Employers Take Note: California Employees Can Be "Silenced No More" In Workplace Settlement Agreements

Insights
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In a sweeping expansion of existing law, Governor Gavin Newsom signed legislation yesterday that broadly prohibits non-disclosure clauses in settlement agreements involving workplace harassment or discrimination on any protected bases, not just sex. SB 331 — known as the "Silenced No More Act" — takes what state lawmakers believe will be a final stand against employers preventing employees from discussing unlawful acts in the workplace. The new law, which takes effect on January 1, 2022, will nullify and make void provisions within any agreement entered on or after that date that prevent or restrict an employee from disclosing factual information on any type of harassment, discrimination, or retaliation. What do employers need to know about this new law?

Background: The Buck Does Not Stop at Claims Based on Sex

SB 331 builds on SB 820, also known as the STAND (Stand Together Against Non-Disclosure) Act, which California passed in 2018 in response to the #MeToo movement. To address what advocates of the movement coined as "secret settlements" used to cover up cases of sexual harassment involving high-profile executives, the STAND Act prohibited the use of confidentiality provisions in settlement agreements for actions including claims based on sex. As such, for several years, the STAND Act has allowed employees to discuss factual information relating to sexual harassment in the workplace.

However, proponents of SB 331 argue that the STAND Act left a gaping hole. Employers could still require non-disclosure agreements (NDAs) for cases involving all other forms of discrimination, harassment, or retaliation. Thus, in a settlement involving claims of intersectional discrimination (*i.e.* discrimination on multiple bases such as sex and race), the claimant could speak about the sex discrimination but be prohibited from discussing the race discrimination. Critics argued that this purported disparity protected employers from categorical reputational harm and facilitated prompt resolution of claims for employees without the expense or unwanted attention of a public dispute in court or an administrative agency.

Meanwhile, considerations for the average employer are varied, as NDAs have long served alternate purposes that could be eliminated with the passing of SB 331. While some argue NDAs were often used to protect repeat offenders or preserve a hostile environment, many employers instead utilized NDAs as part of a business decision to resolve claims early and preserve resources even if the claims were meritless. If an employer's ability to reduce the risk of public presumption of guilt

claims were meritless. If an employer's ability to reduce the risk of public presumption of guilt through early resolution is removed by allowing employees to speak out about any unlawful acts regardless, some employers may be forced to take a case to trial merely to maintain company integrity. The result of protracted litigation has concomitant concerns for both employers and employees. Nevertheless, the desire of some to lift the veil on workplace conduct in the interest of accountability and prevention of future conduct has propelled this proposed law into reality.

What Will Change?

With Governor Newson's signature on SB 331, existing law will soon change in three main respects.

Primarily, SB 331 amends Code of Civil Procedure Section 1001 (previously enacted by SB 820 in 2018) to expand the prohibition of confidentiality provisions in agreements entered into on or after the effective date for all acts of workplace discrimination or harassment, not only based on sex. For example, this includes acts based on race, religion, color, national origin, ancestry, disability, medical condition, familial status, sex, gender, age and other protected characteristics as described in various subdivisions of Sections 12940 and 12955 of the Government Code.

- SB 331 also prohibits non-disparagement agreements or similar agreements required as a condition of employment or continued employment that deny an employee's right to disclose information about unlawful acts in the workplace, *unless* the agreement includes a specific carve-out providing for the employee's right to discuss workplace conduct the employee has "reason to believe" is unlawful. This amendment to Section 12964.5 of the Government Code provides that any agreement that has the purpose or effect of denying an employee the right to disclose information about those acts is against public policy and unenforceable.
- Finally, the amendment to Section 12964.5 takes this prohibition a step further by also applying it to severance agreements containing any provision preventing an employee from discussing unlawful acts in the workplace absent a similar carve out specifying the employee's ability to disclose such information based on a reasonable belief.

The New Law Retains Some Protections

With its substantial changes, the new law importantly preserves the existing protection against disclosure of the settlement amount. While employees may discuss the underlying facts of the case, employers can still insist on clauses that prevent disclosure of the amount of money paid to settle the claim. Therefore, employers remain somewhat shielded against current and former employees "piggybacking" off a settlement with the aim of seeking a similar payout.

As another slight reprieve, employers may still include non-disparagement clauses or similar provisions in agreements provided there is specific language stating the employee's right to disclose information about unlawful acts in the workplace. Absent that language, the provision would be against public policy and unenforceable. Certainly, crafting such language to ensure enforceability is best handled by consulting with legal counsel.

For those employees with privacy concerns who wish to protect themselves against public attention, the Silenced No More Act leaves untouched the exception allowing claimants to maintain privacy. Therefore, at the request of the claimant, a settlement agreement may still include a provision that shields the claimant's identity and all facts that could lead to the discovery of their identity. Consistent with prior law, this exception does not apply if a government agency or public official is a party to the settlement agreement.

Next Steps

Because SB 331 applies to agreements entered into on or after January 1, 2022, employers may want to take a comprehensive look at all their active cases — not just those involving claims based on sex — to determine whether any should be resolved before the end of this year with a non-disclosure agreement. Next year, employers may consider taking a more discerning approach to their pre-litigation claims involving any form of harassment and discrimination to utilize non-disclosure provisions before they become unavailable once those actions are filed.

With the far-reaching implications that follow public disclosure unlawful acts in the workplace on any basis, California employers should coordinate with their legal counsel to re-evaluate their litigation strategies, as well as review and carefully revise any form agreements containing provisions violative of this new law in order to take full advantage of the limited remaining protections in the new year.

We will monitor developments related to this new law and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions on how to comply with SB 331, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in any one of our six California offices.

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