Safeguarding Silence: The Weaponization of Nondisclosure Agreements and the Need for More Regulation

Johanna Shinners

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SAFEGUARDING SILENCE: THE WEAPONIZATION OF NONDISCLOSURE AGREEMENTS AND THE NEED FOR MORE REGULATION

By: Johanna Shinners*

ABSTRACT

With the surge of the #MeToo movement, the weaponization of Nondisclosure agreements in cases of sexual assault and harassment has been brought to the forefront. This comment discusses the use and laws of nondisclosure agreements (NDAs) in cases of sexual assault and sexual harassment, highlighting their role in silencing victims and shielding perpetrators from accountability and underscores the broader implications of NDAs in perpetuating a culture of silence. Emphasizing the prevalence of NDAs, this comment scrutinizes their misuse and explores the historical context, highlighting the intertwining of #MeToo movement and NDAs.

This comment compares State responses, exemplified by Washington, California, New Jersey, and Oregon, and how they showcase varied approaches to regulate NDAs. Federal initiatives, like the Federal Tax Cuts and Jobs Act and the Speak Out Act, are examined, revealing limitations in curbing NDA’s misuse. The comment suggests that a more comprehensive regulatory framework at both state and federal levels regarding the use and enforcement of Nondisclosure agreements may be required to regulate this area of law.
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INTRODUCTION

"‘I told him to stop. I told him to leave the bathroom. And he didn’t. He just kept going towards me.’”

"‘I said no, a lot of ways, a lot of times, and he always came back at me with some new ask.’”

"If [I] accepted his sexual advances, he would boost [my] career.”

"‘Part of me was thinking should I just make a run for it, but he’s a big guy. He’s big. He’s broad. He’s overweight. He’s domineering.’”

"‘Please stop, I don’t want this. What are you doing?’”

Ashley Judd was invited to the Peninsula Beverly Hills Hotel under the pretense of a “business breakfast meeting,” only to have her life take an unexpected turn. Instead of a professional business meeting, Ms. Judd found herself in Mr. Harvey Weinstein’s hotel room “where he appeared in a bathrobe” and requested that she give him a massage or watch him shower. Similar accounts surfaced as women like Emily Nestor shared their experiences of being lured to secluded locations for supposed work meetings, all under the guise of advancing their careers. In Ms. Nestor’s case, Mr. Weinstein told her that “[i]f she accepted his sexual advances, he would boost her career.” These stories came forward after the New York Times exposed Harvey Weinstein’s actions, revealing a pattern of abuse and coerced silence.

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3 Id.
4 Kelner, supra note 1.
5 Id.
6 Kantor & Twohey, supra note 2.
7 Id.
8 Id. (explaining how Weinstein would coax women into being alone with him under the guise of “business”).
9 See Kantor & Twohey, supra note 2.
In some situations, Nondisclosure Agreements ("NDA") have been employed to silence victims of sexual assault or harassment, preventing them from publicly speaking about their experiences.\(^{10}\) NDAs effectively strip victims of the opportunity to speak out about their traumatic experiences.\(^{11}\) With the problematic use of NDAs, many concerns have been raised regarding the potential for NDAs to perpetuate a culture of silence and protect perpetrators from facing accountability for their actions.

This comment argues that NDAs are weaponized tools shielding perpetrators from consequences. This comment will examine what an NDA is, the extensive history of NDAs and sexual assault and harassment claims, and the efforts to limit or regulate the use of NDAs in cases of sexual assault and harassment. Finally, this comment argues that NDAs in cases of sexual assault and sexual harassment should be regulated to hold abusers and their lawyers accountable.

I. THE ROLE OF NONDISCLOSURE AGREEMENTS

An NDA "is a legally binding contract that establishes a confidential relationship between two parties: one that holds sensitive information and the other that will receive that sensitive information."\(^{12}\) NDAs have been identified by many names, such as confidentiality agreements (CAs), confidential disclosure agreements (CDAs), and proprietary information agreements (PIAs).\(^{13}\) Regardless of the term used to describe an NDA, all the names have one crucial aspect in common: "Once an individual signs an NDA, they cannot discuss any information protected by the agreement with any non-authorized party."\(^{14}\) Confidentiality only applies to the specific information agreed upon not to be disclosed, such as the terms of a settlement offer, to prevent the dissemination of information to the public.\(^{15}\) One of the most well-known individuals that weaponized NDAs is Harvey Weinstein.\(^{16}\) His use, or misuse rather, of NDAs transcended the global #MeToo movement and brought this issue to light. This collective movement

