Virginia, Too.

New Virginia Law Restricts Use of Confidentiality and Non-Disparagement Agreements Related to Sexual Assault or Harassment

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Several years after the emergence of the #MeToo movement, Virginia has joined a growing list of states to restrict employers' ability to require employees to abide by confidentiality restrictions related to sexual harassment claims.

Virginia's new law invalidates nondisclosure or non-disparagement agreements with employees that would apply to prohibit disclosure of facts or details regarding alleged sexual harassment claims. And while the law represents a clear legislative move in favor of transparency related to workplace sexual misconduct, it does not appear to apply to post-employment severance or separation agreements, which makes it less expansive than some similar laws recently enacted in other jurisdictions.

Details of the New Law

Virginia Code § 40.1-28.01 provides that no employer can require an employee or prospective employee, as a condition of employment, to execute or renew any provisions in a nondisclosure or confidentiality agreement, including any provision related to non-disparagement, that has the purpose or effect of concealing the details relating to a claim of sexual assault or sexual harassment. The law previously banned such agreements related to sexual assault claims, but it was expanded to include sexual harassment claims effective July 1, 2023.

The law can broadly apply to prevent confidentiality related to almost any instances of workplace conduct of a sexual nature.

The statute defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."[1] As such, the law can broadly apply to prevent confidentiality related to almost any instances of workplace conduct of a sexual nature.

Limitations on the New Law's Reach

Notwithstanding the above, the amended law includes several subtle provisions that seem to limit its scope. For one, the law only applies to agreements that are entered into "as a condition of employment."[2] Though this

language may be subject to judicial interpretation, it does not appear to restrict the use of confidentiality or non-disparagement clauses in severance agreements related to the termination of an employee's employment or litigation settlement agreements because such agreements are not typically entered into as a condition of employment. Moreover, the law does not seem to address a scenario when an employee may sign such agreement voluntarily, or without penalty for refusal.

In effect, the Speak Out Act and the new Virginia law cover the same types of pre-dispute agreements without impacting post-incident settlement or severance agreements.

The law does not include a private right of action. Instead, it declares that any violative provisions are void and unenforceable as a matter of public policy. The law would not invalidate the confidentiality agreement as a whole. Thus, employers do not face an obvious liability risk for maintaining general confidentiality or non-disparagement provisions in employment agreements, but they will not be able to enforce such agreements as applied to sexual harassment or sexual assault claims. Going forward, we believe it is a best practice for employers to include a disclaimer in such agreements to ensure employees understand that their confidentiality and/or non-disparagement obligations have limits.

Other State and Federal Laws

A handful of other states, including California, Illinois, and New York, have similar (and, in some respects, broader) restrictions on confidentiality provisions in employment or settlement agreements related to sexual harassment. For example, in New York, employers cannot include confidentiality provisions in post-employment settlement agreements with employees related to any type of employment discrimination claim, including sexual harassment claims, unless it is the "complainant's preference" to keep the issues confidential.[3] Similarly, Illinois restricts confidentiality requirements in employment agreements and post-employment agreements unless they are the preference of the employee.[4]

On the federal level, Congress passed the "Speak Out Act" in 2022, which limits the use or application of nondisclosure agreements (NDAs) related to allegations of sexual harassment.[5] The Speak Out Act only restricts enforcement of NDAs or non-disparagement clauses entered into before a dispute arises related to sexual harassment. So, for example, the Act prohibits the enforcement of a pre-employment nondisclosure agreement in relation to a sexual harassment dispute that arises during the course of employment. However, it does not restrict the complainant and the employer from entering into a post-dispute settlement agreement that includes confidentiality requirements related to the disputed claims. In effect, the Speak Out Act and the new Virginia law cover the same types of pre-dispute agreements without impacting post-incident settlement or severance agreements.

In addition to these specific, post-#MeToo era laws, other federal laws of general applicability also affect employer rights in the context of confidentiality related to sexual harassment claims. The National Labor Relations Act (the Act) protects the rights of employees to engage in protected, concerted activity.[6] Earlier this year, the National Labor Relations Board (the Board) ruled that employers violate the Act if they include broad confidentiality provisions in severance agreements with employees.[7] The Board reasoned that such provisions were unlawful because they have a reasonable tendency to interfere with employee rights under Section 7 of the Act to discuss the details of their employment experience with third parties, like their co-workers.

The Board's General Counsel analyzed the new case law in a March 2023 memo and announced that she would enforce the decision broadly to restrict confidentiality agreements, as well as other common employment agreement provisions like non-compete and non-solicitation clauses.[8] The General Counsel also opined that so-called "savings clauses" that generically carve out "rights protected by the NLRA" from otherwise overbroad confidentiality restrictions would not serve to insulate employers from potential unfair labor practice liability related to severance and other employment-based agreements.[9]

Takeaways for Employers

For many employers, the recent changes on the federal level will dull the impact of the new Virginia law. Nonetheless, the changes both at the federal and state level reflect a

growing desire to limit the reach of employment-based confidentiality and non-disclosure agreements. **The laws place employers at much greater risk of reputational and legal liability if they allow sexual harassment to fester at their workplace.** Employers should take a fresh look at their employment agreements to comply with these laws, but also review their existing sexual harassment policies and training programs to ensure they have procedures in place to prevent harassment before it starts, and promptly investigate and remedy it when it occurs.

Endnotes

1 Va. Code § 40.1-28.01 (incorporating definition from Va. Code § 30-129.4).
2 *Id.*
3 *See* NY Gen Oblig. L. § 5-336 (2022).
4 820 ILCS 96/1 *et. seq.*
5 42 U.S.C. § 19401 *et. seq.*
6 29 U.S.C. § 157.
7 *McLaren Macomb*, 372 NLRB No. 58 (2023).
8 General Counsel Memo 23-05.
9 *Id.*

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