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## In #MeToo Era, Victims Must Have Choice Over NDAs

By **Lynne Bernabei and Kristen Sinisi** (April 9, 2020, 3:41 PM EDT)

Throughout the Democratic presidential primary debates, the issue of nondisclosure agreements has taken center stage. Allegations that former Democratic-nominee hopeful Michael Bloomberg discriminated against former female employees and silenced them through nondisclosure agreements are the most recent iteration of a familiar narrative: a powerful executive appearing to escape accountability for illegal, gender-based conduct by forcing a vulnerable employee into silence.

From its inception, the #MeToo movement has fought tooth and nail to restore voices to the victims of sexual misconduct, including through the invalidation of NDAs in settlement agreements, which are often viewed as impediments to alerting the public about sexual harassers, and ensuring that serial harassers discontinue their patterns of sexual misconduct.

In the absence of any meaningful movement on the federal level, states have started promulgating legislation to restore victims' voices. Such legislation must tackle a complex issue: how to help victims heal from heinous personal violations outside the spotlight of a public trial while, at the same time, stopping patterns of sexual assault. These objectives are best accomplished when states provide victims the individual choice of whether to agree to confidentiality, rather than enacting blanket prohibitions on NDA provisions.

### New York

In 2018, New York enacted Section 5-336 of the General Obligations Law, which prohibits employers from including terms in settlement agreements that preclude the disclosure of "underlying facts and circumstances" in sexual harassment cases, "unless the condition of confidentiality is the complainant's preference."<sup>[1]</sup> Employers must provide employees 21 days to consider such conditions, and an employer may incorporate an NDA into an agreement only if an employee prefers the term. Further, an employee may revoke an agreement that contains an NDA for seven days following execution.

Senate Bill 6577, which Gov. Andrew Cuomo signed on Aug. 12, 2019, also provides an express carveout for and invalidates any NDA to the extent that it bars a complainant from: (1) "initiating, testifying, assisting, complying with a subpoena



Lynne Bernabei



Kristen Sinisi

from, or participating" with a government investigation; or (2) disclosing facts necessary to obtain a public benefit, such as unemployment insurance.[2]

Similarly, Senate Bill 6577 invalidates any agreement an employer and employee entered into on or after Jan. 1 this year, which prevents the employee from disclosing facts related to future claims of discrimination, unless the agreement contains an appropriate carveout.[3]

## **Arizona**

Under House Bill 2020, confidentiality agreements may not prohibit individuals from disclosing factual information about sexual assault or sexual harassment at the request of a peace officer or prosecutor or during a criminal proceeding when initiated by another party. Further, a defendant may not use such a disclosure as a basis for invalidating a settlement agreement or the defendant's duties under the agreement.[4]

## **California**

The Stand Together Against Non-Disclosure Act of 2018 prohibits settlement provisions that preclude disclosure of facts related to civil or administrative complaints about sexual assault, sexual harassment, and workplace sexual discrimination and retaliation. The act also precludes courts from approving settlement agreements that contain the prohibited clauses.[5]

Further, under the amended version of Section 12964.5 of the California Fair Employment and Housing Act, an employer cannot require an employee to agree to a preemptive NDA or waiver of claims as a condition of employment.[6] However, Section 12964.5 does not apply to negotiated settlement agreements.[7]

## **New Jersey**

In March 2019, New Jersey enacted Senate Bill 121, which prohibits any "provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" and renders such provisions unenforceable against any employee who is a party to the agreement as per public policy.[8]

An employer may not retaliate against an employee or prospective employee who refuses to enter into an agreement containing such an NDA.[9] If an employer attempts to enforce an NDA prohibited under the law, the employer will be liable for the employee's reasonable attorney fees and costs.[10] However, if an employee reveals enough detail about the claim to enable one to reasonably identify the employer, the NDA will become unenforceable against the employer.[11]

## **Washington**

Senate Bill 5996 went into effect on June 7, 2018. Pursuant to this legislation, employers may not require an employee, "as a condition of employment, to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events ... or between employees, or between an employer and an employee, off the employment premises." The law further deems it an unfair labor practice to retaliate against an employee for disclosing workplace sexual harassment or assault, but it does not preclude confidentiality provisions in settlement agreements.[12]

## **Vermont**

Effective July 1, 2018, Vermont's Fair Employment Practices Law prohibited an employer from requiring employees or prospective employees, as a condition of employment, to sign a waiver that restricts the employee from opposing, disclosing, reporting or participating in an investigation of sexual harassment.[13]

