



Why the STAND Act Will Not Discourage Settlements in Sexual Harassment Cases.

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In a recent flurry of legislative activity, Governor Brown enacted a series of employment laws that will become effective January 1, 2019. Several were spawned by the #MeToo movement. One of the most notable from that group is the STAND (Stand Together Against Non-Disclosure) Act.

The STAND Act prohibits a blanket confidentiality provision in a settlement agreement involving claims of sexual harassment and other sexual offenses. The intended purpose of the STAND Act is to prevent perpetrators from silencing victims through the use of settlement agreements and the legal process.

Detractors point out that the STAND Act has the unintended effect of deterring parties from resolving their legal disputes through confidential settlements. After all, both sides may have legitimate reasons for keeping their settlements confidential.

From the claimant's perspective, not every victim wants publicity. Thus, a provision that bars victims from keeping their identities confidential may discourage them from coming forward in the first place.

Defendants have an equally compelling interest in keeping settlements confidential for fear of bad publicity and the possibility of copycat claims, particularly where the claims are not

meritorious.

These are legitimate concerns, especially for mediators retained to help resolve the disputes. However, when read in its entirety, the STAND Act contains several measures that will incentivize the parties to continue to use the alternative dispute resolution process.

Let's take a look at three such provisions and their impact on settlement discussions.

1. The STAND Act prohibits a confidentiality agreement in a sexual harassment case that prevents the disclosure of information related to, "a claim filed in a civil action or a complaint filed in an administrative action."

This language suggests that blanket confidentiality agreements are still permissible in cases where no lawsuit or administrative complaint has been filed. Thus, for parties who wish to avoid the restrictions of the STAND Act, it may be advantageous to resolve cases during the pre-litigation phase of the case.

Plaintiffs' counsel who are typically reluctant to send pre-litigation demand letters may want to reconsider if it could increase the chance of an early settlement. On the flipside, defendants who are reluctant to engage in pre-litigation settlement discussions may now be more motivated to do so. Thus, more than ever, the timing of settlement negotiations in these types of cases is critical.

2. The Act provides that a confidentiality agreement that shields the identity of the victim is permissible if the victim asks for it.

This exception protects victims who, despite the purpose of the law, do not want the publicity. There are countless victims who do not come forward out of fear that their claims will become public tabloid fodder. This exception to the rule gives victims more control over their privacy, which could be the difference when it comes time to discuss settlement. (Note that this exception does not apply if a government agency or public official is a party to the settlement agreement.)

3. The Act does not prohibit a confidentiality agreement that precludes the disclosure of the amount paid in a settlement.

This carveout was likely the result of a political compromise with opponents who argued that the disclosure of the amount paid in a settlement would be a major deterrent for defendants to settle a case. In any event, this exception should give defendants some measure of comfort that when they settle a sexual harassment case, meritorious or not, the amount will not become public knowledge.

On the other hand, plaintiffs may not agree to keep the amount confidential, which could result in an impasse in the settlement negotiations. This is where a mediator will have to earn his or her keep by understanding the root of the stalemate and offering creative

solutions.

Ultimately, the STAND Act is long overdue in the eyes of many. Whether you are a proponent or a detractor, it is here to stay, and an in-depth understanding of its impact on settlement negotiations is critical when navigating the alternative dispute resolution process.

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