Washington Bars Sexual Harassment Nondisclosure Agreements

Insights
3.22.18

In the wake of the Harvey Weinstein scandal and the #MeToo movement, Washington employers will soon need to comply with two new laws aimed at preventing sexual harassment and assault in the workplace while encouraging open discussion about such problems. The new laws—which most notably restrict your ability to require nondisclosure agreements covering sexual harassment—were unanimously passed by the state legislature on February 28, and Governor Jay Inslee signed them into law on March 21, 2018. What do you need to know about the new laws in order to stay in compliance?

Senate Bill 5996: Ending Sexual Harassment Nondisclosure Agreements
Senate Bill 5996 prohibits employers from requiring employees to sign, as a condition of employment, a nondisclosure agreement (NDA) preventing them from "disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises." The law also specifies that such agreements—including nondisclosure agreements that predate the new law—will be void and unenforceable.

Importantly, the new law specifically carves out an exception for confidentiality provisions contained in settlement agreements entered into between employers and employees. So while you will soon no longer be able to craft preemptive NDAs that might otherwise stifle reports of harassment, you will still be able to negotiate enforceable confidentiality agreements in the wake of threatened or actual litigation.

In addition to its nondisclosure provisions, Senate Bill 5996 also adds a new section to the Washington Law Against Discrimination (WLAD) that specifically prohibits employers from firing or retaliating against employees who disclose sexual harassment or sexual assault allegations. Arguably, however, such conduct was already prohibited by existing law, as Washington statutes already prohibit employers from firing or retaliating against employees who report discrimination or harassment based on any protected status.

This law takes effect on June 7, 2018.

Senate Bill 6471: Developing Model Policies And Best Practices

Senate Bill 6471 contains no immediate implications for employers, but sets the stage for new guidance in the near future. This new law requires the Washington Human Rights Commission, the agency charged with enforcement of the WLAD, to convene a "stakeholder work group" tasked with developing model policies and best practices for employers and employees to "keep workplaces safe from sexual harassment." The law suggests that the working group consider an array of policy issues including, for example:

- creating and protecting anonymous reporting channels for employees to raise concerns about misconduct;
- protecting against retaliation for victims and observers;
- empowering human resource departments to enforce sexual harassment policies and aid victims of harassment; and
- developing and using effective surveys, orientations, and trainings to identify and prevent harassment issues.

The agency is required to adopt model policies and best practices by January 1, 2019, and will be required to post the model policies and best practices publicly on its website.

What This Means For Washington Employers

Many employers ask their employees to sign NDAs as a condition of employment for a variety of reasons, such as the protection of proprietary information and trade secrets. Moving forward, however, you should carefully review and evaluate such agreements to determine if they prohibit (or could be construed to as prohibiting) discussion or disclosure of sexual harassment allegations. Any such agreements are likely to be considered void and unenforceable, and you could end up losing out on legitimate protections contained elsewhere in the NDA if the entire agreement is scrapped by a court.

Notably, unlike similar legislation being considered in other states such as California, the Washington law specifically carves out an exception for confidentiality clauses in settlement agreements, which should avoid hampering your efforts to efficiently settle claims. Thus, although you will be prohibited from requiring preemptive nondisclosure agreements covering sexual harassment issues as a condition of employment, you will still be permitted to restrict employees and former employees from discussing sexual harassment allegations pursuant to a validly negotiated settlement agreement.

Finally, although SB 6471 does not impose any direct obligations on employers, the model policies and best practices to come out of it may provide several benefits. In addition to assisting you in ensuring your anti-harassment policies and procedures are effective, you may gain an advantage in defending against future sexual harassment claims and litigation employers if you adopt the model policies and best practices. That is, employers who have adopted these policies and practices may be able to point to them as persuasive evidence of a robust effort to identify, prevent, and address

workplace sexual harassment and sexual assault. As noted above, you should expect the agency's model policies and procedures around January 2019.

In addition to forcing you to review your nondisclosure agreements, the new law provides yet another reason to ensure your workplace anti-harassment and nondiscrimination policies are robust, clear, up-to-date, and specifically prohibit retaliation. You should train your managers regarding their obligations to prevent harassment, discrimination, and retaliation in the workplace and how to handle complaints. You should also ensure your HR professionals and managers are trained in addressing sexual harassment issues.

For more information about how this legislation could affect your workplace, contact any attorney in our Seattle office at (206) 682-2308 or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of two new specific state laws. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

Catharine Morisset
Partner
206.693.5076
Email

Service Focus

Employment Discrimination and Harassment

Litigation and Trials

Related Offices

Seattle