

More on Non-Disclosure Agreements: California Sponsoring State Legislation to Prohibit Confidentiality in Sexual Misconduct Settlements

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It's a new year, and a new session for the active California Legislature. On January 3, 2018, in a likely effort to respond to the #MeToo movement, the Stand Together Against Non-Disclosure Act ("STAND" or the "Bill") was introduced in the California Senate. The Bill seeks to prohibit parties, including all public and private employers in California, from including nondisclosure provisions in settlement agreements in cases involving sexual assault, sexual harassment and/or sex discrimination.

Intends to Expand Existing Law:

California law currently prevents parties from including confidentiality provisions in settlement agreements related to claims for certain sexual offenses, including felony sex offenses, childhood sex abuse, sexual exploitation of a minor, or sexual assault of an elder or dependent adult. The STAND Act seeks to expand these prohibitions to claims for sexual assault, sexual harassment and sex discrimination, unless a claimant requests the inclusion of a nondisclosure provision in the settlement agreement.^[1]

Unintended Consequences:

As currently drafted, the Bill appears to have at least three unintended consequences:

1. Permits the inclusion of confidentiality provisions in settlement agreements for claims that have yet to be filed with the courts. Thus, parties may seek to resolve a claim prior to filing. Many sexual misconduct lawsuits are highly fact intensive and at times require significant investigation. Employers will likely have more incentive, especially in the current charged environment, to resolve a claim regardless of whether they believe there was misconduct to avoid public disclosure and potential damage to the employer's reputation.
2. Consumer Attorneys of California believe that confidentiality provisions at the request of the claimant will provide a guarantee of privacy to those who would not otherwise speak out. The unilateral election for confidentiality in the hands of the claimant could result in higher settlement demands for the inclusion of a confidentiality provision in the settlement agreement.

3. Once a complaint is filed, parties may be less likely to settle the claim since confidentiality cannot be required in a settlement agreement post-filing of the complaint. This may result in the use of additional judicial resources, including more jury trials and law and motion filings.

Stay tuned as this important Bill works its way through the legislative process.

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