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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2018 Issue

The warrior's arsenal

A MODEST PROPOSAL REGARDING THE CONTINUED USEFULNESS OF CONFIDENTIAL SETTLEMENT AGREEMENTS FOR SEXUAL-HARASSMENT CASES IN A POST-WEINSTEIN ERA

As California's plaintiffs' lawyers continue to fight for victims of workplace sexual harassment and abuse, as well as the retaliation that often accompanies it, we all have observed with interest as scandal after scandal has unfolded to reveal the sordid sexual misdeeds of powerful people (usually men) in the workplace. Many of us have also wondered what type of long-term impact the vast amount of media coverage of the #MeToo movement will have on juries, judges, and especially, our clients' cases. Many of us have also wondered how lawmakers might respond legislatively to the underlying issues at the forefront of this frenzy of media.

The anti-confidentiality movement

Recent developments demonstrate a move against confidentiality in sexual harassment and abuse cases. In the past several months, concrete answers to the above situations have begun to emerge. There is a movement afoot seeking to stamp out the use of confidential settlements and non-disclosure agreements in sexual harassment and abuse cases. One of the approaches to this end is to eliminate certain financial incentives for defendants who might wish to settle. For example, in the recently passed so-called Tax Cuts and Jobs Act (the Act), one provision, although stopping short of an outright ban on confidentiality provisions and non-disclosure agreements, is clearly designed to *disincentivize* people and businesses from using confidential settlements and non-disclosure agreements in sexual harassment and abuse cases.

Specifically, this provision amends section 162 of The Internal Revenue Code, which deals with trade or business expenses, denies an employer/wrongdoer a tax deduction for: (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment. We should take note that while it is clear this provision denies an employer/wrongdoer any tax deduction for compensatory payments to victims and attorney's fees related thereto when a confidentiality provision or non-disclosure agreement is involved, it is *not* clear whether the law also disallows a victim's deduction for attorney's fees and costs as part of such a settlement. This question will likely need to be resolved in the tax court or through further clarifying legislation, as it represents a further problem for plaintiffs and their counsel.

Additionally, at least one California legislator, State Senator Connie Leyva, has publicly discussed what she views as the need for legislation that would place an outright ban on the use of confidential settlements or non-disclosure agreements in cases of sexual harassment or abuse. (Nason, Melanie, Los Angeles Times, *California lawmaker wants to ban secret settlements in sexual harassment cases after Weinstein scandal*, October 19, 2017.) The method for placing such a ban would be most likely by identifying such agreements as either illegal, voidable, or void. A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810-811.) As a result, one or more California Civil Code sections generally applicable to contracts could simply be added to or amended to achieve an outright ban on confidentiality clauses or non-disclosure agreements involving sexual harassment and abuse cases. (See, e.g., Civ. Code, 1607 [The consideration of a contract must be lawful within the meaning of Section 1667 and 1667 [That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals].]) The stated rationale for the ban under consideration by the state legislator is that secret settlements can jeopardize the public including other potential victims and allow perpetrators to escape justice just because they have the money to pay the cost of the settlements. (*Ibid.*) This fundamental rationale also is the basis for at least one of the reasons underpinning the new tax provision as well. While there is obviously some appeal to this rationale as a method of protecting *future would-be-victims*, there are numerous countervailing reasons that suggest against blindly implementing bans on confidentiality agreements in all circumstances.

Potential problems with banning or limiting confidentiality clauses

Simply put, banning confidentiality provisions will make it harder to settle cases – not easier. This conclusion is based on numerous factors, including that most employers/wrongdoers insist on confidentiality as a material term in settlement agreements (often requesting liquidated damages clauses to enforce such clauses). It seems reasonable that if employers/wrongdoers cannot obtain plausible deniability through such confidential settlement agreements (in which they never admit fault, anyway), they may be more inclined to simply roll the dice at trial in the hope of getting a defense verdict that they can use to scare away other would-be-plaintiffs from suing them.

Also, because some Employment Practices Liability (EPL) insurance policies contain *consent clauses* that allow the accused to veto a settlement by refusing to give consent, banning confidential

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settlements may make sexual-harassment cases harder to settle for this reason as well. This is because the accused harasser, who is often emotionally embroiled in the fight, will see a non-confidential, insurance-paid settlement as representing a harm to them *personally*, as such persons are often preoccupied with the idea that a public settlement will make them look bad. This will make them more likely to withhold consent to settle in such cases. While this conclusion is less likely true in cases where the EPL policy also has a hammer clause (i.e., a clause that permits the insurer to cap its liability to pay if the insured refuses to consent to a settlement recommended by the insurer), the existence of consent clauses is still something that should be considered when considering whether to support legislation banning confidentiality clauses in settlements agreements.

