New Mexico Prohibits Nondisclosure Agreements Related to Sexual Harassment, Discrimination, and Retaliation Claims

March 6, 2020

On March 4, 2020, New Mexico Governor Michelle Lujan Grisham signed into law House Bill 21, a bipartisan measure that limits the use of nondisclosure agreements (NDAs) in sexual misconduct cases. With the law’s enactment, New Mexico joins the growing number of states—including California, Illinois, New Jersey, New York, Oregon, and Washington—that restrict the use of confidentiality provisions in settlement agreements involving harassment and discrimination claims.

Through an NDA provision, the parties to a private settlement agree that they—or one of them—will not disclose certain types of information. For example, an NDA might restrict the parties from discussing the settlement amount or the facts that gave rise to the claim. New Mexico’s law prohibits employers from requiring NDAs addressing the latter while making clear that it is not intended to prohibit the former.

The move by state legislatures to limit NDAs began in response to the #MeToo movement, which started as an outcry against sexual harassment and assault, as well as a call for greater transparency to prevent abuses of power. Consistent with the underlying impetus for the #MeToo movement, legislative prohibitions on NDAs have largely been limited to the use of NDAs in the settlement of claims of sexual harassment and assault. Notably, the New Mexico law goes beyond that.

New Mexico’s law not only prohibits employers from requiring employees to sign NDAs covering the facts giving rise to claims of sexual harassment or assault, it also prohibits employers from requiring such NDAs when settling discrimination or retaliation claims. And the breadth of the law’s prohibition extends beyond claims arising from incidents occurring solely in the workplace to claims premised on “work-related event[s] coordinated by or through the employer.” The New Mexico law provides that an NDA may cover the facts giving rise to an employee’s claims or facts that could lead to the identification of a settling employee only if the employee makes such a request. Absent such a request, or a requirement that disclosure “be made in a judicial, administrative or other governmental proceeding pursuant to a valid subpoena or other applicable order,” the prohibition stands.

The law will take effect on May 20, 2020, and will apply to agreements entered into between an employer and a current or former employee on or after that date. With the approach of the law’s effective date, employers may want to consider reviewing template settlement agreements currently in use and modifying terms as needed to ensure compliance.

Patrick F. Clark
Atlanta
Author