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# **LIMITING NONDISCLOSURE AND NONDISPARAGEMENT AGREEMENTS THAT SILENCE WORKERS: POLICY RECOMMENDATIONS**

In the wake of #MeToo,<sup>1</sup> it is made clear that when individuals tell their stories, they can create change. But employers continue to use contractual tools, including nondisclosure agreements and nondisparagement agreements, to prevent individuals from disclosing harassment, discrimination, and other worker rights violations—whether to co-workers, enforcement authorities, family and friends, or the public. Individuals who violate these agreements risk significant monetary penalties. As a result, these agreements can allow employers to hide harassment, abuse, discrimination, and exploitation from public scrutiny and accountability, enabling the continuation of these practices.

Policymakers can counter the harmful effects of nondisclosure and nondisparagement agreements (collectively, “NDAs”) by prohibiting employers from requiring individuals to enter NDAs related to harassment, discrimination, and other worker rights violations as a condition of employment and by limiting the use of NDAs in settlement, separation, and severance agreements.

## **Employers' Abusive Use of NDAs**

A nondisclosure agreement or clause is a contract or part of a contract that prevents workers from disclosing specific types of information about the employer and/or workplace conditions. The use of nondisclosure agreements is widespread: recent data indicates that over one-third of the U.S. workforce is bound by some form of nondisclosure agreement.<sup>2</sup> Traditionally, companies used nondisclosure agreements to protect trade secrets. However, since the 1980s, companies have broadened the use of nondisclosure agreements to prohibit workers from speaking up about a range of workplace conditions, including harassment, discrimination, and other violations of worker rights.<sup>3</sup>

Nondisparagement agreements prohibit workers from publicly criticizing their employer or disclosing any negative facts about their employer, even facts that are true.<sup>4</sup>

NDAs that restrict workers from disclosing worker rights violations typically arise in two contexts: 1) they can be imposed upon workers at the time of hire, as a condition of employment, or after hire, as

a condition of continued employment (“pre-dispute”), or 2) they can be inserted into a settlement, separation, or severance agreement after a worker has experienced harassment, discrimination, or some other violation of workplace rights. (“post-dispute”).

## Pre-Dispute NDAs

Too frequently, employers impose NDAs as a condition of getting or keeping a job, requiring workers to give up the freedom to speak publicly about discrimination, harassment, and other violations of their rights.

For example, the use of broad NDAs to cover up harassment was highlighted in a sexual harassment lawsuit filed by a restaurant manager against restaurateur Mike Isabella. The complaint alleged that since 2011, workers had been required to sign, as a condition of employment, NDAs that prevented them from sharing any “details of the personal and business lives of Mike Isabella, his family members, friends, business associates and dealings,” on pain of a \$500,000 penalty per breach.<sup>5</sup> Moreover, the complaint alleged that workers at Isabella’s restaurants were threatened with enforcement of the NDA if they spoke out about sexual harassment in the workplace.<sup>6</sup>

Depending on how they are drafted, these NDAs may also mislead workers into believing that by signing they have waived their legal rights to communicate with civil rights agencies and law enforcement about worker rights violations. Federal laws, including the National Labor Relations Act (“NLRA”)<sup>7</sup> and Title VII of the Civil Rights Act of 1964 (“Title VII”),<sup>8</sup> limit an employer’s ability to enforce contracts that prevent workers from discussing employment conditions or situations. An employer generally cannot, for example, forbid workers protected by the NLRA<sup>9</sup> from discussing employment conditions with each other, including sexual harassment.<sup>10</sup> Additionally, employers cannot require a worker to waive their right to report violations of federal law to civil rights enforcement agencies like the Equal Employment Opportunity Commission (EEOC),<sup>11</sup> nor can they require workers to waive their right to report a crime to authorities.<sup>12</sup> Nevertheless, employers still use NDAs that do not note any such exceptions and so

by their terms prevent workers from telling their stories and reporting worker rights violations.

