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Biden Signs “Speak Out Act” Limiting the Enforceability of Non-Disclosure and Non-Disparagement Clauses in Sexual Harassment Cases

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On December 7, 2022, President Biden signed into law the “Speak Out Act” (S.B. 4524), which prohibits the enforcement of pre-dispute non-disclosure and non-disparagement clauses in disputes relating to claims of sexual assault or sexual harassment. Among other things, the Act is intended to combat sexual harassment and assault in the workplace by ensuring that “victims and survivors have the freedom to report and publicly disclose their abuse” so that perpetrators may be held accountable and workplaces may be “safer and more productive for everyone.” S.B. 4524 § 2. The Act applies *only* to non-disclosure and non-disparagement clauses signed before a dispute arises, meaning that it does not prohibit such provisions in settlement or severance agreements.

In light of Congress’s findings that non-disclosure and non-disparagement provisions “can perpetuate illegal conduct by silencing those who are survivors of illegal sexual harassment and assault or illegal retaliation” and “shielding perpetrators and enabling them to continue their abuse,” the Speak Out Act makes such clauses judicially unenforceable in sexual assault or sexual harassment disputes where the conduct is alleged to have violated federal, state, or tribal law. S.B. 4524 §§ 4(a), 1(6). The Act applies to disputes alleging nonconsensual sexual acts, nonconsensual sexual contact, or sexual harassment. *Id.* §§ 4(a), 1(3)–(4).

A non-disclosure clause is defined as “a provision in a contract or agreement that requires the parties to the contract or agreement 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.” S.B. 4524 § 3(1). A non-disparagement clause is defined as “provision in a contract or agreement that requires 1 or more parties to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case.” S.B. 4524 § 3(2).

The law does not impact an employer’s right to protect trade secrets or proprietary information. S.B. 4524 § 4(d). The Act also does not impact the applicability of state laws governing pre-dispute non-disclosure and non-disparagement clauses to the extent they provide the same or greater protections than the Speak Out Act. S.B. 4524 § 4(c).

The Speak Out Act follows legislation limiting the enforcement of arbitration clauses in employment agreements for sexual assault and discrimination cases. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, enacted in March of 2022, prohibits the enforcement of pre-dispute agreements requiring employees to arbitrate sexual assault or harassment claims.

Notes for Employers

Related People

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1. *Does Not Prohibit Non-Disclosure and Non-Disparagement Clauses*. The Act does not prohibit employers from entering into non-disclosure and non-disparagement provisions with their employees, nor does it prevent employers from enforcing such clauses in most circumstances. The Act only prevents the enforcement of non-disclosure and non-disparagement provisions in connection with disputes relating to sexual harassment and sexual assault. (Other federal and state laws and regulations, such as the Defend Trade Secrets Act and SEC Rule 21F-17, may require or provide for carve-outs from such clauses for certain protected whistleblowing activities.)
2. *No Effect On Settlement Agreements*. The Act only applies to non-disclosure and non-disparagement agreements "agreed to before the dispute arises." S.B. 4524 § 4(a). The Act therefore does not place any limitations on non-disclosure and non-disparagement agreements reached as part of a settlement of sexual harassment and sexual assault claims. Note, however, that many states have laws, such as California's Silenced No More Act (Cal. S.B. 331) and Section 5-336 of the New York General Obligations Law (N.Y. Gen. Oblig. § 5-336), that place limitations on the use of non-disclosure and non-disparagement provisions in settlement agreements.
3. *Not Retroactive*. The Act only applies to claims filed after its enactment, and does not affect the enforceability of non-disclosure and non-disparagement clauses in connection with disputes filed before December 7, 2022. S.B. 4524 § 5.

The following Gibson Dunn attorneys assisted in preparing this client update: Gabrielle Levin and Kelley Pettus.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following:

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