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California Places Further Limitations on an Employer's Use of Non-Disclosure and Non-Disparagement Provisions

Labor & Employment Workforce Watch

WRITTEN BY

Jonevin Sabado

On October 7, 2021, California Governor Gavin Newsom signed into law Senate Bill 331 (SB 331), which, in relevant part, further restricts the use of non-disclosure and non-disparagement provisions in the employment context. Additionally, the law creates new drafting obligations for employers with California operations when entering into settlement and separation agreements with employees. The new law went into effect on January 1st of this year.

History of California's Restrictions on Non-disclosure and Non-disparagement Provisions

In 2018, California passed SB 820 in the wake of the #metoo movement. The law prohibits the use of confidentiality provisions in settlement agreements to the extent they prevent the disclosure of factual information relating to claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, in each case, filed in a civil or administrative action. Any such provision is deemed void as a matter of law.

SB 331 Expands the Limitations Imposed by SB 820

SB 331 expands California's limitation on non-disclosure and non-disparagement provisions from its predecessor law in four key ways:

- SB 331 expands the list of claims subject to the non-disclosure prohibition to all workplace harassment claims based on the Fair Employment and Housing Act ("FEHA"). Whereas, SB 820 applied only to claims of *sexual assault, sexual harassment, or harassment or discrimination based on sex*, SB 331 applies to the settlement of claims of assault, harassment, or discrimination based on *any* protected characteristic—such as age, race, disability, *and* sex.
- SB 331 also expands the scope of agreements subject to the non-disclosure prohibition to include separation agreements.
- SB 331 imposes new drafting obligations on an employer to the extent an employer requires an employee to enter into an agreement that contains a non-disparagement or other provision with the purpose or effect being to restrict the employee's ability to disclose information relating to the conditions in the workplace, in which case, the provision at issue must also include the following language: "*Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful*."
- Finally, as a result of SB 331, employers entering into a separation agreement with an employee or former

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employee must: (1) notify the employee or former employee that he or she has the right to consult with an attorney regarding the agreement; and (2) provide the employee with at least five business days to do so (however, an employee may choose to knowingly and voluntarily sign the agreement prior to the passage of the five-day period).

One important note is that while the law prohibits confidentiality provisions that prevent disclosure of the factual information underlying the unlawful act(s) that constitute the basis of the employee's claim, the law expressly provides that it does not prohibit provisions in any agreement that "precludes the disclosure of the amount paid in a severance agreement." Therefore, an employer may still prevent disclosure of at least the financial terms of a settlement or severance agreement.

Given the expanded limitations placed on non-disclosure and non-disparagement provisions ushered in by SB 331, employers with operations in California should review their form separation agreements and settlement agreements and make any revisions necessary to ensure compliance with SB 331's new mandates.

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