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The Federal Speak Out Act Places Some Limits on Nondisclosure / Nondisparagement Clauses

On December 7, 2022, President Biden signed the Speak Out Act into law. This law declares that predispute nondisclosure and nondisparagement clauses in employment contracts or severance agreements are unenforceable with respect to claims or allegations of sexual assault or sexual harassment.

In practical terms, this means that clauses in employment agreements (or employee handbooks that are incorporated into an employment contract) in which the employee agrees, prospectively, not to disclose sexually related workplace misconduct are no longer enforceable. The same holds true for clauses prohibiting the employee from speaking negatively about the employer or other employees should sexually related workplace misconduct later come to light. Similarly, such clauses would be unenforceable in severance agreements, at least where the separation has not been prompted by allegations of sexual assault or harassment.

Employers may still, to the extent permitted by other law, include nondisclosure and nondisparagement clauses in their employment agreements covering other topics, provided they carve out sexual assault or sexual misconduct.

The Speak Out Act's application only to pre-dispute clauses means that employers settling claims alleging sexual assault or sexual harassment may still negotiate for these clauses in settlement agreements after disputes involving allegations of sexual assault or harassment have arisen. Indeed, these clauses can be critical to getting those disputes resolved.

Likewise, the law explicitly allows employers to continue protecting trade secrets or other "proprietary information" with pre-dispute agreements.

Employers who have included broad nondisclosure or nondisparagement clauses in their employment contracts should review them with legal counsel and decide whether to issue new contracts. For instance, depending on how a severability clause in the contract is worded, the presence of language that the act now says is unenforceable could have an unpredictable effect on the remainder of the nondisclosure or nondisparagement clauses, if not the entire contract. And some states already have adopted laws such as – if not more expansive than – the Speak Out Act. For example, the California Silenced No More Act prohibits settlement agreements restricting the disclosure of factual information related to any forms of unlawful discrimination, retaliation, or harassment. New York, Washington, Oregon, and New Jersey have similar laws.

The Speak Out Act also does not address at-will employees, who by definition do not typically have written employment contracts. So, could an employer discipline an at-will employee who publicly discloses or disparages their employer's response to sexual harassment in the workplace? While this may not be technically prohibited by the Act, employers should consider – at a minimum – the reputational harm that might come with disciplining at-will employees in these circumstances.

Key Takeaways:

1. Effective December 7, 2022, prospective nondisclosure clauses contained in employment contracts prohibiting employees from disclosing or discussing conduct relating to alleged sexual assault or harassment, the existence of a settlement involving such conduct, or information covered by the terms and conditions of the contract are unenforceable under federal law when such contracts are entered into before a sexual assault or harassment dispute has arisen.

2. Effective December 7, 2022, prospective nondisparagement clauses contained in employment contracts that require a party to the contract not to make a negative statement about another party relating to alleged sexual assault or harassment are unenforceable under federal law when such contracts are entered into before a sexual assault or harassment dispute has arisen.

This client alert was drafted by Joe Hatley, a partner in the Kansas City office of Spencer Fane. For more information, click here.