Hedge Up: A Heads-Up on Employment Issues Confronting the Investment Management Industry

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'Speak Out Act' Is the Latest #MeToo Law to Impact Firms

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Key Points

- The new law prohibits judicial enforcement of confidentiality and non-disparagement provisions with respect to sexual harassment and sexual assault disputes.
- The law covers provisions entered into before a dispute arises, not provisions in agreements settling such disputes.
- The law increases pressure on firms to root out harassment in the workplace.

Discussion

Last week, President Biden signed into law the Speak Out Act (SOA or the "Act"), prohibiting judicial enforcement of contractual non-disparagement and confidentiality provisions with respect to claims of sexual harassment or sexual assault. The SOA applies to any contractual provision entered into before a sexual harassment or sexual assault dispute arises, including clauses typically found in firms' offer letters, employment agreements and confidentiality agreements. The Act has immediate effect, including with respect to agreements entered into prior to the law's effective date. The SOA does not apply to settlement agreements or other agreements entered into after a dispute has arisen.

The SOA is the latest legislative outgrowth of the #MeToo movement. The Act's premise is that non-disclosure and confidentiality clauses "can perpetuate illegal conduct by silencing" victims or witnesses of sexual harassment and sexual assault "while shielding perpetrators and enabling them to continue" their unlawful ways.[1]This same tenet underlies several other #MeToo-inspired statutes, including a federal law prohibiting enforcement of certain mandatory arbitration provisions with respect to sexual harassment or sexual assault cases (see here),[2] and a New York law constraining the use of confidentiality provisions in the settlement of discrimination and harassment claims (see here and here). Other #MeToo-related statutes to have hit the books in recent years include those requiring the promulgation of anti-

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discrimination/anti-harassment policies and the provision of regular anti-discrimination/anti-harassment training (*see* here, here and here).

Among those who will benefit the most from the passage of the SOA are members of the plaintiffs' employment bar, who stand to gain significant new leverage in settling sexual harassment claims. Particularly in cities like New York, where plaintiffs' attorneys are extremely aggressive, investment managers can expect more of what feels like extortion, with plaintiffs' counsel threatening to "go public" with harassment allegations absent capitulation to exorbitant settlement demands. Even where the allegations are weak or demonstrably lacking in merit, plaintiffs' counsel know that the mere publication of the allegations have the potential to harm an investment manager's reputation, destabilize its relationships with its investors and complicate its fundraising efforts. The manager's confidence in its legal position, and that it ultimately will prevail in court, are of little solace, as such vindication will be months or years away, long after the damage to the business has been done.

What Now?

Now, more than ever before, firms need to be vigilant in rooting out discrimination and harassment in the workplace. Even beyond the moral imperative of doing so, the downside of sexual harassment claims, in particular, has become ever steeper. Firms should review their anti-discrimination and anti-harassment policies to ensure they are as protective of the business as possible. Firms also should review the manner in which they train their employees—and, in particular, their management teams—regarding these important issues. While all firms in New York and various other states must conduct regular anti-harassment training, there are significant variations in quality and approach, and the stakes of suboptimal instruction just got higher. Firms that haven't updated their form offer letters and employment, confidentiality and separation agreements in recent years also should consider doing so in light of recent changes in the law and the ever-shifting landscape.

1 See Speak Out Act (S.4524), §2(6).

2 New York state law also purports to prohibit the mandatory arbitration of certain harassment and discrimination claims, but this statute is preempted by federal law. See here and here; see also *Rollag v. Cowen Inc.,* No. 20-CV-5138 (RA), 2021 U.S. Dist. LEXIS 39942, at *1 (S.D.N.Y. Mar. 3, 2021); *Latif v. Morgan Stanley & Co. LLC,* No. 18-CV-11528 (DLC), 2019 WL 2610985, at *3 (S.D.N.Y. June 26, 2019); *Curtis v. Marino*, 201 A.D.3d 584, 585 (1st Dept.).

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