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California Expands Restrictions on Employers' Use of Non-Disclosure Provisions

The Bottom Line

- Employers should review any form agreements for California employees that contain non-disparagement and/or confidentiality clauses and incorporate the newly required disclosure of rights language under SB-331.
- Companies that are settling workplace discrimination, harassment and retaliation claims filed in court or before an administrative agency must ensure that settlement agreements do not include confidentiality provisions that would violate SB-331.

California Governor Gavin Newsom recently signed into law SB-331, which imposes restrictions on the non-disclosure and non-disparagement provisions that employers can include in agreements with employees.

While California law already included restrictions on such provisions, the law expands these prohibitions further by:

- Requiring companies to include specific disclosure of rights language in employment and separation agreements that have non-disparagement and confidentiality clauses; and
- Expanding restrictions on settlement agreements that prevent employees from discussing workplace sexual harassment to cover all forms of harassment and discrimination.

Restrictions on Non-Disparagement and Confidentiality Clauses in Employment and Separation Agreements

Under existing California law, employers may not require that, in exchange for a raise or bonus, or as a condition of employment or continued employment, employees sign a non-disparagement or other agreement that prevents them from disclosing information about sexual harassment and other unlawful acts in the workplace. This prohibition previously only applied to agreements with new employees or current employees, and not separation agreements.

SB-331 expands this prohibition by providing that separation agreements cannot prohibit the disclosure of information about unlawful acts in the workplace.

In addition, all non-disparagement or other contractual agreements (including separation agreements) that could restrict an employee's ability to disclose information related to workplace conditions must now include, in substantial form, the following language:

> *"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."*

SB-331 also provides that separation agreements with such non-disparagement and confidentiality clauses must:

- Advise the employee of their right to consult with an attorney regarding the agreement.
- Give the employee "a reasonable time period of not less than five business days" to review the agreement.
  - Employees may sign the agreement prior to the conclusion of the five-day period, as long as their decision is knowing, voluntary and not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter a prior offer, or by providing different terms prior to the expiration of such time period.

SB-331 does not prohibit the following:

- Entering into a provision that precludes the disclosure of the amount paid in a severance agreement;
- Protecting employer trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace; or
- Including in a separation agreement an otherwise lawful and valid general release or waiver of all claims.

The restrictions pertaining to non-disparagement provisions do not apply to negotiated settlement agreements to resolve an underlying claim that has been filed by an employee:

- In court;
- Before an administrative agency;
- In an alternative dispute resolution forum; or
- Through an employer's internal complaint process.

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Confidentiality Provisions in Settlement Agreements

California law already prohibits employers from including confidentiality clauses in settlement agreements that prevent disclosure of factual information relating to claims of sexual harassment, sex discrimination and retaliation for reporting harassment or discrimination based on sex, when those claims are filed in a civil action in court or in an administrative action.

SB-331 expands this prohibition by providing that for any settlement agreements entered into on or after January 1, 2022, employers cannot include confidentiality clauses that prevent employees from disclosing any type of harassment, discrimination and retaliation in the workplace. These types of clauses in settlement agreements are considered void as a matter of law.

Notably, these restrictions only apply to settlement agreements resolving cases in the litigation phase – specifically after an employee files an administrative agency charge or judicial complaint in court. In circumstances where, for example, an employee asserts legal claims through a lawyer's letter or makes an internal complaint to human resources, the parties are permitted to include a confidentiality clause in a settlement agreement that resolves the claims.

For More Information

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