# *California Restricts the Scope of Settlement Agreements (Again)*

For the second time in three years, California has increased restrictions on the scope of non-disclosure and confidentiality provisions in settlement agreements.

### *The "STAND Act" – CCP § 1001*

In 2018, the California Legislature passed SB-820, known as the "STAND Act" ("Stand Together Against Non-Disclosures"), which outlawed any provision within a settlement agreement that prevented the disclosure of "factual information" related to a claim filed in a civil action (or a complaint filed in an administrative action) regarding sexual assault, sexual harassment, workplace harassment or discrimination based on sex. That section also applied to claims for failure to prevent workplace harassment or discrimination based on sex, retaliation for reporting workplace harassment or discrimination based on sex, and harassment or discrimination based on sex by the owner of housing accommodation.

The STAND Act was billed as an outgrowth of the #MeToo movement, in which victims of sexual harassment began to speak out about their experiences after being silenced by societal pressure and, at times, non-disclosure agreements. The STAND Act made any provision in a settlement agreement that prevented the disclosure of factual information related to such claims "void as a matter of law and against public policy."

Governor Newsom signed SB-820 into on September 30, 2018, and it became effective on January 1, 2019. It is now section 1001 of the California Code of Civil Procedure.

### *The "Silenced No More Act"*

In August 2021, the California Legislature expanded the scope of Code of Civil Procedure section 1001 beyond sex-related claims by enacting SB-331, known as the "Silenced No More Act." Governor Newsom signed the legislation on October 7, 2021, and the goes into effect on January 1, 2022.

Under the new law, it is illegal for any settlement agreement to contain a provision that restricts or prevents the disclosure of factual information concerning claims related to harassment, discrimination, and retaliation based on *any* protected category—not just sex.

In other words, the law is expanded to apply to *every* protected category enumerated under the California Government Code, including race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, familial status, sex, gender, gender identity, gender expression, age, sexual

orientation, or veteran or military status. Any settlement agreement provision purporting to restrict the disclosure of factual information relating to such claims will be void and against public policy.

### *How Does This Affect California Employers?*

Employers are frequent targets of complaints alleging harassment, discrimination, or retaliation. In its 2019 Annual Report, the Department of Fair Employment and Housing reported fielding **nearly 29,000** intake forms, and over half of those requested immediate "Right-to-Sue" letters. It has been common practice for employers to include confidentiality and non-disparagement provisions in settlement agreements that encompass claims covered by Code of Civil Procedure section 1001. Such provisions are designed to prevent the employee from collecting a settlement payment on disputed claims, then bad-mouthing the employer by publicizing the alleged events and bragging about the settlement.

While settlement agreements still can protect the *amount* of a settlement from disclosure, these changes to the law dilute the scope of both confidentiality and non-disparagement clauses, since agreements may not restrict employees from disclosing the "factual information" relating to the underlying claims. Most cases that end in a settlement include no determination of the facts; rather, the parties typically maintain competing claims about the facts, and settlement agreements routinely include provisions stipulating that the employer does not admit liability and the settlement is not an admission. Until now, settlement agreements also often placed restrictions on what an employee could say about the settlement, limiting the employee's disclosures to something like, "the case was resolved to my satisfaction." Under the new law, confidentiality provisions that purport to limit an employee's disclosures to such anodyne replies will be against public policy.

Going forward, employers will need to be advised that their payment of settlements in California, while resolving pending litigation, cannot prevent an employee from talking about the "facts" of the case.