Labor and Employment

California Enacts Further Restrictions on Use of Nondisclosure Agreements in Discrimination and Harassment Settlements

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The #MeToo movement caused a significant amount of legislative activity across the country, addressing, among other things, limits on the use of nondisclosure agreements in settlements of sexual harassment claims.[1] Expanding on those protections, California Governor Gavin Newsom has signed into law the Silenced No More Act (S.B. 331), which imposes new, expanded restrictions on the use of nondisclosure agreements (NDAs) in settling bias and harassment claims by employees under various California statutes. The new law, which was passed by the state Senate on August 30, takes effect on January 1, 2022.

S.B. 331 expands on California's existing restrictions on the use of NDAs in sexual harassment settlements, which were enacted in 2019.[2] Under existing California law, settlement agreements regarding sexual assault or sexual harassment generally may not include NDAs.[3] S.B. 331 broadens these restrictions to cover an expanded range of employment- and housing-related settlements in lawsuits arising under California's Fair Employment and Housing Act, including those not based on sex.[4]

Specifically, the law now prohibits NDAs in settlements resolving claims of all types of workplace harassment, discrimination, or retaliation, as well as claims of all types of harassment, discrimination, or retaliation by the "owner of a housing accommodation."[5] However, an employee who wishes to retain privacy can still request that a settlement agreement contain a provision shielding their identity and all facts that could lead to the discovery of their identity.[6] Importantly, S.B. 331 applies prospectively, only covering agreements entered into on or after January 1, 2022.[7]

The law also further restricts the use of non-disparagement agreements required as a condition of employment, continued employment, or in connection with an employee separation, unless there is a carve-out provision allowing an employee to discuss workplace conduct that they have "reason to believe" is unlawful.[8] Agreements that do not contain these carve-out provisions are against public policy and unenforceable.

Employers with employees in California should be mindful of these new prohibitions in preparing any agreements to settle existing harassment or bias claims by employees. Additionally, starting January 1, 2022, employers should ensure that any employment, severance, or other agreement including a non-disparagement provision contains the necessary carve-out language.

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[1] *See generally Sexual Harassment in the Workplace*, Nat'l Conf. of State Legislators (Aug. 12, 2021), https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx
[2] Cal. Code Civ. P. § 1001.
[3] *Id*. § 1001(a)(1)-(2).
[4] *Id*. § 1001(a)(3)-(4).
[5] *Id*.
[6] *Id*. § 1001(c).
[7] *See* S.B. 331 § 1(1001)(g).
[8] *See* Cal. Code Civ. P. § 12964.5.