

## Employment & Labor Law Alert

November 2021

# California Law Expands Restriction on Employers' Use of Nondisclosure, Nondisparagement Provisions in Settlement and Severance Agreements

Recently enacted California legislation imposes substantial restrictions on employers related to nondisclosure provisions in certain settlement agreements involving a broad spectrum of employment-related claims, and bars nondisparagement agreements or other agreements/provisions preventing disclosure of unlawful acts in the workplace. California Gov. Gavin Newsom signed the Silenced No More Act on Oct. 7. The Act was introduced by state Sen. Connie Leyva as Senate Bill 331 for the purpose of ensuring that those who raise complaints about unlawful behavior in the workplace are able to speak candidly about their experiences. It amends both Section 1001 of the California Code of Civil Procedure (CCP) and the California Fair Employment and Housing Act (FEHA) at Section 12964.5 of the California Government Code, and applies to covered agreements entered into on or after Jan. 1, 2022.

### How Does the Act Affect Section 1001 of the CCP?

Section 1001 of the CCP, as it currently exists, prohibits the use of nondisclosure provisions in settlement agreements preventing the disclosure of factual information related to claims filed in a civil action or a complaint filed in an administrative action for the following: sexual assault (not governed by subdivision (a) of Section 1002 of the CCP), sexual harassment (as defined in Section 51.9 of the California Civil Code), workplace discrimination or harassment based on sex, failure to prevent workplace



discrimination or harassment based on sex, and retaliation for reporting harassment or discrimination based on sex.

The Act expands these prohibitions to cover acts of discrimination, harassment, failure to prevent discrimination or harassment, and retaliation for reporting or opposing harassment or discrimination based on other categories protected under California law, which include race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, gender, gender identity, gender expression, age, sexual orientation, and veteran or military status. Although the Act expands the type of acts covered, it retains the limitation that Section 1001 only applies to agreements settling claims filed in a civil action or administrative proceeding.

The Act also:

- Continues to require that provisions in violation of the law's stated restrictions are void as a matter of law and against public policy.
- Allows, at the claimant's request, the inclusion of a provision that shields the identity of the claimant and all facts that could lead to the discovery of the

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claimant’s identity, including court pleadings that are included in the settlement agreement unless a government agency or public official is a party to the settlement agreement.

- Permits provisions requiring that the settlement amount be kept confidential.

### How Does the Act Affect the FEHA?

The FEHA, as it currently exists, bans certain nondisparagement and other agreements/documents that prevent workers from disclosing information about unlawful acts in the workplace as a condition of employment or in exchange for a raise or a bonus. The Act modifies the FEHA as follows:

- Specifically precludes separation/severance agreements from including provisions that prohibit the disclosure of information about unlawful acts.
- Mandates that employers include the following required language in nondisparagement agreements and other contractual provisions that restrict an employee’s ability to disclose information related to conditions in the workplace (including when such provisions are included in a separation/severance agreement): “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.”
- Requires an employer offering a separation/severance agreement to notify the employee that he or she has a right to consult an attorney about the agreement, and to give the employee at least five business days to do so.

Additionally, the Act continues to make contrary to public policy and unenforceable nondisparagement agreements and other agreements/documents (other than separation/severance agreements) that have the purpose or effect of denying an employee the right to disclose information about unlawful acts in the workplace (and/or omit the specific language set forth above, as required). Similarly, the law makes these provisions and omissions in separation/severance agreements against public policy and unenforceable.

In relation to the FEHA, the Act also specifies that severance agreements may (1) include a general release or waiver of all claims; (2) prohibit the disclosure of trade secrets, proprietary information, or confidential information that does not involve illegal acts in the workplace; and (3) require that the amount of severance paid remain confidential.

The FEHA continues to permit “negotiated settlement agreements” that prohibit the employee from disclosing information about illegal acts in the workplace when these agreements resolve a claim that was filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum or through an employer’s internal complaint process. “Negotiated” means that the agreement is voluntary, deliberate and informed; provides consideration of value to the employee; and the employee is given notice and an opportunity to retain an attorney or is in fact represented by an attorney.

### What Are the Suggested Next Steps for Employers?

To prepare for the new law’s effective date of Jan. 1, 2022, employers should review their settlement agreements for sexual assault, harassment, discrimination, failure to prevent harassment or discrimination, and retaliation claims, along with their employment separation/severance agreements, and consult with their attorneys to ensure compliance with the new law.

Employers are also advised to consult with their counsel regarding the potential settlement of ongoing harassment and discrimination litigation prior to Jan. 1, 2022.

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6816 REV1 11-23-2021