\(^{10}\) Kantor & Twohey, supra note 2.
\(^{11}\) Kantor & Twohey, supra note 2.
\(^{14}\) Id.
\(^{15}\) Rachael L. Jones & Virginia Hamrick, Reporting on NDAs and #MeToo: How the Press May Obtain Standing to Challenge NDAs, 35 COMMUNICATIONS LAW. 7, 10 (2019).
\(^{16}\) See generally Kantor and Twohey, supra note 2; See generally Ellen J. Zucker, NDAs: Is There Anything Worth Keeping?, 66 BOSTON BAR J. 22, 22 (2022) (discussing how Weinstein used non-disclosure agreements to silence his accusers of sexual assault and harassment).
of women coming forward evolved into the #MeToo campaign, shedding light on the pervasive problem of sexual misconduct across diverse industries and underscoring the nuanced use and potential abuse of NDAs in such contexts. The NDAs signed by Weinstein’s employees were essentially blanket NDAs that prohibited employees from negatively speaking about the business. The New York Times reported that "Mr. Weinstein enforced a code of silence; employees of the Weinstein Company have contracts saying they will not criticize it or its leaders in a way that could harm its ‘business reputation’ or ‘any employee’s personal reputation.’”

In cases involving sexual harassment or workplace misconduct, NDAs typically "prohibit[] the employee from disclosing to anyone any details about the settlement or any facts that led up to the settlement." These gag orders likely result in adverse emotions and feelings due to the victims’ incapacity to share their narratives. It can also prevent victims from seeking the help they need, whether medical or psychological. Additionally, individuals subject to NDAs often encounter limitations that hinder their ability to testify truthfully when called upon for deposition or trial, thereby obstructing the criminal justice process, thus further enabling perpetrators in positions of power to continue a vicious cycle of abuse and cover up their indiscretions without any consequences.

As articulated in The Restatement (Second) of Contracts §175, a contract is defined as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” NDAs are a common and specific type of contract commonly employed in conjunction with settlement agreements. Recent research indicates that 88% of businesses utilize NDAs, encompassing 57% of the U.S. workforce. Within the purview of contract law, NDAs become subject to enforceability and remedies when breaches occur. Therefore, the general principles governing contracts, including defenses such as

17 See Kantor & Twohey, supra note 2; see also Zucker, supra note 13.
18 Kantor & Twohey, supra note 2.
19 Id.
20 Ann Fromholz & Jeanette Laba, #MeToo Challenges Confidentiality and Nondisclosure Agreements, 41 LOS ANGELES LAW. 12, 12 (2018).
22 Id.
23 See Fromholz & Laba, supra note 20.
25 See Fromholz & Laba, supra note 20.
27 See INVESTOPEDIA, supra note 12.
unconscionability, duress, public policy, and specific damages, apply to NDAs. Therefore, disregarding a contract or breaking the terms of an NDA may result in legal and financial ramifications, irrespective of the ethical and moral reasoning behind the breach.

II. NONDISCLOSURE AGREEMENTS AND SEXUAL ASSAULT/HARASSMENT CLAIMS

NDAs have experienced increased prevalence with the surge in innovative ideas and the corresponding intellectual property rights, particularly within the technology sectors. Conceived initially to safeguard novel concepts, proprietary information, and intellectual assets from being shared upon an employee’s departure to a rival entity, NDAs have now spread beyond these initial confines.

In 2017, The New York Times and The New Yorker published a comprehensive exposé delineating the alleged serial sexual abuses committed by Harvey Weinstein against women. Upon release of the articles, numerous women came forward, recounting in explicit detail their experiences of assault and the enforced silence integral to their settlements.

During the #MeToo era, NDAs assumed a prominent position within the realm of contract law. Historically, these agreements were instrumentalized within legal settlements to silence victims of assault and harassment. Over a span of more than three decades, Harvey Weinstein, leveraging his status, influence, and authority, weaponized NDAs to conceal persistent harassment and sexual misconduct through settlement agreements. The revelation of Weinstein’s former assistant, Zelda Perkins, detailing her sustained harassment while employed by Weinstein, was a catalyst for the

29 Jones and Hamrick, supra note 14, at 7.
31 Id.
33 Zucker, supra note 16.
35 Kantor & Twohey, supra note 2.
subsequent #MeToo movement.36 Perkins was one of the many who came forward and told her story, igniting the #MeToo movement.37

