

TIPS FOR EMPLOYERS TO COMPLY WITH SEX AND PREGNANCY DISCRIMINATION LAWS



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Tips for Employers to Comply with Sex and Pregnancy Discrimination Laws

Presenters: Jaime S. Tuite & Amanda M. Scarpo

Statutes to Consider

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

- Protection includes pregnancy, sexual orientation & gender identity

THE PENNSYLVANIA HUMAN RIGHTS ACT

- Protections include for non-job related handicap or disability – including pregnancy and childbirth

THE FAIR LABOR STANDARDS ACT (“FLSA”)

- Break Time for Nursing Mothers Law
- PUMP Act

AMERICANS WITH DISABILITIES ACT (“ADA”) and FAMILY MEDICAL LEAVE ACT (“FMLA”)

PREGNANCY DISCRIMINATION ACT (“PDA”)

PREGNANT WORKERS’ FAIRNESS ACT (“PWFA”)

SPEAK OUT ACT (“SOA”)

EQUAL PAY ACT & LILLY LEDBETTER FAIR PAY ACT

**Additional state and local statutes not listed

Anti-Discrimination

Sex Considerations

Gender identity

- Lived experience
- Not to be confused with your sex assigned at birth

Gender expression

- Outward presentation

Misgendering

- Referring to someone using a pronoun that does not reflect their gender identity

Pronouns to consider:

- He/Him - They/Them - She/Her

Pronoun Policies

- Promote inclusivity
- Can be as simple as permitting employees to put their preferred pronouns in their email signature blocks

Example

Amanda M. Scarpo
Associate
(she/her)

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Real Life Scenario – Sex

Jessica is a transgender woman who identifies as female and prefers to use the women's restroom. Some employees have expressed discomfort with Jessica using the women's restroom to Nick, a supervisor. As a result, Nick has requested that Jessica use the family/gender neutral restroom instead.

- Discrimination?
- Harassment?
 - <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/TransgenderBathroomAccessBestPractices.pdf>

PHRA defines “Sex” to include:

1. Pregnancy, including medical conditions related to pregnancy.
2. Childbirth, including medical conditions related to childbirth.
3. Breastfeeding, including medical conditions related to breastfeeding.
4. Sex assigned at birth, including, but not limited to, male, female or intersex.
5. A person’s gender, including a person’s gender identity or gender expression.
6. Affectional or sexual orientation, including heterosexuality, homosexuality, bisexuality and asexuality.
7. Differences of sex development, variations of sex characteristics or other intersex characteristics.



Equal Pay Act of 1963

Prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working condition

Comparisons

- Job duties, not job titles and classifications

Lilly Ledbetter Act

Overtaken *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007)

Each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began

LACTATION IN THE WORKPLACE

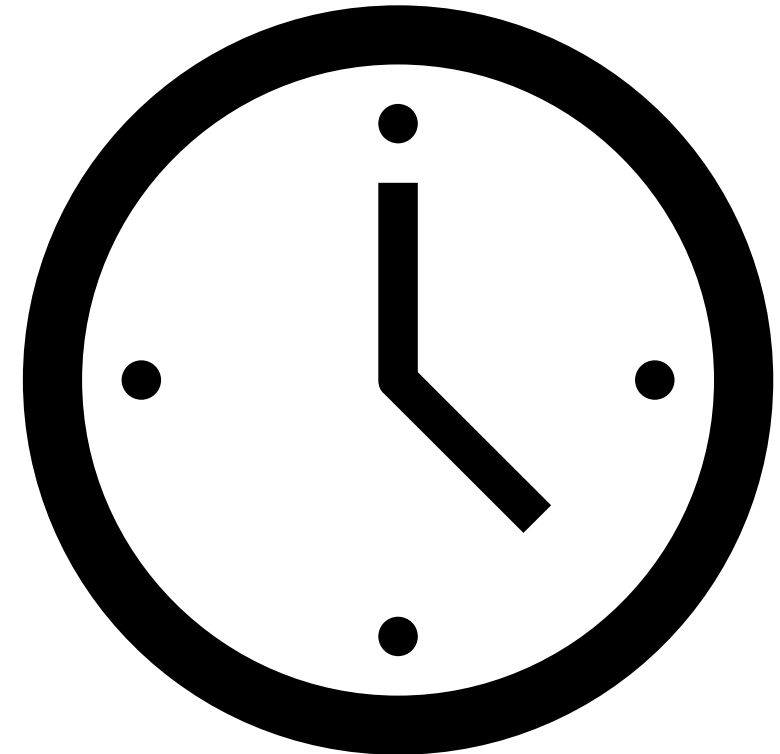
- Things to consider as the employer:
 - Break Time And Space
 - Reasonable Accommodation