It is also reasonable to assume that a ban on confidential settlement agreements will make it more difficult to get top dollar for such settlements because the employer is deathly afraid of word getting out about the amount of such settlements for fear other victims will "start coming out of the woodwork," as the defense so often likes to characterize it. Moreover, the relative unavailability of settlement as an option may reduce the number of attorneys willing to take cases, especially ones that may depend heavily on discovery after filing due to a dearth of willing witnesses (e.g., a case presenting with probable high case costs and a much less certain positive outcome decreases the pool of attorneys willing to take the case). Many lawyers may respond, "Great, this means we get to try more cases!" But, such a response ignores the time constraints and resources of most lawyers, especially solo practitioners. It also ignores that not all cases need be, or should be, tried. These are but a few reasons that settlement will likely be more difficult if there are laws banning confidentiality in settlement agreements.

Existing state law

State law already bans certain types of confidentiality agreements in the most serious sexual harassment and abuse cases. Under California Code of Civil Procedure section 1002 (as amended September 30, 2016, effective January 1, 2017), "a provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action the factual foundation for which establishes a cause of action for civil damages for. . .an act that may be prosecuted as a felony sex offense." (*Id*., subd. (a)(1).) This would obviously include any sexual harassment or abuse claims that may be prosecuted as a felony sex offense, such as felony sexual assault, battery or rape. Other predicate types of acts included within the statute: (2) childhood sexual abuse, as defined in Section 340.1, (3) sexual exploitation of a minor, or conduct prohibited with respect to a minor as defined in certain statutes, or (4) sexual assault of an elder, under certain defined elder abuse statutes. (*Id.*, subds. (a)(2)-(4).)

The statute prohibits a court from entering an order, by stipulation or otherwise in any of the above types of civil actions, that restricts dissemination of the underlying information related to the action. The statute further declares that any provision in a settlement agreement that prevents disclosure of factual information related to the action, as described above, entered into on or after January 1, 2017, is "void as a matter of law and against public policy." (*Id.*, subd. (d).) As a further and possibly even more powerful deterrent, the statute provides that an attorney's failure to comply with requirements of the statute by: either (1) demanding that a provision that prevents the disclosure of factual information related to the action as described in the section be included in a settlement agreement, or (2) by advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline.

Lastly, the statute states in this regard that the State Bar of California shall investigate and take appropriate action in any such case brought to its attention. Clearly, section 1002 is meant to be taken seriously, and it provides real protections to the public-at-large in cases in which the perpetrator has engaged the most egregious types of sexual harassment and/or abuse.

Future victims have access to evidence

Most variations of the currently used confidential settlement agreements permit the settling victim to provide information and testify in other cases pursuant to subpoena or court order, thereby limiting the harm to other victims' cases that might otherwise arise. An important aspect of most employment related sexual harassment lawsuits under the Fair Employment and Housing Act or FEHA, as it is commonly referred to (see Gov. Code, § 12940, et seq.), is a cause of action against the employer for failure to prevent sexual harassment, discrimination and retaliation from occurring. An employer is required under section 12940, subdivision (k): "...to take *all reasonable steps necessary* to prevent discrimination and harassment from occurring." (emphasis added). (*Id.*, see, also CACI No. 2527 and *Taylor v. City of L.A. Dep't. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240 [we conclude that retaliation is a form of discrimination actionable under [Gov. Code section 12940(k)], *disapproved on another point in Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, at 1162, 1174.) If the employer fails to prevent harassment from occurring, it is independently liable under section 12940, subd. (k). (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1161; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 287-289.)

Thus, when an employer has prior actual or constructive knowledge that a particular employee is engaging in conduct potentially violative of the FEHA, it has a duty to take *all reasonable steps* to prevent such conduct. "One such reasonable step, and one that is required in order to ensure a discrimination-free work environment, is a prompt investigation of the discrimination claim." (*FEHC v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1024, *citing*, *Northrop Grumman Corp. v. Workers' Comp. Appeals*

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Bd. (2002) 103 Cal.App.4th 1021, 1035.)

As a result, factual information related to other victims' prior allegations, claims or lawsuits against the same employer or perpetrator based on similar misconduct are *highly relevant* to failure to prevent claims. Moreover, evidence of prior and subsequent similar misconduct by the same actors is also directly relevant to whether "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded…," for purposes of imposing punitive damages. (Civ. Code § 3294(b).)

Thus, given the importance of evidence of other victims' allegations, claims or lawsuits against the same employer or perpetrator based on similar misconduct, reasonable minds may argue that confidential settlement agreements that prohibit a victim from disclosing factual information related to such other bad acts tend to undermine FEHA's purpose of preventing unlawful employment practices and deterring future misconduct through exemplary damages. However, there are two reasons why this is not a true cause for concern here.

First, under appropriate circumstances, such clauses may be argued to be void as against public policy given that their nature and purpose would be to undermine an express goal of the FEHA (i.e., to prevent sex discrimination). (See, e.g., Civ. Code, 1667 [That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals].)

Secondly, most modern day confidential settlement agreements currently in use by defense counsel do not preclude a public discussion of the underlying facts and usually contain express exceptions to the duty of confidentiality in the case of compelled testimony.

