

Washington Prohibits Most Nondisclosure and Nondisparagement Provisions

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Under Washington law, employers are already prohibited from requiring employees sign nondisclosure agreements that restrict their ability to disclose workplace sexual harassment and assault. Washington recently enacted its “Silenced No More” law that extends this restriction even further. Effective June 9, 2022, employers are prohibited from including in their agreements nondisclosure and nondisparagement provisions regarding illegal discrimination, harassment, retaliation, wage and hour violations, and sexual assault. Employers should review their agreements to identify any nondisclosure and nondisparagement provisions that do not comply with the new law. Contact your Vorys lawyer if you have questions about the new Washington law or similar state laws pertaining to employment and other agreements.

What agreements are covered?

The law applies to nondisclosure and nondisparagement provisions contained in employment agreements, independent contractor agreements, agreements to pay compensation in exchange for the release of a legal claim, and any other agreement between an employer and an employee.

Notably, the law is retroactive. As such, the law invalidates nondisclosure and nondisparagement provisions in agreements created before June 9, 2022, that were agreed to at the outset of employment or during the course of employment. However, employers will only be found to be in violation if they seek to actually force such provisions (in other words, previously executed agreements do not need to be rewritten). Further, the retroactive invalidation does not apply to nondisclosure or nondisparagement provisions in employment-related settlement or severance agreements entered into before June 9, 2022. Those provisions remain valid and enforceable.

What employee conduct is protected?

The law prohibits nondisclosure and nondisparagement provisions in agreements concerning conduct that occurred at the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the employment premises. An employer may not request or require that an employee enter into any such agreement. However, provisions that prohibit disclosing the amount paid in settlement of any claim are permitted.

An employer is further prohibited from discharging, discriminating against, or retaliating against an employee for disclosing or discussing conduct that the employee “reasonably believed” to be illegal harassment, discrimination, or retaliation, wage and hour violations, or sexual assault. This includes conduct recognized as illegal under state, federal, or common law or recognized as against a clear mandate of public policy. It further encompasses conduct occurring in the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the employment premises.

However, employers may still include provisions protecting trade secrets, proprietary information, or confidential information that does not involve illegal acts.

Can employers contract around the restrictions in Washington law?

No. The new Washington law expressly forbids forum shopping and choice of law provisions. “A nondisclosure or nondisparagement provision in any agreement signed by an employee who is a Washington resident is governed by Washington law.”

What are the penalties for violating the new law?

A provision that prohibits an employee from disclosing or discussing conduct, or the existence of a settlement involving conduct, reasonably believed to be illegal discrimination, harassment, or retaliation, a wage and hour violation, or sexual assault, or that is recognized as against a clear mandate of public policy, is void and unenforceable.

An employer who violates the law’s provisions is liable for actual or statutory damages of \$10,000, whichever is more, as well as reasonable attorneys’ fees and costs.