Break Time & Space

Break Time & Space → Break Time for Nursing Mothers Law

- 2010 amendment to the FLSA
- Employer requirements
 - Reasonable time
 - One year after birth
 - private space other than a bathroom
- What is not required of the employer
 - Not paid unless already offering paid breaks to other employees
- Breaks for non-exempt employees under 20 minutes must be paid under the FLSA



A close-up photograph of a woman with dark hair, wearing a grey t-shirt, holding a baby in a white onesie. The woman is looking down at the baby with a gentle expression. The background is softly blurred, showing what appears to be a couch or bed.

Providing Urgent Maternal Protections for Nursing Mother (“PUMP”) Act

Effective immediately

Amendment to FLSA

Private cause of action - April 28, 2023

Expands Break Time for Nursing Mothers Law

- Applies to exempt & non-exempt workers

PUMP Act, Cont'd.

- Time spent expressing breast milk **MUST** be paid unless employee is completely relieved from duties
- Space shielded from view of public and free from intrusion by co-workers
- Accommodation extended from 1 year to 2 years
- Available to both in office and work from home employees



PUMP Act Applied

Applies to ALL employers

- Smaller employer exemption

Covers exempt employees

Does NOT cover airline flight crewmembers

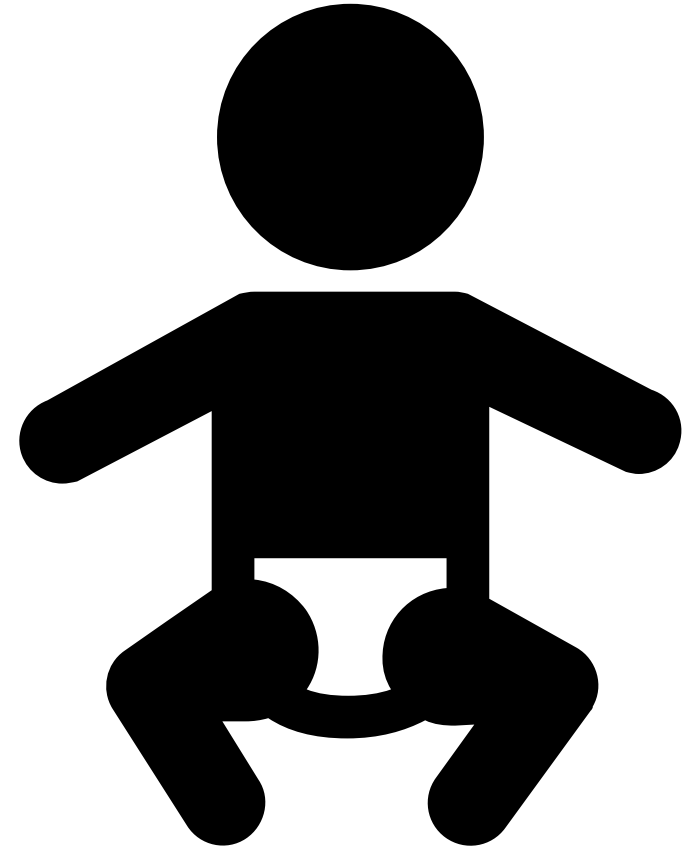
- (flight attendants and pilots)

