LEGAL UPDATES

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The Speak Out Act and Its Potential Impact on Employers

Service

Labor & Employment

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Five years after the beginning of the #MeToo movement, sexual assault and harassment in the workplace remain an issue with 81% of women and 43% of men reporting that they have experienced some form of sexual harassment or assault throughout their lifetime according to the National Sexual Violence Resource Center. On November 16, 2022, Congress passed the bipartisan Speak Out Act, which is now headed to President Joseph Biden's desk and is expected to become law in the near future. If signed, the Act will apply to any claim of sexual assault or harassment brought under state, federal or tribal law on or after the date the Act is signed. Once signed by the President, the Act will prohibit the enforcement of nondisclosure and nondisparagement provisions regarding discussion or disclosure of sexual assault or harassment disputes entered into before such assault or dispute is alleged to have occurred. This includes nondisclosure and nondisparagement provisions contained in employment agreements, nondisclosure agreements, and other agreements employees might sign prior to a sexual assault or harassment dispute arising.

Key provisions of the Act

Nondisclosure provisions by which employees agree to keep confidential the details of any future sexual assault or harassment disputes are unenforceable as of the Enactment Date.

Nondisparagement provisions, which limit employees' ability to speak out against, or say anything negative about, their employer in the context of future sexual assault or harassment disputes are unenforceable as of the enactment date.

The Act applies to all contracts past, present, and future, as long as the claim of sexual assault or harassment is brought under state, federal or tribal law on or after the enactment date.

States may continue to enforce their laws that are equally or more protective of an employee's ability to speak out about alleged sexual assault or harassment in the workplace, and those state laws are not superseded by the Act.

Conduct permitted under the Act

The Act allows employers and employees to enter into nondisclosure and nondisparagement agreements regarding alleged sexual assault or harassment as a result of a settlement, as long as otherwise permitted by applicable state law.

The Act allows employers and employees to enter into nondisclosure and nondisparagement agreements at the outset of employment if the provisions don't include sexual assault or harassment.

The Act specifically allows employers to protect trade secrets or proprietary information with nondisclosure agreements.

The Act specifically allows employees to use pseudonyms in filing claims of sexual assault or harassment if doing so is permitted under state, federal or tribal law.

What this means for employers

The Act's impact on most employers may be fairly limited. First, the Act only applies to pre-dispute provisions, so it would not impact employers' use of these provisions as a result of a settlement agreement. Second, many employers do not explicitly include future claims of sexual assault or harassment in their nondisclosure clauses. In fact, most employers use nondisclosure clauses or agreements to protect only their trade secrets and confidential/proprietary information, and the provisions do not even reach allegations of sexual assault or harassment in the workplace. The Act may limit an employer's broad nondisparagement provision, however. These two types of agreements in the context of sexual assault and harassment could run afoul of other laws and are generally not good practice. As such, many employers already do not utilize them in the ordinary course of their business. The Act simply means that if an employee speaks out about, or files a claim related to, alleged sexual harassment or assault in the workplace, an employer may not attempt to use its nondisclosure or nondisparagement clauses that the employee signed before the disputes occurred to prevent the employee from speaking about it.

Because the Act is likely to be signed into law soon, many employers may want to review the wording of their nondisclosure and nondisparagement provisions entered into with employees as a condition of employment to ensure such provisions comply with the Act and any applicable state laws. If an employer's nondisclosure or nondisparagement provision explicitly prevents employees from speaking about alleged sexual assault or harassment, employers are encouraged to redraft those provisions to not include sexual assault or harassment or risk the entire provision being held unenforceable, or even void entirely in some states.

Employers must remember to also consult state law for further limits on nondisclosure and nondisparagement provisions. Although entering into such provisions as a result of a settlement agreement is permitted under the Act, that does not mean it is as straightforward under state law. As of this writing, 16 states have enacted more stringent laws that further limit nondisclosure and nondisparagement agreements. Because the Act does not supersede equally more protective state laws, employers must also comply with these additional state law restrictions.

Contact us

If you have further questions regarding the Speak Out Act and its potential impacts on your business, or if you would like assistance adjusting your policies in accordance with state and federal law, contact Randy Thompson, Quinn Stigers or your Husch Blackwell attorney.