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"DO SPEAK!" NO DOUBT THAT WASHINGTON EMPLOYERS MUST RETHINK NONDISCLOSURE AGREEMENTS GIVEN SWEEPING NEW LAW

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Washington employers are already prohibited from using employment agreements that restrict workers from disclosing claims of workplace sexual assault and sexual harassment – but will soon be unable to use nondisclosure agreements encompassing nearly all common employment claims and all employment agreements, including settlements. Governor Inslee signed Washington's Silenced No More Act into law in March 24, replacing a 2018 law that only covered claims related to the #MeToo movement. Effective June 9, Washington employers will be subject to a sweeping new law more closely following California's similar law, causing most businesses to take immediate action to come into compliance.

Our Memories

The 2018 version of Washington's law prohibited workplace non-disclosure agreements (NDA) that would stop employees from sharing factual details of sexual harassment or sexual assault that occurred at or about work. While it was retroactive, the old law did not apply to settlement agreements. And it made largely symbolic updates to pre-existing anti-retaliation statutes.

This Could be the End

The new Act expands the scope of prohibited NDAs to encompass cases beyond sexual assault and sexual harassment and to all employer-employee agreements, including settlements. Specifically, it prohibits any clause between an employer and employee:

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not to disclose or discuss conduct, or the existence of a settlement involving conduct, that the employee reasonably believed under Washington state, federal, or common law to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault, or that is recognized as against a clear mandate of public policy.

This prohibition applies to all "employment agreements, independent contractor agreements, agreements to pay compensation in exchange for the release of a legal claim, or any other agreement between an employer and an employee." An "employee" broadly covers a current, former, or prospective employee or independent contractor.

We Do Need Your Reasons

There are some narrow exceptions. The new law allows for confidentiality as to the amount of any settlement payment. And it also excludes confidentiality agreements concerning trade secrets, proprietary information, or "confidential information that does not involve illegal acts." The law also leaves alone confidentiality provisions limited to disclosure of the amount of any settlement.

Altogether Mighty Frightening?

While the 2018 law prohibited Washington employers from *requiring* an employee to sign an NDA, the Act now prohibits an employer from even *requesting* an employee to sign a prohibited agreement. It is also a violation to attempt to enforce a non-compliant NDA, "whether through a lawsuit, a threat to enforce, or any other attempt to influence a party to comply." An employer who violates the law after its effective date may be sued for actual damages or $10,000 per violation, along with paying the employee's attorneys' fees.

The law's broad prohibition of "any other attempt" to influence a party to meet confidentiality or non-disparagement obligations suggests there is more risk than just presenting a non-complaint NDA. Employers should thus exercise caution before even mentioning such obligations in any workplace investigation, hiring process (other than trade secrets protection), in workplace policies such as social media use, or at separation of employment.

I Know Just What You're Thinkin'

While the Act will require businesses to be careful with NDAs (both new and old ones), employers may still have useful reasons for them, keeping the limits of the new law in mind. For example:

- Employers may still use NDAs to protect trade secrets and other confidential business information. But employers who opt to protect their intellectual property with an NDA should review such agreements to ensure this clause is narrowly limited to this type of information.
- Employers may still include a confidentiality provision in the settlement agreements that will prevent an employee from disclosing the *amount* paid in settlement of a claim. But employers need to review settlement agreements to ensure that there are not broad non-disparagement or confidentiality provisions, which could trigger the automatic $10,000 penalty.
- The new law is silent on defamation, so presumably an employer remains free to pursue claims against current of former employees who have made public statements that are provably false.
- Employers should exercise care when considering what clauses must be revised or eliminated in employee agreements so as to not inadvertently give up any remaining rights.

So, When is it All Ending?

As to existing employment agreements, the law is retroactive. As of June 9, 2022, any nondisclosure or nondisparagement provisions in agreements, even those "created before the effective date . . . and which were agreed to at the outset of employment or during the course of employment" are invalidated. However, employees cannot recover damages for agreements already in place unless the employer seeks to enforce these now unlawful provisions.

The law will not apply retroactively to invalidate a nondisclosure or nondisparagement provision contained in a settlement agreement. Thus, employers do have certainty that such clauses, common in settlement agreements, remain enforceable if signed before June 9, 2022.

Conclusion

For more information about how this new law could affect your workplace, contact your regular Fisher Phillips attorney, the authors of this Insight, or any attorney in our Seattle office. We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox