

Blog Post

# Silenced No More: The Speak Out Act Set to Curb Nondisclosure Agreements for Victims of Sexual Misconduct

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Employers who have made use of pre-dispute nondisclosure and nondisparagement agreements will now have to change those practices and reevaluate their existing agreements thanks to the “Speak Out Act” (the Act) – a bipartisan piece of legislation born out of the #MeToo movement. The Act, which President Biden recently signed into law, is poised to nationalize a budding statewide trend that aims to make it easier for workers to speak out against sexual harassment or abuse in the workplace.

## Policy Rationale

That there exists a power imbalance in the relationship between an employee and his or her employer is nothing new. Employers have the ability to hire, fire, and set terms and conditions of an individual’s employment, and employees are often willing to accept less than ideal terms in exchange for employment and a steady paycheck. Indeed, [according to Reuters](#), “an estimated one-third of private sector workers have signed agreements not to disclose details of their employment or disparage their employers.” At the same time, the Act notes that although one in three women has faced sexual harassment in the

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workplace, only a small fraction of that number ends up filing a formal complaint.

Proponents of the Act contend that it will help level that power imbalance back toward workers by ensuring that survivors of sexual harassment or assault will not be silenced by pre-dispute – or as one of the Act’s sponsors referred to it, “forced” – nondisclosure or nondisparagement agreements. In doing so, the Act’s stated intent is to “empower survivors to come forward,” “hold perpetrators accountable for abuse,” and “make workplaces safer and more productive for everyone,” among other related goals.

### Who Is Covered By The Speak Out Act?

The Act covers all employers and their current, former, and prospective employees. It also covers independent contractors.

### What Does The Speak Out Act Require?

As noted above, the Act prohibits nondisclosure and nondisparagement agreements which were agreed to before a sexual harassment or sexual assault dispute arises. However, the Act does not define the term “dispute,” thereby creating ambiguity as to whether such agreements would still be permitted if entered into prior to commencement of formal litigation, for example versus commencement of a more informal internal complaint. Given this ambiguity, employers are well-advised to interpret the provision broadly and consider such agreements prohibited unless they arise after the resolution of a formal dispute (e.g., post-settlement agreement).

Notably, the Act’s provisions are only restrained to agreements pertaining to sexual assault or sexual harassment. Thus, subject to state law employers would still be permitted to enter into nondisclosure or nondisparagement agreements that do not cover those topics. Employers wishing to retain such provisions should make clear that sexual

harassment and assault disputes are excepted from those terms.

## Does The Speak Out Act Affect State And Local Law?

The Act explicitly states that it does not prohibit States or localities from enforcing a law that is at least as protective (or stricter) than the provisions in the Act. Indeed, a growing number of states such as California, Illinois, Maine, Oregon, New Jersey, New York, and Washington, have already adopted their own laws on this topic. Likewise, the Act does not supersede any Federal, State, or Tribal law that allows individuals to use pseudonyms when filing claims involving sexual assault or sexual harassment disputes.

## Are Existing Pre-Dispute Nondisclosure Or Nondisparagement Agreements Still Valid?

The Act applies with respect to any claim filed under Federal, State, or Tribal law on or after December 7, 2022. Implicit in this provision is that existing pre-dispute nondisclosure or nondisparagement agreements applicable to claims that have not yet been filed would be unenforceable. Employers should therefore review any existing agreements with their current, former, or prospective employees or independent contractors, to determine whether all or part of those agreements are no longer valid.

## Trade Secrets And Proprietary Information Remain Protected

The Act also makes clear that employers and employees may continue to enter into agreements which protect disclosure of trade secrets or proprietary information.

## Takeaway for Employers

Given the Act's focus on pre-dispute agreements specific to sexual assault and sexual harassment disputes, employers might be forgiven for assuming

that the Act will have a minimal effect on their operations. Even so, employers should nevertheless be cautioned that broad nondisclosure and nondisparagement provisions are likely no longer valid in their entirety, and moreover, that this would even be the case with former employees or contractors. Accordingly, employers are well advised to review their existing agreements in order to ensure that they remain effective, and consider drafting addenda to non-complying agreements to clarify that they do not apply to sexual harassment and assault allegations.

For guidance on the Speak Out Act and other workplace issues, consult your Akerman attorney.

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