SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 331 (Leyva)
Version: February 8, 2021
Hearing Date: April 13, 2021
Fiscal: No
Urgency: No
TSG

SUBJECT

Settlement and nondisparagement agreements

DIGEST

This bill prohibits the use of non-disclosure agreements to settle employment and housing-related legal claims involving unlawful harassment, discrimination, or related retaliation of any kind, with limited exceptions when requested by the complainant. The bill also prohibits the inclusion, in an employment severance agreement, of terms that restrict the separated employee's ability to discuss unlawful conduct at their former workplace, unless the separated employee agrees to those terms under specified conditions designed to safeguard the separated employee's rights.

EXECUTIVE SUMMARY

This bill further restricts the use of two kinds of legal agreements. First, existing law prohibits the inclusion of non-disclosure agreements (NDAs) in settlements resolving housing or employment complaints that have been formally filed and that involve sexual harassment, discrimination based on sex, and related acts of retaliation, with an exception for provisions shielding the identity of the complainant, when requested by the complainant. This bill extends that same prohibition to any form of unlawful harassment, discrimination, and retaliation, regardless of the legally protected category – race, religion, sexual orientation, and disability, among others – that is involved. Second, existing law prohibits an employer from forcing an applicant or employee to sign an agreement not to disclose information about unlawful acts in the workplace in exchange for getting the job, keeping the job, or obtaining a raise or bonus, unless the agreement resolves a formally-submitted complaint and the worker enters into the agreement voluntarily, receives compensation for signing, and has been given the opportunity to consult an attorney. This bill extends that same rule to employment severance agreements as well.

The bill is sponsored by the California Employment Lawyers Association, Earthseed, and Equal Rights Advocates. Support comes from worker and civil rights organizations. Opposition comes from business and employer trade associations who assert that

NDAs in both settlement agreements and severance agreements help avoid legal disputes and can be in the best interest of all parties involved.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Prohibits any provision in a settlement agreement that prevents the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following:
   a) an act of sexual assault that is not governed by subdivision (a) of Section 1002;
   b) an act of sexual harassment within the context of business, service, or professional relationship;
   c) an act of workplace harassment or discrimination based on sex, or failure to prevent an act of workplace harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment or discrimination based on sex; and
   d) an act of harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment or discrimination based on sex, by the owner of a housing accommodation. (Code Civ. Proc. § 1001(a).)

2) Exempts from the prohibition in (1), above, a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, including pleadings filed in court, if included in the settlement agreement at the request of the claimant, unless a government agency or public official is a party to the settlement agreement. (Code Civ. Proc. § 1001(c).)

3) Renders void any settlement agreement provision entered into on or after January 1, 2019 that violates the prohibition in (1), above, unless exempted pursuant to (2), above. (Code Civ. Proc. § 1001(d).)

4) Makes it an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to require an employee to sign either of the following:
   a) a release of a claim of employment discrimination, harassment, or retaliation for reporting or opposing employment discrimination or harassment; or
   b) a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful or potentially unlawful acts in the workplace. (Gov. Code § 12964.5(a).)

5) Renders unenforceable any document signed in violation of (4), above. (Gov. Code § 12964.5(b).)

6) Exempts from (4) and (5), above, any settlement agreement to resolve an underlying claim that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process, provided that the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney. (Gov. Code § 12964.5(c).)

This bill:

1) Prohibits provisions in settlement agreements that prevent or restrict the disclosure of factual information relating to all claims involving discrimination, harassment, or retaliation for reporting or opposing harassment or discrimination pursuant to the Fair Employment and Housing Act, regardless of the protected class on which the claim is based, with an exception for a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, if included in the settlement agreement at the request of the claimant, unless a government agency or public official is a party to the settlement agreement.

2) Prohibits provisions in employment severance agreements to the extent that they have the purpose or effect of denying the separated employee the right to disclose information about unlawful or potentially unlawful acts in the workplace, except when:
   a) the provision is part of a settlement agreement to resolve an employment discrimination-related claim 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; and
   b) the settlement agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and the employee was given notice and an opportunity to retain an attorney or was represented by an attorney.

