

# Employees ‘Speak Out!’: How the Speak Out Act Will Affect Employee Non-Disclosure Agreements

Labor & Employment Workforce Watch

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In early 2022, President Joe Biden signed the [Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act](#). Inspired by the #MeToo movement, the law banned compulsory, pre-dispute arbitration clauses in cases involving allegations of workplace sexual harassment or sexual assault. The federal government’s goal was to provide victims of workplace sexual misconduct with increased options to bring their claims in court.

Now, President Biden has signed into law yet another #MeToo-inspired bill that could affect employers’ ability to enforce nondisclosure and non-disparagement clauses in their employment agreements. Effective December 7, 2022, the [Speak Out Act](#) prohibits the enforcement of pre-dispute nondisclosure and non-disparagement clauses in cases involving sexual harassment or sexual assault.

## Speak Out Act Overview

The Speak Out Act passed both chambers of Congress with bipartisan support, and it reflects the federal government’s latest attempt to curb sexual misconduct in the workplace. In the “findings” section of the Act, Congress noted that approximately 81% of women and 43% of men have experienced some form of sexual harassment or assault in their lifetimes. The Act recognizes that, although more than one in three women have faced sexual harassment in the workplace, approximately 90% of alleged victims never file a complaint. Congress attributed “pervasive” sexual harassment and assault in the United States, in part, to the prevalence of nondisclosure and non-disparagement clauses in employment agreements.

Nondisclosure clauses, as defined by the Speak Out Act, prohibit an employee from disclosing or discussing certain conduct, the existence of a settlement involving certain conduct, or information covered by the terms and conditions of a contract. Non-disparagement clauses prohibit an employee from making a negative statement about the employer relating to a contract and/or certain conduct. In the Speak Out Act, Congress explained that nondisclosure and non-disparagement clauses can “perpetuate illegal conduct by silencing those who are survivors of illegal sexual harassment and assault and retaliation,” and those with knowledge of such misconduct.

The Speak Out Act prohibits nondisclosure and non-disparagement clauses agreed to **before a dispute** involving sexual misconduct arises. The term “dispute” is not clearly defined but appears to mean when the alleged sexual misconduct or unlawful sexual activity occurs, including conduct involving sexual assault or sexual harassment.

Importantly, the Act’s sweeping prohibition also applies to those nondisclosure and non-disparagement clauses contained in agreements entered into before the law’s effective date. However, the Speak Out Act does **not** apply

to disputes involving sexual misconduct that arose before December 7, 2022.

Notably, the Speak Out Act also does **not** apply to, or otherwise prohibit, nondisclosure and non-disparagement agreements concerning sexual misconduct entered into by an employee **after** a dispute arises.

## **Key Employer Takeaways**

In light of the new Speak Out Act and the previously enacted Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, employers should review their existing policies and agreements that include compulsory arbitration, nondisclosure, and non-disparagement clauses to determine whether any amendments may be necessary to exclude claims involving sexual harassment and assault.

In addition, multistate employers should be mindful of varying state and local laws that may provide increased protections for victims of sexual misconduct. For example, [California's Silenced No More Act](#) bans settlement agreement clauses that prohibit an employee from disclosing the factual information surrounding sexual misconduct in the workplace. As another example, [New Mexico's House Bill 21](#) ("HB 21") (effective March 4, 2020) goes a step further. HB 21 broadly (i) prohibits nondisclosure clauses in cases involving sexual harassment or assault, (ii) prohibits employers from using nondisclosure clauses when settling claims of discrimination or retaliation, and (iii) applies to incidents of sexual misconduct, discrimination, or retaliation in the workplace *and* at any "work-related event[s] coordinated by or through the employer."

The federal government's efforts to address the #MeToo movement have resulted in wide-sweeping legislation to protect victims of sexual harassment and assault, especially in the workplace. Although the Speak Out Act made headlines at the beginning of 2023, its practical implications for employers may be somewhat limited. Employers may still include nondisclosure and non-disparagement provisions in separation or settlement agreements executed after alleged incidents of sexual harassment or assault occur, subject to state or local law. In addition, the Speak Out Act contains an express carve-out for employers' efforts to protect their trade secrets and proprietary information via nondisclosure and non-disparagement clauses.

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