Special rules for

- Rail carrier employees
- Motorcoach employees

State & Local Laws

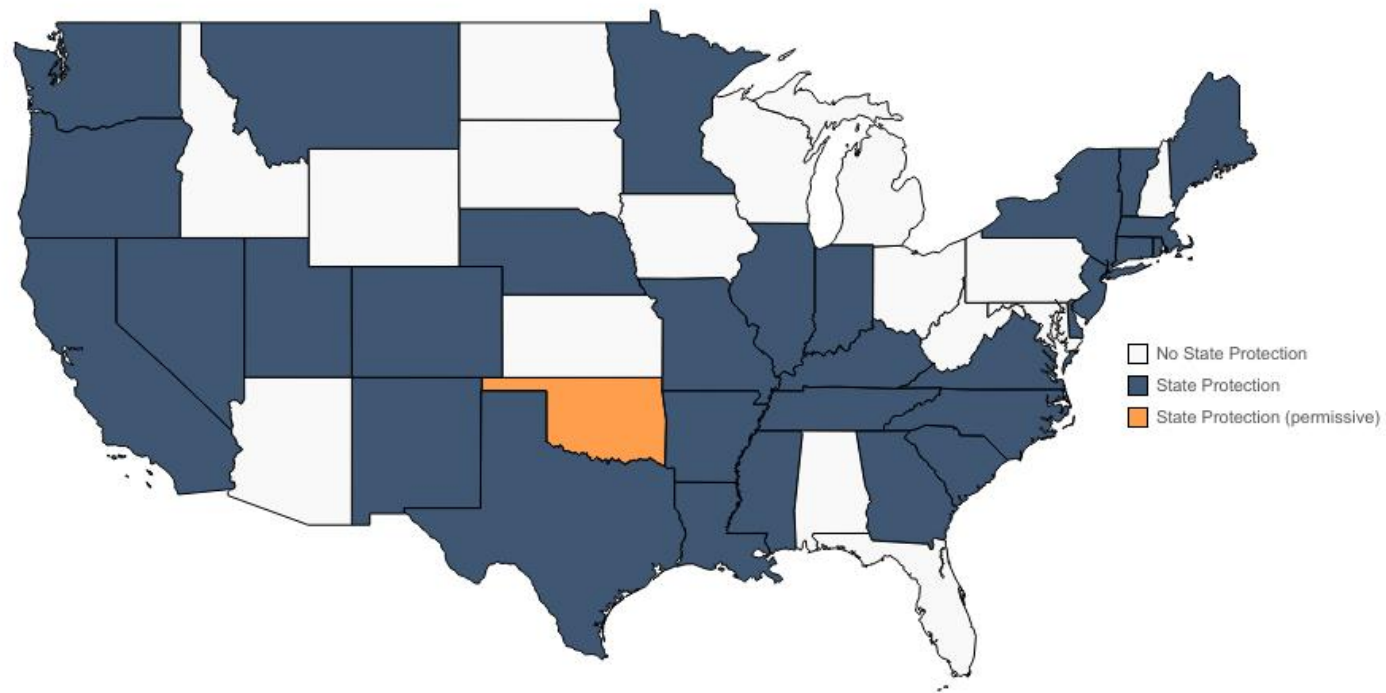
- Many states have their own breastfeeding laws
- PUMP Act catches up to many state and local laws
- Consult state and local laws before amending policies and designating lactation space
- Pennsylvania does not have its own break time and space law



Employment Protections for Workers Who Are Pregnant or Nursing

Hover over the map for information on available state protections.

- Protection against pregnancy discrimination
- Provisions for pregnancy accommodation
- Workplace breast feeding rights



