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The Federal Speak Out Act and Implications for Employers

In December 2022, President Biden signed into law the [Speak Out Act](#) (the "Act"), which has become effective. As discussed below, the Act prohibits *pre-dispute* nondisclosure and nondisparagement agreements relating to sexual assault and sexual harassment disputes.

In connection with the new law, Congress presented, *inter alia*, the following findings:

- Sexual harassment and assault continue to be pervasive in the workplace.
- 81 percent of women and 43 percent of men experience some type of sexual harassment or assault in their lifetime.
- One in three women has encountered sexual harassment in the workplace, yet an estimated 87 to 94 percent of those who have experienced harassment never file any type of formal complaint.
- Many women leave their job or industry or pass up advancement opportunities as a result of sexual harassment.
- To combat sexual harassment and assault, victims must be able to report and publicly disclose such issues.
- Nondisclosure and nondisparagement provisions in agreements between employers and employees can allow harassment and assault to continue by silencing victims and those with knowledge of the conduct, while protecting those engaging in such conduct, thus allowing it to continue.
- Prohibiting nondisclosure and nondisparagement clauses will provide transparency around unlawful conduct, allow victims to come forward, hold perpetrators accountable, and make workplaces safer.

Explanation of the Act

The Act prohibits the use of nondisclosure and nondisparagement clauses related to allegations of sexual harassment or assault and

that are entered into *before* a dispute arises. Once an allegation of harassment or assault has been made, however, an employer may include nondisparagement and nondisclosure provisions in agreements, in connection with resolving these types of disputes. For example, if an employee commenced a lawsuit against his or her employer for workplace sexual harassment and the litigation was resolved before trial, the settlement agreement entered into between the parties may include nondisclosure and nondisparagement clauses, preventing the employee from, *inter alia*, disclosing to others the purported harassing conduct at issue and making negative statements about the employer related to such conduct. In this scenario, the provisions are permissible because the agreement was entered into *after* the dispute between the employer and employee arose.

Importantly, the Act's reach is limited to allegations of sexual harassment and sexual assault and not other types of discrimination and harassment. The Act also does not prevent enforcement of any state law concerning nondisclosure or nondisparagement clauses that provide at least the same protection to an individual to "speak freely" as that provided under the Act.

Finally, the Act does not restrict an employer from protecting its trade secrets or proprietary information.

The Act follows federal legislation enacted in March 2022, the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, which prohibits enforcement of pre-dispute arbitration agreements and class/collective action waivers concerning sexual assault and sexual harassment claims, if the aggrieved individual, or representative in a class/collective action, decides to pursue such claims in a different forum.

Conclusion

Given the legislation discussed above, the time is now for employers to review their employment agreements, arbitration agreements, policies, and handbooks to ensure compliance with the laws discussed above and any applicable state laws. It is also a

good idea for employers to review their current anti-harassment policies and procedures, to make certain their employees know how and to whom to make a complaint, and ensure mechanisms are in place so that employee complaints are properly and timely addressed and handled. These steps can assist employers in mitigating the risk of claims and defending those that are brought.

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