

RESTRICTIONS ON CONFIDENTIAL SETTLEMENTS WHAT IS HAPPENING IN NEW JERSEY AND CALIFORNIA

New Jersey - In 2019, New Jersey passed a law that made unenforceable an agreement that conceals the details relating to discrimination claims. Relevant provision:

A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a "non-disclosure provision") shall be deemed against public policy and unenforceable against a current or former employee (hereinafter referred to as an "employee") who is a party to the contract or settlement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the non-disclosure provision shall also be unenforceable against the employer. N.J. Stat. § 10:5-12.8(a).

New Jersey's law does not prohibit:

confidentiality regarding the amount of the settlement payment

non-disparagement agreements so long as discussion of the claim is not restricted

voluntary agreement by the employee to keep the claim confidential - the agreement cannot be enforced *against* the employee, but if the employee breaches confidentiality, the employer is also relieved of the obligation to maintain confidentiality

California - In 2013, California restricted the use of non-disclosure agreements in cases involving sexual harassment, if a complaint has been filed with an agency or court. In 2021, California expanded this restriction to cover all forms of discrimination. Relevant provision:

“... a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action ... is prohibited.” CA Code of Civil Procedure §1001(a).

California's law does not prohibit:

the amount of payment or non-disparagement (apart from facts of claim)

Unlike New Jersey, California allows confidential agreements before an action is filed with an agency or in court.

California allows, for private employers, “a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant’s identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant.” CA Code of Civil Procedure §1001(c).

Senate Bill No. 331
CHAPTER 638

An act to amend Section 1001 of the Code of Civil Procedure, and to amend Section 12964.5 of the Government Code, relating to civil actions.

[Approved by Governor October 07, 2021. Filed with Secretary of State October 07, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 331, Leyva. Settlement and nondisparagement agreements.

Existing law prohibits a settlement agreement from preventing the disclosure of factual information regarding specified acts related to a claim filed in a civil action or a complaint filed in an administrative action. These acts include sexual assault, as defined; sexual harassment, as defined; an act of workplace harassment or discrimination based on sex, failure to prevent such an act, or retaliation against a person for reporting such an act; and an act of harassment or discrimination based on sex by the owner of a housing accommodation, as defined, or retaliation against a person for reporting such an act.

This bill would clarify that this prohibition includes provisions which restrict the disclosure of the information described above. For purposes of agreements entered into on or after January 1, 2022, the bill would also expand the prohibition to include acts of workplace harassment or discrimination not based on sex and acts of harassment or discrimination not based on sex by the owner of a housing accommodation.

The California Fair Employment and Housing Act (FEHA) prohibits various actions as unlawful employment practices unless the employer acts based upon a bona fide occupational qualification or applicable security regulations established by the United States or the State of California. In this regard, FEHA makes it an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to require an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment or discrimination.

This bill would provide that unlawful acts in the workplace for these purposes include any harassment or discrimination and would instead prohibit an employer from requiring an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about those acts. The bill would make it an unlawful employment practice for an employer or former employer to include in any agreement related to an employee's separation from employment any provision that prohibits the disclosure of information about unlawful acts in the workplace. The bill would provide that any provision in violation of that prohibition would be against public policy and unenforceable. The bill would require a nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace to include specified language relating to the employee's right to disclose information about unlawful acts in the workplace.

Digest Key

Vote: MAJORITY Appropriation: NO Fiscal Committee: NO Local Program: NO

Bill Text

The people of the State of California do enact as follows:

SECTION 1. Section 1001 of the Code of Civil Procedure is amended to read:

1001. (a) Notwithstanding any other law, a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited:

(1) An act of sexual assault that is not governed by subdivision (a) of Section 1002.

(2) An act of sexual harassment, as defined in Section 51.9 of the Civil Code.

(3) An act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination, as described in subdivisions (a), (h), (i), (j), and (k) of Section 12940 of the Government Code.

(4) An act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination by the owner of a housing accommodation, as described in Section 12955 of the Government Code.

(b) Notwithstanding any other law, in a civil matter described in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts with subdivision (a).

(c) Notwithstanding subdivisions (a) and (b), a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant. This subdivision does not apply if a government agency or public official is a party to the settlement agreement.

(d) Except as authorized by subdivision (c), a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to the claim described in subdivision (a) that is entered into on or after January 1, 2019, is void as a matter of law and against public policy.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.

