

# States Continue Crack Down on Nondisclosure Agreements

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Disfavour toward employer/employee nondisclosure agreements (NDAs) has been an increasingly popular sentiment expressed by state legislatures over the last few years, and 2022 has seen the trend continue. Legislation in some states may void and make unenforceable certain employer/employee nondisclosure agreements; it may prohibit employers from requiring employees to enter into such agreements; or it may outright prohibit employers from executing the agreements, for example in employment contracts and separation agreements. Just over halfway through 2022, Hawaii, Maine, Oregon, and Washington have issued or amended state laws voiding, prohibiting, or restricting employer/employee nondisclosure agreements.

## Hawaii

In late 2020, Hawaii passed a law prohibiting employers from requiring employees to execute nondisclosure agreements as a condition of employment, to the extent such agreement prevents the disclosure or discussion of sexual harassment or sexual assault that occurred in the workplace, at a work-related event, involved another employee, or involved the employer. On July 12, 2022, Hawaii amended the 2020 law by adding language that outright prohibits employers from entering into covered nondisclosure agreements. This amended law now not only prohibits covered nondisclosure agreements in employment contracts, but also in severance and settlement agreements. While the law was likely passed with good intentions, it will most certainly have an impact on the amount employers are willing to pay for severance and settlement, as it restricts the value employers are permitted to seek in return for such payments. The Hawaii amendments are effective July 12, 2022.

## Maine

On May 12, 2022, Maine passed a law prohibiting employers from requiring employees, interns, and applicants to enter into agreements whereby they waive or limit their right to report or discuss unlawful employment discrimination that occurred in the workplace or at work-related events. Additionally, the law states that an employer “may not require an employee, intern, or applicant...to enter into a settlement, separation or severance agreement” that limits, prevents, or prohibits the employee, intern, or applicant from reporting, testifying, or otherwise cooperating with law enforcement or other agencies in charge of enforcing anti-discrimination laws. However, being

mindful of the potential harm to employees caused by overly restrictive prohibitions on nondisclosure agreements, the Maine law permits employers to enter into settlement and severance agreements that prevent employees from disclosing factual information related to a claim of unlawful employment discrimination, provided that such nondisclosure provisions are obtained in exchange for, among other things, separate monetary consideration. The Maine law is set to be effective as of August 8, 2022.

## Oregon

Oregon state law, which permits nondisclosure agreements that prevent the disclosure of factual information related to a claim of discrimination or sexual harassment only when requested by the employee, was amended on March 24, 2022, effective January 1, 2023, to prohibit employers from making an offer of settlement conditioned on a request by the employee to include a covered nondisclosure provision. Covered nondisclosure agreements that were not requested by the employee, or that were a condition of the employer's offer of settlement, are deemed void and unenforceable.

## Washington

Effective June 9, 2022, Washington state passed a law deeming void and unenforceable agreements between an employer and employee that prevent the employee from disclosing or discussing conduct the employee reasonably believed constituted a wage and hour violation or illegal discrimination, harassment, retaliation, or sexual assault that occurred at the workplace or a work-related event, involved another employee, or involved the employer. The new law also prohibits discrimination or retaliation against employees who disclose protected information and prohibits employers from requiring employees to enter into an agreement with a provision that is prohibited by the law. A violation of the law subjects employers to the greater of actual damages or \$10,000, plus attorneys' fees and costs.

There is every reason to expect that states will continue enacting or enhancing prohibitions and limitations on nondisclosure agreements between employers and employees. Accordingly, employers should work closely with employment counsel to ensure they are not executing employment, severance, or settlement agreements that run afoul of these prohibitions or limitations.

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