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Alert

Employment & Labor Practice Group

Will N.Y. Law Banning Non-Disclosure Agreements Eliminate Their Use?

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Governor Cuomo has announced his support for new legislation that would reform New York's sexual harassment laws. Significantly, the reforms would:

1. Prohibit mandatory arbitration for sexual harassment complaints (except in the case of collective bargaining agreements);
2. Require every employer to adopt sexual harassment policies that meet minimum standards;
3. Require every employer to utilize a sexual harassment prevention training program;
4. Allow non-employees, such as contractors, subcontractors, vendors and consultants (traditionally independent contractors) to sue employers for sexual harassment;
5. Require every bidder on state and local contracts to certify that they provide annual sexual harassment prevention training to all of their employees; and
6. Require state employees to reimburse the state for awards in sex harassment cases if a final judgment is rendered finding the employee guilty of sex harassment.

One reform gaining the attention of many employers and commentators concerns the outlaw of the use of non-disclosure clauses in settlement agreements involving employees who complained of sexual harassment.

The new law, which will be codified by amendments to the General Obligations Law and New York Civil Practice Law and Rules, states the following:

> "Notwithstanding any other law to the contrary, no employer…shall have the authority to include…in any settlement, agreement, or other resolution of any claim…which includes sexual harassment, any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action…."

On its face, the law prohibits the use of non-disclosure agreements. The new law, however, provides one exception which virtually makes the new rule meaningless.
The exception permits a non-disclosure agreement if "the condition of confidentiality is the complainant's preference." It also sets forth a mechanism by which the employee will have twenty-one days to consider the non-disclosure clause and, after signing, seven days to revoke the agreement.

For several reasons, this exception for the "complainant's preference" will likely swallow the rule, resulting in the use of non-disclosure clauses in virtually all settlement agreements between companies and their employees.

First, providing the complaining employee with a twenty-one day review period and the seven day revocation period will not likely have any impact on the use of non-disclosure clauses in settlement agreements. Most settlement agreements already incorporate a twenty-one day review and seven day revocation period. That is because this language is required under the federal Older Workers' Benefit Protection Act to obtain a valid release of age discrimination claims.

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Second, the "complainant's preference" to have a non-disclosure clause in the settlement agreement is illusory because most employers will not offer to settle a matter without such clause. Employers resolve disputes with employees by settlement for three very basic reasons: (i) they want a release of claims to avoid the time, expense and risk of litigation; (ii) they want the employee not to disparage their company or employees once the matter is resolved; and (iii) they want CONFIDENTIALITY. Employers do not want a complaining employee who threatened to sue their company to brag about their settlement or discuss their "dirty laundry" with other employees, their clients/customers or the public. Employers may also fear that the public will view the very fact of settlement as an admission of liability, rather than a compromise, and will resist any settlement that imposes such a business risk

Third, most employees signing a settlement agreement want confidentiality themselves. Victims of sexual harassment are typically not eager to talk about what happened to them with their co-workers or family, and certainly not the general public. They are embarrassed by the events and fear how others may view their actions. They also do not want prospective employers to perceive them as litigious. Thus employees, as well as their employers, are looking for finality when they enter into a settlement agreement.

Fourth, this new law only covers matters in which "**sexual** harassment" was alleged. Consequently, non-disclosure agreements can still lawfully be a part of any settlement agreement in which "sex harassment" was not alleged by the employee.

Frankly, the effort to "outlaw" non-disclosure agreements is misguided. While some commentators are troubled by a company's ability to use non-disclosure agreements to silence victims of sexual harassment (a fair concern), these victims are still able to discuss the facts relating to their sexual harassment if compelled by legal process, such as a subpoena, and they are often permitted to discuss their matter with family members, lawyers, tax consultants and doctors. These rights are typically set forth in most settlement agreements. Finally, without non-disclosure agreements, many sex harassment cases would never settle, forcing victims who often don't have the financial means to pursue litigation to either abandon their claim or risk substantial sums of money to litigate their claims to conclusion.

It is possible that regulations from the N.Y.S. Department of Labor or case law interpreting the "complainant's preference" exception will alter the impact of this new law. Unless this occurs, although non-disclosure agreements will soon be made "illegal" in New York, the one exception to the rule will ensure that non-disclosure agreements will remain a part of virtually all settlement agreements.

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Bousquet Holstein Employment and Labor Practice

How may we be of service?

The Employment & Labor Practice Group at **Bousquet Holstein PLLC** provides representation to employers, large and small, and to employees. Our attorneys make it a priority to become familiar with our clients' businesses. We emphasize addressing employment, discrimination, and labor issues before they become problems and we advise our clients in all areas of human relations and human resource practices to satisfy our clients' business objectives. If we can provide you with additional insight and information regarding changes to the law and how they may impact your business, please contact **John L. Valentino** at **315.701.6308 or JValentino@bhlawpllc.com**