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Confidentiality and Nondisclosure Provisions in Employment Settlement Agreements Now Coming Under Fire

In the context of employment disputes (including sexual harassment claims), companies try to protect themselves through the use of nondisclosure, nondisparagement and confidentiality provisions in settlement agreements.

By Steven I. Adler and Lauren X. Topelsohn | November 13, 2017

There is a lot of truth to the saying that "it takes years to build a reputation and only seconds to destroy it." Yet, some bad reputations are well deserved. Roger Ailes and Bill O'Reilly, both formerly of Fox News, Harvey Weinstein, formerly of The Weinstein Company (TWC), and Roy Price, formerly of Amazon Studios, are a few examples. All were taken down by allegations of sexual harassment and/or sexual assault. Now, former President George H. W. Bush and Kevin Spacey have been added to the list. A company's reputation is also easily tarnished. Companies are regularly ranked based on the public's perception of their vision and leadership, financial performance and social responsibility, as well as their workplace environments. Law firms are no different. Some are known as sweat shops and others as "ol' boys' clubs."

Companies try to protect their reputations from executives who have "gone wild" by including moral turpitude clauses as a basis to terminate executives for cause under their employment agreements. Similarly, in the context of employment disputes, companies try to protect themselves through the use of nondisclosure, nondisparagement and confidentiality provisions in settlement agreements. Although confidentiality policies that bar employees from discussing sexual harassment or other workplace misconduct are generally held to violate Section 7 of the National Labor Relations Act, which prohibits employers from interfering with employees' rights "to organize," or "to engage in other concerted activities for mutual aid or protection," confidentiality clauses in settlement agreements are permitted. On Aug. 25, 2016, the National Labor Relations Board (NLRB) held, in S. Freeman & Sons, 364 NLRB No. 82, that "an employer can require an employee to keep confidential the terms of a settlement agreement in exchange for reinstatement" to his former position. In doing so, the NLRB noted that it has long favored "private, amicable resolution of labor disputes, whenever possible," and "that an employer may condition a settlement on an employee's waiver of Section 7 rights if the waiver is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver."

Generally, confidentiality provisions work well. Without them, a company may be penalized for the improper actions of a rogue employee by being labeled as a hostile place to work. This, in turn, may impact morale, attendance and recruiting, and even cause others to stop doing business with the company. TWC is a prime example: the company is purportedly considering bankruptcy. Nondisclosure agreements also protect individuals who are falsely accused of harassment and companies that decide to settle specious claims for nuisance value. On the flip side, confidentiality clauses are helpful to victims of harassment or discrimination who may not want it known that they sued their employers and who would not see any financial recovery short of trial without them.

As a result of the adverse publicity surrounding the rampant harassment in the entertainment field, nondisclosure and confidentiality provisions in settlement agreements have come under fire. Should they be enforced like any other contractual provision? What about when they subvert public policy? Confidentiality clauses clearly restrict communications to government agencies charged with enforcing employment laws.

New Jersey law appears to protect persons who disclose confidential information to the government. Khair v. Campbell Soup Co., 893 F. Supp. 316 (D.N.J. 1995) ("[T]here is a serious issue as to whether under New Jersey law a confidentiality agreement may frustrate the right of an employee to report his employer's alleged conduct to the appropriate government agency"). New York law is even clearer. Confidentiality clauses that subvert public policy are unenforceable. Brockport v. Calandria, 745 N.Y.S. 2d 662 (2002).

The United States Equal Employment Opportunity Commission (EEOC) also has made clear that agreements cannot limit an employee's right to participate in an EEOC investigation, hearing or proceeding because it interferes with the EEOC's enforcement activities. See, EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes. However, an employee may waive his or her right to recover any subsequent monetary recovery the EEOC may obtain. Id.

"Whistleblowers" receive special protection under a number of laws. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) authorizes the Securities and Exchange Commission (SEC) to pay awards to whistleblowers who provide the SEC with information about federal securities law violations under certain circumstances. 15 U.S.C. §78u-6. Dodd-Frank also prohibits public companies from discharging or discriminating against an employee for engaging in protected conduct. 15 U.S.C. §78u-6 (h)(1)(A). The "rights and remedies" afforded by Dodd-Frank "may not be waived by … agreement, policy form, or condition of employment, including by a pre-dispute arbitration agreement."

Similarly, the Defend Trade Secrets Act (DTSA), enacted in May 2016, immunizes employees and contractors, who disclose trade secrets in confidence to the government for the purpose of reporting or investigating a suspected violation of law, from civil and criminal liability. Id. §1833 (b)(1)(A)(i)-(ii). Employers must give notice of the DTSA's immunity protection in contracts governing the use of trade secrets or other confidential information. 18 U.S.C §1833(b)(3)(A). Although an employer's failure to do so does not preclude a suit under the DTSA, it will disqualify the employer from recovering exemplary damages or attorney fees in an action against any person who was not given notice. 18 U.S.C. §1833(b)(3)(C).

Just a few months ago, the New Jersey Supreme Court declined to decide whether remarks made to a reporter by a plaintiff and her attorney violated the confidentiality clause in the plaintiff's settlement agreement with a municipality. In a July 11, 2017, decision, the Appellate Division found that the confidentiality clause had not been breached because what was disclosed to the media concerned a municipal court action only, and not the malicious prosecution suit covered by the confidentiality clause at issue. The Appellate Division declined to address the larger issue of whether the confidentiality clause violated public policy. See, New Jersey Intergovernmental Ins. Fund v. Selecky, 2017 WL 2953055 (App. Div. July 11, 2017). The Appellate Division also did not address whether the confidentiality clause in

question extended to the plaintiff's attorney. It may be argued that including a party's counsel in a confidentiality clause restricts the right to practice law in violation of Rule of Professional Conduct (RPC) 5.6(b), and an attorney's right to free dissemination of information under RPC 3.6.

In response to the wave of sexual harassment allegations against senior executives, in May 2017, Senate Bill 6382 was introduced in New York State. The proposed law would make it unlawful to require employees to prospectively waive any substantive or procedural right or remedy relating to a claim of discrimination, non-payment of wages or benefits, retaliation, harassment or violation of public policy in employment. The law would hold such clauses void and unenforceable with respect to any such claim arising after the date of the waiver. Anyone who attempts to enforce such a waiver would be subject to tort remedies, injunctive relief and attorney fees. The proposed law expands upon the Department of Labor's (DOL) rule that future claims for overtime and minimum wages cannot be waived under the Fair Labor Standards Act (FLSA). The DOL has held, however, that FLSA claims may be waived as part of a settlement agreement that is entered into under court or DOL supervision.

Confidentiality agreements are coming under increasing scrutiny. As established above, they are also subject to numerous state and federal law "carve-outs." Employers who rely on general, confidentiality policies or "form" agreements risk a later determination that the policy or agreement is unenforceable. Best practices require that confidentiality provisions be customized to the specific circumstances at issue, including the unique notice and timing requirements of applicable law.

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