

HRInsights

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Employer Takeaways From the Speak Out Act

On Nov. 16, 2022, the U.S. House of Representatives passed the [Speak Out Act](#), prohibiting courts from enforcing nondisclosure and nondisparagement clauses between employers and their employees and independent contractors that were in place before sexual harassment and assault disputes. The U.S. Senate signed the bill on Sept. 29, 2022. President Joe Biden has indicated his support for the law, so it's likely he will soon sign the bill into law. As the law will take immediate effect once signed, employers need to understand how the Speak Out Act may impact them in order to adequately prepare their organizations.

This article explains the Speak Out Act and outlines steps employers can take to prepare and protect their organizations.

What Is the Speak Out Act?

The Speak Out Act is part of a recent bipartisan effort to curb unprofessional and illegal workplace behavior. The U.S. Congress found that 81% of women and 43% of men have experienced some form of sexual harassment or assault throughout their lifetime. Additionally, 1 in 3 women have faced harassment in the workplace, and approximately 87% to 94% of those who experience sexual harassment never file a formal complaint.

Congress also found the following when drafting the bill:

- Sexual harassment and assault remain pervasive in the workplace and throughout society, affecting millions of individuals.

- Sexual harassment in the workplace forces many victims to leave their occupations or industry or pass up opportunities for advancement.
- Victims and survivors of sexual harassment and assault must be able to report and publicly disclose the incidents to combat this abuse.
- Nondisclosure and nondisparagement provisions in agreements between employers and their current, former and prospective employees and independent contractors can perpetuate illegal conduct. They silence victims and survivors of sexual harassment and assault, enabling perpetrators to continue their abuse.
- The prohibition of nondisclosure and nondisparagement clauses will empower survivors to come forward, hold perpetrators accountable for their abuse, improve transparency around illegal conduct, enable the pursuit of justice and make workplaces safer and more productive for all workers.

The bill follows the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which was enacted in February 2022 and invalidated mandatory pre-dispute arbitration agreements in cases of sexual harassment and assault.



The Speak Out Act would render void any pre-dispute nondisclosure and nondisparagement provisions between employers and employees involving sexual harassment and assault. It only prohibits the enforcement of agreements entered into before a dispute arises, such as agreements made at the start of employment. This bill would apply to current, former and prospective employees as well as independent contractors.

The bill does not define “disputes,” so it’s unclear whether the prohibition of nondisclosure and nondisparagement contract clauses would apply only to formal litigation or to informal complaints as well. Additionally, it defines nondisclosure agreements broadly to include any contractual provision requiring a party not to disclose or discuss conduct or information covered by the terms and conditions of a contract or agreement, including the existence of a settlement.

The act would not prevent employers from entering into standard confidentiality agreements—which prevent one or both parties from revealing information about resolved claims or settlements—with employees when settling claims or demands of sexual harassment or assault. However, some states and localities have enacted laws restricting confidentiality agreements involving sexual harassment and assault claims. The Speak Out Act would not interfere with those existing laws, and it would allow other states and localities to create more restrictive laws regarding nondisclosure and nondisparagement agreements. It may also affect arbitration and grievance procedures established in collective bargaining agreements.

Considerations for Employers

As the Speak Out Act will take immediate effect once signed into law by the president, employers should consider taking action now to make certain they comply with the new law’s requirements. Employers should consider taking the following actions to prepare and protect themselves:

- **Review existing employment agreements.** Employers should review their preemployment and standard employment agreements to ensure they meet the act’s requirements. If employers rely on

independent contractors, they should do the same for their independent contractor agreements.

- **Protect business interests.** If employers use nondisclosure agreements to protect trade secrets, proprietary information and confidential data, they should consider working with local legal counsel to confirm their agreements are drafted in a way that complies with the bill while protecting their organization’s legitimate business interests.

Additionally, employers can avoid issues related to the new bill by preventing sexual harassment and assault from happening in the workplace. Employers can implement the following strategies to combat sexual harassment and assault at work:

- Verify workplace policies comply with current employment laws and regulations.
- Provide employees with copies of the employee handbook or workplace policies.
- Train managers to recognize and address issues involving sexual harassment and assault.
- Educate employees on proper workplace behavior.
- Investigate any complaints or issues of sexual harassment and assault promptly.
- Enforce workplace policies consistently.

Evaluating employment agreements and workplace policies will enable employers to protect and strengthen their organizations by complying with current employment laws and providing employees with a safe work environment.

Summary

Support for ending mandatory arbitration and nondisclosure agreements in the workplace has been on the rise. The Speak Out Act is intended to allow victims of sexual harassment and assault to speak publicly in order to prevent perpetrators from continuing to harm people. Understanding the bill can aid employers in preparing for the law’s enactment as well as establishing policies to protect employees from sexual harassment and assault.

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