



#MeToo:

How State and Federal Legislation is Impacting the Use of Nondisclosure Agreements in Employment

BY JESSICA BRADLEY AND KATHERINE NYQUIST

For those who thought the #MeToo movement would fade into the next news cycle, the growing list of powerful individuals accused of sexual misconduct and real-life consequences for businesses have shown that it has no signs of slowing down. Not to be left out of the national conversation are lawmakers in Washington, D.C., and state legislatures across the country. While sexual harassment is already illegal under state and federal law, lawmakers are now taking steps to supplement existing laws to address what appears to be a continuing trend of sexual harassment and discrimination in the workplace.

One approach lawmakers have taken is to focus on the use of nondisclosure agreements (NDA) in the employment context. An NDA is a provision in a contract in which a person agrees not to discuss a topic or disclose information in exchange for compensation. NDAs are commonly used in the employment context for a variety of reasons, including the protection of trade secrets or to settle an employee's legal claims against their employer. Where discrimination

allegations are involved, employers often insist upon an NDA as part of a settlement agreement. For example, the terms of the settlement agreement may require the employee to keep confidential all negotiations and terms of the settlement or may prevent the employee from disclosing the existence of the settlement at all. Employees agreeing to these provisions may be obligated to pay the employer in the event of a breach of the agreement. Advocates of the #MeToo movement have attacked the use of NDAs in sexual harassment settlement agreements, claiming the provisions prevent victims from going public with their accusations, thus enabling harassers and limiting transparency. Lawmakers at the state and federal level have responded to these criticisms with proposals that limit the use, value, or enforceability of such agreements.

Federal Action Affecting Sexual Harassment Claims

On Dec. 22, 2017, President Donald Trump signed the Tax Cuts and Jobs Act (TCJA), which contained an unlikely salute to the #MeToo movement. A desire to promote transparency in sexual harassment cases is likely the impetus for § 13307 of the bill, titled "Denial of Deduction for Settlements Subject to Nondisclosure Agreements Paid in Connection With Sexual Harassment or Sexual Abuse." The provision amended § 162 of the tax code, which generally allows businesses to deduct certain ordinary and necessary expenses paid or incurred during the year as part of running the business, to provide the following exclusion:

Payments Related to Sexual Harassment and Sexual Abuse.

—No deduction shall be allowed under this chapter for—

(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or

(2) attorney's fees related to such a settlement or payment.¹

Additional language in the TCJA further eliminates the deduction for any penalties “at the direction of the government” to any individual. It is uncertain how broadly these provisions will be interpreted, but they may fundamentally change the way employers will approach sexual harassment claims. Moreover, the changes to the tax code are not likely to be the last piece of legislation in this area.

Indeed, additional legislation is currently sitting in the Ways and Means Committee. H.R. 4495 would deny deductions for “any amount paid or incurred on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) . . . originating from . . . a claim or accusation” of criminal sexual abuse or sexual harassment. The bill defines “sexual harassment” to include “unwelcome sexual advances, requests for sexual favors, or other verbal or physical harassment of a sexual nature.” It also covers payments made “to require the nondisclosure of or otherwise prevent” claims of sexual misconduct. Overall, the act eliminates deductions for “any amount paid or incurred in connection with negotiating or settling” a harassment claim, whether or not an NDA is involved.

Another bill before the U.S. House of Representatives, titled Ending Secrecy About Workplace Sexual Harassment Act (H.R. 4729), would require employers obligated to submit annual Employer Information Report EEO-1 to disclose sexual harassment settlements. Covered employers would be required to disclose on the EEO-1 “the number of settlements reached by the employer with an employee in the resolution of claims pertaining to discrimination on the basis of sex, including verbal and physical sexual harassment.”

