

Senate Bill 331

Silenced No More Act

Senator Connie M. Leyva (D-Chino)

SUMMARY

SB 331 would expand the prohibition on **non-disclosure** agreements (NDA's) in settlement agreements involving sexual harassment, sexual assault, and sex discrimination to cover settlement agreements involving all forms of harassment or discrimination. SB 331 would also expand the prohibition on overly broad confidentiality and **non-disparagement** clauses in employment agreements to cover workers who are required to sign these types of clauses as part of a severance agreement.

BACKGROUND

Confidentiality in settlement agreements

In 2018—in response to the #MeToo movement which revealed the key role that ‘secret settlements’ played in shielding perpetrators of sexual harassment, sexual assault, and sex discrimination—the Legislature passed the STAND (Stand Together Against Non-Disclosures) Act (SB 820, Leyva). This measure specifically bans non-disclosure agreements in cases of sexual harassment, sexual assault, and sex discrimination. Importantly, the Act also permits the claimant to request confidentiality if they so choose. In passing this historic law, the Legislature recognized that ‘secret settlements’ were helping to perpetuate hostile work environments by allowing complaints to be swept under the rug.

Of course, ‘secret settlements’ play as much a role in perpetuating workplace discrimination, harassment and bias based on race, ethnicity, sexual orientation, age, disability, religion, etc., because here too complaints are kept secret and those who raise the complaints are effectively silenced.

For example, two Black women recently raised [gender and race discrimination claims](#)¹ against a company where they were underpaid, faced racist comments from their manager and were subject to retaliation. While the company initially dismissed their claims, the women’s stories soon sparked a media firestorm and inspired other women to speak out. As a result, the CEO was forced to issue a subsequent statement: “I’m embarrassed to say that I didn’t understand the depth of the hardship and hurt many of our team

¹ Nitasha Tiku, “Black women say Pinterest created a den of discrimination,” *The Washington Post*, July 4 2020, <https://www.washingtonpost.com/technology/2020/07/03/pintere-st-race-bias-black-employees/>

members have experienced...” The company has since appointed two Black women to its board, hired a head of inclusion and diversity, and entered into a partnership with the NAACP to form an inclusion advisory council. The women eventually settled their claims and were protected by the STAND Act, but only for their gender-based claims. This means that—though they can speak about their experience involving gender discrimination—they cannot speak about their experience involving race discrimination.

What we have learned from the #MeToo movement is that meaningful change in the workplace cannot happen unless workers are able to speak out about their experiences and hold those in power accountable.

Confidentiality in employment and severance agreements

In 2018, the Legislature passed another #MeToo bill that made several important changes to California’s harassment and discrimination laws (SB 1300, Jackson). This bill also addressed silencing mechanisms used to bar or intimidate workers from speaking out about harassment or discrimination. As a result of this bill, employers now cannot require workers to sign non-disparagement agreements or other documents that try to prevent the worker from disclosing information about unlawful conduct in the workplace, such as harassment or discrimination. In one [notable case](#)² involving a serial harasser, a worker was forced to sign a confidentiality and non-disparagement agreement that had a \$1 million liquidated damages provision if the worker said anything publicly about their experiences at work.

These types of confidentiality and non-disparagement agreements are now banned as a condition of employment, but many employers still force workers to sign these types of provisions as part of severance packages when a worker leaves a job. Whether a worker is taking a job or leaving a job, they should never have to give up their right to speak out about harassment or discrimination. Especially now, when critical public discourse about racism is happening across this country, workers must be able to speak about their own experiences if we are going to have meaningful and public conversations about effectuating real change.

² Hamilton Nolan, “American Apparel Confidential: A Million-Dollar Penalty for Whistleblowers,” *Gawker*, June 22 2010, <https://gawker.com/5569904/american-apparel-confidential-a-million-dollar-penalty-for-whistleblowers>

PROBLEM

Forcing workers to sign non-disclosure and non-disparagement agreements prevents them from speaking out about harassment and discrimination in the workplace. These silencing mechanisms impose yet another form of harm on employees, prevent accountability, and allow harassment and discrimination to persist unchecked.

SOLUTION

SB 331 will build upon recently enacted protections against broad confidentiality provisions to ensure that workers are able to speak out about all forms of harassment and discrimination. Since complaints involving harassment or discrimination are oftentimes intersectional (e.g., based on gender and race or gender and age, etc.), SB 331 will resolve an often unworkable situation where the NDA covers only one aspect of the workers' experience and claim.

Specifically, this bill would expand SB 820's protections to ban secret settlements for all forms of harassment and discrimination claims—not just those involving sexual harassment, sexual assault, and sex discrimination. This bill would also expand SB 1300's protections to ban non-disparagement or other confidentiality clauses in severance agreements (not just in employment agreements) that have the purpose or effect of denying a worker or former worker the right to disclose information about harassment or discrimination.

STATUS

Introduced – February 8, 2021

SUPPORT

California Employment Law Association (CELA) – Co Sponsor
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