## Post-Dispute NDAs

Mutual NDAs binding both employer and employee that are included in agreements resolving harassment or discrimination complaints or other workplace disputes (including settlement, separation, and severance agreements) can provide individuals whose rights have been violated with a much-desired assurance of privacy. Individuals may not want details about the harassment or other forms of discrimination they endured disclosed to the public because, for example, they want to avoid reliving the trauma of their experience or they are concerned that disclosure of their experience will negatively impact their career prospects. Additionally, NDAs can be an important bargaining chip allowing those who have experienced harassment or other workplace abuses to obtain relief from the employer without having to file a lawsuit: an employer may be more motivated to resolve a matter if it is confident that the resolution will ensure that the worker’s allegations remain confidential.

At the same time, employers too often abuse these NDAs, pressuring victims into signing them in order to cover up harassment, hinder the ability of working people to come together to address worker rights violations, and avoid accountability. Moreover, NDAs prevent victims from speaking up and warning others about a particular individual’s misconduct. For example, film producer Harvey Weinstein used secret settlements to silence his victims and cover up his decades-long harassment and abuse of women.<sup>13</sup> The NDAs in these settlements long shielded Weinstein’s pattern of predation from his victims and from the public, allowing him to continue to abuse with impunity.

NDAs create barriers to justice and accountability that are especially pronounced for workers in low-wage jobs.<sup>14</sup> These workers may lack resources for securing legal counsel and be more vulnerable to economic pressure from an employer to accept an NDA in order to get some minimal level of severance pay, for example.

Post-dispute NDAs also can misinform workers about their rights to answer questions about workplace conditions when asked by the EEOC or in the course of an EEOC investigation of the workplace, or to report workplace crime to law enforcement. These are rights that cannot be legally waived in a settlement, separation, or severance agreement,<sup>15</sup> but some NDAs do not note that individuals

retain these rights.

## Examples of Public Policy Solutions

Policymakers play an incredibly important role in stopping the abusive use of NDAs and restoring victims' voices. Lawmakers across the country and in Congress have advanced a range of legislative approaches to limit the use of NDAs in the pre-dispute and post-dispute contexts. While the reforms to date are important steps in the right direction, policymakers can and should do more to curtail the harmful impact of NDAs on workers facing harassment and other forms of discrimination on the job, as set out further below. These policy efforts must be carefully calibrated to ensure they empower victims of worker rights violations and avoid unintended negative consequences.

### PROHIBITING PRE-DISPUTE NDAS RELATED TO WORKER RIGHTS VIOLATIONS

Since #MeToo went viral in October 2017, eleven states have enacted legislation to prohibit employers from requiring individuals to sign pre-dispute NDAs that prevent a worker from disclosing harassment, discrimination, and/or sexual assault: **California**,<sup>16</sup> **Illinois**,<sup>17</sup> **Maryland**,<sup>18</sup> **New Jersey**,<sup>19</sup> **New Mexico**,<sup>20</sup> **New York**,<sup>21</sup> **Oregon**,<sup>22</sup> **Tennessee**,<sup>23</sup> **Vermont**,<sup>24</sup> **Virginia**,<sup>25</sup> and **Washington** state.<sup>26</sup>

In April 2019, the **Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination ("BE HEARD") in the Workplace Act** was introduced in Congress. The BE HEARD in the Workplace Act includes a broad set of reforms that would prevent and respond to workplace harassment, including a ban on pre-dispute NDAs that prohibit workers from disclosing harassment or other forms of discrimination or retaliation prohibited by federal anti-discrimination law.<sup>27</sup> Another federal bill, the **Ending the Monopoly of Power Over Workplace Harassment Through Education and Reporting ("EMPOWER") Act** would also prohibit employers from forcing employees and applicants to sign pre-dispute NDAs that prevent them from speaking out about workplace harassment or about retaliation for reporting workplace harassment.<sup>28</sup>

### LIMITING NDAS IN POST-DISPUTE AGREEMENTS

Prior to #MeToo, several states restricted the use of contracts to conceal wrongdoing in the employment context and more broadly. For example, in 1990, Florida became the first state to pass a "Sunshine in Litigation" law, which prohibits court orders and settlements that obscure a public hazard<sup>29</sup>— defined as something that poses a danger

to public health or safety.<sup>30</sup> Several other states, including New York, North Carolina, Oregon, and Washington have adopted similar Sunshine in Litigation statutes.<sup>31</sup>