COMMENTS

1. Background

In 2017, revelations of serial sexual harassment by high profile individuals inspired the Me Too movement. People who had experienced sexual harassment took to social media, in particular, to share what they had gone through, sometimes naming the perpetrators publicly for the first time. The phenomenon led not only to greater understanding that sexual harassment is a widespread problem, but also to the identification of several serial harassers who had previously managed to evade accountability for their actions.

In response to the MeToo Movement, this Committee convened two hearings to examine the problem of sexual harassment and identify potential policy changes that might help to eradicate it. (Sen. Com. on Jud. and Sen. Select Com. on Women, Work and Families, Justice for Victims: Developing a Harassment-Free Culture in California (Feb. 13, 2018); Justice for Victims: Re-Examining California's Legal Standards for Sexual Harassment (Jan. 11, 2018).) Those hearings shed light on the role that certain legal tactics played in enabling serial harassers to avoid responsibility for their conduct. Among the legal tactics discussed were the inclusion of non-disclosure agreements (NDAs) in settlement agreements and the use of non-disparagement agreements in employment contracts. To curb further exploitation of these particular legal tactics by serial sexual harassers, the Legislature proceeded to pass two bills: SB 820 (Leyva, Ch. 953, Stats. 2018) and SB 1300 (Jackson, Ch. 955, Stats. 2018).

This bill now proposes to expand upon each of those bills, thereby further restricting the abuse of NSAs and non-disparagment agreements to enable unlawful activity.

2. About NDAs

An NDA is a provision in a contract that binds the parties to secrecy regarding information specified in the contract. "Secret settlements" are contracts to resolve a dispute that contain an NDA. A typical NDA looks something like this:

> The terms and conditions of this Agreement are absolutely confidential between the parties and shall not be disclosed to anyone else, except as shall be necessary to effectuate its terms. Any disclosure in violation of this section shall be deemed a material breach of this Agreement.

This non-disclosure language would keep the details of the contract secret. In the settlement context, such NDAs are frequently supplemented with agreements that the parties will not disparage one another or other additional language that prevents the parties from speaking not only about the terms of the settlement itself, but also about the nature of the underlying dispute. To try to ensure the promised secrecy, "secret settlements" typically contain some kind of financial punishment as an ongoing deterrent against disclosure.

The case of U.S. Olympic gold medalist McKayla Maroney is illustrative. Maroney was among the more than 200 victims sexually abused by former USA Gymnastics team doctor Larry Nasser. The agreement she reached to settle her claims against Nasser contained a non-disclosure provision. By the reported terms of the agreement, if

Maroney spoke publicly about what happened to her, she faced a $100,000 penalty.[1] Similar NDAs reportedly bound many of Harvey Weinstein's victims to silence. [2]

3. SB 820's limitations on the use of NDAs

Recognizing the role that NDAs had been playing in the perpetuation of sexual harassment, SB 820 (Leyva, Ch. 953, Stats. 2018) – the "STAND Act" -- prohibited their inclusion in settlement agreements resolving such cases, as well as claims of sex discrimination and related retaliation once those cases have been filed with an administrative agency or in court. (Code Civ. Proc. § 1001(a).)

Because it was enacted as part of the response to widespread incidents of sexual harassment, SB 820's prohibition on NDAs focused exclusively on sexual harassment and sex discrimination. As a result, NDAs can no longer be used as easily or effectively to silence victims of those particular forms of harassment and discrimination. Under California's Fair Employment and Housing Act (FEHA), however, unlawful harassment and discrimination can be based on many other categories as well. Those categories differ slightly, depending on whether the conduct in question takes place in the context of work or housing but, among others, they include: race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, familial status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status. (Gov. Code §§ 12940 and 12955.)

As a policy matter, there is no obvious rationale for restricting the use of NDAs in the context of harassment or discrimination on the basis of sex only. The same policy concerns would seem to apply as strongly in the case of other forms of harassment and discrimination. Just as NDAs can be used to isolate victims of sexual harassment and prevent them from discovering that their experience is part of a pattern, the same is true of people harassed on the basis of race, disability, religion, or any of the other protected categories.

