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The Demise of Non-Disclosure Agreements in the #MeToo Era

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With the criminal trial of Harvey Weinstein—the disgraced Hollywood producer accused of sexual assault by dozens of women—the issue of non-disclosure agreements has taken center stage. Although a criminal prosecution trumps any non-disclosure agreement, the question is how prosecutors find out about serial sexual harassers in the first place. In the absence of any movement on the federal level, states are looking at the issue of how to help victims heal from these heinous personal violations outside the spotlight of a trial while simultaneously stopping patterns of sexual assault.

Weinstein used a number of tactics to silence his victims, notably non-disclosure agreements (NDA) and private intelligence companies to dig up dirt on victims. The #MeToo Movement has fought tooth and nail to restore voices to the victims of sexual misconduct, including through the invalidation of NDAs in settlement agreements, extension of the statute of limitations, expansion of anti-retaliation provisions, and enactment of local laws that provide broader protections than does Title VII of the Civil Rights Act of 1964.

The states that have taken action are starting to turn around the power dynamic in these cases. Some of the states which have introduced bills over the past three years include:

- **Arizona**: In April 2018, Arizona passed House Bill 2020,[i] pursuant to which confidentiality agreements may not be used to prohibit individuals from disclosing factual information about sexual assault or sexual harassment at the request of a peace officer, prosecutor, or during a criminal proceeding when initiated by another party. Further, a defendant may not use such a disclosure as a basis for invalidating a settlement agreement or the defendant's duties under the agreement. Additionally, the law precludes public funds from being used as consideration in exchange for non-disclosure agreements in cases of sexual assault or harassment.
- **California**: The Governor approved The Stand Together Against Non-Disclosure Act[ii] on September 30, 2018. The Act prohibits settlement agreements that render confidential facts related to civil claims or administrative complaints about sexual assault, sexual harassment, and workplace sexual discrimination and retaliation. The Act also precludes courts from approving settlement agreements which contain the prohibited clauses.
- **Maryland**: The Disclosing Sexual Harassment in the Workplace Act of 2018[iii] invalidates provisions in employment contracts, policies, or other agreements which purport to waive procedural or substantive rights with respect to a victim's future claims

for sexual harassment or retaliation. The Act prohibits employers from retaliating against employees for refusing to enter into such agreements. Further, it requires employers with 50 or more employees to report to the Maryland Commission on Civil Rights information about: the number of sexual-harassment settlements it entered into; the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years; the number of settlements made after an allegation of sexual harassment that included a confidentiality provision; and whether the employer took personnel action against any employee with whom the employer settled a sexual-harassment claim.

- **New Jersey**: In March 2019, New Jersey enacted Senate Bill 121,[iv] which prohibits any "provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" and renders such provisions unenforceable against any employee who is a party to the agreement as per public policy.
- **New York**: New York prohibits courts from approving settlement agreements for sexual harassment claims when they contain confidentiality provisions, unless the agreement states that confidentiality is the plaintiff's preference, the plaintiff has been provided at least twenty-one days to consider the confidentiality provision, and the plaintiff has been provided at least seven days to revoke his or her acceptance of the confidentiality provision.[v]
- **Pennsylvania**: In 2017, Senator Judith Schwank introduced Senate Bill No. 999,[vi] which would invalidate settlement agreement and contract provisions that bar disclosing the name of individuals suspected of sexual misconduct or information relevant to the investigation of sexual misconduct. It also would outlaw provisions which impair attempts to report sexual misconduct claims, waive substantive or procedural rights or remedies with respect to sexual misconduct claims, or require the expungement of truthful information about sexual misconduct claims from documents maintained by the victim. However, Senate Bill No 999 was referred to the Judiciary Committee in December 2017, where it currently languishes.
- **Washington**: Senate Bill 5996[vii] went into effect on June 7, 2018. Pursuant to this legislation, employers may not require an employee, "as a condition of employment, to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events . . . or between employees, or between an employer and an employee, off the employment premises." The law further deems it an unfair labor practice to retaliate against an employee for disclosing workplace sexual harassment or assault, but it does not preclude confidentiality provisions in settlement agreements.

While on its face, legislation that prohibits NDAs with respect to sexual misconduct settlements seems to benefit victims, these agreements can be helpful to victims in many circumstances.

Defendants resolve lawsuits informally, rather than proceeding to trial, in large part, to protect their reputations by buying silence. Confidentiality and non-disparagement clauses are standard provisions in the vast majority of employment settlement agreements, not only those involving sexual assault.

In addition to confidentiality and non-disparagement provisions, settlements typically contain carve outs, which permit a plaintiff to respond (truthfully) to legal process, cooperate with law-enforcement and other governmental investigations, and file administrative claims with the U.S. Equal Employment Opportunity Commission and its state equivalents, because such claims are not waivable by law.

NDAs instead focus on prohibiting a plaintiff's voluntary cooperation in the absence of legal process, that is, voluntarily disclosing facts about one's case to someone else who has actual or potential claims against the same defendant—and broader public disclosure. From a policy standpoint, the invalidation of agreements which prohibit voluntary cooperation and public disclosure further the public interest by ensuring that the public has access to information about serious sexual misconduct and that prosecutors can hold the perpetrators accountable.

However, from an individual standpoint, many victims value confidentiality provisions. They fear that vengeful employers will engage in smear campaigns against them by disclosing the fact that they lodged sexual harassment allegations, or worse, lies, to other potential employers, and will thereby preclude them from obtaining new employment. This threat is particularly pronounced in industries which are historically male-dominated, such as Hollywood and the finance industry.

Further, some victims settle their cases in order to avoid the re-traumatization of a public trial, too often characterized by an aggressor's attempt to paint the victim as sexually promiscuous, money hungry, or not credible. A victim's purpose in foregoing a public trial is lost, if a defendant can simply disclose details about the victim and try the case in the court of public opinion. For victims who have suffered physical or psychological impacts from sexual misconduct, the unwanted attention and public scrutiny can be particularly injurious.[viii]

One of a defendant's primary objectives in settling a case is to bind a plaintiff to a confidentiality provision. If the law precludes a plaintiff from committing to an NDA, the value of the settlement drastically decreases for both parties. While some plaintiffs prioritize their ability to share their story, others place more value on obtaining closure and moving forward. Therefore, states should provide victims the individual choice of whether to agree to confidentiality. As individuals who have suffered sexual assault have unique needs, legislation must respect their differing priorities—and the individuals who want to hold wrongdoers accountable publicly or privately should be permitted to do so.

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[i] Ariz. Rev. Stat. § 12-720 (2018).

[ii] Cal. Civ. Pro. § 1001 (2018).

[iii] Md. Code Ann., Lab. & Empl. § 3-715 (2018).

[iv] N.J. Stat. Ann. §§ 10:5-12.7–10.5-12.11.

[v] N.Y. Gen. Oblig. Law § 5-336 (2018).

[vi] S.B. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

[vii] Wash. Rev. Code § 49.44.210 (2018).

[viii] World Health Organization, *Guidelines for Medico-Legal Care for Victims of Sexual Violence* 6 (2003), http://apps.who.int/iris/bitstream/handle/10665/42788/?sequence=1.