Serial harassment that continues with impunity endangers not only the victims of harassment, but others who may come into contact with the serial harasser in the future, too, and thus, endangers public safety; as a result, post-dispute NDAs that prevent an individual from disclosing sexual harassment may run afoul of Sunshine in Litigation laws.<sup>32</sup>

Other states have enacted laws more narrowly focused on sexual assault and related offenses. For example, in 2006, California enacted a law prohibiting the use of nondisclosure agreements in any settlement of matters that included allegations of behavior that constitutes a felony sex offense.<sup>33</sup> For example, if an individual alleged she was raped on the job and filed a sexual harassment complaint against her employer, the settlement could not include a nondisclosure agreement that prevents the individual from disclosing the facts of her case. The statute was amended in 2016 to prohibit nondisclosure agreements in settlements in matters that included allegations of behavior that constitutes one of several other non-felony sexual crimes, including childhood sexual abuse, sexual exploitation of a minor, and sexual assault against an elder or dependent adult.<sup>34</sup>

In the wake of #MeToo, a number of states have enacted new legislation to limit, but not completely ban, nondisclosure, nondisparagement, and/or other confidentiality agreements in employment settlement, separation, and/or severance agreements – including **California**,<sup>35</sup> **Illinois**,<sup>36</sup> **Louisiana**,<sup>37</sup> **New Jersey**,<sup>38</sup> **New Mexico**,<sup>39</sup> **New York**,<sup>40</sup> **Nevada**,<sup>41</sup> **Oregon**,<sup>42</sup> **Tennessee**<sup>43</sup> and **Vermont**.<sup>44</sup> In Congress, the **EMPOWER Act** and the **BE HEARD in the Workplace Act** would limit post-dispute NDAs, but neither has been enacted thus far.<sup>45</sup>

Some advocates for workers warn that a complete ban on NDAs in the post-dispute context could have unintended negative consequences for individuals who experienced workplace harassment or other forms of discrimination. Victims of harassment and other forms of discrimination may want to be able to bargain their silence for their employer's silence in order to maintain confidentiality over information related to their identity and their claim, to protect their privacy, or because they are worried that information about their employment dispute could damage future employment prospects or that their employer might

say disparaging things about them that could harm their career. Moreover, if a worker cannot promise an employer confidentiality as part of a settlement, an employer may offer smaller settlement amounts or refrain from settling altogether.

To date, no state has completely banned post-dispute NDAs. Instead, many states have enacted legislation that seeks to give the victim the power to decide whether or not to be bound by an NDA. Given the inherent power imbalances between workers and employers—imbalances that are magnified for workers experiencing trauma and those without legal representation—such policies should include elements that help shift power imbalances, prevent workers from being coerced into being bound by an NDA, and limit the abusive scope of NDAs.

Accordingly, legislation limiting NDAs in the post-dispute context should:

- **Enhance the ability of victims of worker rights violations to control whether an NDA is included in a settlement agreement.** When an individual experiences workplace harassment, the individual should retain control over whether an NDA is part of the settlement process.

To help provide the individual with this type of control, California enacted legislation that limits an employer's ability to request a confidentiality provision once the individual has filed a civil or administrative complaint alleging sex-based workplace harassment, discrimination, or retaliation.<sup>46</sup> Once a complaint has been filed, confidentiality provisions are permitted only to protect the claimant's identity or to shield the amount paid in the settlement of the claim.<sup>47</sup> Because the individual can decide whether and when to file a complaint, the individual has more control over whether an NDA is part of the settlement process or not.

Additionally, post-dispute NDAs should be permitted only when the individual requests one and even then, the individual should be afforded adequate time to review the NDA and the opportunity to obtain the advice of an attorney. Jurisdictions have taken a variety of approaches to ensure victims of discrimination can exercise informed consent when agreeing to a post-dispute NDA. New York prohibits employers from including nondisclosure clauses in settlement agreements involving discrimination claims unless the condition of confidentiality is the complainant's preference and the complainant is given twenty-one days to consider the agreement, and then at least seven

days following the execution of the agreement to revoke the agreement.<sup>48</sup> Similarly, in California, agreement to a settlement nondisparagement clause must be voluntary, deliberate, and informed, and the worker must be represented by an attorney or given notice and an opportunity to retain an attorney.<sup>49</sup>

