CLIENT ALERT: President Biden Signs the "Speak Out Act" – Prohibiting Employers from Enforcing Pre-dispute Nondisclosure and Nondisparagement Agreements for Claims Involving Sexual Assault and Sexual Harassment

On December 7, 2022, just nine months after signing the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, President Biden signed the Speak Out Act (the "Act"). President Biden's signature on the Speak Out Act comes after the bill was passed with unanimous consent in the Senate and with an overwhelming majority in the House of Representatives. The law prohibits certain nondisclosure and nondisparagement agreements, and it has the stated purpose to provide safer workplaces and greater access to justice by enabling victims of sexual harassment and assault to come forward and hold perpetrators accountable for such abuse.

What Does the Act Do?

The Act targets the broad agreements highlighted by the "#MeToo" movement which had significantly limited the ability of victims of sexual assault and/or harassment from making their allegations of abuse public. The Act effectively prohibits employers from enforcing all nondisclosure ("NDAs") and nondisparagement agreements that were entered into **before** the dispute arose, where the dispute involves claims of sexual assault and/or sexual harassment. In other words, the Act's limitations on the use of NDAs and nondisparagement agreements appears to have no impact on the use of such provisions in agreements reached to resolve claims of sexual harassment and/or assault that have already been raised.

Importantly, the Act does not prevent the application of more restrictive state laws such as those seen in states like California, Illinois, New Jersey, New York, Maine, and Washington.

How Does the Act Define Nondisclosure and Nondisparagement?

The Act defines nondisclosure clauses as "a provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement."

The Act further defines nondisparagement clauses as "a provision in a contract or agreement that requires 1 or more parties to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case."

What Does This Mean For Employers?

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While the Act does not retroactively apply to claims of sexual harassment or assault raised prior to December 7, 2022, employers will still need to immediately adjust to its requirements as all agreements impacting claims raised or filed after December 7th are covered by the Act, even if the Agreement was signed prior to December 7, 2022.

Additionally, and as noted above, it is important for employers to realize that the Act does not prohibit employers from including nondisclosure and nondisparagement clauses in agreements used to resolve claims of sexual harassment and/or assault that have already been raised. However, this may not be the case for employers who operate in multiple states. Employers with multi-state operations will need to be cognizant of those states with more restrictive limitations on the use of NDAs and nondisparagement agreements when entering into any such agreement both before and after a claim has arisen.

Finally, employers should carefully reevaluate the language used in their employee handbooks in addition to the employment and confidentiality agreements that they require employees to sign at the beginning or during their employment to ensure that they remain compliant with the requirements of the Act and other similar state laws.

Employers with questions regarding the requirements of the Speak Out Act, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, and other state laws limiting an employer's use of arbitration and nondisclosure/nondisparagement agreements are encouraged to consult with their MBJ attorney.

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