

California Law Alert – Employment Agreements Subject to New Restrictions

Labor & Employment Law Update

By John Hayes on January 20, 2022



Signed into law on October 7, 2021 by California Governor Gavin Newsom and effective January 1, 2022, the “Silenced No More Act” amends and expands the previous Stand Together Against Non-Disclosures (STAND) Act.

The STAND Act was passed in 2018 in the wake of the #MeToo movement and focused specifically on claims of sexual harassment and discrimination or retaliation based on sex. The new law goes beyond the STAND Act’s focus on sex discrimination and harassment, and expands its protections to any characteristic protected

under California law. For example, this would include claims based on race, religion, national origin, disability, age, and various other protected characteristics under California law.

Below are some key requirements of the new law depending on the type of agreement.

Negotiated settlement agreements to resolve an underlying claim filed by an employee in a court, administrative agency, alternative dispute resolution forum, or the employer’s internal complaint process:

- Cannot contain confidentiality provisions that prevent an employee from disclosing information regarding the claim.

- At the employee's request, an agreement may include a provision that shields their identity and facts that could lead to the discovery of their identity, except if a government agency or public official is a party to the settlement agreement.
- Employers can still prevent the disclosure of amounts paid in settlement.

Employment separation and non-disclosure agreements (other than negotiated settlement agreements):

- Prohibits confidentiality and non-disparagement provisions in employment separation and nondisclosure agreements that have the purpose or effect of restricting disclosure of information about harassment, discrimination, or other workplace conduct the employee believes is unlawful, for any protected characteristic.
- Employers must include the following disclaimer in the non-disparagement clause or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace:
 - "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."
- For all employment separation agreements (other than negotiated settlement agreements) the employer must:
 - Notify the employee that the employee has a right to consult an attorney regarding the agreement; and
 - Provide the employee with a reasonable time period of not less than **five** business days in which to consult an attorney. An employee may sign the agreement prior to the end of the five-day period if the decision to do so is knowing and voluntary and not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer, or by providing different terms if an employee signs prior to the expiration of such time period.

While these requirements are hardly earth-shattering, if a California employer is using a template from another state, or one from several years ago, they may not be in compliance with the new law.

Consequently, in California, if an employer is entering into a settlement agreement to resolve any claims of discrimination, retaliation or harassment (sex-based or not), then the agreement cannot include non-disclosure language related to the actual claim(s). Also, employers in California should ensure all employment agreements that include non-disclosure obligations contain the necessary disclaimer, and that any separation agreements contain language expressly giving the employee the right to consult an attorney and that they have no less than five business days to do so.

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