Cooley

June 22, 2022

Background

Washington state's Engrossed Substitute House Bill 1795, also known as the Silenced No More Act, took effect June 9, 2022, and prohibits nondisclosure and nondisparagement provisions that prevent an employee or contractor from disclosing or discussing conduct the individual reasonably believes to be illegal acts of discrimination, harassment, retaliation, wage and hour violations, sexual assault, or other conduct recognized as being against a clear mandate of public policy. Companies with employees or independent contractors who are Washington state residents should be aware that the act will require changes to many commonplace employment and contractor agreements. The act will implicate nondisclosure and nondisparagement provisions in many existing standard offer letters, confidential information and invention assignment agreements, separation or settlement agreements, and consulting/independent contractor agreements.

Who is covered under the act?

The act will implicate nondisclosure and nondisparagement provisions in agreements between companies and current, former, or prospective employees or independent contractors who are residents of Washington state. The act applies to all employers regardless of size and to any company that engages at least one independent contractor in Washington state, and defines an "employee" as a current, former, or prospective employee or independent contractor. The act highlights that any nondisclosure or nondisparagement provision in any agreement signed by an employee or contractor who is a Washington resident will be governed by Washington law. Therefore, Washington state employers or companies that engage independent contractors in Washington cannot contract around the act's requirements through choice of law provisions.

What does the act prohibit?

The act prohibits employers from entering into or enforcing a provision of any agreement that prohibits discussion or disclosure of:

- Conduct that the individual reasonably believes to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault.
- Conduct that is recognized as being against a clear mandate of public policy.
- The existence of a settlement involving any of the above conduct.

Importantly, the act still allows companies to prohibit the disclosure of the settlement amount paid under a settlement agreement and to protect trade secrets, proprietary information or confidential information that does not involve illegal acts.

The act also provides employees and contractors protection against retaliation. Companies may not discharge, discriminate or retaliate against any current, former, or prospective employee or independent contractor for discussing or disclosing any work-related conduct that an employee or independent contractor reasonably believes to be illegal harassment, illegal discrimination, illegal retaliation, wage and hour violations, or sexual assault that is recognized as illegal under state, federal or common law – or that is recognized as being against a clear mandate of public policy – which occurs in the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the employment premises.

What are the consequences for violating the act?

Significantly, the act applies retroactively to existing agreements that contain nondisclosure or nondisparagement provisions prohibiting employees or contractors from engaging in the kind of discussions or

disclosures permitted by the act. Existing agreements are not grandfathered in under the new law. As of June 9, 2022, noncompliant provisions in an employment agreement, contractor agreement, agreement to pay compensation in exchange for the release of a legal claim, or any other agreement between an employer and an employee or contractor are void and unenforceable. Entering into a new agreement that contains noncompliant provisions or attempting to enforce an existing agreement that contains noncompliant provisions may result in penalties. Specifically, the act provides for a minimum damages award of $10,000, plus attorneys' fees and costs.

It is important that employers recognize the act's retroactive effect before attempting to enforce existing noncompliant provisions in varying employment or contractor agreements. Employers do not necessarily need to re-paper their current agreements, as employees cannot recover damages for noncompliant provisions in agreements entered into before June 9, 2022, unless the employer seeks to enforce invalid provisions. Notably, agreements to settle legal claims entered into before June 9, 2022, are exempt from the retroactive effect of the law.

The act's effect on existing Washington law

As many Washington employers are aware, before the passage of the act, Washington employers already were prohibited from utilizing employment agreements that restricted workers from disclosing claims of workplace sexual assault and sexual harassment under Revised Code of Washington (RCW) 49.44.210. The act overturned RCW 49.44.210, but effectively has expanded its protections by prohibiting the use of nondisclosure or nondisparagement provisions in a wider range of contexts.

Practical guidance for employers

Employers should review their existing forms for use with Washington employees and contractors, and revise those forms to include language specifying that employees and contractors may disclose the specific topics identified in the act. Employers also must be diligent in ensuring that they do not try to enforce noncompliant provisions.

Cooley is available to help any employer seeking guidance on necessary changes to their employment, contractor, and settlement and separation agreements for compliance with the act going forward. Please feel free to reach out to any of the lawyers listed below with questions regarding this recent change in law.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Selin Akkan Palo Alto	sakkan@cooley.com +1 650 843 5076

Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Carly E. Gibbons Chicago	cgibbons@cooley.com +1 312 881 6613
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Carly Mitchell Washington, DC	cmitchell@cooley.com +1 202 842 7828
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Miriam Petrillo Chicago	mpetrillo@cooley.com +1 312 881 6612
Ryan Vann Chicago	rhvann@cooley.com +1 312 881 6640
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire

document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.