Alaska

Hawaii

DC



Download data

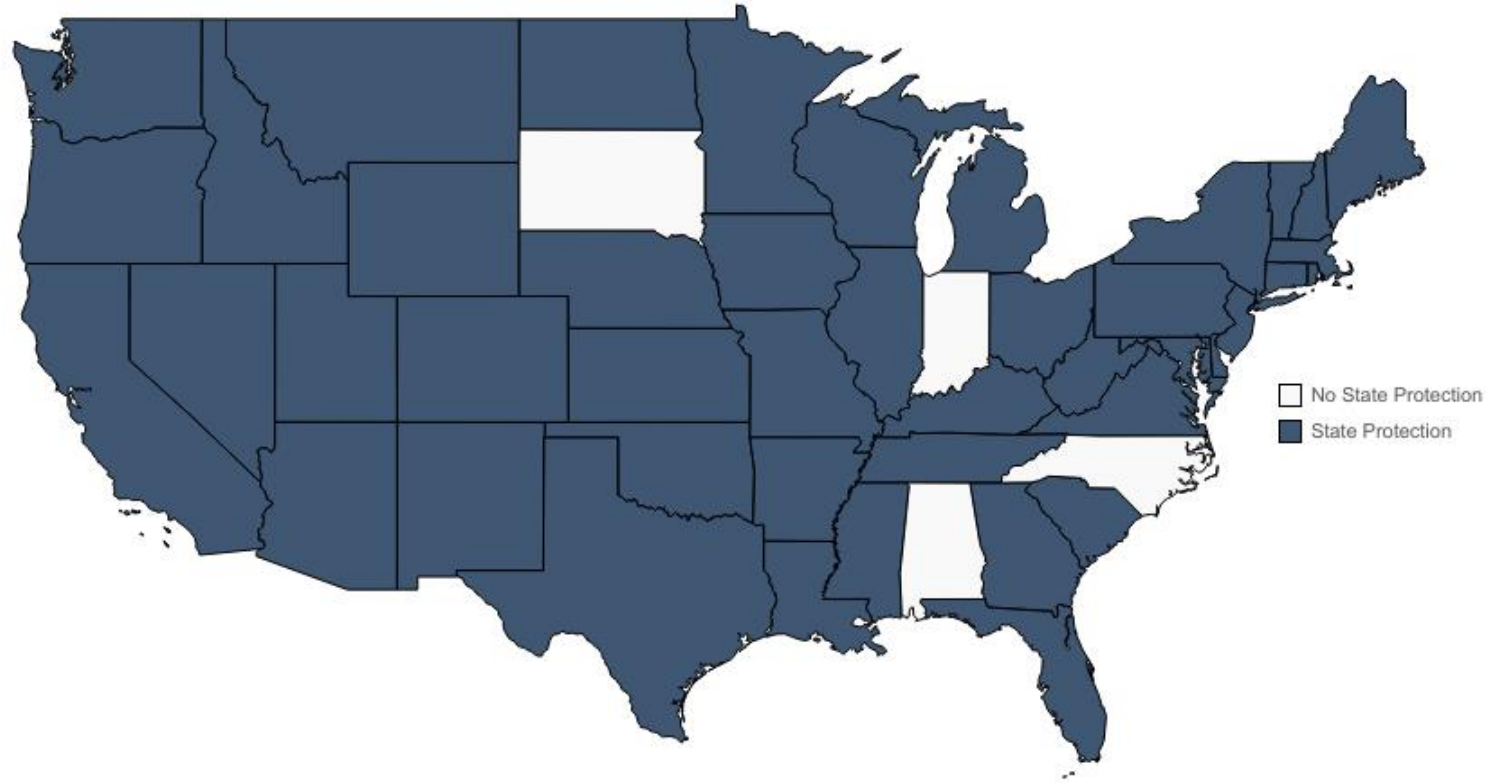


<https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections>

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Reasonable Accommodation

Pregnancy Discrimination Act (“PDA”)

- Extended Title VII in 1978
- Silent on reasonable accommodations
- Defines sex to include pregnancy





The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes



- Section 701(k) of the Civil Rights Act of 1964

Reasonable Accommodation → ADA

Prohibits discrimination against an applicant or employees on the basis of disability



Includes disabilities related to pregnancy, i.e. gestational diabetes



Pregnancy is NOT a disability



Employer may have to provide accommodation

The Gap → *Young v. United Parcel Service*

- 2014 SCOTUS decision
- Right to accommodation is not free standing under the PDA
- PDA only requires pregnant workers be treated the same as similarly situated employees
- Must identify similarly-situated comparator receiving an accommodation
- Highly fact specific on whether employer action was discriminatory

