January 6, 2023

Congress Tells Victims to Speak Out!

On December 7, 2022, President Biden signed into law the Speak Out Act (the Act), which precludes employers from enforcing nondisclosure and nondisparagement clauses related to allegations of sexual assault and sexual harassment that are entered into at the pre-dispute phase. As stated by Congress, the purpose of this Act is to "empower survivors to come forward, hold perpetrators accountable for abuse, improve transparency around illegal conduct, enable the pursuit of justice, and make workplaces safer and more productive for everyone." The Act took effect immediately and is not retroactive, so it has no application to agreements entered into prior to December 7, 2022.

The Act broadly defines the terms "nondisclosure clause" and "nondisparagement clause." Under the Act, a "nondisclosure clause" is defined as "a provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement." The Act defines a "nondisparagement clause" as "a provision in a contract or agreement that requires one or more parties to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case."

The Act does not prohibit employers from entering into nondisclosure or nondisparagement provisions with their employees. It, likewise, does not prevent employers from enforcing such clauses in most circumstances. Rather, the Act only prevents employers from enforcing nondisclosure and nondisparagement provisions in connection with disputes relating to sexual harassment and sexual assault that arise *after* the employee signed the nondisclosure and/or nondisparagement provision. To apply, the allegations of the dispute must relate to a nonconsensual sexual act or conduct that is alleged to constitute sexual harassment under applicable federal, tribal or state law. In essence, employers may not contractually limit an employee from discussing allegations relating to a sexual assault or harassment dispute when the employee agreed to the nondisparagement or nondisclosure agreement *prior* to the allegations or dispute arising. Subject to relevant state law that may lead to a different result and preclude such provisions, employers may include enforceable nondisclosure and nondisparagement clauses in agreements resolving claims and allegations of sexual assault or sexual harassment that are entered into *after* such claims and allegations have arisen. The Act also does not prohibit employers' enforcement of nondisclosure agreements to protect trade secrets or other confidential and/or proprietary information.

The Speak Out Act is another example of Congress' continuing support of the #MeToo movement and its commitment to combating efforts to silence victims of sexual assault and harassment.

While the Act limits the enforceability of nondisclosure and nondisparagement clauses at the federal level, a number of states, including New York and New Jersey, have enacted similar laws over the past few years curtailing the restrictions that employers may include in agreements resolving allegations of sexual assault and/or harassment. In addition, as we previously discussed here, earlier this year, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which prohibits employers from enforcing pre-dispute arbitration agreements relating to sexual assault and sexual harassment claims.

What Should Employers Do Now?

Nondisclosure and nondisparagement provisions can appear in various places, including, for example, employment agreements, arbitration agreements and employee handbooks. Employers should review their workplace agreements and policies to ensure they comply with the Speak Out Act, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act and any applicable state laws.

Authors

James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com

Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com

Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com

Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com

Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com

Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com