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Employment Law Note

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Silenced No More

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Two new pieces of legislation enacted in March 2022 have changed the landscape of confidentiality in the employment relationship in Washington. On March 24, 2022, Governor Inslee signed into law Washington's "Silenced No More Act," prohibiting employers' use of non-disclosure agreements ("NDAs") and nondisparagement agreements to prevent employees from speaking publicly about certain workplace disputes. This development comes on the heels of a related action at the federal level. On March 3, 2022, President Biden signed into law HR 4445, which prohibited pre-dispute arbitration agreements for sexual harassment and assault claims.

These two laws are examples of a nationwide effort, with roots in the #MeToo movement, to limit employers' power to require confidentiality in workplace disputes. The new legislation takes aim at two of employers' strongest tools to enforce confidentiality: NDAs and confidential arbitration.

Silenced No More Act

Washington's Silenced No More Act is the second of its name, following California's passage of its own version of the law last year. However, unlike California's Act—which focuses on discrimination and harassment—Washington's Act prohibits any agreement between employee and employer requiring that the employee not disclose conduct that the employee reasonably believes to be "illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault." To date, Washington is the only state to include wage and hour matters in a law of this kind.

When the Act takes effect on June 9, 2022, it will retroactively void all prohibited NDAs and nondisparagement agreements that were entered at the outset of employment (*i.e.*, contained in employment agreements). Next, all such NDAs and nondisparagement agreements included in settlement or severance agreements after June 9th will also be rendered unenforceable. Employers will face civil penalties of up to $10,000 for even requesting that an employee sign a prohibited agreement.

The Act does include several important exceptions. It does not prohibit agreements that protect trade secrets, proprietary information, or confidential information. Nor does it prohibit employers from restricting disclosure of the amount paid in any settlement agreement. The Act instead focuses on ensuring that employees have the right to publicly discuss work-related conduct they believe to be illegal, even after all disputes have been resolved.

Mandatory Arbitration

Arbitration is generally a confidential process that allows parties to resolve disputes much more quickly than litigation. For this reason, mandatory arbitration clauses have become increasingly popular in employment agreements nationwide. Yet the clauses were left seemingly untouched by the Silenced No More Act. This comes as no surprise, as attempts to prohibit mandatory arbitration at the state level have been struck down by Washington courts in the past.

In 2018, Washington passed a law barring the use of mandatory arbitration clauses in employment agreements for all claims arising under the Washington Law Against Discrimination. The following year, the King County Superior Court held that the law was

preempted by the Federal Arbitration Act ("FAA"). Similar laws in other states have met the same fate in the past several years. In response, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (or "HR 4445"), which President Biden signed into law in March of this year.

HR 4445 amends the FAA to make pre-dispute arbitration agreements for sexual assault and sexual harassment claims invalid. The new law ensures that employees with sexual assault or sexual harassment claims have access to the courts, even if they signed a mandatory arbitration agreement when they were hired.

Looking Ahead

In combination, the Silenced No More Act and HR 4445 significantly weaken employers' power to require confidentiality among current and former employees, in certain circumstances. Washington employers should review their employment agreements to ensure they do not run afoul of either new law, and that their confidential and proprietary information remains protected.

For example, it is common practice in some industries to have employees agree at the outset of employment to keep employer practices confidential. Broad NDAs that do not explicitly define the confidential information and trade secrets they seek to protect run the risk of being rendered void under the Silenced No More Act. Similarly, broad agreements to arbitrate all claims throughout the course of employment will soon become unenforceable, at least in the event of a claim of sexual harassment or sexual assault.

Another likely outcome of the new legislation is an increase in sexual harassment cases advancing through litigation. While some plaintiffs may still prefer the confidentiality of arbitration, HR 4445 provides the option to seek redress in open court. Further, the Silenced No More Act may make early settlement of these matters less advantageous in the eyes of employers, without the ability to include confidentiality and nondisparagement clauses. Employers should prioritize preventing and eliminating harassment in the workplace by reexamining anti-harassment policies and trainings.

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