To illustrate this point, the author and sponsors highlight the case of Ifeoma Ozoma. According to Ozoma, she endured racial and other discrimination and harassment while working at the social media company Pinterest. She left her job there as a result. Ozoma did not initially speak out about her experience at the company, however, because she was bound by the terms of an NDA. Under the terms of that agreement,

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[1] Bailey, *Chrissy Teigen Pledges to Pay $100K Fine for McKayla Maroney*. (Jan. 16, 2018) Elle http://www.elle.com/culture/career-politics/a15174640/mckayla-maroney-larry-nassar-nda-chrissy-teigen-response/ (as of Mar. 11, 2021). (Maroney ultimately elected to speak out about the abuse in spite of the non-disclosure clause. USA Gymnastics later indicated it would not to seek to impose the penalty for the breach.)

[2] Fabio, *The Harvey Weinstein Effect: The End Of Nondisclosure Agreements In Sexual Assault Cases?* (Oct. 26, 2017) Forbes https://www.forbes.com/sites/michellefabio/2017/10/26/the-harvey-weinstein-effect-the-end-of-nondisclosure-agreements-in-sexual-assault-cases/#3dc80fea2c11 (as of Mar. 11, 2021).

according to Ozoma, Pinterest could sue her for discussing harassment and discrimination at the company and given the consequences set forth in the agreement, she would be left bankrupt as a result. About a year after leaving, Ozoma decided it was worth the risk when she became incensed by what she viewed as Pinterest's hypocritical public support for the Black Lives Matter movement.[3]

Had Ozoma's claims of harassment and discrimination been based on sex alone, she would have been covered by SB 820 and she likely would not have faced the risk of bankruptcy for discussing her experience. Because her allegations of harassment and discrimination were also based on race, however, the provisions of SB 820 did not apply. This bill would rectify that anomaly.

4. Not all NDAs would be prohibited

It is important to note that SB 820 does not outlaw NDAs in all instances and neither would this bill. First of all, SB 820 only applies to situations in which a civil action or an administrative claim has already been filed. Thus, if the parties to a housing or employment harassment, discrimination, or related retaliation dispute resolve the matter before any formal complaint is filed, the resulting settlement agreement could include an NDA. Nothing in this bill would change that framework; it would just apply it to all varieties of harassment and discrimination.

Second, in deference to complainants' individual privacy interests, SB 820 also provided an exception to its general rule against NDAs. Under SB 820, NDAs can be used for the limited purpose of shielding the complainant's identity, but only if requested by the complainant. (Code Civ. Proc. § 1001(c).) There is an exception to this exception, however. To account for the heightened public interest in government transparency, SB 820 established that even these more limited NDAs cannot be used if a government official or agency is a party to the settlement. Here again, nothing in this bill would change those rules; it would simply apply them to all varieties of unlawful harassment and discrimination.

5. About non-disparagement agreements

As the name implies, non-disparagement agreements are promises not to criticize an employer or perpetrator publicly. Truth is not a defense to breach of a contractual non-disparagement agreement, as it would be to a tort claim of defamation.

[3] Myrow, "It Really is a Gag Order": California May Limit Nondisclosure Agreements (Mar. 6, 2021) National Public Radio https://www.npr.org/2021/03/06/973439404/it-really-is-a-gag-order-california-may-limit-nondisclosure-agreements (as of Mar. 11, 2021).

Non-disparagement agreements can come as part of employment contracts at the time of hire. In that scenario, candidates are agreeing never to criticize the company publicly as part of the terms of employment. Non-disparagement agreements can also form part of settlement agreements or severance deals at the end of an employee's tenure. The latter type of non-disparagement agreement strongly correlates with non-disclosure agreements. They are, together, the typical components of so-called "secret settlements," mentioned previously.