Perkins emerged as a trailblazer by breaking her NDA and publicly addressing Weinstein’s assaults.38 Eventually, they both left the company due to the harassment and filed a lawsuit against Weinstein.39 The ensuing legal action resulted in a settlement of $316,000, which they had to divide.40 Integral to the settlement were NDAs that prohibited them from divulging any information pertaining to the allegations and settlement.41 Such constraints barred them from sharing their narrative with acquaintances, family members, medical professionals, and even the judiciary.42 Critics contend that in cases such as Weinstein’s, NDAs serve to perpetuate the victim’s vulnerability by restoring power and authority to the perpetrator.43

NDAs and confidentiality agreements, prevalent for centuries, have been wielded to shield individuals in positions of power from the repercussions of sexual assault and harassment scandals. Beyond the Weinstein case, which brought NDAs to public scrutiny, instances within the sports industry, churches, and the presidencies offer further illustrations of influential figures employing NDAs to safeguard their public image.

In the realm of sports, prominent female athletes, including McKayla Maroney, Aly Raisman, Gabby Douglas, and Simone Biles, joined over 150 others in accusing team doctor Larry Nassar of sexual abuse.44 Maroney alleged that officials “attempted to keep her silent regarding the sexual abuse she suffered.”45 Maroney’s disclosure was constrained by an NDA, subjecting her to potential fines of up to $100,000 if she spoke out during Nassar’s sentencing.46 Larry Nassar was permitted to continuously sexually assault these athletes not only under the guise of his position but also due to the silencing nature of NDA laws.47 This highlights how NDAs in the athletic sphere exacerbate power imbalances and stifle victims’ voices.

36 Perman, supra note 35.
37 Id.
38 Id.
39 Id.
40 Jones and Hamrick, supra note 15, at 7.
41 Id.
42 Id.
43 Macfarlane, supra note 31; Zucker, supra note 16.
44 See Alexandria Murphy, Better Late than Never: Why the USOC Took So Long To Fix a Failing System for Protecting Olympic Athletes from Abuse, 26 JEFFREY S. MOORAD SPORTS L. J. 157, 158 (2019).
45 Id. at 171.
47 See Murphy, supra note 45, at 170-71.
The ecclesiastical domain has also witnessed the use of NDAs to suppress sexual harassment claims, particularly within the Catholic Church.\(^{48}\) Victims, despite receiving settlements, are coerced into silence by NDAs that impose financial penalties for breach of confidentiality.\(^{49}\) A church, for example, paid millions of dollars to victims of sexual abuse at the hands of church personnel.\(^{50}\) Nonetheless, a settlement term required the individuals to sign NDAs, effectively forcing their silence.\(^{51}\) The agreements they signed stipulated that if confidentiality were violated, the victim would be required to pay the church a certain amount.\(^{52}\) As a result, this compels victims to endure their ordeal in silence or face dire financial consequences for sharing their traumatic experiences.

Furthermore, former U.S. presidents have employed NDAs to shield sensitive information from public scrutiny.\(^{53}\) Notably, former President Donald Trump used an extensive and unique NDA to prevent campaign personnel from disclosing information that might tarnish his or his family’s reputation, including allegations of sexual assault.\(^{54}\) During Donald Trump’s presidential campaign in 2016, he required all employees to sign NDAs that prohibited them from sharing information that "Mr. Trump insists remain private or confidential."\(^{55}\) The NDAs were written broadly, demanded silence while working for him, and required employees to remain silent "at all times thereafter."\(^{56}\) Trump’s NDAs were unique in that they required not only paid staff but also unpaid staff and volunteers to sign away their silence without fully understanding what they were giving up.\(^{57}\) When Trump was elected, he brought his broad blanket NDAs to the White House.\(^{58}\) The NDAs stipulated penalties for any disclosure of "nonpublic information" obtained during their duties working for President Trump.\(^{59}\) This is just one of many presidents who have used broad NDAs to protect their image.\(^{60}\)
III. Nondisclosure Agreements – Are They Against Public Policy?

Courts typically avoid intervening in private contracts, such as NDAs, unless necessary.\(^{61}\) This reluctance is grounded in the principle that individuals are free to enter contracts and establish their terms as long as the agreement is voluntary.\(^{62}\) Courts apply the general principle that for a contract to be valid, two things must be present during its formation: mutual assent and consideration.\(^{63}\)

Even in cases where a party might not consciously consent to the contract, courts have historically upheld the agreement so long as consent is established.\(^{64}\) Nevertheless, recent legal developments indicate a shift in their approach, with courts refusing to enforce NDAs that interfere with ongoing investigations or contravene public policy.\(^{65}\) Thus, based on past court decisions, there is a hesitancy to intervene in NDAs that parties willingly enter into.\(^{66}\) However, there are situations where enforcing NDAs would be an egregious violation of public policy and, therefore, not enforceable.\(^{67}\)

