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Labor & Employment Alert

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Speak Out: Congress passes bill limiting use of NDAs

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Employers should prepare for the impact of the Speak Out Act.

What's the Impact?

- Under that Act, nondisclosure or nondisparagement clauses that an employee agreed to *before* a dispute arises will not be judicially enforceable with respect to a sexual assault or sexual harassment dispute.
- Employers will have to assess the impact on their employment agreements and their need for additional policies and procedures to prevent harassment.

President Biden is poised to sign into law the Speak Out Act, that prohibits the use of nondisclosure and nondisparagement agreements in certain workplace scenarios. Both chambers have already passed the Act, with the Senate doing so unanimously.

Once the Speak Out Act becomes the law of the land, any nondisclosure or nondisparagement clause that an employee agreed to *before* a dispute arises will not be judicially enforceable with respect to a sexual assault or sexual harassment dispute.

Under the Act, "nondisclosure clause" means a provision in an agreement that requires the parties to not disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the agreement. "Nondisparagement clause"

means a provision requiring one of the parties not to make a negative statement about another party that relates to the contract, agreement, claim, or case.

The term "sexual assault dispute" means a dispute involving a nonconsensual sexual act or sexual contact, as defined in 18 U.S.C. 2246 or similar applicable Tribal or state law, including when the victim lacks capacity to consent. "Sexual harassment dispute" means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable federal, Tribal, or state law.

The Act does not define when a "dispute" arises, but it is clear that a broad NDA that an employee signs at onset of a job, promotion, or simply during their employment as a matter of course, cannot be used to prohibit that individual from speaking out against sexual assault or harassment that they have experienced or witnessed. The federal law does not alter an employer's ability to include such provisions in settlement agreements *after* a dispute has arisen or to continue to have clauses in place that protect trade secrets or other proprietary information.

Takeaways

Employers should review their current nondisclosure and nondisparagement agreements to ensure that they are drafted in such a way that does not run afoul with the new law. Companies in one of the 16 states that have statutes or regulations addressing similar provisions must also ensure compliance where those state laws are more restrictive. Lastly, many states already mandate some form of sexual harassment training. This is a good opportunity for employers to revisit their training requirements, or implement such training even if not required by law where they operate. Employers should implement policies and procedures to help prevent harassment, and ensure that they are providing the space within their organizations for employees to speak out and raise concerns about sexual (and other forms of) harassment internally.

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