

Publications

Labor and Employment Alert: Washington Prohibits Certain Nondisclosure, Waiver and Arbitration Agreements Relating to Discrimination Claims

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Under the Washington Law Against Discrimination (WLAD), discrimination on the basis of a protected status such as race, national origin, sex, veteran or military status, sexual orientation or disability is prohibited. Sexual harassment is a form of sex discrimination under WLAD (and Title VII of the Civil Rights Act of 1964). In June 2018, Washington enacted three laws concerning discrimination claims in the workplace.

Nondisclosure agreements regarding sexual harassment are prohibited.

Employers are prohibited from requiring an employee, as a condition of employment, to sign a nondisclosure agreement that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events, or between employees, or between an employer and an employee, off the employment premises. Any such nondisclosure agreement is against public policy and is void and unenforceable. Further, it is an unfair practice under WLAD for an employer to retaliate against an employee for disclosing or discussing sexual harassment or sexual assault.

The law defines "sexual assault" means any type of sexual contact or behavior that occurs without the explicit consent of the recipient. "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party. Sexual harassment means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if: submission to that conduct or communication is made a term or condition of obtaining an education or employment; submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or that conduct or communication substantially interferes with an individual's educational or work

performance or creates an intimidating, hostile, or offensive educational or work environment.

Human resources employees who are expected to maintain the confidentiality of an investigation as part of their official duties, and employees requested to maintain confidentiality of an ongoing human resources investigation are not covered. Additionally, the law does not apply to confidential settlements between an employee alleging sexual harassment and an employer.

Confidential dispute resolution of discrimination claims is prohibited.

Washington law now prohibits provisions in an employment contract or agreement that require an employee to waive his or her right to publicly pursue a cause of action arising under WLAD or federal antidiscrimination laws or to publicly file a complaint with the appropriate state or federal agencies. The law further prohibits provisions that require an employee to resolve claims of discrimination in a dispute resolution process that is confidential. Any such provision is against public policy and is void and unenforceable.

State-issued model policies and best practices are forthcoming.

Finally, the Washington Human Rights Commission is required to develop model policies and best practices for employers and employees to keep workplaces safe from sexual harassment and retaliation. The policies and practices must be developed and posted on the state's Department of Labor and Industries' website by January 1, 2019. Among other issues, the Commission may consider how to ensure that human resource departments are accountable for enforcing sexual harassment policies and using required training for all employees in a classroom environment. It may be that these "model policies" become the minimum standard employers must meet in order to comply with the WLAD.

Employers in Washington should review their policies and procedures to ensure they comply with these new requirements. Contact your Vorys lawyer if you have questions about sexual harassment or equal employment opportunity.