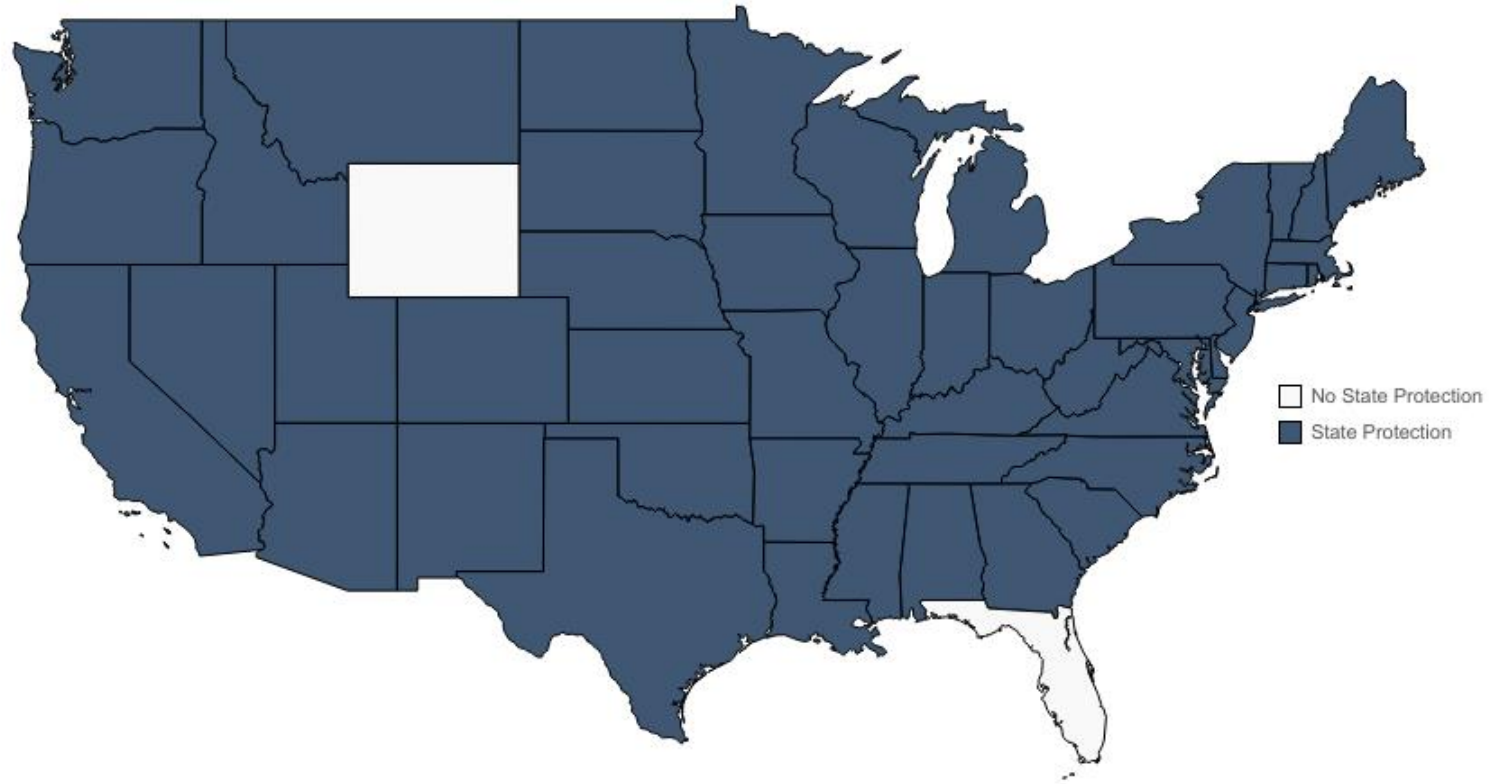
State and Local Laws – PA Example

- The Pennsylvania Human Rights Commission has interpreted the Human Relations Act's prohibition on sex discrimination to require that ***employers apply all policies and practices, including leave and benefit policies, equally to those employees who have a disability due to pregnancy or childbirth as to those with other disabilities.*** Employers may not require employees to take leave due to pregnancy or childbirth. 43 Pa. Stat. § 955 (emphasis added); 16 Pa. Code § 41.103.
- State employees are granted 6 weeks of paid leave for the birth of a child or the adoption or foster care placement of a child. A full-time or part-time permanent employee who has been continuously employed by the state for the immediate 12 months preceding the birth, adoption, or foster care placement is eligible. HR-WS003

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Alaska

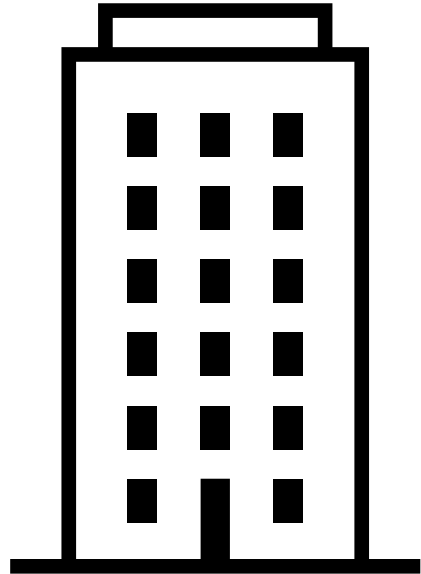
Hawaii

DC



Bridging the Gap → Pregnant Workers' Fairness Act

Reasonable Accommodation → PWFA



- Effective June 27, 2023
- Applies to employers with 15 or more employees
- Free standing right to a reasonable accommodation



PWFA – “Qualified employees”

- Defined as :

- Employee or application who can perform the essential functions of the job,

OR

- Employee or applicant who:

- (1) Is temporarily unavailable to perform essential job function;

- (2) Could be able to perform the essential job functions in the near future;

- AND,**

- (3) The inability to perform the essential job function can be reasonably accommodated.