Here is an example of a non-disparagement clause, described in the Harvard Business Review as a "boilerplate non-disparagement clause from a major corporation's employment contract":

> You shall not, at any time, directly or indirectly, disparage Company, including making or publishing any statement, written, oral, electronic, or digital, truthful or otherwise, which may adversely affect the business, public image, reputation or goodwill of the company, including its operations, employees, directors and its past, present or future products or services.[4]

To further discourage employees from speaking negatively about their employers, non-disparagement clauses often come with liquidated damages[5] provisions, some reportedly as high as a million dollars for a single violation.[6]

Draconian liquidated damages provisions probably would not stand up in court. (Civ. Code § 1671.) Moreover, there are already certain limitations on what a non-disparagement agreement can lawfully cover. For instance, the National Labor Relations Act does not permit employers to prevent workers from discussing sexual harassment or discrimination complaints at work or in a legal claim. (29 U.S.C. § 158(a)(1).) Courts have nonetheless upheld and enforced non-disparagement agreements in many contexts. Moreover, as a practical matter, even a legally infirm non-disparagement clause can still have a powerful deterrent effect on victims or witnesses who might otherwise come forward publicly.

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[4] Lobel, *NDAs Are Out of Control. Here's What Needs to Change*. (Jan. 30, 2018) Harvard Business Review https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change (as of Mar. 11, 2021).

[5] The term "liquidated damages" refers to a pre-determined amount of money to be awarded for breach of a contract. In the absence of a liquidated damages clause (or if a liquidated damages clause is found to be invalid), courts determine the amount of damages to be awarded only after the breach and based upon an assessment of the financial harm caused by the breach.

[6] Soloman, *Arbitration Clauses Let American Apparel Hide Misconduct*. (July 15, 2014) New York Times https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/ (as of Mar. 11, 2021).

6. SB 1300's limitations on the use of non-disparagement agreements

To try to address these problems, SB 1300 (Jackson, Ch. 955, Stats. 2018) imposed new restrictions on the use of non-disparagement agreements. Specifically, the bill made it an unlawful employment practice for an employer to require an employee, in exchange for a raise or bonus, or as a condition of employment or continued employment, to sign any document denying the employee the right to disclose information about unlawful acts in the workplace, unless that agreement was reached under certain conditions meant to safeguard the worker's right. Because of the phrase "as a condition of employment or continued employment," however, the bill did not apply to severance agreements which, as the name suggests, are reached on the condition that the employment ends.

Thus, SB 1300 made it more difficult for employers to use non-disparagement agreements to try to demand silence from their current workers regarding unlawful activity in the workplace. Yet SB 1300 did not necessarily do anything to stop employers from using such agreements to keep departing workers quiet. This bill proposes to fill that gap, by applying to non-disparagement provisions in severance agreements the same set of rules that apply to the inclusion of non-disparagement agreements at the outset or during the regular course of employment.

7. Not all non-disparagement agreements would be prohibited

It is important to note that SB 1300 does not outlaw the use of non-disparagement agreements altogether and neither would this bill. There are two situations in which employers could still have and enforce non-disparagement agreements.

First, though this bill uses slightly different language than SB 1300, both make it clear that they only restrict non-disparagement agreements to the degree that those agreements operate to prevent workers from disclosing unlawful or potentially unlawful activity in the workplace. Thus, employers are still free to stop employees from criticizing the company they work for in relation to perfectly legal matters involving the workplace.

Some examples may be helpful to illustrate this point. An employer's Chief Executive Officer may have no sense of fashion. Since that is not unlawful, however, the employer could require the employee to sign an agreement promising not to criticize the CEO's style. Similarly, a restaurant may serve hamburgers that are not very tasty. Since this is not unlawful, the restaurant owner could make employees sign an agreement not to badmouth the burgers. By contrast, if the CEO makes derogatory remarks about employees who are originally from India, say, the employer could not rely on a non-disparagement agreement to prevent employees from disclosing those unlawful, discriminatory statements. In the same vein, the restaurant owner could not use a non-

disparagement agreement to prevent employees from disclosing that the hamburgers are made using spoiled meat in violation of applicable health codes.