Additionally, two companion bills (H.R. 6406 and S. 2994) with bipartisan support were introduced in both the Senate and the House that seek to change the use of NDAs and non-disparagement provisions in relation to allegations of sexual harassment or assault in both the employment relationship context and in settlement and/or separation agreements. The bills, titled the Ending the Monopoly of Power Over Workplace Harassment through Educating and Reporting (EMPOWER) Act, seek to “deter, prevent, reduce, and respond to harassment in the workplace, including sexual harassment, sexual assault, and harassment based on protected categories,” with the House bill also seeking to amend the Internal Revenue Code of 1986 “to modify the tax treatment of amounts related” to the above-described conduct.

With respect to NDAs and non-disparagement provisions, the EMPOWER Act would make it an unlawful practice for employers to enter into a contract or agreement with an employee or job applicant “as a condition of employment, promotion, compensation, benefits, or change in employment status or contractual relationship, or as a term, condition or privilege of employment” if said contract or agreement contains a nondisclosure and/or non-disparagement clause “that covers workplace harassment, including sexual harassment or retaliation for reporting, resisting, opposing, or assisting in the investigation of workplace harassment.”² However, with respect to the use of these clauses in settlement or separation agreements, the act states that

the provisions of the subsections described above do *not* apply to a nondisclosure and/or non-disparagement clause in a settlement or separation agreement when such legal claims accrued or arose “before the settlement agreement or separation agreement was executed” and the clauses are “mutually agreed upon and mutually benefit both the employer and employee.”³ The act also explicitly reserves the right to report harassment and/or bring a lawsuit based on harassing conduct where a nondisclosure or non-disparagement clause was signed either before or after the effective date of the respective bill.⁴

Both bills further propose establishing a confidential tip-line within a year of the date of enactment to facilitate reporting incidents of workplace harassment and provide information to callers about the process of making a report, complaint, and/or charge.⁵ Finally, H.R. 6406 would deny tax deductions for amounts paid or incurred “pursuant to any judgment or award in litigation related to workplace harassment, including sexual harassment” or “for expenses and attorney’s fees” related to any such action. While these bills appear to have stalled in the current session, they demonstrate the direction lawmakers are headed and what the future might hold at the federal level.⁶

Current and Looming State Action

State legislatures are also seizing upon this moment. For example, the state of New York enacted a law that prohibits an employer from including in a settlement, agreement, or other resolution of a sexual harassment claim “any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action *unless the condition of confidentiality is the complainant’s preference.*”⁷ The law further provides the plaintiff with 21 days to consider including any such provision and also provides for a seven-day revocation period after signing.

Similarly, in California, legislators passed the Stand Together Against Non-Disclosure Act (S.B. 820),⁸ which seeks to curtail the use of confidentiality provisions generally in sexual harassment settlement agreements. The new law prohibits provisions in settlement agreements that restrict any party from disclosing the facts relating to claims for sexual harassment, sexual assault, and sex discrimination—unless a claimant specifically requests the inclusion of a such a provision.

A bill pending before the Pennsylvania Senate (S.B. 999) focuses more specifically on NDAs in the sexual harassment context. The legislation, should the bill become law, voids contracts executed prior to the effective date that: (1) prohibit disclosure of the name of anyone accused of sexual misconduct (including stalking), (2) suppress or attempt to suppress information relevant to a sexual harassment investigation, (3) impair or attempt to impair the ability of individuals to report claims, (4) attempt to waive a substantive or procedural right relating to a claim of sexual misconduct, or (5) require someone to expunge relevant information from documents.

Not to be left out, Alaska, Arizona, Kansas, Kentucky, Louisiana, Maryland (passed, effective Oct. 1, 2018), Missouri, New Jersey, Pennsylvania, Rhode Island, South Carolina, Tennessee (passed, effective May 15, 2018), Vermont (passed, effective July 1, 2018), Washington (passed, effective June 7, 2018), and West Virginia have passed or introduced similar bills.⁹

Takeaways

The new and proposed legislation regarding NDAs change the way employers fundamentally approach and evaluate nondisclosure

agreements generally and settlement of employment disputes. When preparing to settle a covered dispute, businesses will have to decide whether inclusion is worth losing the tax deduction and what social or policy statements a business wants to make in the current climate. For example, an employer may see value in reforming its own policies as part of a broader public and/or employee relations initiative before new legislation is enacted. Employers will have to weigh the value of the nondisclosure against the risk that a provision may not be enforceable in the future, or a plaintiff may have the opportunity to void the provision under subsequent legislation targeting enforcement of these agreements.

