

California Introduces New Restrictions on Employers' Separation and Settlement Agreements with Employees

Client Alert | January 19, 2022

[Click for PDF](#)

Related People

[Tiffany Phan](#)

California has seen a flurry of legislative activity over the last couple of years focused on protecting the rights of employees entering separation or settlement agreements with employers. Employers who have not updated their separation or severance agreement templates in the last few years should consider whether updates to their agreements are needed. This is especially true in light of SB 331 which Governor Gavin Newsom signed into law on October 7, 2021. SB 331, or the "Silenced No More Act," introduces additional restrictions on settlement agreements, non-disparagement agreements and separation agreements executed with employees in California after January 1, 2022.

Background – Recent Legal Developments

California has made a number of changes to requirements for separation and settlement agreements over the past few years, including but not limited to:

- SB 1431, effective January 1, 2019, which amended the language of Section 1542 of the California Civil Code, often cited in settlement agreements, to read as follows: "A general release

supported by valuable consideration were exempted from these prohibitions.

- AB 749 went into effect on January 1, 2020 and further impacted settlement agreements by limiting the inclusion of “no-rehire” provisions in agreements that settle employment disputes. AB 749 created Code of Civil Procedure Section 1002.5, which prohibits an agreement to settle an employment dispute from containing “a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer.” AB 749 defined an “aggrieved person” as “a person who has filed a claim against the person’s employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer’s internal complaint process.” Notably, AB 749 continued to allow a “no-rehire” provision in a settlement agreement with an employee whom the employer, in good faith, determined engaged in sexual harassment or sexual assault. AB 749 did not restrict the execution of a severance agreement that is unrelated to a claim filed by the employee against the employer.
- AB 2143, which took effect January 1, 2021, modified the provisions enacted by AB 749 to further clarify and expand when employers can include a “no-rehire” provision in separation or settlement agreements. Specifically, AB 2143 amended Code of Civil Procedure Section 1002.5 to also allow a “no-rehire” provision if the aggrieved party has engaged in “any criminal conduct.” AB 2143 also clarified that in order to include a “no-rehire” provision in a separation or settlement agreement, an employer must have made and documented a good-faith determination that such individual engaged in sexual harassment, sexual assault, or any criminal conduct before the aggrieved employee raised his or her claim. Finally, AB 2143 also made clear that the restriction on “no-rehire” provisions set forth in Code of Civil

restricts an employee's ability to disclose information related to conditions in the workplace must 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."

Finally, SB 331 also provides that any separation agreement with an employee or former employee related to an employee's separation from employment that includes a release of claims must provide: (i) notice that the employee has the right to consult an attorney regarding the agreement and (ii) a reasonable time period of at least five (5) business days in which to consult with an attorney. An employee may sign the agreement before the end of such reasonable time period so long as such employee's decision is "knowing and voluntary" and is not induced by the employer through fraud, misrepresentation or a threat to withdraw or alter the offer prior to the expiration of such reasonable period of time or by providing different terms to the employees who sign such an agreement before the expiration of such time period. The SB 331 requirements do not apply to a negotiated agreement to resolve an underlying claim filed by an employee in court, before an administrative agency, in arbitration, or through an employer's internal complaint process.

Conclusion and Next Steps

SB 331 represents the latest step taken by California intended to protect employees' rights by restraining employers from preventing the disclosure of information regarding certain workplace conditions.

When evaluating separation or severance agreement templates, employers should consider whether the agreements:

GIBSON DUNN

[Katherine V.A. Smith](#) – Co-Chair, Labor & Employment Group, Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)

© 2022 Gibson, Dunn & Crutcher LLP Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.

Related Capabilities

[Labor and Employment](#)