The second way that a non-disparagement agreement could still be used without violating SB 1300 or this bill is as part of a settlement agreement, provided that both of the following conditions are met. The settlement must resolve a workplace harassment, discrimination, or related retaliation claim that the employee has formally filed in court, with an administrative agency, or through the employer's internal complaint process. (Gov. Code § 12964.5(c)(1).) The settlement must also have been "negotiated," meaning that the employee had the option of reviewing it with an attorney and entered into it on a voluntary, deliberate, and informed basis. (Gov. Code § 12964.5(c)(2).)

8. Potential impacts on employers' incentives to offer severance packages?

In its opposition to this bill, a coalition of thirteen business and trade organizations led by the Chamber of Commerce asserts that the bill will "essentially eliminate the use of severance agreements." The opposition correctly notes that severance payments "are not automatic or required." Unless there is sufficient incentive for employers to offer severance payments, therefore, all but the most generous employers are unlikely to do so. Since separation from employment can often trigger a particularly precarious financial time for workers, fewer or lesser severance payments would be detrimental to those workers.

The opponents accurately observe that the usual incentives for an employer to offer a severance package to a departing employee include, among other things, the assurance that the employee will not sue their employer (waiver or release of claims), protection of intellectual property (prohibition on the disclosure of trade secrets, confidential or proprietary information), and protection from reputational harm (non-disparagement).

The opponents state that "under SB 331, a release of all claims under a severance agreement would be void and unenforceable." However, SB 331's provisions related to severance agreements are not intended to alter anything about the existing law relating to release or waiver of claims. Because filing a claim in court could be construed as a form of disclosure, however, the opponents argue that the current language in the bill could have the effect of prohibiting the waiver of claims, whether intended or not. To avoid any such interpretation, the author proposes to amend the bill in Committee to state, explicitly, that the bill does not prohibit releases and waivers of claims in severance agreements.

The opponents also assert that SB 331 exposes employers' intellectual property and proprietary information to disclosure. However, there is nothing in the bill in print that would stop an employer from requiring the employee to safeguard the employer's intellectual property and proprietary information in exchange for the severance payment (unless, perhaps, the employer's "trade secret" is a plan for robbing a bank).

The employer can even demand that the employee refrain from criticizing the employer regarding all ordinary, lawful aspects of the employer's business. The only thing that SB 331 would prohibit an employer from demanding in exchange for a severance payment is an agreement that the departing worker will not disclose anything about unlawful or potentially unlawful activity in the workplace. Nonetheless, the author proposes to amend the bill in Committee to state, explicitly, that the bill does not prohibit employers from protecting their intellectual property, proprietary information, or confidential information.

Thus, contrary to the opponents' assertion, much of an employer's incentive for offering a severance package would remain intact under SB 331. An employer could still buy a guarantee against future lawsuits from the departing employee, and the employer could still buy some assurance that the employee would not disclose the employer's trade secrets or proprietary information.

As the opposition observes, however, "protecting an employer's reputation […] is often a critical factor in offering a severance" and it *is* an accurate statement about this bill to say that it might reduce the value that a severance agreement could have with respect to preservation of reputation. Under SB 331, an employer could not generally oblige a departing worker to remain silent about illegal or potentially illegal activity at the workplace, no matter how large a severance the employer offered. As a result, an employer could not use a severance payment to buy assurance that the employee will not turn around and make public allegations – in the newspapers or on social media, say – that unlawful activity took place at the employer's workplace. That might somewhat reduce the value of the severance agreement from the employer's perspective.

Just how much value would be lost is debatable, however. In practice, a non-disparagement agreement only provides so much protection to an employer. Unless the employee is relatively wealthy, the employer is unlikely to get much out of an employee in the event of a suit for breach of the agreement. Moreover, suing an employee for breaking a non-disparagement agreement invites a public relations nightmare: the employer is likely to look bad both on account of allegations of unlawful activity *and* because the employer has proceeded to sue the person who brought it to light.

