

California Expands Prohibition on Certain Nondisclosure and Non-Disparagement Clauses in Settlement, Separation, and Certain Other Agreements

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Key Points

- On January 1, 2022, SB 331—also known as the Silenced No More Act—went into effect in California. It prohibits clauses, in settlement agreements for civil or administrative claims, which prevent or restrict the disclosure of information regarding discrimination, harassment or retaliation under the Fair Employment and Housing Act.
- Previously, California prohibited such provisions in settlement agreements only to the extent they prevented disclosure of information regarding sexual assault, sexual harassment or sex discrimination. SB 331 expands that prohibition.
- SB 331 also prohibits separation agreements from including nondisparagement clauses that have the purpose or effect of denying the right to disclose information about unlawful acts in the workplace, and provides certain requirements for separation agreements that purport to limit an employee's ability to disclose any workplace conditions (whether lawful or not). Some of these restrictions also apply to certain other types of agreements.

Effective January 1, 2022, SB 331 (also known as the "Silenced No More Act") imposes new restrictions on certain types of settlement agreements, and agreements in exchange for a raise, bonus or continued employment. Most significantly, the law amends Code of Civil Procedure Section 1001 to prohibit nondisclosure and non-disparagement clauses in settlement agreements regarding civil or administrative claims alleging unlawful harassment, discrimination or retaliation under the Fair Employment and Housing Act (FEHA), to the extent such clauses prevent or restrict the disclosure of factual information relating to a civil or administrative claim. Previously, California law banned such clauses only to the extent they prevented or restricted disclosure of information related to sexual assault, sexual harassment and sex discrimination. SB 331 expands that prohibition to cover information about other types of unlawful harassment, discrimination and retaliation.

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SB 331 also places new restrictions on separation agreements and certain other agreements by amending Government Code Section 12964.5. Prior law prohibited an employer from requiring an employee to sign an agreement, as a condition of a bonus, a raise or continued employment, which denied the employee the right to disclose information about unlawful acts in the workplace. SB 331 now extends this prohibition to separation agreements, and broadens its scope to include agreements that have the “purpose or effect” of preventing employees from disclosing information about unlawful acts. It also provides that if either type of agreement purports to limit an employee’s ability to disclose workplace conditions, it must state, in substantial form, 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.” Moreover, any employer offering an employee or former employee a separation agreement that purports to restrict an employee’s ability to disclose workplace conditions must notify the employee that the employee has a right to consult an attorney and must provide at least five business days to do so.

Government Code Section 12964.5 does not apply to a “negotiated settlement” to resolve a FEHA claim that has been filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum or through an employer’s internal complaint process. Under the statute, a settlement qualifies for this exception if “the agreement is voluntary, deliberate, and informed, the agreement provides consideration of value to the employee, and . . . the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.”

Because Code of Civil Procedure Section 1001 has no such provision, as a practical matter, the scope of the negotiated settlement exception is limited to two circumstances. First, it exempts negotiated settlements in cases filed in an alternative dispute resolution forum or through an employer’s internal complaint process, but not in court or an administrative agency. Second, it allows parties to a civil or administrative claim to agree to nondisclosure provisions that would restrict the employee’s ability to disclose information about *other* unlawful acts (other than FEHA violations) that were *not* alleged in the complaint.

SB 331 also expressly preserves the right of parties to protect certain other information from disclosure. It permits settling parties to agree not to disclose the amount paid in settlement of a claim or in a severance agreement. It also clarifies that employers may protect trade secrets, proprietary information or confidential information that do not involve unlawful acts in the workplace. Finally, at a claimant’s request, a settlement agreement may include a provision that shields the claimant’s identity and all facts that could lead to discovering the claimant’s identity (unless a government agency or public official is a party to the settlement agreement).

In light of these new restrictions on nondisclosure and non-disparagement clauses, employers and practitioners should update form settlement agreements and separation agreements to ensure compliance with the new law.

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