

Developments in nondisclosure and confidentiality provisions

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The #MeToo movement has been a catalyst for legislative action related to employee protections in agreements containing non-disclosure, confidentiality, and non-disparagement provisions, and recent legislative developments show how that movement is evolving.

On December 7, 2022, President Biden signed the Speak Out Act, making nondisclosure or non-disparagement clauses, agreed to before a sexual assault or sexual harassment dispute arises, unenforceable where the conduct alleged has violated Federal, Tribal, or State law.

While the Speak Out Act¹ and many existing state laws protect victims of sexual harassment or sexual assault, several states, as described below, have recently expanded their nondisclosure and non-disparagement laws to address all forms of discrimination and harassment.

Effective January 1, 2023, Senate Bill 1586² amended Oregon's Workplace Fairness Act. The Act prohibits separation agreement provisions that prevent employees from disclosing work-related discrimination, harassment, or sexual assault, unless the employee requests it.

Among other things, the amendments make clear that an employer cannot include a provision that prevents current, former, or prospective employees from disclosing the amount or fact of any settlement, unless the individual requests it, nor may employers condition settlement on the individual's request to include such a provision. However, non-disclosure and non-disparagement provisions unrelated to discrimination, harassment, and sexual assault remain enforceable.

Washington's Silenced No More Act³ went into effect on June 9, 2022, and renders unenforceable all nondisclosure and non-disparagement provisions that prohibit disclosure of conduct or the existence of a settlement involving conduct that the individual reasonably believes to be illegal discrimination, harassment, retaliation, a wage/hour violation, or sexual assault.

The Act applies to current, former, or prospective employees or independent contractors. Provisions prohibiting disclosure of a settlement amount, trade secrets, proprietary information, or confidential information that does not involve illegal acts remain enforceable.

Importantly, Washington's law applies retroactively to existing agreements and invalidates nondisclosure or non-disparagement provisions in agreements created before the effective date. However, agreements to settle legal claims entered into before June 9, 2022 are exempt from the law's retroactive effect.

While existing nondisclosure and non-disparagement provisions will be ultimately unenforceable, employees cannot recover damages for non-compliant provisions entered into before the law's effective date unless the employer attempts to enforce them.

While the Speak Out Act and many existing state laws protect victims of sexual harassment or sexual assault, several states have recently expanded their nondisclosure and non-disparagement laws to address all forms of discrimination and harassment.

Maine's Act Concerning Nondisclosure Agreements in Employment,⁴ which became effective August 8, 2022, bans pre-employment and employment agreement provisions that prohibit an employee, intern, or applicant from waiving or limiting any right to report or discuss unlawful employment discrimination occurring in the workplace or at work-related events.

Settlement, separation, and severance agreement provisions preventing subsequent disclosure of factual information relating to a claim of unlawful employment discrimination are enforceable only if the agreement states that the individual retains the right to report, testify, or provide evidence to federal and state agencies enforcing employment or discrimination laws and to testify in federal and state court proceedings.

New York Senate Bill S738,⁵ which passed the Senate in March 2022, would, if signed into law, invalidate any releases of claims of discrimination, harassment, or retaliation where (1) the employee, potential employee, or independent contractor is

required to pay liquidated damages, or is required to forfeit all or part of the separation/settlement payment, if they violate the agreement's confidentiality or nondisparagement provisions; or (2) the agreement contains an affirmative statement, assertion, or disclaimer that the employee was not subjected to discrimination, harassment, or retaliation.

Agreements must state that nothing precludes the employee from speaking with the New York Attorney General, law enforcement, the EEOC, the state or local commission of human rights, or an attorney.

While none of the above laws, if violated, would render an entire separation agreement void and unenforceable, violation of Oregon, Washington, and Maine's laws carry civil penalties ranging from \$1,000 to \$10,000; Washington's and Oregon's laws provide for private rights of action; and, of course, any noncompliant provisions entered into after each law's effective date (or, in Washington's case, all noncompliant provisions) will themselves be unenforceable.

Employers should therefore review their existing form separation agreements to ensure any new agreements entered into are in compliance with the above laws and continue to monitor state and federal developments in this area.

In addition to monitoring new developments, employers should also remain cognizant of those laws already on the books in this area, such as New York State's confidentiality preference requirement,⁶ which prohibits confidentiality and nondisclosure provisions in any settlement, agreement or other resolution of

any claim involving discrimination unless such a provision is the employee's preference and all parties sign a separate agreement memorializing that preference; California's Silenced No More Act,⁷ which prohibits provisions in separation agreements that restrict the disclosure of information about unlawful acts in the workplace and requires specific carve-out language to be included in any non-disparagement, confidentiality, separation, or other employment-related agreement that restricts an employee's ability to disclose information related to workplace conditions; and New Jersey's⁸ law deeming a provision in any employment contract or settlement agreement which requires the concealment of details relating to a claim of discrimination, retaliation, or harassment void as against public policy.

The legislative trend is clear, as more states promulgate broader non-disclosure and confidentiality provision protections for employees; employers should remain sensitive to this developing area and reform their form agreements accordingly.

Notes

¹ <https://bit.ly/3MzHGgf>

² <https://bit.ly/40546Zz>

³ <https://bit.ly/3KrBWSP>

⁴ <https://bit.ly/3KQwKJJ>

⁵ <http://bit.ly/3KRxJJE>

⁶ <http://bit.ly/3GAih24>

⁷ <https://bit.ly/3MAMGRF>

⁸ <https://bit.ly/3Ktmlgb>

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