9. <u>Preventing disclosure of the amount of a severance payment</u>

The opponents to the bill also worry that the language in print could be interpreted to mean that employees cannot be prevented from disclosing how much money they got as a result of their severance agreement. This is of concern to employers because they fear that comparisons between severance amounts could lead to jealousy and resentment about any differences. Ultimately, this could mean legal disputes, which are a big part of what a severance agreement is intended to avoid in the first place. To respond to this concern, the author proposes to offer amendments in Committee that

clarify that the bill does not prevent employers from making the amount of any severance a confidential aspect of the overall agreement.

10. Tightening up language

As the opposition to the bill points out, there are places in the bill in print where the language could be tightened up.

First, the bill in print says that employees cannot be prevented from disclosing unlawful or "potentially unlawful" conduct in the workplace. This language is intended to insure that workers can disclose conduct that arguably amounts to unlawful harassment, even if a court might not conclude, ultimately, that the conduct was sufficiently severe or pervasive to meet the technical legal standard. The only problem is that pretty much any conduct is "potentially unlawful." To address the issue, the author proposes to offer amendments in Committee that delete the phrase "potentially unlawful" and instead ensure that workers can disclose information about any conduct that the employee has reasonable cause to believe is unlawful. This matches the phrasing used in California's whistleblower protection statutes (*see* Lab. Code § 1102.5), and should narrow what employees could disclose under a non-disparagement agreement, while still serving to prevent employers from trying to stop former employees from disclosing harassing conduct, even where a court might conclude that the harassing conduct was not sufficiently severe or pervasive enough to constitute unlawful discrimination as a technical legal matter.

Second, the bill in print states that a non-disparagement provision is a severance agreement is impermissible "to the extent it has the purpose or effect" of denying the employee or former employee the right to disclose information about unlawful conduct in the workplace. As the opponents point out, this language is broad and slightly confusing. Is the provision invalid only in so far as it denies the right to disclose? Or is the entire provision invalid if it denies the right to disclose to any extent? The author proposes to offer amendments in Committee that replace this broad language with an alternative that simply bans non-disparagement agreements if they prohibit disclosure of information related to unlawful conduct in the workplace.

11. Additional clean up to existing law

In addition to the primary impacts of the bill discussed in the Comments above, the bill also clarifies some details from SB 820 and SB 1300, thereby sealing off some legal loopholes that might otherwise be exploited by creative legal counsel.

Specifically, where the existing language enacted by SB 820 only prohibits settlement provisions if they "prevent" disclosure, this bill is careful to prohibit the settlement provisions even if they only "restrict" disclosure. To use an exaggerated example, this change would prevent an overly zealous attorney from crafting a settlement agreement

provision limiting a party to disclosure "in the company of an albino gibbon on the summit of Mt. Everest at midnight on a full moon" and proceeding to argue that such a provision is valid under the law because it does not, technically speaking, "prevent" disclosure.

Similarly, the existing language enacted by SB 820 only mentions retaliation in the context of "reporting" unlawful harassment or discrimination. (Code Civ. Proc. § 1001(a)(3).) In contrast, the Fair Employment and Housing Act's (FEHA's) anti-retaliation provision encompasses more than just "reporting" violations; it actually prohibits retaliation for "opposing" any practices that FEHA forbids. (Gov. Code § 12940(h).) This bill would insert the phrase "or opposing" into the existing statute, thus rendering it more consistent with the language in FEHA.

12. Proposed Amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- clarify that the amount of a severance payment may be kept confidential as part of a severance agreement;
- clarify that a general release and waiver of claims is permissible as part of a severance agreement;
- clarify that employers may, as part of a severance agreement, protect the employer's trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace;
- clarify that non-disparagement provisions in severance agreements cannot prevent disclosure of conduct that the employee has reasonable cause to believe is unlawful; and
- add a requirement that employees signing severance agreements must be given a reasonable opportunity to consult with legal counsel if they wish, as specified.

A mock-up of the amendments in context is attached to this analysis.

13. Arguments in support of the bill

According to the author:

> SB 331 will prevent workers from being forced to sign non-disclosure and non-disparagement agreements that would limit their ability to speak out about harassment and discrimination in the workplace. It is unacceptable for any employer to try to silence a worker because he or she was a victim of any type of harassment or discrimination—whether due to race, sexual orientation, religion, age or any other characteristic. SB 331 will empower survivors to speak out—if they so wish—so they can hold

> perpetrators accountable and hopefully prevent abusers from continuing to torment and abuse other workers.

