

Biden Signs Speak Out Act, Barring Predispute NDAs, Nondisparagement Clauses for Sexual Assault, Harassment Claims

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“I just signed the Speak Out Act, a bill that’ll enable survivors to speak out about workplace assault and harassment and increase access to justice,” President Joe Biden wrote on Twitter on December 7, 2022.

The bipartisan [Speak Out Act](#) passed the Senate by unanimous consent on September 29 and the House on November 16 with a roll call vote of 315-109.

The Act applies to claims filed on or after December 7, 2022.

What Does the Speak Out Act Say?

The Act limits the enforcement of predispute nondisclosure and nondisparagement clauses relating to sexual assault and sexual harassment claims.

Under the Act, a nondisclosure clause is “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.”

Nondisparagement clause means “a provision in a contract or agreement that requires 1 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 provides: “with respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which the conduct is alleged to have violated Federal, Tribal, or State law.”

As set forth in similar state legislation, the Act specifically states that state or local laws that are “at least as protective of the right of an individual to speak freely, as provided by this Act” remain enforceable, as do provisions that protect trade secrets or proprietary information, which often form the basis for such clauses.

What Are the Implications for Employers?

- The Act applies only to agreements entered before a sexual assault or sexual harassment dispute arises. As such, the Act does not apply to agreements resolving claims already raised.
- The Act covers agreements signed before December 7, 2022, but it applies only to claims filed after that date.
- Employers should carefully review nondisparagement and nondisclosure provisions in employment, arbitration, and confidentiality agreements to tailor provisions appropriately. Carefully consider agreements that cover “all claims”



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and whether specific carve-outs for sexual assault or sexual harassment disputes are warranted. Address specifically existing claims for sexual assault and sexual harassment. General nondisclosure and nondisparagement provisions in separation and settlement agreements may not be enforceable with respect to sexual assault and sexual harassment claims filed after December 7, 2022.

- Keep in mind that several states (including, for example, California, Illinois, and Washington) previously enacted similar laws that are broader than the Act, and those laws remain in effect. Therefore, while the Act may not apply to certain settlement or separation agreements, the Act does not prevent application of more restrictive state laws. (For more on such laws, see our articles, [Claims of Workplace Harassment in California to Receive Greater Protections under New Law](#), [California Further Limits NDAs and Settlement Agreement Terms in Employment Cases](#), [Illinois Bill to Further Limit Use of Restrictive Covenants With Employees Headed to Governor's Desk](#), [Washington's Limits on Use of Nondisclosure, Nondisparagement Clauses in Employment Agreements](#).)

Stay Tuned

The Act comes just months after [President Biden signed, on March 3, 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act](#). That bipartisan law amended the Federal Arbitration Act and curbs the use of predispute arbitration agreements for sexual assault and sexual harassment claims.

The Act is consistent with President Biden's Statement of Administration Policy from November 14, which underscores the Administration's view that "[t]ransparency is the best way to hold employers and perpetrators accountable. Prohibiting the use of predispute NDAs and nondisparagement clauses will increase access to justice." The statement concludes, "[t]he Administration looks forward to continuing to work with Congress to advance broader legislation that address the range of issues ... including those related to discrimination on the basis of race, unfair labor practices, and other violations."

Jackson Lewis attorneys will continue to monitor developments. Employers with questions about the Act or its implications should reach out to Jackson Lewis attorneys.

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