

New Law Prohibits Employers from Preventing Employee Disclosure of Alleged Workplace Discrimination and Harassment

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Effective January 1, 2022, Senate Bill (SB) 331 makes it unlawful for employers to enter into agreements with employees in exchange for employees' silence on information concerning claims or complaints of workplace discrimination or harassment, subject to certain exemptions.

Background

SB 331 builds on SB 820 which was passed in 2018 and went into effect January 1, 2019, preventing employers from prohibiting employees from disclosing information about alleged sexual harassment or discrimination in the workplace.

On October 7, 2021, Governor Newsom signed SB 331 into law, which limits the scope of confidentiality provisions in employment agreements. Subject to certain exemptions, these agreements cannot prevent current or former employees from disclosing information about alleged harassment or discrimination in the workplace based on *any* protected characteristics, not just sexual harassment or discrimination.

Under SB 331, employers cannot require employees to sign agreements, in exchange for a raise or bonus, or as a condition of employment or continued employment, containing any provision prohibiting employees from disclosing information about alleged unlawful acts of harassment, discrimination, or any conduct in the workplace that the employee has reason to believe is unlawful. Moreover, these types of agreements cannot include a requirement that employees sign a release of a claim or right (i.e., that employees do not possess any claim or injury against their employers and release the rights to file and pursue civil actions or complaints, among other types of actions, on the basis of harassment or discrimination at the workplace).

If an employment agreement contains a nondisparagement provision, the agreement must contain the following, or similar, 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." (Gov. Code, § 12964.5, subd. (a)(1)(B)(2).)

Employment separation/settlement agreements cannot include language that prevents disclosure of information concerning alleged workplace harassment or

discrimination on the basis of race, religion, gender, age, familial status, and any other protected class as defined under California's Fair Employment and Housing Act (FEHA).

In addition, for separation agreements containing a nondisclosure provision, SB 331 requires employers to: (1) notify employees of their rights to consult an attorney regarding the agreement and provide employees at least five business days to do so; and (2) notify employees that they may sign the agreement prior to the end of five business days as long as the decision to accept the shortened time is voluntary, understood by the employee, and not induced by the employers through fraud, misrepresentation, or threat to withdraw or alter the offer prior to the expiration of the reasonable time period.

SB 331 makes clear that it is not intended to prevent the inclusion of a general release of claims from a settlement agreement. In addition, the prohibitions set forth in SB 331 do not apply to a negotiated settlement agreement to resolve an underlying claim under FEHA 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. (Gov. Code, § 12964.5, subd. (d)(1).)

Any provisions that violate SB 331 are against public policy and unenforceable. This bill does not apply retroactively, and will only affect agreements entered into on or after January 1, 2022.

Takeaways

Employers are encouraged to review and update agreements to ensure compliance with SB 331. If your organization intends to include nondisparagement or nondisclosure language in an employment settlement agreement, you should contact your attorney to determine whether it is subject to the limitations of SB 331.

If you have any questions about SB 331, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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