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New Federal Law Limits Enforceability of Predispute Nondisclosure and Nondisparagement Clauses Related to Sexual Harassment

The Bottom Line

- The federal Speak Out Act limits the enforceability of predispute nondisclosure and nondisparagement provisions related to incidents of sexual harassment and sexual assault.
- Employers should review and, if necessary, revise standard employment and restrictive covenant agreements to comply with the Act's requirements.
- The Act may also impact how separation and settlement agreements resolving disputes involving alleged sexual misconduct are drafted.

The Speak Out Act (the Act), which imposes limits on the judicial enforcement of predispute nondisclosure and nondisparagement provisions as they relate to sexual harassment and sexual assault, was signed into law by President Biden on December 7, 2022.

Overview

The Act provides that with respect to disputes involving sexual harassment or sexual assault, nondisclosure and nondisparagement clauses that were agreed to before a dispute arose are not legally enforceable in instances where the misconduct is alleged to have violated federal, state or tribal law. "Nondisclosure clause" is defined in the legislation as a provision in a contract or agreement that requires the parties not to disclose or discuss conduct, the existence of a settlement involving conduct or information covered by the terms and conditions of the contract or agreement. "Nondisparagement clause" is defined as a provision in a contract or agreement that requires one or more parties not to make a negative statement about another party that relates to the contract, agreement, claim, or case.

These restrictions will apply to agreements between employers and current, former and prospective employees, and independent contractors, and between providers of goods and services and consumers.

The Act is most likely to impact standardized confidentiality and nondisparagement provisions in employment contracts and restrictive covenant agreements that many companies require employees to sign as a condition of employment, to the extent such agreements can be interpreted to prevent employees from publicly disclosing their experience with sexual harassment or sexual assault.

The law makes clear that it does not supersede any provision of federal, state or tribal law that governs the use of pseudonyms in the filing of claims involving sexual assault or sexual harassment disputes or prohibit an employer from protecting its trade secrets or proprietary information. The Act also does not preclude enforcement of any state or local laws governing the use of nondisclosure or nondisparagement clauses, as long as such laws are at least as protective as the Act in terms of an individual's right to speak freely.

Impact on Sexual Harassment Disputes

Given that the Act applies only to nondisclosure and nondisparagement clauses agreed to before a dispute arises, employers may still include confidentiality and nondisparagement provisions in separation and settlement agreements resolving sexual harassment and sexual assault disputes. However, the Act does not define what constitutes a "dispute," nor does it indicate whether a complaint must be filed in court or with a government agency to be considered a "dispute." Indeed, the section of the Act addressing its applicability states only that it will apply to a claim that is "filed" under federal, state or tribal law on or after the date the Act is enacted. As such, it is unclear whether the Act permits the use of nondisclosure and nondisparagement provisions in settlement and separation agreements resolving internal complaints of sexual harassment and/or assault that have not been filed in court or with a government agency. This ambiguity may be addressed in subsequent federal guidance or may be left to the courts to decide.

In the interim, employers should consider drafting settlement and separation agreements in a way that makes clear that any nondisclosure or nondisparagement terms are being agreed to in connection with the resolution of an existing dispute. Employers should also review their form employment and restrictive covenant agreements to determine if any changes need to be made to account for the new restrictions under the Act.

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For More Information

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