Non-Disclosure Agreements in the World of #MeToo

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The #MeToo movement and recent wave of sexual harassment claims against high-profile indivduals has greatly increased scrutiny of the use of nondisclosure agreements in settlement agreements involving sexual misconduct claims. Opponents argue that these provisions silence victims, harm victims' careers, and allow perpetrators to continue their misbehavior without facing public scrutiny. In response, the legal landscape surrounding the use of nondisclosure agreements in sexual misconduct claims is rapidly changing.

Although Nevada has not passed any legislation since the #MeToo movement began that addresses nondisclosure agreements, neigboring states have recently passed legislation prohibiting or limiting them in the context of sexual misconduct claims. Furthermore, a relatively new federal tax law substantially increases the cost to businesses of including nondisclosures in settlement agreements related to sexual harassment and sexual assault claims. Employment litigators should be aware of these legislative trends and should understand how the new federal tax law affects clients dealing with sexual harassment and sexual assault claims.

Legislation Passed in Neighboring States

Two of Nevada's neighboring states, California and Arizona, recently passed legislation prohibiting or limiting the use of nondisclosures in settlement agreements involving sexual misconduct claims. In 2018, California passed sweeping legislation that prohibits any settlement provision that prevents the disclosure of facts concerning sexual assault, sexual harassment and sex discrimination claims, including retaliation claims and the failure to prevent acts of sexual harassment.[1] The new California law applies to any settlement agreement entered into after January 1, 2019, and it voids such provisions as a matter of public policy.

A similar bill was introduced in Arizona in 2018 (Ariz. H.B. 2020). It provided broad prohibitions on any confidentiality agreement restricting the disclosure of factual information related to a sexual assualt or harassment claim. However, the bill that ultimately passed into law is much more limited than California's legislation. The new Arizona law provides that a nondisclosure cannot prohibit a party from responding to a peace office or prosecutor's inquiry

regarding a sexual offense or prohibit a party from making a statement in a criminal proceeding regarding a sexual offense, as long as the party did not initiate the statement.[2]

Nevada Law Addressing Nondisclosure Agreements

Nevada has not passed any legislation prohibiting the use of nondisclosures in settlement agreements involving sexual harassment or sexual misconduct. Notably however, the #MeToo movement did not gain widespread attention until the fall of 2017, after the Nevada Legislature had already adjourned the 2017 Legislative Session. The first post-#MeToo era legislative session in Nevada began on February 4, 2019. As of the date this article was written, there did not appear to be any bill draft requests addressing nondisclosure agreements in relation to sexual misconduct claims. It should be noted that existing Nevada law, NRS 41.0375(1)(a), broadly prohibits nondisclosures in settlement agreements involving claims against state employees.[3] This statute does not specifically address claims of sexual misconduct, but it is broad enough to prohibit nondisclosure agreements in this context. However, the current law only affords protections for claims against state employees, officers, contractors and state legislators.

Federal Tax Implications of Including Nondisclosures in Sexual Harassment Settlement Agreements

While Nevada law does not outright prohibit nondisclosures in settlement agreements involving sexual misconduct claims (other than those against state employees), a new federal tax law makes it more costly for businesses to include nondisclosure agreements in such settlements. The Federal Tax Cuts & Jobs Act of 2017 prohibits businesses from deducting, as business expenses, amounts paid for settlements or judgments related to sexual harassment or sexual abuse claims, "if such settlement or payment is subject to a nondisclosure agreement."[4] The rule also prohibits deductions of attorney's fees related to such claims if the settlement is subject a nondisclosure agreement.

Prior to the December 22, 2017, enactment of the Federal Tax Cuts & Jobs Act of 2017, businesses were permitted to deduct settlements and judgments paid for sexual harassment and assualt claims, including attorney's fees related to such claims. These were deducted as ordinary and necessary business expenses.[5] The new tax law is clearly meant to discourage businesses from including nondisclosuress in sexual harassment and assault settlement agreements. Businesses can still deduct these settlements and attorney's fees as long as the settlement or payment is not subject a nondisclosure agreement.

The statute is written broadly enough to encompass nondisclosure agreements of any kind related to a settlement or payment involving a sexual harassment or sexual assault claim. This would appear to include nondisclosure agreements that are limited to the amount of the settlement or payment, even if they do not prohibit disclosure of the facts of the sexual harassment or abuse. This provision of the new tax law appears to be more broad as to the types of nondisclosure agreements that it encompasses than even California's statute, which focuses only on nondisclosures prohibiting parties from diclosing the facts of the sexual misconduct, as opposed to the amount of the settlement.

There is little guidance from the IRS on this new tax law. The statute applies to settlements and payments that are "related to sexual harassment or sexual abuse."[6] The statute does not define sexual harassment or sexual abuse. Thus, if a settlement agreement includes claims other than sexual harassment or abuse, businesses may have some flexibility in determining the amount of the settlement, payment or attorney's fees that are "related to" the sexual harassment or sexual abuse claim as opposed to other claims. Furthermore, it is unclear whether the term "payment,"[7] as used in the statute, includes expert costs, investigative costs and court costs related to sexual harassment or sexual abuse claims.

Despite these unresolved issues of interpretation, one thing is clear: The price of including a nondisclosure agreement in a settlement agreement involving a sexual harassment or abuse claim has increased.

This is an area of the law that is rapidly changing. Employment litigators should monitor new bill draft requests and legislation from Nevada's 2019 Legislative Session that may address this issue, and they should look for guidance from the courts and IRS as businesses and attorneys are starting to navigate the new tax law concerning nondisclosure agreements related to sexual misconduct settlements and payments. NL

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1. *See*, California S.B. 820 (adding Code of Civil Procedure § 1001).
2. A.R.S. § 12-720
3. *See*, NRS 41.0375(1)(a)
4. 26 U.S.C. 162(q)
5. 26 U.S.C. §162(q)
6. *Id.*
7. *See*, 26 U.S.C. § 871(m)(5) defining "payment" to include "any gross amount which is used in computing any net amount which is transferred to or from the taxpayer."