- **Provide that any agreement including an NDA must provide a reasonable economic or other benefit to the individual that is on par with the benefit to the employer.**

When a victim of workplace harassment or other worker rights violation agrees to keep the resolution of a claim confidential, the worker should receive some meaningful benefit, economic or otherwise, in exchange.<sup>50</sup> Requiring this type of equity in the settlement process would help correct the power imbalances between workers, including workers in low-wage jobs and those without legal counsel, and their employers.<sup>51</sup>

- **Allow victims of worker rights violations to withdraw from an NDA without financial penalty.** Victims of worker rights violations should never be subject to monetary damages or penalties for breaching an NDA. Workers in low-wage jobs, in particular, often suffer significant economic hardship because of worker rights violations and related retaliation, hardships that would be worsened by the monetary penalties they could face for breaching an NDA.

New Jersey enacted legislation that allows nondisclosure provisions in settlement agreements relating to claims of discrimination, retaliation, or harassment but makes them unenforceable against the employee, such that an employee would not be penalized for breaking a nondisclosure provision. However, if an employee discloses details about a claim against the employer, such that the employer becomes identifiable, the nondisclosure provision is no longer enforceable against either the employee or the employer.<sup>52</sup> This approach prevents victims of worker rights violations from incurring harsh monetary penalties for speaking out about their experiences.

- **Ensure that NDAs do not limit an individual's ability to access justice or basic necessities.** Legislation should clarify and require that any agreement including a post-dispute NDA explicitly state that post-dispute NDAs cannot restrict victims of worker rights violations from communicating with federal or state civil rights enforcement agencies, reporting a crime to law enforcement, or providing testimony or evidence in state



or federal litigation brought by others, including class or collective actions, against the employer. Moreover, reform should ensure that NDAs do not limit an individual's ability to obtain public benefits. A worker who leaves a job because of harassment should be free to explain to government agencies why she left her job in order to obtain unemployment insurance, for example.

Vermont now requires settlements of sexual harassment claims to expressly state that the worker is free to file a complaint or participate in an investigation with state or federal agencies, such as the EEOC. Additionally, settlements must notify workers of their right to participate in collective action to address workplace violations.<sup>53</sup> In Arizona, legislation makes clear that nondisclosure agreements cannot be used to prevent workers from responding to inquiries about sexual or obscenity offenses when asked by law enforcement or during a criminal proceeding.<sup>54</sup>

New York enacted legislation that renders void nondisclosure agreements that restrict a worker from filing a complaint with a local, state, or federal agency; testifying, assisting, or participating in an investigation; or filing or disclosing any facts necessary to obtain unemployment insurance, Medicaid or other public benefits.<sup>55</sup>

**Any legislative reform to address NDAs that silence victims of worker rights violations— whether as a condition of employment or as part of a settlement, separation, or severance agreement – should incorporate the following key principles:**

- **Cover all types of workers, and all workplaces, regardless of workplace size or industry.** Independent contractors, unpaid interns, volunteers, apprentices, and trainees, and all workers employed by an employer with one or more workers, should be covered by legislation addressing NDAs.<sup>56</sup>
- **Cover all employment and labor law violations.** Workplace harassment and other forms of discrimination based on race, color, disability, religion, age, or national origin each undermine workers' equality, safety, and dignity, and are no less humiliating than harassment and other forms of discrimination based on sex. Sex-based harassment and discrimination, including when targeted at an individual's pregnancy, sexual orientation, or gender identity, is deeply harmful even when it is not sexual in nature. Moreover, many workers experience discrimination based on multiple identities. Legislation

that focuses exclusively on sexual harassment would have the odd result of providing a worker who experiences multiple, intersecting forms of discrimination with only partial protection. Additionally, violations of employment and labor laws, such as wage and hour laws, deepen the power imbalances between workers and their employers and leave workers more vulnerable to harassment. Workers must be able to speak up about these workplace abuses as well, without the fear of breaching an NDA.

