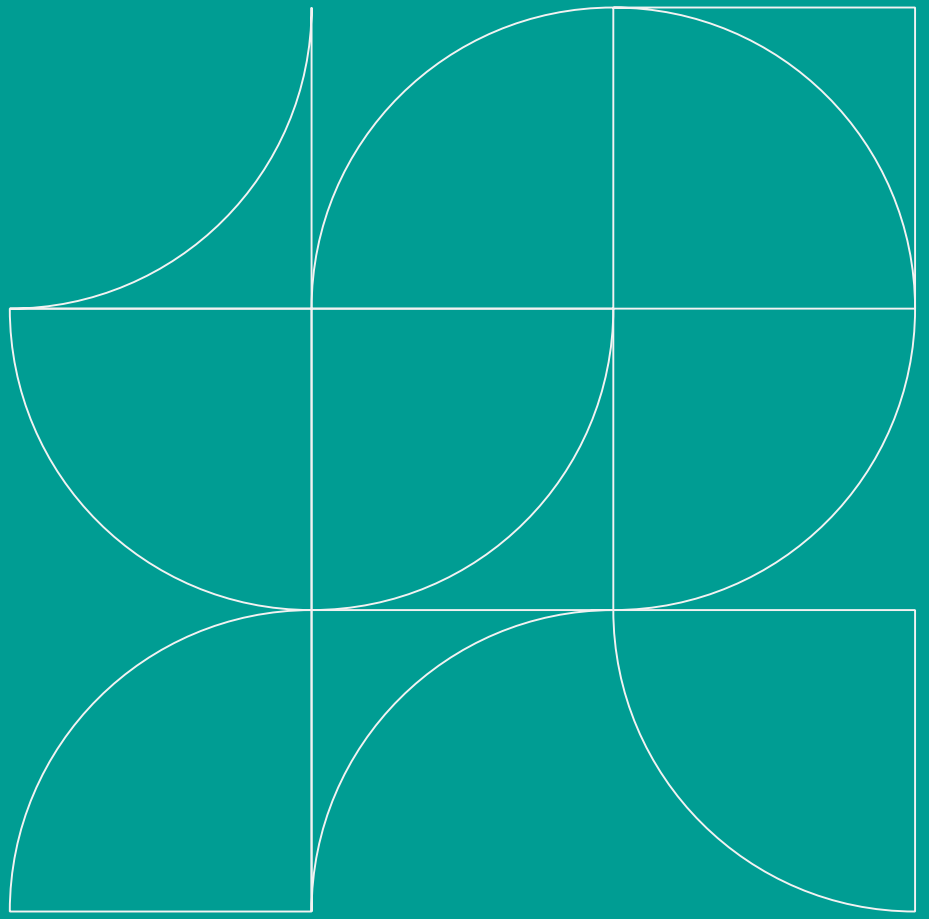
02 D.C. Cannabis Employment Protections Amendment Act

03 D.C. Legislation to Watch

D.C. Non Compete Clarification Amendment Act



Background

Non Compete Clarification Amendment Act

- In 2020, the DC Council passed the Ban on Non Compete Agreements Amendment Act of 2020. One of the most restrictive non compete laws in the country
- Significant outcry from the business community
- Following a period of public comment and revision, the Non Compete Clarification Amendment Act of 2022, was signed on July 27, 2022

Non Compete Clarification Amendment Act

Key Points:

- Non Competition Agreements are prohibited in the District of Columbia for most employees.
- Law was effective Date October 1, 2022
- There are exceptions: (1) highly compensated employees (make $150,000 or more), and which do not exceed 1 year and provide 14 days notice; (2) non competition agreements as part of a sale of the business; (3) agreements providing long term incentives to an employee
- The law is not retroactive
- Permits anti-moonlighting provisions and conflict of interest policies—but must provide these policies to employees within 30 days of acceptance of employment. The employer must reasonably believe outside work could lead to disclosure of proprietary or confidential information, violate conflict of interest rules, create a conflict of commitment for employees of accredited higher educational institutions, or impair the employer's ability to comply with the laws of DC, the federal government, or with a grant or contract
- Does not address non solicitation of customers and employees
- Does not apply to collective bargaining agreements

Definitions

- A non compete is any provision which prohibits an employee from performing work for another or from operating the employee's own business
- Employer is 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. DC and Federal government excluded.
- An "employee" is a person who spends more than 50% of their time working in the District, or regularly spends a substantial amount of time working in the District, and not more than 50% of their time in another jurisdiction
- "Highly Compensated" means the employee is expected to earn $150,000 or more in a consecutive 12 month period. $250,000 with respect to physicians. Compensation includes salary, bonuses, commissions, overtime and stock.

