

My Employees Have Seen Too Much. Can I Make Them An Offer They Can't Refuse?

October 7, 2024 – Dorsey Work Watch

by Nisha Verma and Hannah Green



It is common knowledge that employers have a vested interest in the confidentiality and discretion of their employees, especially in emerging or sensitive industries. Employers invest time and money into training employees on

proprietary systems, expose employees to valuable trade secrets, and make employees privy to internal disputes that could be damaging if made public. Accordingly, it is common practice for employers to require their employees sign confidentiality or nondisclosure provisions, often referred to as NDAs, in their employee or severance agreements as a condition for employment. Nondisclosure provisions in standard form employee or severance agreements offer employers a quick and easy way to safeguard potentially valuable or risky information without having to implement more costly measures. Even before the recent AI boom, competitive industries like technology and financial services relied so heavily on nondisclosure agreements that they became a ubiquitous part of the employment process.[1]

However, employers should be aware that, in addition to the federal Speak Out Act (42 U.S.C. § 19403), state laws regarding the enforceability of confidentiality provisions in employee agreements vary and have undergone significant transformations in recent years. In 2017, the #MeToo movement arose in North America and Europe, a digital social movement regarding the pervasiveness of sexual misconduct, particularly in the workplace.[2] In the wake of the #MeToo movement, nearly twenty states and the federal legislature enacted laws limiting the use of confidentiality provisions that would prevent a victim or witness of sexual misconduct from disclosing their experience. The extent and application of state restrictions on nondisclosure agreements varies wildly: for example, some states like Louisiana provide merely that nondisclosure agreements that

Related People

- Nisha Verma
- Hannah Green

Related Capabilities

- Labor & Employment

preemptively prevent an employee from disclosing future sexual misconduct are unenforceable.[3] By contrast, other states, like California, make it an unlawful employment practice, and creates significant employer liability, for any employer that requires any employee to sign a nondisclosure agreement that has the effect of preventing that employee from disclosing any unlawful acts.[4] Moreover, even states that have not adopted statutory limits on nondisclosure agreements have common law doctrines limiting the enforceability of nondisclosure agreements that are overly broad or restrictive.

Specifically, 19 states have adopted restrictions on employer nondisclosure agreements. Seven of those states, Arizona, Hawaii, Maryland, Tennessee, Utah, and Virginia, restrict employers from enforcing nondisclosure agreements specifically related to sexual misconduct. While all seven states' laws relate only to sexual misconduct, there are still notable differences in the degree of their restriction. Before the federal Speak Out Act was passed, other states chose to adopt an even lower level of statutory restriction. For example, Arizona's law only restricts the enforcement of nondisclosure agreements that prohibit a party to the agreement from making a statement in a criminal proceeding related to sexual assault and does not prohibit enforcement of an agreement that would prevent a party from making a public statement.[5] For these laws, compliance with the federal standard generally will mean compliance with the state law.

By contrast, other states have restricted enforcement of all nondisclosure agreements related to sexual misconduct, regardless of whether they were agreed to before or after the incident occurred. For example, the laws of Hawaii, Tennessee, Virginia, and Utah all restrict the enforcement of nondisclosure agreements regarding sexual misconduct that are a condition of employment, even if the agreement was entered into after the workplace dispute occurred. Importantly, all these laws reference the enforcement of a nondisclosure agreement that is required by the employer as a condition for employment. Accordingly, most (but not all) of these states allow the inclusion of nondisclosure agreements in settlements, so long as they are independent of employment with distinct consideration. Indeed, Utah's law specifically provides that their statute does not prohibit nondisclosure clauses that relate to the amount of a monetary settlement, or at the request of the employee.[6]

Other states have gone further and have restricted the enforcement of employer nondisclosure agreements for a range of conduct beyond sexual misconduct. California, Colorado, Illinois, Maine, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington all restrict employer nondisclosure agreements that would prevent disclosure of certain types of unlawful conduct. For example, Colorado, Illinois, and Maine restrict the enforcement of nondisclosure agreements related to any unlawful employment practice, including and in addition to sexual assault. This is relevant because 'unlawful employment practices' include a range of conduct that might be difficult for an employer to predict. For example, Colorado's law provides that it is an unlawful employment practice for an employer to "cause to be printed" an advertisement for prospective employment that indirectly discriminates on the basis of a protected class.[7] Intuitively, it may seem like common sense to draft a nondisclosure agreement

that does not potentially restrict an employee's disclosure of unlawful employment practices. However, when dealing with dense anti-discrimination statutes that don't provide clear thresholds for liability, an overly broad nondisclosure agreement can easily restrict disclosure of an unlawful employment action, despite the employer's best intentions.

Furthermore, some states go even further and create liability for employers that require their employees to enter into statutorily prohibited nondisclosure agreements. California, Oregon, and Rhode Island all make it an unlawful employment practice for an employer to require their employees to sign a nondisclosure or nondisparagement agreement regarding certain unlawful acts. For example, California makes it an unlawful employment practice for an employer to require an employee to sign any "document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace."^[8] Furthermore, the California statute requires that all nondisclosure agreements contain language clarifying that nothing prevents the employee from disclosing conduct that they have reason to believe is unlawful.^[9] An employer's unlawful employment action under California's statute exposes them to a civil cause of action and accompanying costs and damages.^[10] When drafting nondisclosure agreements in states like California, employers should strive to carefully comply with the statutory restrictions to avoid significant liability.

While the laws governing employers use of nondisclosure agreements have become increasingly complicated in recent years, there are a few longstanding principles that employers should keep in mind. Most importantly, no state restricts an employer from entering into a nondisclosure agreement for the purpose of protecting trade secrets and other proprietary information. Even California, which adopted extremely restrictive laws governing nondisclosure agreements, provides that their statute "does not prohibit an employer from protecting the employer's trade secret proprietary information, or confidential information," so long as the restrictions do not pertain to unlawful acts in the workplace.^[11]

In light of the recent changes to federal and state laws regarding the enforceability of employer nondisclosure agreements, employers should consider the following:

- Employers should avoid using the same standard form nondisclosure agreement for employees employed in different states.
- Employers should avoid drafting nondisclosure agreements that are overly broad and prohibit disclosure of information beyond what the employer intends to protect.
- For applicable states, employers should ensure that their nondisclosure agreements contain statutorily required disclosures that nothing prevent an employee from discussing instances of sexual misconduct, or other unlawful employment practices.

[1] Shira Ovide, *An Obsession With Secrets*, The New York Times, July 27, 2021, <https://www.nytimes.com/2021/07/27/technology/nondisclosure-agreements-tech-companies.html>.

[2] Amy Brittain, *Me Too movement*, Encyclopedia Britannica, Last Updated July 22, 2024, <https://www.britannica.com/topic/Me-Too-movement>.

[3] LA HB161, 2024 Regular Session, Bill Text (2024),
<https://legiscan.com/LA/text/HB161/id/3011873>.

[4] Cal. Gov. Code § 12964.5(a)(1)(B).

[5] Ariz. Rev. Stat. § 12-720.

[6] Utah Code Ann. § 34A-5-114.

[7] Colo. Rev. Stat. § 24-34-402.

[8] *Id.* Cal. Gov. Code § 12964.5(a)(1)(B).

[9] *Id.*

[10] *Id.* § 12965(a).

[11] *Id.* § 12964.5(f).