Settlement agreements must include express carveouts for: (1) filing sexual harassment complaints with the attorney general, a state's attorney, the Human Rights Commission, the U.S. Equal Employment Opportunity Commission, or any other state or federal agency; (2) testifying in, assisting with or participating in a sexual harassment investigation conducted by the attorney general, a state's attorney, the Human Rights Commission, the EEOC, or any other state or federal agency; (3) complying with legal process; and (4) exercising rights to engage in concerted activities with other employees.[14]

### **Other States**

Several states, including Alaska, Tennessee and Virginia, have enacted legislation that prohibits employers from requiring that employees or potential employees agree to NDAs with respect to sexual harassment claims as a condition of employment.[15]

Despite the recent push by state legislatures to promulgate legislation that bans NDAs in sexual misconduct cases, victims may desire NDAs under some circumstances.

Defendants resolve lawsuits informally, rather than proceeding to trial, in large part, to protect their reputations by buying silence. Confidentiality and nondisparagement clauses are standard provisions in the vast majority of employment settlement agreements, not only those involving sexual assault.

In addition to confidentiality and nondisparagement provisions, settlements typically contain carveouts, which permit a plaintiff to respond (truthfully) to legal process, cooperate with law enforcement and other governmental investigations, and file administrative claims with the EEOC and its state equivalents, because such claims are not waivable by law.

NDAs instead focus on prohibiting a plaintiff's voluntary cooperation in the absence of legal process, that is, voluntarily disclosing facts about one's case to someone else who has actual or potential claims against the same defendant, and broader public disclosure. From a policy standpoint, the invalidation of agreements that prohibit voluntary cooperation and public disclosure further the public interest by ensuring that the public has access to information about serious sexual misconduct and that prosecutors can hold the perpetrators accountable.

However, from an individual standpoint, many victims value confidentiality provisions. They fear that vengeful employers will engage in smear campaigns against them by disclosing the fact that they lodged sexual harassment allegations, or worse, they may lie, to potential future employers and will stop them from obtaining new employment. This threat is particularly pronounced in industries that are historically male-dominated, such as Hollywood and the finance industry.

Further, some victims settle their cases in order to avoid the retraumatization of a public trial, too often characterized by an aggressor's attempt to paint the victim as sexually promiscuous, money-hungry or not credible. A victim's purpose in foregoing a public trial is lost if a defendant can simply disclose details about the victim and try the case in the court of public opinion. In the recent Harvey

Weinstein trial, defense counsel used brutal tactics to contend, unsuccessfully, that the victims willingly consented to sex to get ahead in the movie industry.

One of defendants' primary objectives in settling a case is to bind a plaintiff to a confidentiality provision. If the law precludes a plaintiff from committing to an NDA, the value of the settlement drastically decreases for both parties.

While some plaintiffs prioritize their ability to share their story, others place more value on maintaining their privacy, obtaining closure and moving forward. Therefore, states should provide victims the individual choice of whether to agree to confidentiality.

Individuals who have suffered sexual assault have unique needs, and legislation must respect their differing priorities. The law should honor victims' wishes and incentivize them to hold wrongdoers accountable, either publicly or privately.

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*Lynne Bernabei is founding partner of Bernabei & Kabat PLLC.*

*Kristen Sinisi is a partner at the firm.*

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[1] N.Y. Gen. Oblig. Law § 5-336 (2018).

[2] N.Y. Gen. Oblig. Law § 5-336(1)(c) (2019).

[3] Id. § 5-336(2).

[4] Ariz. Rev. Stat. § 12-720 (2018).

[5] See Cal. Civ. Pro. § 1001 (2018).

[6] Cal. Gov't Code § 12964.5 (2018).

[7] Id. § 12964.5(c)(1).

[8] N.J. Stat. Ann. § 10:5-12.8(a) (2019).

[9] Id. § 10:5-12.10.

[10] Id. § 10:5-12.9.

[11] Id. § 10:5-12.8(a).

[12] Wash. Rev. Code § 49.44.210 (2018).

[13] 21 V.S.A. § 495h(g)(1)(A) (2018).

[14] Id. § 495h(h)(2)(A)(i)-(iv).

[15] See Ala. Stat. 23.55.010(a) (2018); Tenn. Code § 50-1-108(a) (2018); Va. Code § 40.1-28.01(A) (2019).

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