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New Law Restricts Washington Employers From Using Nondisclosure and Nondisparagement Agreements

Washington Governor Jay Inslee signed into law the Silenced No More Act (Engrossed Substitute House Bill 1795) on March 24, 2022, making Washington the second state in the nation after California to prohibit employers from using certain nondisclosure and nondisparagement provisions in employment agreements. Employers should take immediate steps to come into compliance.

How is this law different than the 2018 version?

Since 2018, Washington has prohibited employers from requiring employees to sign agreements, as a condition of employment, that prevent employees from disclosing sexual assault or sexual harassment occurring in the workplace or at work-related events. The 2018 law (RCW 49.44.210) excepted settlement agreements between an employer and an employee or former employee alleging sexual harassment.

Under the newly enacted law, which repeals the 2018 version, that prohibition extends to settlement agreements, additional types of allegations, and agreements with independent contractors. It also eliminates the 2018 exception for certain employees expected to maintain confidentiality in the course of their job duties, or for individuals participating in an ongoing investigation.

What conduct is prohibited under the new law?

Washington employers are prohibited from (1) retaliating against an employee for disclosing allegations related to the protected topics; (2) requesting that an employee agree to a prohibited provision; or (3) attempting to enforce, threatening to enforce, or attempting to influence a party to comply with a prohibited provision.

What are the protected topics?

Prohibited topics include any conduct that an employee *reasonably believes* under Washington state, federal, or common law to be illegal discrimination, harassment, retaliation, a wage-and-hour violation, sexual assault, or conduct that is recognized as against a clear mandate of public policy.

This applies to allegations concerning conduct occurring at the workplace and at work-related events, on or off the work premises, coordinated by or through the employer, between employees, or between an employer and an employee.

Are there any exceptions to the protected topics?

The only stated exceptions to the new law are: (1) employers may keep confidential the *amount* of a settlement or severance payment; however, employers cannot prohibit the disclosure of the employee's allegations or the fact of settlement; and (2) employers may continue to include provisions protecting trade secrets, proprietary information, or other confidential information that do not involve illegal acts.

What agreements are covered under the new law?

The new law broadly covers agreements between an employer and an employee or independent contractor, including employment agreements, independent contractor agreements, settlement or severance agreements, and any other agreement between an employer and an employee/independent contractor.

Does the new law apply retroactively to preexisting agreements?

Yes, the law applies retroactively to invalidate nondisclosure and nondisparagement provisions in agreements created before June 9, 2022, that were agreed to at the outset or during employment. Although employees cannot recover damages for agreements already in place, any attempt to enforce such provisions or agreements is a violation of the new law.

However, the law does not apply retroactively to such provisions contained in settlement or severance agreements entered into before June 9, 2022.

Who is covered by the new law, and is there an exception for human resources and similar employees?

"Employees" under this law includes current, former, and prospective employees, as well as independent contractors.

The 2018 law excepted human resources staff, supervisors, or managers when they are expected to maintain confidentiality as part of their assigned job duties. It also included individuals who are asked to participate in an open and ongoing investigation into sexual harassment and requested to maintain confidentiality during the pendency of that investigation. However, these exceptions no longer exist as of June 9, 2022.

What is the consequence for failure to comply with the new law?

The law provides a private right of action and for civil penalties of either actual damages or statutory damages of \$10,000, whichever is greater. The law also provides for attorneys' fees and costs under certain circumstances.

When does the new law become effective?

The law becomes effective on June 9, 2022. However, because the law applies retroactively in certain circumstances, Washington employers should immediately review and update their employment agreements with confidentiality and/or nondisparagement provisions and ensure they comply. Employers who are settling employment claims might also consider the impact of this law and revise severance and settlement agreement templates. Employers should also ensure their staff, including those responsible for conducting workplace investigations, are adequately trained on these new requirements. Finally, employers would do well to consult counsel before seeking to enforce confidentiality or nondisparagement provisions in prior agreements.

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