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New restrictions on employee confidentiality and non-disparagement pacts

By **Dan Eaton**
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During the hiring process and throughout employment, employees may be asked to sign documents agreeing not to disclose their employer's confidential information and not to criticize (disparage) their employer publicly. These provisions may be included in a countersigned offer letter, employee handbook whose receipt an employee acknowledges, or separate non-disclosure and non-disparagement agreements.


(San Diego Union-Tribune Community Press File Photo)

Upon termination of employment, an employee may be asked to sign a severance agreement containing similar non-disclosure and nondisparagement provisions. In exchange for money or other consideration, an employee relinquishes any right he or she may have to sue an employer and agrees to dismiss any pending claim.

The new year will bring new limits on the enforceability of these non-disclosure and non-disparagement provisions. Earlier this month, Gov. Gavin Newsom signed into law SB 331, dubbed the "Silenced No More Act."

The first part of the law expands existing prohibitions on settlement provisions that prohibit an employee from disclosing facts relating to a claim filed in court or as an administrative complaint that alleged workplace discrimination based on sex, sexual assault, or other acts related to gender, or that alleged similar acts by the owner of a housing accommodation. The new law extends that prohibition to claims alleging such misconduct based on any characteristic protected under the Fair Employment and Housing Act (FEHA). The new law retains the right of the complaining party to elect to shield their identity as part of a settlement. The parties also still may agree to bar disclosure of the amount of the settlement payment.

The second part of the law expands existing law making it unlawful for an employer to condition a raise, bonus, or continued employment on an employee signing a statement that he or she has no claim against the employer and releases any right to file such a claim with an enforcement authority. An employer also may not require an employee to sign a non-disparagement agreement "that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment."

Effective January 1, it will be an unlawful practice to include any provision that purports to limit the disclosure of "information about unlawful acts in the workplace" in severance agreements as well. The definition of "information about unlawful acts in the workplace" will be broadened to mean "information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful."

The measure additionally requires any non-disclosure or non-disparagement provision that restricts an employee's ability to disclose "information related to conditions in the workplace" — whether in an agreement with an existing employee or departing one — to include substantially the following caveat: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

That does not mean employers may not include non-disparagement clauses in severance agreements. An employer "can insist that the employee, in exchange for a severance package, not speak negatively in public about the employer," according to a legislative analyst, as long as such a provision does not bar the employee "from speaking about unlawful acts in the workplace."

Any employee offering a severance agreement releasing FEHA claims that contains a non-disclosure or non-disparagement provision must, under the new law, "notify the employee that the employee has a right to consult an attorney regarding the agreement and provide the employee" with a reasonable period of at least five business days to do so.

This second part of the law does not apply to a "negotiated settlement agreement" resolving a claim filed by an employee in court, in an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process, where the employee was notified of their opportunity to retain an attorney or was represented by an attorney.

Moreover, the law does not prohibit an employer from protecting trade secrets or other confidential information that does not involve unlawful acts in the workplace.

Before the new year, employers should revise employee handbooks, severance agreements, and any other agreements with non-disclosure or non-disparagement provisions to reflect these changes in the law.

Dan Eaton is a partner with the San Diego law firm of Seltzer Caplan McMahon Vitek where his practice focuses on defending and advising employers. He also is an instructor at the San Diego State University Fowler College of Business where he teaches classes in business ethics and employment law. He may be reached at **eaton@scmv.com**. His Twitter handle is **@DanEatonlaw**.