

CLIENT ALERT: Maine is the Latest State to Limit Private Employer Use of Nondisclosure Agreements

Effective August 8, 2022, a new **Maine law** becomes the latest example of states limiting the use of employment related nondisclosure agreements (NDAs). The law prevents employers from requiring employees and prospective employees to enter into contracts or agreements that “[have] the purpose or effect of preventing the employee from disclosing or discussing discrimination, including harassment.” In addition to prohibitions on such provisions in agreements with prospective and current employees, the law also restricts provisions in settlement, separation, and severance agreements, that “prevent[] the disclosure of factual information relating to a claim of discrimination, including harassment.” There is an exception to this restriction, specifically when agreements are entered into at the employee’s request. Also, under this law, agreements may not prevent individuals from “provid[ing] testimony or evidence, fil[ing] claims, or mak[ing] reports to any federal or state agency” or “in state or federal litigation or proceedings” and requires agreements to explicitly state that employees retain those rights. Importantly, the law requires employers to provide employees with 21 days to consider a nondisclosure provision and then seven days to revoke the agreement once executed.

Maine’s new law is part of a developing trend, as numerous states have put similar laws into effect in recent years. For example, California, Hawaii, Illinois, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington have all enacted legislation limiting employer use of non-disclosure agreements. Additionally, a new bipartisan bill called the Speak Out Act has recently been introduced in Congress. If passed, the bill would prevent employers from enforcing NDAs where sexual misconduct is involved.

After #MeToo became a national movement, state laws limiting nondisclosure agreements were often initially limited to sexual harassment and discrimination related claims, but in recent years, there has been a move towards more expansive restrictions on NDAs. The Maine law, for example, covers all workplace discrimination. Additionally, in recent years, some states have expanded their existing laws:

- In 2018, California enacted a law which banned private employers from using NDAs in settlement agreements involving sexual assault, sexual harassment, and workplace harassment or discrimination based on sex. In 2021, Effective January 1, 2022, California passed S.B. 331 which expanded the law to include other forms of workplace harassment and discrimination.
- Washington passed a law in 2018, which provided some limitations on employers’ ability to require employees to sign agreements, but in 2022, a new Washington law (Engrossed Substitute House Bill 1795) was passed which repealed the earlier law and significantly expanded its scope. The new law (effective June 9, 2022) prohibits “provision[s] in an agreement by an employer and an employee not to disclose or discuss conduct, or the existence of a settlement involving conduct, that the employee reasonably believed to... to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual

assault, or that is recognized as against a clear mandate of public policy.” Notably, this law is retroactive and applies to “invalidate nondisclosure or nondisparagement provisions in agreements created before the effective date.”

- In July 2022, Hawaii amended its law to prevent employers from “enter[ing] into ... nondisclosure agreement[s] that prevent[... disclosing or discussing sexual harassment or assault.” Previously the Hawaii law only prohibited employers from “requir[ing]...as a condition of employment” that an employee sign such a nondisclosure agreement.

As this area of the law is rapidly evolving, employers are strongly encouraged to consult their MBJ attorney regarding the effect of these laws on their stand-alone NDA agreements as well as any separation or settlement agreements with confidentiality provisions.

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