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

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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 does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."
- SB 820 which prohibits provisions in settlement agreements entered into after January 1, 2019 that prevent the disclosure of facts related to sexual assault, harassment, and discrimination claims "filed in a civil action" or in "a complaint filed in an administrative action." SB 820 did not prohibit provisions requiring confidentiality of a settlement payment amount, and the law included an exception for provisions protecting the identity of the claimant where requested by the claimant.
- SB 1300, effective January 1, 2019, amended California's Fair Employment and Housing Act to prohibit employers from requiring employees to agree to a non-disparagement agreement or other document limiting the disclosure of information about unlawful workplace acts in exchange for a raise or bonus, or as a condition of employment or continued employment. SB 1300 further prohibited employers from requiring, in exchange for a raise or bonus or as a condition of employment or continued employment, that an individual "execute a statement that he or she does not possess any claim or injury against the employer" or release "a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity." Under the law, any such agreement is contrary to public policy and unenforceable. That said, negotiated settlement agreements of civil claims

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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 Procedure Section 1002.5 applies only to employees whose claims were filed in "good faith."

SB 331 – Key Changes

Against this legal backdrop, SB 331 has introduced additional restrictions that employers should keep in mind when entering into settlement or separation agreements with employees in California.

Settlement Agreements

Building on the protections included in SB 820, SB 331 expanded SB 820's prohibition on provisions that prevent the disclosure of facts to include all facts related to all forms of harassment, discrimination, and retaliation—not just those related to sexual assault, sexual harassment, or sex discrimination. Just as with SB 820, parties can agree to prevent the disclosure of the settlement payment amount, and the identity of the claimant can be protected where requested by the claimant.

Non-Disparagement Covenants and Separation Agreements

Consistent with SB 1300, SB 331 prohibits an employer from requiring an employee to agree to a non-disparagement agreement or other document limiting the disclosure of "information about unlawful acts in the workplace" in exchange for a raise or bonus, or as a condition of employment or continued employment. SB 331 also prohibits an employer from including in any separation agreement with an employee or former employee any provision that prevents the disclosure of "information about unlawful acts in the workplace" which includes, but is not limited to, information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful.

Effective January 1, 2022, any non-disparagement or other contractual provision that

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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:

- Include language requiring that a settlement or severance amount be held in the strictest confidence by the employee or former employee.
- Have the latest amended Section 1542 language.
- Have the appropriate disclosures for any non-disparagement provisions.
- Provide employees with sufficient disclosures and time to consider the separation agreement.
- Include limitations on individuals which are now prohibited.

Employers should navigate these requirements with care. Compliance with California's multifaceted legal protections for employees and former employees will require careful drafting. Employers should consider seeking the assistance of legal counsel to refresh templates prior to entering into settlement or separation agreements in California.

The following Gibson Dunn attorneys assisted in preparing this client update: Tiffany Phan, Florentino Salazar, Sean Feller, Jason Schwartz, and Katherine V.A. Smith.

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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