

Virginia, Too – Increased Restrictions on Employee Confidentiality Provisions Related to Sexual Harassment Claims

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Virginia joined the list of states limiting employers' ability to include confidentiality and non-disparagement provisions in employment agreements for matters related to sexual harassment. But the law's scope seems limited, and does not appear to apply to post-employment severance agreements.

In March, Governor Glenn Youngkin signed House Bill 1895, which amends the Virginia Code to expand restrictions on employment agreements that include confidentiality or non-disparagement provisions related to sexual assault and sexual harassment. Virginia Code § 40.1-28.01 currently prohibits nondisclosure or confidentiality clauses related to claims of sexual assault in employment agreements. Effective July 1, 2023, House Bill 1895 expands the law to cover both claims of sexual harassment, and to explicitly prohibit non-disparagement agreements related to such matters. The statute outlaws any clauses in employment agreements that have the purpose or effect of concealing details related to sexual assault or harassment claims.

The statute defines sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.”

Importantly, the amended law applies to agreements that are entered into “as a condition of employment.” Though this language may be subject to judicial interpretation, it does not appear to restrict the use of confidentiality or non-disparagement clauses in severance agreements related to the termination of an employee's employment or litigation settlement agreements because such agreements are not typically entered into as a condition of employment.

Some other states, including California, Illinois and New York, have similar (and, in some respects, broader) restrictions on confidentiality provisions in employment or settlement agreements related to sexual harassment. In 2022, Congress passed the “Speak Out Act,” which limited the use or application of nondisclosure agreements (NDAs) to silence employee allegations of sexual

harassment. More broadly, the National Labor Relations Board recently held overbroad confidentiality and non-disparagement provisions [unlawful in most circumstances](#), not just in cases involving sexual harassment. While employers commonly use confidentiality and non-disparagement language in employment agreements to protect their business or reputational interests, they should craft such clauses with additional care going forward to avoid their invalidation under state or federal law.

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