Penalties

- Agreement may be invalidated
- Employers subject to fines, from $350 to $1,000
- Employees may seek relief from the Mayor or sue in court
- Repeat violators may pay fine up to $3,000

Agreements With Highly Compensated Employees

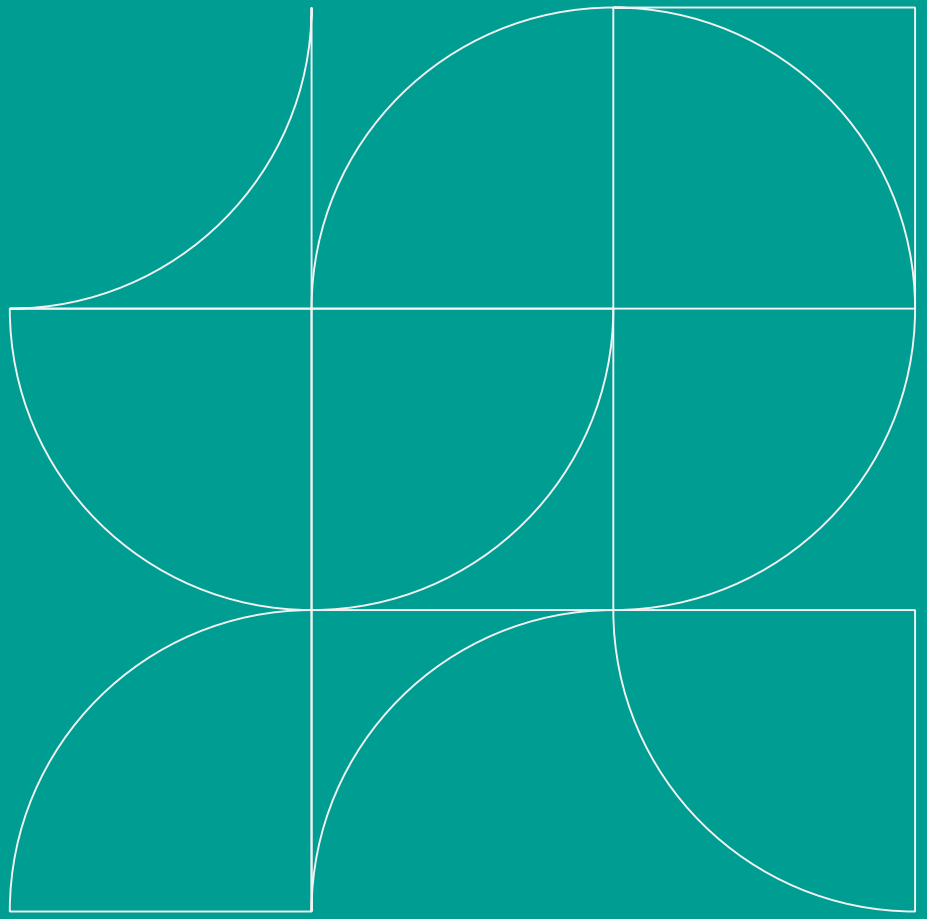
- To be enforceable, agreement must specify (a) scope of the restrictive provision, including services, roles, industries or competing entities (b) geographical limitations (c) term—not greater than 365 calendar days from the date of separation, or if medical specialist, 730 calendar days
- The employer must also provide 14 days notice before requiring execution
- When the employer provide the agreement, it must also provide a notice that states:

The District's 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, as that term is defined in the Ban on Non-Compete Agreements Amendment Act of 2020, 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).

What Should You Do?

- Identify covered employees
- Review policies to ensure they do not unintentionally create a “non-compete” situation or are within an exception. Make sure employees are provided with any such policies within 30 days of acceptance of employment
- Consider process to ensure non highly compensated employees are not asked to sign a non compete
- Do not amend previous non competition agreements. If you do need to amend/revise, look closely at the Act and consult with counsel
- Make sure notification regarding any non competition agreement provides 14 days notice
- Keep alert for possible changes to definition of highly compensated employee

D.C. Cannabis Employment Protections Amendment Act



Background

D.C. Cannabis Employment Protections Amendment Act (C.E.P.A.A.)