As sponsor of the bill, the California Employment Lawyers Association, Earthseed, and Equal Rights Advocates writes:

> […] [S]ecret settlements' play as much a role in perpetuating workplace discrimination, harassment and bias based on race, ethnicity, sexual orientation, age, disability, religion, etc., because here too, complaints are kept secret and those who raise the complaints are effectively silenced. […] What we have learned from the #MeToo movement is that meaningful change in the workplace cannot happen unless workers are able to speak out about their experiences and hold those in power accountable. SB 331 will help effectuate broader and greater changes in the workplace because workers will be empowered to speak about all forms of harassment or discrimination. […]
>
> Whether a worker is taking a job or leaving a job, they should never have to give up their right to speak out about harassment or discrimination.

In support, Force the Issue writes:

> For the last two years, we've had a front row seat for the specific ways corporations use non-disclosure agreements (NDAs) in combination with forced arbitration agreements to silence victims of harassment and discrimination. Often, more than one form of discrimination will show up in the stories workers share with us. […] We were therefore very happy, Senator Leyva, to hear that you […] have created a much needed intersectional expansion to CA's groundbreaking 2018 STAND Act in the form of SB 331. Harassers don't stick to one area, so their victims shouldn't have to either. […]
>
> We also believe SB 331 is good business. A growing number of consumers and investors want to know whether companies provide safe and respectful working environments for employees. By expanding current protections for workers and preventing serial perpetrators from being further shielded, SB 331 will go a long way toward creating safer workplaces, boosting employee engagement, and ensuring companies can continue to attract and retain high-quality workers.

14. Arguments in opposition to the bill

In opposition to the bill, a coalition of thirteen business and trade associations led by the California Chamber of Commerce writes to express a number of objections. First, the coalition argues that SB 331 serves to benefit trial attorneys who want a portion of any recovery out of a settlement, rather than employees. In this respect, the coalition points out that the bill allows non-disparagement agreements if the employee has been given the opportunity to consult an attorney before signing. Next, the coalition contends that the bill removes employers' incentive to offer severance payments to the detriment of employees. In support of this point, the coalition states that the bill invalidates waivers of claims, provisions protecting an employer's intellectual property and proprietary information, and provisions keeping the severance payment amount confidential. (*See* Comment 6 for a discussion about the validity of these assertions.) Additionally, the coalition asserts that the bill will encourage employers to wait until the employee has filed a formal claim of some sort before offering a severance payment, since the bill does permit the inclusion of non-disparagement agreements once such a claim has been filed. Finally, the coalition argues that the bill will invite costly litigation against employers because it enables workers to enforce their rights in court and potentially obtain civil penalties, punitive damages, and attorney's fees if they prevail.

SUPPORT

California Employment Lawyers Association (sponsor)
Earthseed (sponsor)
Equal Rights Advocates (sponsor)
AI Now Institute
American Federation of State, County and Municipal Employees
Anti-Defamation League
Bayla Ventures
Brandworkers
California Conference of Machinists
California Conference of the Amalgamated Transit Union
California Rural Legal Assistance Foundation
California Teamsters Public Affairs Council
California Women's Law Center
The Center for Institutional Courage
Consumer Attorneys of California
Disability Rights California
Engineers and Scientists of California, IFPTE, Local 20, AFL-CIO
Force the Issue
Indivisible California: StateStrong
Legal Aid at Work
Lift Our Voices
National Association of Social Workers, California Chapter

National Council of Jewish Women-California
National Employment Law Project
Professional and Technical Engineers, IFPTE, Local 21, AFL-CIO
Radical Candor LLC
Santa Barbara Women's Political Committee
SEIU California
TechEquity Collaborative
The People's Parity Project
The Real Facebook Oversight Board
UNITE HERE, AFL-CIO
Utility Workers Union of America
Vaya Consulting, LLC
Western Center on Law & Poverty
Whistleblower International Network
Women's Foundation California
Work Equity

OPPOSITION

Acclamation Insurance Management Services
Allied Managed Care
California Business Properties Association
California Employment Law Council
California Farm Bureau
California Restaurant Association
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
Housing Contractors of California
Flasher Barricade Association
Official Police Garages Los Angeles
Western Electrical Contractors Association
Western Growers Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 3109 (Mark Stone, Ch. 949, Stats. 2018) prohibited settlements from including terms preventing the parties from testifying about the settled dispute in administrative, legislative, or judicial proceedings.

