Congress Voids Sexual Harassment NDAs: 10 Things Employers Need to Know

Insights
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Congress just passed a law yesterday that will prevent employers from forcing victims of sexual harassment and assault to remain quiet in response to alleged abuse, requiring some businesses to alter their business practices – and serving as yet another incentive for you to curb unprofessional and illegal workplace behavior. President Biden has indicated that he supports the law, also known as the Speak Out Act, so we can expect him to move quickly and enshrine this bill into law in the coming days. **[Editor's Note: the president signed the law into effect on December 7.]** It will take immediate effect upon his signature, rendering void any noncompliant nondisclosure agreement (NDA) or non-disparagement agreement that is challenged thereafter. It will not, however, prevent employers from entering into standard confidentiality agreements with claimants upon settlement of assault or harassment claims or demands. Here are the 10 things you need to know as a result of this impending new law – including a handy compliance checklist.

1. Congress Offers Bipartisan Support for Measure

The Speak Out Act passed the House of Representatives on Wednesday with an overwhelming and bipartisan 315-109 vote. This follows the Senate passing the bill (S. 4524) by unanimous consent in late September. Clearly federal lawmakers are taking a united stance against this practice, reflecting society's shifting position on such NDAs.

2. Will Take Effect Upon President's Signature

The law will apply to all claims filed on or after the date of the president's signature. Biden released a letter several days ago expressing his support for the Speak Out Act, so we can expect his signature in short order. **[Editor's Note: the president signed the law into effect on December 7.]**

3. Covers NDAs in Some Sexual Assault or Harassment Cases

The law will prevent courts from enforcing certain NDAs in "disputes" where a party is alleging sexual assault or sexual harassment. (Note that the bill refers to "disputes" but does not define them, so it is unclear whether Congress is referring to formal litigation or something as simple as an informal internal complaint.) It defines such NDAs broadly – any contractual provision that requires a party to not disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement.

4. Also Covers Certain Non-Disparagement Clauses

Similarly, the law also applies to "non-disparagement clauses" in sexual assault or harassment disputes – any contractual provision that requires any party not to make a negative statement about another party that relates to the contract, agreement, claim, or case.

5. Only Restricts *Pre-Dispute* Gag Orders

But the bill only prevents the enforcement of those nondisclosure and non-disparagement clauses entered into before a dispute arises. Under the new law, no such agreement – often referred to as "gag orders" – shall be enforceable by any court in any case alleging a violation of state, federal, or tribal law.

6. You Can (Mostly) Still Enter into Post-Dispute Confidentiality Agreements

It is quite common for employers to resolve demands and claims through settlement agreements that include a confidentiality provision, preventing one or both parties from revealing information about the claim or the settlement. Such agreements are not impacted by this new law. Take note, however, that some state or local laws may restrict such provisions (see California, for example, or New Jersey or Washington), and this new law explicitly allows states to create more restrictive laws.

7. Does Not Restrict Trade Secret Protection

The law specifically permits employers, however, to protect trade secrets and proprietary information through NDAs. Any such agreements should be carefully crafted as to not violate this new law and potentially get stricken down as overbroad.

8. Aims to Cover Independent Contractors, Too

The preamble of the bill refers to the applicability of the provisions to not only current, former, and prospective employees, but also to "independent contractors." Meanwhile, the legislative text makes no specific mention of who the new law will apply to, simply describing "parties to the contract or agreement." While it is possible that a court may narrow the provisions of the bill to employees and applicants, risk-averse businesses should read this law broadly and consider it to be applicable to your contractor workforce as well.

9. Follows #MeToo Arbitration Ban

This is the second #MeToo-inspired bill to be passed by Congress this year. In February, federal lawmakers passed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act," which prevents employers from enforcing pre-dispute arbitration agreements without the employee's consent in cases involving sexual harassment and sexual assault. You can read a summary of that law here, and a detailed set of FAQs about the law here.

10. Your 3-Point To-Do List

Given this impending new law, employers have a checklist of actions to consider in order to stay on the right side of the law and to protect your interests.

1. Review all of your pre-hire and standard employment agreements to ensure none serve as gags on the types of disclosure intended to be protected by this law. To the extent you deploy an independent contractor workforce, check those agreements for compliance as well.
2. If any of your NDAs cover trade secrets, proprietary information, or other confidential data, you will want to work with your counsel to ensure they are crafted in such a way as to be preserved under this new law.
3. The best way to avoid any issues related to confidentiality is to prevent workplace harassment or assault in the first place. If you need to brush up on the five steps you should take to ensure a harassment-free workplace, read this trusted guidance.

Conclusion

"In order to combat sexual harassment and assault," the bill's preamble states, "it is essential that victims and survivors have the freedom to report and publicly disclose their abuse." There is no doubt that attention is now pointed directly at these kinds of situations, and your business would be wise to stay on the right side of the law in light of this new development.

We will continue to monitor the latest developments related to workplace law, so you should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions, please contact the authors of this Insight or your Fisher Phillips attorney.

Related People

Melissa Camire
Partner
212.899.9965

Email

George A. Reeves, III
Partner
803.255.0000
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