

SILENCED NO MORE

New Restrictions on Severance and Settlement Agreements Take Effect on January 1, 2022

The “Silenced No More Act,” which amends California Code of Civil Procedure Section 1001 and the California Fair Employment and Housing Act (“FEHA”), creates important new requirements for severance and settlement agreements. The new law takes effect on the first of the year. Here’s what employers need to know.

Time to Consider Severance Agreements and the Right to Consult an Attorney

Employers must include a provision in severance agreements giving employees at least five days to consider the severance agreement (although the employee may sign sooner if they wish). Employers must also include a provision in severance agreements advising employees they have the right to consult an attorney about the severance agreement.

Disclosure of FEHA Claims

Settlement agreements may not restrict an employee from disclosing factual information about claims of harassment, discrimination, or retaliation under the FEHA, including claims based on race, sexual orientation, religion, color, national origin, ancestry, disability, medical condition, and age. This provision supplements a 2019 law that prohibits settlement agreements from restricting employees from disclosing factual information about claims based on sex.

Disclosure of Unlawful Workplace Acts

Severance and settlement agreements may not prohibit employees from disclosing information about unlawful workplace acts. This restriction does not apply to settlement agreements that resolve an employment claim that the employee filed in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer’s internal complaint process, if the employee was given notice and an opportunity to retain an attorney or was represented by an attorney.

Non-disparagement Clauses

Non-disparagement clauses in severance or settlement agreements that release FEHA claims must include a provision notifying the employee that the agreement does not prohibit the employee from disclosing unlawful workplace acts. The notice should, in effect, state: “Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”

Things Left Unchanged

The new law makes clear that severance and settlement agreements with employees may still:

1. include a general release and waiver of all claims;
2. prohibit disclosure of trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace; and
3. require that the severance or settlement amount paid remain confidential.