Other considerations may include business performance in the applicable tax year and the type of claims brought in a particular case. Losing a deduction may mean less to a business that is already claiming a loss in that tax year. The changes to the tax code only impact settlement agreements related to sexual harassment and sexual abuse. However, alleged victims of sexual harassment often assert a variety of additional claims—such as gender, race, or familial status discrimination claims—against their employers in a single lawsuit. It remains unclear how employers may reconcile the new and proposed legislation in instances where a single employee has alleged multiple claims. Employers will have to consider if and how they may want to separate and address an employee's multiple claims.

Employers may also consider whether their settlement goals may be accomplished through the use of other contractual provisions. For example, a nonadmissions clause formalizes an employer's position that a settlement is not an acknowledgement of guilt or liability. Similarly, non-disparagement clauses allow the employee to discuss the settlement agreement, but would prohibit the employee from disparaging the employer.

As demonstrated in the foregoing, the lasting consequences of the #MeToo movement are here to stay. While the changes to the tax law are set, there are certainly some gray areas here, and employers should consult counsel to ensure they are aware of their options and the potential ramifications of any settlement agreement. Moreover, employers need to stay in tune with the ever-changing and jurisdiction-specific legislation. ☺

medical leave, repeal of the Affordable Care Act's (ACA) individual mandate, changes to the deduction and exclusion of several popular fringe benefits, and changes to the tax treatment of certain employer-provided fringe benefits, among others.

²H.R. 4606 § 103(a)(1); S. 2994 § 4(a)(1).

³*Id.* at §103(b)(1); *id.* at § 4(b)(1).

⁴*Id.* at §103(c); *id.* at § 4(c).

⁵*Id.* at § 104(a); *id.* at § 5(a).

⁶For example, another proposed bill, the Ending Forced Arbitration of Sexual Harassment Act, would make it illegal for businesses to enforce arbitration agreements that works must sign upon taking a job if the allegations involve either sexual harassment or gender discrimination under Title VII. Bills are pending in both the House and Senate H.R. 4570, S. 2203.

⁷N.Y. Gen. Oblig. § 5-336 (emphasis added).

⁸S.B. 820 was presented to the governor on Aug. 30, 2018. It would take effect immediately upon the governor's signature.

⁹*See* HB 405 & HB 2020 (Arizona); HB 2696 (Kansas) (died in committee); HB 500 & BR 1705 (Kentucky); HB 578 (Louisiana); HB 1596 & SB 1010 (Maryland); HB 2363 & 2552 (Missouri); AB 1242, SB 1526 (New Jersey); HB 8278 Rhode Island; HB 4433 (South Carolina); SB 2328 (Tennessee); HB 707 (Vermont); SB 5996 (Washington); and HB 4456 (West Virginia).



Jessica Bradley is a labor and employment attorney at Littler Mendelson P.C. in Minneapolis where she advises and represents companies in a variety of employment law matters. Bradley has

experience handling and resolving a broad range of employment issues in state and federal courts, through arbitration, and before state and federal agencies. Bradley is also a member of the FBA Labor & Employment Law Section's Standing Committee on Legislation and Congressional Relations. She may be reached at jbradley@littler.com. Katherine Nyquist is an associate attorney at Littler Mendelson P.C. in Minneapolis. Nyquist advises and represents clients in labor and employment law matters in both state and federal court. She may be reached at knyquist@littler.com. © 2019 Jessica Bradley & Katherine Nyquist. All Rights Reserved.

Endnotes

¹TCJA also included multiple provisions that impact employers including: an employer tax credit for providing paid family and