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In New York, NDAs Aren't Always An Employee's Enemy

By **Braden Campbell**

Law360 (February 26, 2020, 8:09 PM EST) -- Requiring confidentiality as a condition of discrimination settlements has drawn fire from presidential hopefuls and others who equate the practice with employers covering up misconduct. But a recent New York law banning nondisclosure agreements unless the worker wants one shows this debate isn't so black and white.

Opponents of nondisclosure agreements say these pacts let employers hide wrongdoing and protect serial harassers by stifling workers. But in many cases, New Yorkers continue to negotiate settlements with confidentiality agreements, say attorneys who have been hashing out deals under the state's framework for the last year and a half.

"There's always going to be plaintiffs that prefer confidentiality," said Jeanne Christensen, an attorney with New York-based plaintiffs firm Wigdor LLP who often represents workers in harassment disputes. "It's not always [included in an agreement] to benefit the employer or the company."

Nondisclosure agreements, which were a frequent target in the early days of the #MeToo Movement, reemerged on the national stage last week when Sen. Elizabeth Warren, D-Mass. attacked businessman and former New York City Mayor Michael Bloomberg for using them in deals with workers. Warren accused her opponent in the race for the Democratic presidential nomination of silencing women who complained about sexual harassment within Bloomberg LP.

This charge echoes opponents' primary criticism of NDAs: That they allow harassment to continue by shielding harassers from accountability. These concerns led New York lawmakers in the 2019 budget bill to bar confidentiality agreements in sexual harassment settlements unless they're the "complainant's preference." The law gives workers three weeks to mull an NDA, and another week to change their mind after signing. Gov. Andrew Cuomo signed the bill in April 2018, and lawmakers updated the provision last year to cover other forms of harassment.

But aside from taking three weeks longer, settlement negotiations haven't changed much since the law took effect in July 2018, said Jessica Taub Rosenberg, a New York-based partner at Kasowitz Benson Torres LLP.

"We have not seen any change with respect to confidential settlement agreements," said Rosenberg, who mostly represents employers. "Complainants are still electing confidentiality."

Rosenberg said it's been business as usual in large part because employers can still request confidentiality as a settlement term, which triggers the three-week consideration period. She added that the change has also been somewhat beneficial for employers, who now have a separate agreement showing the complaining worker wanted to keep things quiet.

Mark Lerner, a colleague of Rosenberg's in Kasowitz's New York office, said lawmakers made this change in the public's interest: If NDAs are discouraged, it's more likely the public will find out about misconduct, the reasoning goes. But, he said, many employees have strong personal reasons for agreeing to confidentiality.

"People frequently, for their own reasons, would rather have their own claims be private, or they'd rather trade the ability to talk about it for significant monetary payment," said Lerner, who heads the firm's employment practices and litigation group. If the worker insists on talking, it's unlikely the employer will settle, he added.

Wigdor's Christensen pushed back at the notion that a worker's refusal to keep quiet will put a settlement out of reach. She told Law360 that at least one client has refused confidentiality, but declined to say how many settlement negotiations she's handled since the law took effect.

Whether a complaining worker will agree to a secret settlement will generally depend on the facts of the case, she added. For example, a midlevel worker at a large company with thousands of employees may prefer anonymity, while a high-profile person who feels they've been wronged by someone of similar stature may want to make a public stand, she said.

Plaintiff-side attorney Steven Arenson of Arenson Dittmar & Karban, who specializes in hostile work environment cases, said the change hasn't had a dramatic effect on his practice. He said he's seen more deals without an NDA, but some clients still "choose confidentiality for personal reasons," he said.

The more personal or severe a claim, the more workers will want to keep things quiet, he said. A group of women whose boss puts up a vulgar or demeaning poster may want to speak out, but a single woman who's slipped a $100 bill and told to meet her boss at his hotel may not, he said.

But while the law hasn't changed workers' reasons for wanting or opposing confidentiality, the state has strengthened their negotiating position by taking a public stance against NDAs, he said. This means striking a confidentiality agreement is no longer the formality it has historically been, nor are employers demanding workers keep as many things secret as they used to, he said.

In the past, employers would "define confidential information as including everything" with the aim of scaring workers away from saying anything that could possibly be construed as within the agreement, he said. He recalled one defense lawyer telling him "I want you to be looking over your back as you sign this," with the aim of scaring his client away from saying anything that could possibly be construed as covered.

"Now [confidentiality terms] can no longer be dictated sort of by executive fiat," he said.

--Editing by Brian Baresch and Alanna Weissman.