- **Clearly state that prohibited NDAs are void and unenforceable and that it is an unlawful employment practice for an employer to enter into such an NDA.** Legislation should not only declare that NDAs that prevent individuals from speaking out about workplace violations are void as against public policy, but it should also clearly prohibit employers from entering into these NDAs in the first instance.
- **Ensure that victims of worker rights violations who report or otherwise speak up about these violations are not asked to sign an NDA that requires their silence during the investigation.** Employers may ask victims who speak up about harassment or other worker rights violations to sign an NDA while the employer investigates the allegations. But these NDAs can prevent workers from seeking valuable support from friends and family or advice from a lawyer or social worker during the investigation, and thus, should be prohibited.
- **Require severability clauses in agreements containing NDAs.** A severability clause would provide that if an NDA in an employment or settlement, separation, or severance agreement is rendered void and unenforceable, it will not affect the remainder of the document. Workers will still receive the benefits of the contract – whether employment or settlement, separation, or severance pay – but will not be subject to the NDA.
- **Provide for a private right of action with the ability to recover damages and civil penalties if a victim of worker rights violations is forced to sign an unlawful NDA or the employer seeks to enforce such an NDA against the victim.** Laws are only meaningful when they can be enforced by impacted individuals. A private right of action would allow workers to file lawsuits to enforce laws prohibiting unlawful NDAs. Civil penalties are important because it can be difficult for victims of discrimination to accurately estimate the monetary cost of the harm suffered because of an NDA. Thus, allowing civil penalties in addition to compensatory damages would help redress the harm to workers bringing such claims.<sup>57</sup>

- **Address retaliation.** Workers should not be retaliated against for speaking out against or complaining about unlawful NDAs. Accordingly, legislation addressing NDAs must include anti-retaliation provisions.<sup>58</sup>

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Workers experiencing discrimination, including harassment, and other violations of their rights on the job should not have to suffer in silence. Public policy reforms limiting the use of NDAs will bring much-needed transparency to worker rights violations, hold harassers and employers accountable, and empower victims.