SB 820 (Leyva, Ch. 953, Stats. 2018) prohibited a provision in a settlement agreement that prevents the disclosure of factual information relating to specified claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed

in a civil or administrative action. The bill specified that plaintiffs in such actions retain the right to request provisions in settlement agreements that shield their identity.

SB 1300 (Jackson, Ch. 955, Stats. 2018) prohibited employers from requiring employees to sign a release of claims under the Fair Employment and Housing Act in exchange for a raise or as a condition of employment, among other things.

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Amended Mock-up for 2021-2022 SB-331 (Leyva (S))

Mock-up based on Version Number 99 - Introduced 2/8/21

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1001 of the Code of Civil Procedure is amended to read:

1001. (a) Notwithstanding any other law, a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited:

(1) An act of sexual assault that is not governed by subdivision (a) of Section 1002.

(2) An act of sexual harassment, as defined in Section 51.9 of the Civil Code.

(3) An act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination, as described in subdivisions (a), (h), (i), (j), and (k) of Section 12940 of the Government Code.

(4) An act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination by the owner of a housing accommodation, as described in Section 12955 of the Government Code.

(b) Notwithstanding any other law, in a civil matter described in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts with subdivision (a).

(c) Notwithstanding subdivision (a) and (b), a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant. This subdivision does not apply if a government agency or public official is a party to the settlement agreement.

(d) Except as authorized by subdivision (c), a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to the claim described in subdivision (a) that is entered into on or after January 1, 2019, is void as a matter of law and against public policy.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.

(f) In determining the factual foundation of a cause of action for civil damages under subdivision (a), a court may consider the pleadings and other papers in the record, or any other findings of the court.

SEC. 2. Section 12964.5 of the Government Code is amended to read:

12964.5. (a) (1) It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either of the following:

(A) (i) For an employer to require an employee to sign a release of a claim or right under this part.

(ii) As used in this subparagraph, "release of claim or right" includes requiring an individual to execute a statement that the individual does not possess any claim or injury against the employer or other covered entity, and includes the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.

(B) For an employer to require an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace.

(2) Any agreement or document in violation of this subdivision is contrary to public policy and shall be unenforceable.

(b) (1) It is an unlawful employment practice for an employer or former employer to include in any agreement related to an employee's separation from employment any provision that prohibits the disclosure of ~~to the extent it has the purpose or effect of denying the employee or former employee the right to disclose~~ information about unlawful acts in the workplace.

(2) Any provision in violation of paragraph (1) is against public policy and shall be unenforceable.

(3) This subdivision does not prohibit the inclusion of a general release or waiver of all claims in an agreement related to an employee's separation from employment, provided that the release or waiver is otherwise lawful and valid.

(4) An employer offering an employee or former employee an agreement related to that employee's separation from employment as provided in this subdivision shall notify the employee that the employee has a right to consult an attorney regarding the agreement and shall provide the employee with a reasonable time period of not less than five business days in which to do so. An employee may sign such an agreement prior to the end of the reasonable time period as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of

the reasonable time period, or by providing different terms to employees who sign such an agreement prior to the expiration of such time period.

(c) As used in this section, "information about unlawful acts in the workplace" includes, but is not limited to, information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful. ~~or potentially unlawful conduct.~~

(d) (1) This section does not apply to a negotiated settlement agreement to resolve an underlying claim under this part that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process.

(2) As used in this section, "negotiated" means that the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.

(f) This section does not prohibit an employer from protecting the employer's trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.