Calif. NDA Law May Have Surprising Effect On Settlements

By **William Jhaveri-Weeks and Ally Girouard** (October 26, 2021)

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On Oct. 7, California Gov. Gavin Newsom signed the Silenced No More Act, or S.B. 331, which will expand restrictions on the use of confidentiality and nondisparagement provisions in certain settlement agreements involving claims of workplace harassment and discrimination.

This article describes the changes and identifies several nonobvious consequences of the law in early settlements.

Expanding Limits on Confidentiality Provisions

The new limitations on confidentiality provisions build on the 2018 Stand Together Against Non-Disclosure, or STAND, Act, codified in the California Code of Civil Procedure, Section 1001. The STAND Act prohibits certain settlement agreements from requiring confidentiality of facts related to sex- or gender-based harassment or discrimination in the workplace.

The STAND Act did not apply to facts related to other alleged bases of illegal harassment or discrimination in employment, such as race, age, religion and so on.

This created confusing situations for employees settling claims of discrimination based on sex and other characteristics — for example, an employee who settled claims of discrimination based on sex and race might have reached an agreement that allowed her to discuss her allegations of sex discrimination but not those of race discrimination.

The Silenced No More Act will expand the STAND Act to facts related to workplace harassment or discrimination on any basis prohibited under California's Fair Employment and Housing Act, or FEHA, including race, disability, religion and sexual orientation.

As was true of the STAND Act, the new law:

- Applies only to factual information related to "a claim filed in a civil action or a complaint filed in an administrative action" — i.e., it does not apply to settlements reached prior to the filing of an administrative complaint or lawsuit;

- Permits the dollar amount of the settlement to be kept confidential; and

- Permits an employee to request confidentiality of facts that would reveal his or her identity.

The act will amend Section 1001 of the Code of Civil Procedure, effective Jan. 1, 2022.

Expanding Limits on Nondisparagement Provisions

The Silenced No More Act will also expand a provision added to FEHA in 2018 that limited the use of nondisparagement agreements.

The 2018 law, Government Code Section 12964.5, prevents employers from requiring employees to sign nondisparagement provisions as a condition of employment or continued employment, or in exchange for a raise or bonus, if such agreements would prevent employees from disclosing unlawful workplace conduct.

The new law will expand this restriction to apply to "any agreement related to an employee's separation from employment," with certain exceptions discussed below.

In settlement agreements covered by the new law, nondisparagement provisions are not allowed to the extent that they "[prohibit] the disclosure of information about unlawful acts in the workplace."[1] As was true of the 2018 law, this new provision does not apply to

> a negotiated settlement agreement to resolve an underlying claim under [FEHA] that has been filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process.[2]

The statutory language appears to cover a settlement after a demand letter from an employee claiming that he or she was wrongfully terminated — i.e., an agreement that involves separation from employment — provided that the employee has not filed the claim in court, before an administrative agency or ADR forum, or through an employer's internal complaint process.

It should be noted that, according to Mariko Yoshihara of the California Employment Lawyers Association, a sponsor of the bill whom we consulted, this provision was not envisioned as applying to negotiated settlements after a demand letter.

When the law applies, it also requires nondisparagement provisions to contain specific carveout language allowing disclosure of allegations of unlawful workplace conduct, and it adds a five-business-day waiting period to allow employees considering signing a nondisparagement provision time to consult an attorney.

Nonobvious Consequences for Early Settlements

In most situations, the impact of these new laws is clear. However, the laws have consequences that may not be immediately apparent for some early settlement agreements.

The confidentiality law, CCP Section 1001, applies only to settlements reached after an administrative complaint, such as with the California Department of Fair Employment and Housing, or after a lawsuit has been filed.

Thus, under CCP Section 1001, a demand letter that results in a settlement prior to the filing of an administrative complaint would still be free to contain a confidentiality provision restricting disclosure of allegations of unlawful harassment or discrimination.

The nondisparagement provision in FEHA, on the other hand, ceases to apply to settlements

after the employee has filed a claim "in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process."

Negotiated settlements made after one of those things has happened are not subject to any restrictions under the nondisparagement law.

Outlined below are some unapparent consequences for early settlements, based on the text of the bill.

First, in a FEHA wrongful termination claim that settles after a demand letter, before a DFEH complaint is filed and where the claim was not filed through the employer's internal complaint process, the confidentiality provision will not apply. However, the new FEHA nondisparagement provision in Gov. Code Section 12964.5 will apply, because the settlement agreement will be related to an employee's separation from employment.

In other words, the nondisparagement law would have the practical effect of extending CCP Section 1001's bar on confidentiality to apply not only after a DFEH complaint has been filed, but also before, with respect to claims pertaining to separation from employment.

That is because the new FEHA provision will forbid the use of "any provision that prohibits the disclosure of information about unlawful acts in the workplace," with the latter phrase further defined to include "information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful."

Second, because of the "any other conduct" language in the nondisparagement law, the bar on confidentiality is even broader at the pre-DFEH filing stage — barring confidentiality with respect to "any other conduct that the employee has reasonable cause to believe is unlawful" — than it is at the post-DFEH filing stage, barring confidentiality with respect to facts related to harassment and discrimination only.

Third, the nondisparagement law applies to agreements related to an employee's separation from employment; that is, this definition does not extend to settlement of a claim when the worker remains employed. For example, it does not extend to the settlement of a FEHA harassment or failure-to-promote claim when there is no separation from employment.

Fourth, if an employee has made a claim through the employer's internal complaint process, and that employee settles on a demand letter before filing a complaint with the DFEH, he or she will have no protection under CCP Section 1001 because no DFEH complaint has been filed. The employee will also have no protection under Gov. Code Section 12964.5 because that provision does not apply to negotiated settlements of claims that have been filed through an employer's internal complaint process.

In sum, these two laws provide for significantly greater transparency concerning allegations of workplace harassment and discrimination, and in the context of some early settlements, the protections for employees against confidentiality and nondisparagement provisions are even greater than might initially be apparent.

To the extent that some of these early-settlement implications are not consistent with the drafters' intentions, the law may be subject to further efforts at clarification or revision.

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Disclosure: Jhaveri-Weeks and Girouard are members of the California Employment Lawyers Association, but were not involved with the bill's sponsorship.

[1] SB 331, amending Gov. Code §12964.5(b)(1)(A).

[2] Id. § 12964.5(d)(1).