- 1 In 2006, gender justice activist Tarana Burke coined the phrase “Me Too” and launched a movement for survivors of sexual violence to find healing and strength in solidarity. In October 2017, following media reports of serial sexual harassment and assault by producer Harvey Weinstein, the actress and activist Alyssa Milano invited survivors to share their experiences of harassment and violence on social media using the hashtag #MeToo. The hashtag quickly went viral worldwide as individuals shared their stories and demanded accountability. The unleashing of the power of their voices has prompted an unprecedented public reckoning with the pervasiveness of harassment, and particularly workplace harassment, that continues today.
- 2 Orly Lobel, *NDAs Are Out of Control. Here’s What Needs to Change*, HARV. BUS. REV., Jan. 30, 2018, <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change> (citing Randall S. Thomas, Norman Bishara, and Kenneth J. Martin, *An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants*, last revised Sept. 6, 2017, VAND. L. REV., Vol. 68, No. 1, 2015; VAND. L. & ECON. RES. Paper No. 14-11, <https://ssrn.com/abstract=2401781>); Katie Benner, *Abuses Hide in the Silence of Nondisparagement Agreements*, N.Y. TIMES, July 21, 2017, <https://www.nytimes.com/2017/07/21/technology/silicon-valley-sexual-harassment-nondisparagementagreements.html>.
- 3 Orly Lobel, *Trump’s Extreme NDAs*, THE ATLANTIC, Mar. 4, 2019, <https://www.theatlantic.com/ideas/archive/2019/03/trumps-use-ndas-unprecedented/583984/>; see also Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Harassment*, THE ATLANTIC, Oct. 18, 2017, <https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/>. The TIME’S UP Legal Defense Fund, which is housed at and administered by the National Women’s Law Center Fund, has received over 4,400 requests for legal assistance since it was launched in January 2018. Among those are requests from workers who have signed NDAs, so their ability to come forward is limited. For a summary of the work of the TIME’S UP Legal Defense Fund, please visit <https://nwc.org/times-up-legal-defense-fund/about-times-up-legal-defense-fund/>.
- 4 See, e.g., Lobel, *NDAs Are Out of Control. Here’s What Needs to Change*, *supra* note 2 (“A boilerplate non-disparagement clause from a major corporation’s employment contract, illustrating the breadth of the prohibition, reads ‘you shall not at any time, directly or indirectly, disparage the Company, including making or publishing any statement, written, oral, electronic or digital, truthful or otherwise, which may adversely affect the business, public image, reputation or goodwill of the company, including its operations, employees, directors and its past, present or future products or services.’”).
- 5 Complaint at paras. 5, 74, 75, *Caras v. Mike Isabella Concepts, et al.*, No. 1:18-cv-00749 (filed Apr. 3, 2018); see also Maura Judkis and Tim Carman, *Mike Isabella’s restaurants used nondisclosure agreements to silence sexual harassment accounts, lawsuit alleges*, WASH. POST, Apr. 3, 2018, [https://www.washingtonpost.com/lifestyle/food/mike-isabellas-restaurants-used-nondisclosure-agreements-to-silence-sexual-harassment-accounts-new-lawsuit-alleges/2018/04/03/aaf6f766-373e-11e8-9c0a85d477d9a226\\_story.html?utm\\_term=.e34684196e8b](https://www.washingtonpost.com/lifestyle/food/mike-isabellas-restaurants-used-nondisclosure-agreements-to-silence-sexual-harassment-accounts-new-lawsuit-alleges/2018/04/03/aaf6f766-373e-11e8-9c0a85d477d9a226_story.html?utm_term=.e34684196e8b).
- 6 See *Caras*, *supra* note 5, at para. 5.
- 7 29 U.S.C. §§ 151-169.
- 8 42 U.S.C. § 2000e *et seq.*
- 9 However, large swaths of workers are not protected by the NLRA, including federal, state, and local government workers, agricultural workers, domestic workers, independent contractors, and workers whose employers are subject to the Railway Labor Act, such as interstate railroads and airlines. Additionally, supervisors are not protected by the NLRA (however, supervisors who have been discriminated against for refusing to violate the NLRA may be protected). *Nat’l Labor Relations Board, Employee Rights*, <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/employee-rights>.
- 10 *Phoenix Transit Sys.*, 337 NLRB 510, 511 (2002).
- 11 *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (“[T]here can be no prospective waiver of an employee’s rights under Title VII”).
- 12 See *Fomby-Denson v. Dep’t of Army*, 247 F.3d 1366, 1377–78 (Fed. Cir. 2001) (“it is a long-standing principle of general contract law that courts will not enforce contracts that purport to bar a party . . . from reporting another party’s alleged misconduct to law enforcement authorities for investigation and possible prosecution.”); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972) (“it is public policy . . . everywhere to encourage the disclosure of criminal activity . . .”); *Cosby v. Am. Media, Inc.*, 197 F. Supp. 3d 735, 740–43 (E.D. Pa. 2016) (holding that a confidential settlement agreement was unenforceable under Pennsylvania law as against public policy to the extent that it purported to prevent its signatories from voluntarily disclosing information about crimes to law enforcement authorities, since public policy at issue was well defined and dominant); Shannon Bond and Jane Croft, *Non-disclosure Agreements – an Explainer*, FINANCIAL TIMES (Oct. 24, 2017), <https://www.ft.com/content/80dcd58-b893-11e7-9bfb-4a9c83ffa852> (“In the U.S., NDAs cannot lawfully prevent people from reporting claims to law enforcement and government agencies, such as the Equal Employment Opportunity Commission, or responding to a subpoena.”).
- 13 Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, THE NEW YORKER, Nov. 21, 2017, <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>.
- 14 See, e.g., *Public Hearing on Sexual Misconduct Sunshine Amendment Act of 2018 (B22-0907) before the D.C Council Committee on the Judiciary and Public Safety*, Testimony of Laura Brown, Executive Director, First Shift Justice Project, at 48:33-48:53, Oct. 4, 2018, [http://dc.granicus.com/MediaPlayer.php?view\\_id=44&clip\\_id=4669](http://dc.granicus.com/MediaPlayer.php?view_id=44&clip_id=4669).
- 15 See *Fomby-Denson*, 247 F.3d at 1377–78; *Lachman*, 457 F.2d at 853 and *Cosby*, 197 F. Supp. 3d 735 at 740–43; EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC-Enforced Statutes, No. 915.002, at 7. III. A. (Apr. 10, 1997), <https://www.eeoc.gov/policy/docs/waiver.html>.
- 16 S.B. 1300, Sec. 4 (a), 2017–2018 Reg. Sess. (Cal. 2018).
- 17 Public Act 101-0221, S.B. 0075, Sec. 1-25(a), 101st Gen. Assemb. (Ill. 2019).
- 18 *Disclosing Sexual Harassment in The Workplace Act Of 2018*, S.B. 1010, Sec. 1, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
- 19 S. 121, § 2, 2018–2019 Reg. Sess. (N.J. 2019); N.J. STAT. § 10:5-12.8 (2019).

