What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Connie Elder Carrigan is an accomplished Employment Law attorney with a passion for helping clients, individuals, employers, and business representatives in planning for their future - from creating initial documents for a new company to advising on compensation, harassment and discrimination, and employment agreements - to estate planning, Connie advises clients with shrewdness and prudence backed by over three decades of experience.

Use of Pre-Dispute Confidentiality Provisions Regarding Sexual Harassment Will Soon Fall by the Wayside

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In March of 2022, we **reported** the passage of landmark legislation paving a clearer path for individuals to pursue workplace sexual harassment and sexual assault claims in court. The **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021** added a new chapter to the Federal Arbitration Act to permit persons alleging conduct constituting sexual harassment or sexual assault under state or federal law to elect to invalidate pre-dispute arbitration agreements or joint-action waivers in class or collective actions with respect to cases that relate to such sexual harassment or assault disputes.

The **Speak Out Act** is now on its way to President Biden's desk after the United States House of Representatives passed this landmark legislation on Wednesday, November 15, after the Senate's unanimous vote passing the Act in September. The passage of this bill demonstrates continued bipartisan support for the **#MeToo** movement, which took the nation by storm a little over five years ago and is the subject of a new movie, **She Said**.

The Act limits the use of non-disclosure (NDA) and non-disparagement agreements signed before a dispute arises, typically as a part of employee onboarding practice, that serve to silence victims of sexual misconduct in the workplace. In other words, agreements in which employees agree to keep confidential any future sexual assault or harassment claims are unenforceable under the Act, as are non-disparagement provisions to the extent they would limit an employee's ability to comment on a sexual harassment or sexual assault dispute. Such NDA agreements were the focus of scrutiny in the wake of allegations of sexual misconduct by Hollywood producer Harvey Weinstein, the former head of Fox News, Roger Ailes, and other persons in positions of power. In fact, former Fox News employees Gretchen Carlson and Julie Roginsky and their advocacy group, **Lift Our Voices**, were driving forces in moving forward this new legislation after they were forced to sign NDAs when they joined Fox News and thereafter as part of sexual harassment lawsuits with the organization.

SCOPE OF THE NEW LEGISLATION: ENDING FORCED ARBITRATION OF

SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

As a practical matter, while NDAs are often included as part of the mandatory forms that new hires must sign and bind over one-third of the American workforce, the Act may have limited impact as the majority of such agreements signed at the inception of employment pertain to the business's proprietary information and trade secrets. While broad non-disparagement provisions would be limited under the Act, many employers do not routinely utilize such covenants. Most importantly, the Act only applies to pre-dispute agreements entered into as a result of alleged sexual harassment or other related misconduct. An issue for courts to decide once the bill is enacted is what constitutes a "dispute" – does it mean that a lawsuit must have been filed, or is a complaint registered with an employer's human resources team the event which triggers the time frame after which such agreements may be enforced?

EMPLOYER TAKEAWAYS

In light of this new legislation, employers are encouraged to review their policies and contractual documentation in order to ensure that agreements entered into as a condition of employment contain nondisclosure or non-disparagement provisions that would run afoul of the Act's prohibitions. Employers should further keep in mind that in many jurisdictions there are other limits to nondisclosure provisions relating to claims of sexual harassment. In New York, for example, employers are prohibited from requiring a nondisclosure provision in any settlement agreement resolving claims of discrimination unless the condition of confidentiality is the employee's preference. Under Illinois law, an employer may not unilaterally include a nondisclosure provision in a settlement agreement that prohibits an employee from disclosing unlawful employment practices unless confidentiality is the documented preference of the employee.

If you have questions regarding this new legislation or other legal issues pertaining to the **employment** relationship, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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