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PERSPECTIVE

New law may change the employment settlement equation

By Angela Reddock-Wright

Years ago, the calculus in employment discrimination cases was clear: Companies offered to settle employee grievances in exchange for a guarantee that everything about the settlement, from its terms to its very existence, would be kept confidential. It was a standard contract give-and-take, with both parties presumably receiving something of value.

The typical settlement agreement included a liquidated damages provision that made victims of alleged discrimination or harassment think twice before going public. They would be required to pay a set amount each time they divulged anything covered by the confidentiality clause, and this was sufficient disincentive to prevent disclosure of alleged bad acts.

The #MeToo movement changed the equation with respect to allegations of workplace sexual misconduct. Advocates for victims of alleged sex-based harassment, assault and discrimination protested against constraints that precluded them from going public with their stories.

Thus California's Senate Bill 820, which became effective in 2019. The STAND Act (Stand Together Against Non-Disclosure Act) expressly carved claims for sexual harassment and assault, as well as workplace harassment and discrimination based on sex, out of standard settlement agreements. In short, the STAND Act means that victims of alleged misconduct can no longer be required to abide by confidentiality and nondisclosure provisions as a condition of receiving compensation, nor can they be kept from disparaging the companies from which they receive monetary settlements.

Now SB 331, the "Silenced No More Act," has been added to the equation, and it could change the way parties consider settling certain employment claims. The law expands upon the STAND Act by extending the prohibition against nondisclosure and nondisparagement clauses to other categories of claimants. For reasons I'll explain, pre-litigation settlement — ideally with the help of a neutral mediator — is still a valuable avenue for resolving these types of cases.

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The new law, which went into effect January 1, affects not only settlement agreements but also employment agreements and separation agreements. It expands the nondisclosure provisions of the STAND Act, which only applied to sex-based claims of workplace harassment or discrimination. SB 331 prohibits confidentiality requirements in connection with claims based on race, religion, color, national origin, ancestry, disability, medical condition, familial status, gender, age, and all other protected characteristics.

Employers may no longer condition compensation for these types of claims on the victim's agreement to keep the existence and terms of the settlement confidential. They may still require employees to agree to nondisclosure language regarding trade secrets, proprietary information, and other confidential information not connected with alleged harassment or discrimination.

The new law adds a provision regarding nondisparagement, which was not part of the 2018 STAND Act. Employers may no longer include in any employment, settlement or separation agreement a provision that prohibits an employee from disclosing "disparaging" information about harassment, discrimination or other conduct in the workplace that he or she reasonably believes is unlawful unless the agreement includes this specific carve-out: "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."

What does this mean for employers and employees in the context of mediation and settlement negotiations? Companies may find themselves less open to settling claims of harassment or discrimination when there is less assurance that those claims will not become public. However, there are still good reasons to pursue settlement when seeking to resolve such cases.

As a neutral who has spent years overseeing the resolution of employment disputes, I have seen firsthand the value of bypassing litigation. Trials are both expensive and time-consuming. With COVID-generated court backlogs, employment cases could easily drag on for years, with no assurance of finality. Pre-litigation dispute resolution, with the help of a neutral third party, provides finality while freeing up corporate resources for other important work.

Even though employers can no longer legally make settlement dependent on a nondisclosure provision, parties are still able to mutually agree to keep the existence and terms of a settlement agreement confidential. Moreover, some victims of alleged discrimination, harassment or assault may prefer that their stories not become public. Nothing in the law prevents parties from agreeing to keep their settlements private.

The expansion of the STAND Act still creates ripe opportunities for employers and employees to consider mediated solutions to their disputes. In the words of Justice Sandra Day O'Connor, "The courts of this country should not be the place where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."

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