- 20 H.B. 21, 2020 Reg. Sess. (N.M. 2020).
- 21 A. 8421, § 7, 2019–2020 Reg. Sess. (N.Y. 2019).
- 22 S.B. 726, § 2, 80th Leg., Reg. Sess. (Or. 2019).
- 23 H.B. 2613, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).
- 24 Vermont Act 183, H.707, Sec. 1, 2017–2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
- 25 H. 1820, 2019 Reg. Sess. (Va. 2019); VA. CODE ANN. § 40.1-28.01 (2019).
- 26 S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
- 27 BE HEARD IN THE WORKPLACE ACT, H.R. 2148/S. 1082, 116th Cong. (2019).
- 28 In March 2019, Congress reintroduced the Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (EMPOWER) Act. EMPOWER Act, H.R. 1521/S. 574, S. 575, 116th Cong., 1st Sess. (2019–2020).
- 29 Fla. Stat. Ann. § 69.081.
- 30 See *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2000).
- 31 N.Y. Comp. Codes R. & Regs. tit. 22, § 216.1 (applies to “court records” only); N.C. Gen. Stat. Ann. § 132-1.3 (settlements involving public sector defendants only); Or. Rev. Stat. Ann. § 17.095 (settlements involving public sector defendants only); Wash. Rev. Code § 4.24.611(2).
- 32 Stephanie Russell-Craft, *How to End the Silence Around Sexual-Harassment Settlements*, THE NATION, Jan. 12, 2018, <https://www.thenation.com/article/archive/how-to-end-the-silence-around-sexual-harassment-settlements/>.
- 33 Cal. Civ. Proc. Code § 1002.
- 34 A.B. 1682, 2016 Reg. Sess. (Cal. 2016).
- 35 S.B. 820, 2017-2018 Reg. Sess. (Cal. 2018).
- 36 Public Act 101-0221, S.B. 0075, Sec. 1-30, 101st Gen. Assemb. (Ill. 2019).
- 37 H.B. 197, 2019 Reg. Sess. (La. 2019); LA. REV. STAT. § 13:5109.1 (2019).
- 38 S. 121, § 2, 2018–2019 Reg. Sess. (N.J. 2019); N.J. STAT. § 10:5-12.8.
- 39 H.B. 21, 2020 Reg. Sess. (N.M. 2020).
- 40 N.Y. C.P.L.R. 5003-b (McKinney); A. 8421, § 7, 2019–2020 Reg. Sess. (N.Y. 2019).
- 41 A.B. 248, 80th Leg. (Nev. 2019).
- 42 S.B. 726, § 2, 80th Leg., Reg. Sess. (Or. 2019).
- 43 H.B. 594, 111th Gen. Ass. (Tenn. 2019).
- 44 Vermont Act 183, H.707, Sec. 1(h), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
- 45 The EMPOWER Act would permit NDAs in settlements when they are mutually agreed upon by the employer and worker and mutually beneficial. EMPOWER Act, H.R.1521/S. 575, Sec. 103(b)/Sec. 4(b), 116th Cong., 1st Sess. (2019–2020). Like the EMPOWER Act, the BE HEARD in the Workplace Act would permit NDAs in settlement or separation agreements where the NDA is mutually agreed upon and mutually beneficial. However, the BE HEARD in the Workplace Act would provide additional protections for workers who wish to enter into an NDA as part of a settlement or separation agreement: the worker’s agreement must be knowing and voluntary, the settlement or separation agreement must expressly clarify the worker’s rights to communicate about workplace violations with government agencies that have the authority to enforce laws and regulations prohibiting harassment and other forms of discrimination in employment or contracting, with law enforcement, and in civil litigation. Additionally, the employer would be prohibited from requiring workers to sign an NDA that solely benefits the employer and workers would not be required, under any circumstances, to pay damages for breach of an NDA in excess of an amount equal to the consideration of value provided to the worker in exchange for the worker’s agreement to the NDA. BE HEARD in the Workplace Act, H.R.2148/ S.1082, Sec. 302(b)(3), 116th Cong., 1st Sess. (2019–2020).