- In 2015, the DC Council passed the “Prohibition of Pre-Employment Marijuana Testing Act of 2015 ” which prohibits employers from requiring prospective employees to submit to a drug test for cannabis usage as part of the employer’s application process **until after a conditional offer of employment has been extended** unless otherwise required by law. D.C. Code § 32–931

- However, nothing prohibits an employer from testing a prospective employee for marijuana **after a conditional offer has been extended**. Further, nothing prohibits an employer from demanding compliance with workplace drug policies or denying a position based on a positive drug test (post-conditional offer). Likewise, nothing requires an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or at any time during employment.

- Pro-cannabis advocates sought additional employment protections for those using medical cannabis and for adult-use (recreational use) post-offer, including off-duty use of cannabis, and wished to replicate increased employee protections being passed in other states.

D.C. Cannabis Employment Protections Amendment Act (C.E.P.A.A.) - D.C. Law 24-190

Key Points:

- On July 1, 2023, D.C. enacted the Cannabis Employment Protections Amendment Act of 2022 (the "Act"). Originally, unfunded and not in effect, but was included in 2024 D.C. budget approved on August 30, 2023 so will be enforceable after October 1, 2023.

- Employers may not refuse to hire, terminate from employment, suspend, fail to promote, demote, or penalize an individual due to an individual's: (i) use of cannabis; (ii) status as a "medical cannabis program patient;" or (iii) having "the presence of cannabinoid metabolites in [their] bodily fluids in an employer-required or requested drug test without additional factors indicating impairment." This means that **employers are prohibited from taking personnel actions against an individual for cannabis or marijuana use off-premises during non-work hours.**

- "Impairment" for purposes of the Act is defined as where "the employee manifests specific articulable symptoms while working, or during the employee's hours of work, that substantially decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy workplace as required by District or federal occupational safety and health law."

What is Permitted?

- Employers may take adverse employment action related to the use of cannabis if the employee is working in a "safety-sensitive position," defined as an employment position as designated by the employer, in which it is reasonably foreseeable that, if the employee performs the position's routine duties or tasks while under the influence of drugs or alcohol, he or she would likely cause actual, immediate and serious bodily injury or loss of life to self or others.
- Additionally, employers may take action related to the use of cannabis if their actions are required by federal statute, federal regulations or a federal contract or funding agreement.
- Employers may also prohibit and take disciplinary action against any employees who are **impaired at work** and are permitted to require post-accident and reasonable suspicion drug testing of employees.
- Employers are also **not required to permit or accommodate the use**, consumption, possession, growing, and sale or transfer of cannabis **at work**.