PWFA -“Covered employers”

- Under the PWFA covered employers cannot:
 - Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
 - Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
 - Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
 - Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
 - Interfere with any individual’s rights under the PWFA.

PWFA Cont'd.

Adopts ADA interactive process



Adopts ADA definition of “undue hardship”



Adopts ADA definition of “reasonable accommodation”



Contains a notice provision before any violation can be found

What Should Employers Do? – PUMP Act

Draft/amend lactation policies

- Application to both exempt and non-exempt employees
- Accommodation available for two years

Employee/management training

- Obligation to respect breaks in private spaces

Review pay practices

- Must include break time in minimum wage and overtime calculations

What Should Employers Do? – PWFA

Review accommodation policies

- Ensure reasonable accommodations available for pregnancy, childbirth, and related medical issues

Modify ADA accommodation forms

- Criteria for “qualified employee”

Training

- Ensure managers and human resources representatives prepared to address employee requests

Speak Out Act



With respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law



Congressional Findings

- Although more than one in three women have faced sexual harassment in the workplace, approximately 90% of alleged victims never file a complaint
- “Pervasive” sexual assault and harassment is perpetuated by nondisclosure and nondisparagement clauses in employment agreements
- To combat sexual assault and harassment, it is essential that victims and survivors have the freedom to report and publicly disclose their abuse.
- Prohibiting nondisclosure and nondisparagement clauses will hold perpetrators accountable and make work places safer

SOA





Nondisclosure clause. -- a provision in a contract or agreement that requires the parties to the agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement.



Nondisparagement clause.-- a provision in a contract or agreement that requires 1 or more parties to the agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or their employment [or the employer's management, products, services, etc.]

Pre-dispute?

Nondisparagement and nondisclosure provisions executed “before a dispute arises”



Prior iterations of the Act read “before a lawsuit is filed”



This means → Dispute has arisen once an allegation is made

Post-Dispute

No prohibition on nondisparagements and nondisclosures in agreements resolving sexual assault or harassment disputes

Parties still free to contract as to their actions moving forward once dispute is known

Other legislation to consider – Tax Cuts and Jobs Act

Subject to other state or local laws

Trade Secrets and Proprietary Information Remain Protectable

“Nothing in this Act shall prohibit an employer and an employee from protecting trade secrets or proprietary information.” → Limits though under DTSA

Narrowly tailored provisions remain available for protectable business interests

- non-public pricing margins,
- customer account details,
- product specifications, and
- other proprietary information

Also does not effect use of nondisclosures and nondisparagements for other reasons → Limits though under NLRA

State issued “mini”-SOAs

California’s Silenced No More Act

Bans confidentiality provisions in settlement agreements relating to the disclosure of underlying, factual information relating to any type of harassment, discrimination or retaliation at work.

New Mexico’s HB 21

Employer shall not, as a term of employment, require an employee to sign a nondisclosure provision of a settlement agreement relating to a claim of sexual harassment or sexual assault in the workplace brought by the employee or prevent the employee from disclosing a claim of sexual harassment or sexual assault occurring in the workplace or at a work-related event coordinated by or through the employer.

What Should Employers Do? – SOA

Review Agreements and Policies



Draft proper carve outs to ensure maximum enforceability **
Broad nondisclosure and nondisparagement language may be found unenforceable

Trainings

Company policies on mandatory reporting

**consult state and local laws that may provide increased protections

“

Notwithstanding anything in this Agreement to the contrary, the release ... does not and is not intended to prevent, restrict or otherwise interfere with Employee's right to ... report or disclose facts related to any unlawful activity in the workplace, including but not limited to discrimination, sexual assault, and harassment.

”

Additional Protections

Additional Protections for Sexual Assault/Harassment Victims

- **2017** → Tax Cuts and Jobs Act – no deduction is permitted for sexual harassment settlements subject to nondisclosure agreements
- <https://www.bipc.com/new-tax-bill-provisions-address-sexual-harassment-settlements-paid-leave>
- **2022** → Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act – voids pre-dispute arbitration clauses involving sexual misconduct claims allowing individuals to bring claims to court
- <https://www.bipc.com/legislation-banning-mandatory-arbitration-of-employee-sexual-harassment-and-sexual-assault-claims-awaits-bidens-signature>

QUESTIONS?
COMMENTS?

Thank you for your attention!



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