- 46 S.B. 820, 2017-2018 Reg. Sess. (Cal. 2018).
- 47 *Id.*
- 48 N.Y. C.P.L.R. 5003-b (McKinney).
- 49 S.B. 1300, Sec. 4, 2017-2018 Reg. Sess. (Cal. 2018).
- 50 AMERICAN CIVIL LIBERTIES UNION, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE NATIONAL WOMEN’S LAW CENTER, *A Call For Legislative Action To Eliminate Workplace Harassment: Principles and Priorities* (Dec. 2018), at para. 4, <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/Workplace-Harassment-Legislative-Principles.pdf>.
- 51 The EMPOWER Act and the BE HEARD in the Workplace Act would require post-dispute NDAs to be mutually agreed upon and mutually benefit both the employer and the worker.
- 52 S. 121, § 2, 2018–2019 Reg. Sess. (N.J. 2019); N.J. STAT. § 10:5-12.8 (2019).
- 53 Vermont Act 183, H.707, Sec. 1(h)(2), 2017–2018 Gen. Assemb., Reg. Sess. (Vt. 2018)
- 54 H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).
- 55 A. 8421, § 5-336 (1) (c), 2019–2020 Reg. Sess. (N.Y. 2019).
- 56 See, e.g., *Public Hearing on Sexual Misconduct Sunshine Amendment Act of 2018 (B22-0907) before the D.C Council Committee on the Judiciary and Public Safety*, Oct. 4, 2018, Testimonies of Laura Brown, Executive Director, First Shift Justice Project, at 49:30-50:10; Lauren Khouri, Associate, Correia & Puth, PLLC, at 46:09-46:16; Kalpana Kotagal, Partner, Cohen Milstein Sellers & Toll PLLC, at 1:08:50-1:08:55; Alexis Ronickher, Partner, Katz, Marshall & Banks, LLP, at 41:01-41:15; Deborah J. Vagins, Former Senior Vice President, Public Policy & Research, American Association of University Women, at 1:04:18-1:04:23, [http://dc.granicus.com/MediaPlayer.php?view\\_id=44&clip\\_id=4669](http://dc.granicus.com/MediaPlayer.php?view_id=44&clip_id=4669); Written Testimony of Maya Raghu, Director of Workplace Equality and Senior Counsel, National Women’s Law Center, *Regarding the Sexual Misconduct Sunshine Amendment Act of 2018 (B22-0907) Before the District of Columbia Council Committee on the Judiciary and Public Safety*, at Ill. A., Oct. 4, 2018, <https://nwlc.org/resources/nwlc-testimony-on-sexual-misconduct-before-the-dc-council-committee-on-the-judiciary-and-public-safety/>.
- 57 See, e.g., *Public Hearing on Sexual Misconduct Sunshine Amendment Act of 2018 (B22-0907) before the D.C Council Committee on the Judiciary and Public Safety*, Oct. 4, 2018, Testimonies of Laura Brown, Executive Director, First Shift Justice Project, at 52:42-53:03; Lauren Khouri, Associate, Correia & Puth, PLLC, at 47:43-48:00; Alexis Ronickher, Partner, Katz, Marshall & Banks, LLP, at 42:49-42:55, [http://dc.granicus.com/MediaPlayer.php?view\\_id=44&clip\\_id=4669](http://dc.granicus.com/MediaPlayer.php?view_id=44&clip_id=4669).
- 58 See, e.g., *Public Hearing on Sexual Misconduct Sunshine Amendment Act of 2018 (B22-0907) before the D.C Council Committee on the Judiciary and Public Safety*, Oct. 4, 2018, Testimony of Kendall Onyendu, Former Georgetown Women’s Law and Public Policy Fellow, Washington Lawyers’ Committee for Civil Rights and Urban Affairs, at 1:16:03-1:16:10, [http://dc.granicus.com/MediaPlayer.php?view\\_id=44&clip\\_id=4669](http://dc.granicus.com/MediaPlayer.php?view_id=44&clip_id=4669).