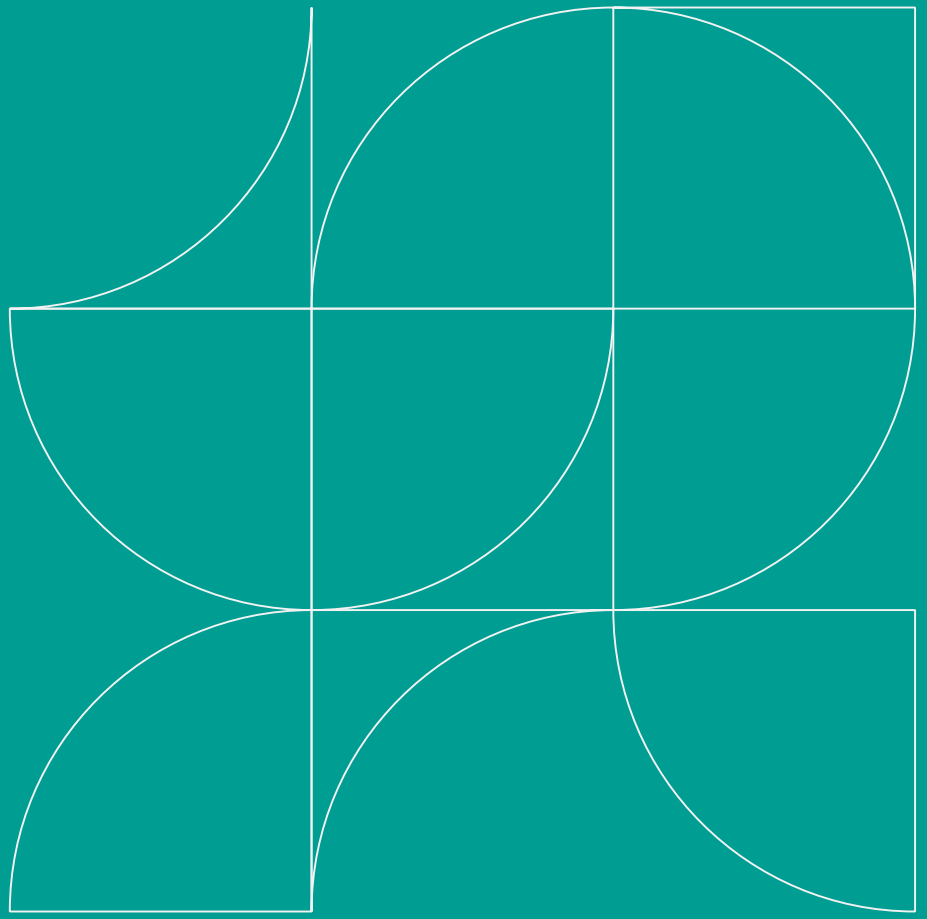
Penalties

- Enforced by the D.C. Office of Human Rights
- Civil penalties (half of which awarded to complainant);
  - 1–30 employees: up to $1,000 per violation
  - 31–99 employees: up to $2,500 per violation
  - 100+ employees: up to $5,000 per violation
- Lost wages to employee;
- Reasonable attorneys' fees and costs.
- Also private right of action which allows for recovery of the above plus compensatory damages and other equitable relief as appropriate.

What Should You Do?

- Employers must provide notice to their employees of the new protections as within 60 days of employment protections being enforceable or upon hire and on annual basis thereafter. (DCOHR to provide template within 45 days)
- Notice must inform if their position has been designated as safety sensitive.
- Safety-sensitive positions are those reasonably foreseeable that, if the employee performs the position under the influence of drugs or alcohol, the person could cause actual, immediate, and serious bodily injury or loss of life to themself or others.
- D.C. Code provides the following (non-exhaustive) examples of safety sensitive positions:
- (A) Security services such as police or security that involves the custody, handling, or use of weapons;
- (B) Regular or frequent operation of a motor vehicle or other heavy or dangerous machinery;
- (C) Regular or frequent work on an active construction site;
- (D) Regular or frequent work near gas or utility lines;
- (E) Regular or frequent work involving hazardous material;
- (F) Supervision of those who reside in an institutional or custodial environment;
- (G) Administration of medication, performance or supervision of surgeries, or other medical treatment requiring professional credentials

D.C. Legislation to Watch



DC Legislation to Watch

- **Pay Range Act of 2023 (B25-26 & 24-708; Under Council Review)**
  - As introduced, prohibits employers from posting a job advertisement without including the maximum and minimum salary or hourly pay information (public hearing on 6/14/23)
  - In stating the minimum and maximum salary or hourly pay for the position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion, or transfer opportunity.

- **Pay Scale and Benefits Disclosure Amendment Act of 2023 (B25-194)**
  - Permit prospective employees to access the pay scale of positions from employer and require private employers (25+ employees) to disclose the schedule of benefits, including bonuses, benefits, stocks, bonds, options, equity, or ownership, that employees may receive. (public hearing on 6/14/23)

DC Legislation to Watch

- **Fair Wage Amendment Act of 2023**
  - Prohibits employers from screening prospective employees based on wage history or requiring disclosure of wage history (including minimum or maximum criteria) as a condition of being interviewed or continuing to be considered for an offer of employment; also prohibits inquiring with current or past employers wage history before a conditional offer is made (public hearing on 6/14/23)

- **Minimum Wage Clarification Amendment Act of 2023 (B25-134)**
  - Requires employers to pay DC minimum wage rates (currently $17/hr) when an employee performs at least two hours of work in DC in one workweek (public hearing on 6/28/23)
  - Current law requires employers to pay the District minimum wage if employees work at least 50% of their time in the District but there remains ambiguity about whether current law requires minimum wage to be paid for just the hours worked in DC, or for all the hours that a person works for that employer.

Thank You

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