(f) In determining the factual foundation of a cause of action for civil damages under subdivision (a), a court may consider the pleadings and other papers in the record, or any other findings of the court.

(g) The amendments made to subparagraphs (3) and (4) of subdivision (a) by Senate Bill 331 of the 2021–22 Regular Session apply only to agreements entered into on or after January 1, 2022. All other amendments made to this section by Senate Bill 331 of the 2021-22 Regular Session shall not be construed as substantive changes, but instead as merely clarifying existing law.

SEC. 2. Section 12964.5 of the Government Code is amended to read:

12964.5. (a) (1) It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either of the following:

(A) (i) For an employer to require an employee to sign a release of a claim or right under this

part.

(ii) As used in this subparagraph, “release of a claim or right” includes requiring an individual to execute a statement that the individual does not possess any claim or injury against the employer or other covered entity, and includes the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.

(B) (i) For an employer to require an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace.

(ii) A nondisparagement or other contractual provision that restricts an employee’s ability to disclose information related to conditions in the workplace shall include, 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.”

(2) Any agreement or document in violation of this subdivision is contrary to public policy and shall be unenforceable.

(b) (1) (A) It is an unlawful employment practice for an employer or former employer to include in any agreement related to an employee’s separation from employment any provision that prohibits the disclosure of information about unlawful acts in the workplace.

(B) A nondisparagement or other contractual provision that restricts an employee’s ability to disclose information related to conditions in the workplace shall include, 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.”

(2) Any provision in violation of paragraph (1) is against public policy and shall be unenforceable.

(3) This subdivision does not prohibit the inclusion of a general release or waiver of all claims in an agreement related to an employee’s separation from employment, provided that the release or waiver is otherwise lawful and valid.

(4) An employer offering an employee or former employee an agreement related to that employee’s separation from employment as provided in this subdivision shall notify the employee that the employee has a right to consult an attorney regarding the agreement and shall provide the employee with a reasonable time period of not less than five business days in which to do so. An employee may sign such an agreement prior to the end of the reasonable time period as long as the employee’s decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, or a threat to withdraw or alter the offer prior to the expiration of the reasonable time period, or by providing different terms to employees who sign such an agreement prior to the expiration of such time period.

(c) As used in this section, “information about unlawful acts in the workplace” includes, but is not limited to, information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful.

(d) (1) This section does not apply to a negotiated settlement agreement to resolve an underlying claim under this part 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.

(2) As used in this section, “negotiated” means that the agreement is voluntary, deliberate, and informed, the agreement provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in a severance agreement.

(f) This section does not prohibit an employer from protecting the employer’s trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.

N.J. Stat. § 10:5-12.8

Section 10:5-12.8 - Certain provisions in employment contract, settlement agreement deemed against public policy and unenforceable

a. A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a "non-disclosure provision") shall be deemed against public policy and unenforceable against a current or former employee (hereinafter referred to as an "employee") who is a party to the contract or settlement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the non-disclosure provision shall also be unenforceable against the employer.

b. Every settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer shall include a bold, prominently placed notice that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.

c. Notwithstanding any other provision of law to the contrary, this section shall not be construed to prohibit an employer from requiring an employee to sign an agreement:

(1) in which the employee agrees not to enter into competition with the employer during or after employment; or

(2) in which the employee agrees not to disclose proprietary information, which includes only non-public trade secrets, business plan and customer information.

N.J.S. § 10:5-12.8

Added by L. 2019, c. 39, s. 2, eff. 3/18/2019.



GREEN SAVITS LLC
EMPLOYEE RIGHTS ADVOCATES

SETTLEMENT LANGUAGE UTILIZED POST 2019

Settlement language partially required by *N.J.S.A.* §10:5-12.8(b), i.e., the italicized language below:

Although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employee: *if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, such a provision in an agreement is then also unenforceable against the employer.*

If the employer does not agree to mutual non-disparagement and for some reason does not agree to the italicized language noted above, then this is the typical language that is utilized:

Non-Disparagement. *Subject to N.J.S.A. §10:5-12.8(a), Employee and Employer agree not to make, authorize, or direct others to make defamatory or maliciously disparaging remarks, written or verbal, intended to adversely affect or having a foreseeable result of adversely affecting the businesses or the good name or reputation of Employer, or of Employee, unless compelled to do so by law. In response to any inquiries by third parties for references or work history, Employer will provide only Employee's dates of employment with Employer, job title and scope of responsibilities.*