Usually, the latter clause will read something to the effect that a settling plaintiff and her respective attorneys agree to keep the existence of the agreement and its terms confidential and that they are not to disclose same to third parties except in response to duly served and noticed court process, to the extent disclosure may be required by law or statute. As a result, if other victims later bring cases against the same employer/harasser and seek testimony from a settling prior plaintiff, there is usually a clear avenue by which the second victim may obtain evidence to support his or her case from the previously settling victim. Obviously, this is not a perfect situation, as this exception essentially means the other victim will need to file a lawsuit to command the power of subpoena, and this essentially means victims who do not wish to file suit may find it difficult to obtain the needed information since they have no power of subpoena. However, at least there remains a clear avenue for a settling victim to still provide the testimony and information to other victims of the same employer/harasser that are willing to files suit to get the needed information.

Sometimes sexual abuse/harassment victims *prefer* confidentiality

The common thinking behind passing anti-confidentiality laws does not leave room for the possibility that the victim might actually desire confidentiality. The truth is, we live in a "google it" world. People who have gone through the upheaval of being sexually harassed, abused and/or retaliated against, may not want everyone to know about it (or how they chose to deal with it). They also might not want potential or subsequent employers to be able to simply google their name to find out that they sued their former employer or boss, or that the misconduct directed at them had caused them serious emotional and/or financial harm and had a negative effect on them.

Obviously, details of publicly filed lawsuits are available to those who know where to look and how to look for them, but in most cases, the details of lawsuits are not readily available to someone who simply googles a victim's name. This affords *some measure of privacy* for the victim from the casual observer. Additionally, many of us have had clients who do not want their family, spouse or significant other to know they were sexually harassed at work, or to know the extent of the harassment, or to know how the matter was resolved. Another situation in which this might arise is in the context of industries that are insular in nature, where everyone knows everyone, and people talk.

The entertainment industry is an obvious example, but there are many others as well. Harassment and abuse victims in these contexts may desperately want to avoid having everyone in their industry being able to know that they made a claim or filed a lawsuit, what the details were, and how it was resolved. Taking away the victim's right to decide whether to keep such matters confidential could lead to them being exposed to industry blackballing, or (non-actionable) mistreatment by future co-employees. Eliminating the ability to reach a confidential settlement also takes away the victim's ability to decide. This is not a good thing. It is the victim's right to make that decision, not that of a patriarchal (or matriarchal) legislature. Because victory may take many forms, eliminating the option of confidential settlement also removes a valuable weapon from the warrior's arsenal.

Our clients should have more, not less, autonomy over their own futures

It is hard enough for a victim of sexual harassment or abuse to come forward and tell their story. Many have already been subjected to harsh, sexual mistreatment of a physical and emotional nature. Add to this the fear of having to call an attorney and explain the gory details, and the entire process can feel very intimidating and daunting. During this early phase of a victim's attempt to find some form of justice, he or she naturally will have many questions. What do I do next? What should I do if the employer/harasser fires me based on made-up reasons? How long will this process take?

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Do I have to file a lawsuit? Obviously, the answers to these questions are not one-size-fits-all. Some people do not want to file a lawsuit. Others may initially think they want to file a lawsuit, but then lose heart after circumstances change or evidence does not develop in the way they had hoped. Some people are committed to taking a case all the way. It is our responsibility to attempt to provide our clients with as much information as possible and to help them make informed decisions.

People should not be further stripped of their autonomy when seeking justice. Leaving the potential for a settlement on the table – even when it may require confidentiality, provides victims with a greater arsenal of weapons and tools, from which they will choose in seeking justice. This includes everything from negotiating a pre-trial settlement, to formal mediation, to arbitration, or trial, appeal and beyond. Whatever our approach is as an informed citizenry of advocates, we should strive to keep this full arsenal of weapons and tools available to aid our clients. Passing legislation that would limit or deprive us of one of our most powerful tools in settlement is not in the best interests of our clients; our clients are the ones who have been victimized, and it is they who should ultimately have the ability to make the final choice – from all the available options – of what is best for them.

Conclusion

It is certainly a good idea to undertake a comprehensive examination of the myriad considerations posed by the use of confidentiality provisions in sexual harassment and abuse cases – as well as the potential negative (and positive) impact they may have on victims and society. However, it is unwise to hastily implement a blanket ban on such confidentiality agreements in all cases, as the unintended consequences of doing so *may lead to further harm to the victims*, who may be denied justice completely or denied the right to full autonomy over important decisions regarding their case as a result of such a ban.

An attorney for over 21 years, Jason L. Oliver, primarily focuses on cases of workplace sexual harassment, discrimination, and retaliation across California. Mr. Oliver is a graduate of Gerry Spence's nationally acclaimed Trial Lawyers College and has been nationally recognized among the "Top 100" Employment Lawyers by National Trial Lawyers, the "Best Lawyers in America," by American Lawyer, and enjoys a "Superb" rating in sexual harassment law from Avvo.com. He was also named a "Rising Star" and a "Super Lawyer" by Los Angeles magazine, as well as a "Top Attorney" by Pasadena Magazine. For more information, see https://nosexualharassment.com.