The Legal Intelligencer

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COMMENTARY

The End May be Near for Nondisclosure Agreements

After years of misuse, though, NDAs, and their wicked first cousin, the nondisparagement clause, have come under fire for silencing sexual assault victims. As a result of the #MeToo movement, the legal landscape has fundamentally altered how NDAs are enforced, if at all.

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Employment Law

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Every lawyer who has ever resolved an employment dispute between an employer and an employee has thought about “it” when evaluating terms of a settlement agreement. In these circumstances, “it” is a nondisclosure agreement (or NDA) which, after signing, largely governs what the parties can say about a case. Confidentiality clauses, while no stranger to employment law issues, has its origins in business disputes. In business, NDAs have been used to protect confidential, sensitive, and proprietary company information from improper disclosure. Over the years, however, NDAs have also been used by high profile individuals like athletes, presidents (see here), politicians, and business leaders when settling sexual assault and sexual harassment claims. Defendants want an NDA to prevent unproven (but likely scandalous) allegations from seeing the light of day. Victims will often agree to an NDA as it helps increase settlement value. It would seem like a win-win for all involved.

After years of misuse, though, NDAs, and their wicked first cousin, the nondisparagement clause, have come under fire for silencing sexual assault victims. As a result of the #MeToo movement, the legal landscape has fundamentally altered how NDAs are enforced, if at all. “Instead of protecting trade secrets as it was initially intended, abusive use of NDAs silence employees and covers up serious and systemic misconduct,” according to New York Sen. Kirsten Gillibrand. Gillibrand introduced legislation in July 2022 to ban the use of NDAs.

Get Up, Stand Up. Stand Up for Your Rights: The Speak Out Act

While a number of states passed laws limiting how NDAs and nondisparagement clauses could be used, late last year Congress passed (and President Joe Biden signed) the Speak Out Act which precludes enforcement of pre-dispute NDAs and nondisparagement clauses when sexual harassment or sexual assault is asserted. Similarly, Congress passed a related #MeToo law, the Sexual Assault and Sexual Harassment Act of 2021, which prohibits the use of mandatory arbitration agreements for sexual harassment and/or assault claims. As we have previously written (see our articles here and here), defendants (particularly high profile defendants) routinely move to compel confidential mandatory arbitration in an effort to keep unproven claims from ever becoming public. It is a strategy that makes sense from a defense perspective, but after #MeToo—it now appropriately receives closer scrutiny.

In sum, the Speak Out Act prohibits judges from enforcing NDAs and nondisparagement language entered into prior to a dispute being filed in court, as Congress determined those types of agreements hinder efforts to combat workplace sexual misconduct and assault by empowering victims to come forward and by holding perpetrators accountable. The new law applies to agreements between employers and current, former, and prospective employees, and independent contractors, and between providers of goods and services and consumers.

Going forward, employers need to know that NDAs are unenforceable if they were: entered into before a lawsuit was filed; and prevents disclosure of or discussion about illegal conduct or the existence of a settlement agreement involving illegal conduct. Likewise, nondisparagement clauses are unenforceable if they were: entered into prior to a dispute; and prohibit negative statements about an individual that relate to the claim of sexual harassment or assault. Excluded from this change in the law are pre-dispute NDAs which involve legitimate trade secrets, confidential or business proprietary information.

The Speak Out Act is clear that pre-dispute clauses are unenforceable. However (and this is a big exception), post-dispute employment agreements (such as settlement agreements) may still contain NDAs and nondisparagement terms—even when sexual harassment or assault was alleged in the complaint. Nevertheless, you should still check your state and local laws as the Speak Out Act permits states to create more restrictive laws (California and New Jersey, for example, have already done so).

The Tiger Woods NDA

Tiger Woods’ ex-girlfriend, Erica Herman, has sued Woods seeking to invalidate an NDA alleging she was the victim of his sexual harassment. Herman claimed that Woods pursued her romantically while she was an employee at his restaurant and forced her to sign an NDA to keep the details of their relationship private, according to the complaint. While Herman’s original complaint did not include accusations of sexual harassment or assault against Woods, her filing cited the Speak Out Act and the Sexual Assault and Sexual Harassment Act of 2021. Herman alleged that Woods threatened to fire her if she did not sign an NDA, arguing that it is a type of harassment to treat one employee different from others merely because they have a sexual relationship.

In the lawsuit Herman asked the court to either void the NDA or at least give her guidance about what she can say publicly. She also argued that the agreement covers only her work relationship with Woods, not their personal matters. After a hearing, a Florida judge ruled that Herman must abide by the NDA and resolve her issues through private arbitration. In the judge’s order, the court declared that “Herman has had the opportunity to provide factual specificity for any claim relating to sexual assault or sexual harassment, however, she has not done so. Additionally, at no time has Herman’s counsel requested an opportunity to file” any allegations against Woods.

Time to Review Those NDAs

Given the current legal climate, the reticence by many courts to enforce arbitration agreements, NDAs, and nondisparagement clauses, now would be a good time for employers and businesses to: review your pre-hire and related employee/employer agreements to make clear that any now unlawful restrictive language is removed; to the extent NDA’s cover trade secrets, confidential or business proprietary information, make sure they remain enforceable and can be carved out of any provisions now unenforceable; and think about reviewing your company workplace harassment/sexual misconduct training to reduce the chances you need to speak with a lawyer like us.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.*

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