In *Equal Employment Opportunity Commission v. Astra U.S.A., Inc.*, a district court ruled in favor of the Equal Employment Opportunity Commission (EEOC).\(^{68}\) It issued a preliminary injunction preventing Astra from "entering into or enforcing settlement agreements containing provisions that prohibit settling employees both from filing charges of sexual harassment with the Equal Employment Opportunity Commission ("EEOC or "the Commission") and from assisting the Commission in its investigation of any such charges."\(^{69}\) The district court ultimately intervened because the clauses violated public policy.\(^{70}\)

In this case, the Equal Employment Opportunity Commission (EEOC) was investigating three alleged sexual harassment charges that were filed against Astra.\(^{71}\) The EEOC encountered a problem during its investigation and could not acquire further information from Astra’s employees due to NDAs that were signed as part of the settlement agreement.\(^{72}\) One employee of Astra stated that she

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\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) See Jones and Hamrick, supra note 15, at 8.

\(^{67}\) See Stephens, supra note 62.

\(^{68}\) Jones and Hamrick, supra note 15, at 8.


\(^{70}\) Id.

\(^{71}\) Id. at 744-45.

\(^{72}\) Id. at 741.
“possessed relevant information but was unable to disclose it ‘due to a confidential settlement agreement that she had entered into with Astra.’” Another employee refused to confirm or deny whether she had entered into a settlement agreement.

Additionally, the EEOC found that there were at least 11 settlement agreements between Astra and its employees who were either subject to or witnessed sexual harassment. While the agreements may have varied slightly, they all contained four provisions: the settling employee agrees not to file a charge with the EEOC; the employee would not assist others who file charges with the EEOC; that she release all employment-related claims against Astra and anyone in connection with Astra; and that she “assents to a confidentiality regime under which she is barred from discussing the incident(s) that gave rise to her claim and from disclosing the terms of her settlement agreement.” To further the investigation, the EEOC asked Astra to rescind any part of the agreement that barred the employees from speaking. Astra remained persistent in that the employees who have signed settlement agreements may not volunteer any information to the Commission that is beyond the scope of an ongoing investigation.

In determining whether the district court was justified in finding a significant risk of irreparable harm, the court relied on a balancing test, weighing the impact of settlement provisions "that effectively bar cooperation with the EEOC on the enforcement of Title VII against the impact that outlawing such provisions would have on private dispute resolution." The court held that the provisions violated public policy and did not enforce the employees’ NDAs.

EEOC v. Astra demonstrates that settlement agreements involving sexual harassment and assault are against public policy, and the courts should not enforce them. This case was decided in 1996, and to date, the courts appear only to get involved in NDAs when they impede EEOC investigations or violate public policy and safety concerns.

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73 Id.
74 Id.
75 Id.
76 Id.
77 Id. at 741-42.
78 Id. at 742.
79 Id. at 744.
80 Id.
81 Id. at 744-45; see also Jones and Hamrick, supra note 15, at 8 ("courts have refused to enforce NDAs that interfere with ongoing investigations. ... Bill Cosby tried to enforce a confidential agreement" that was signed by Andrea Constand from a 2005 sexual assault case.).
IV. STATES RESPONSES TO NONDISCLOSURE AGREEMENTS

With the outpouring of stories and experiences surrounding the #MeToo movement and Harvey Weinstein came a need for reform surrounding the outdated and ineffective protections available to survivors of the unimaginable. In response to these concerns, states acted almost immediately, attempting to limit or regulate the use of NDAs in cases of sexual assault and harassment. Five years after the #MeToo movement became an international sensation, 22 states and the District of Columbia have passed over 70 workplace anti-harassment bills.

NDAs are contracts, and therefore, laws and regulations surrounding NDAs and sexual assault can vary significantly by jurisdiction. Following the #MeToo movement and in the absence of a federal response to this problem, states have attempted to address this alarming public issue by enacting legislation to limit the usage of NDAs. Some states have enacted much stricter legislation than others. Washington's "Silenced No More" law, enacted in March 2022, is potentially one of the most restrictive laws passed because it "voids all blanket NDAs and non-disparagement clauses entered into as a

83 Id.
84 Id.
condition of employment, no matter when they were signed." The law invalidates all blanket NDAs and non-disparagement clauses associated with employment, regardless of when they were initially signed. Thus, the legislation refrains from enforcing any NDA in cases involving illegal actions such as discrimination, harassment, retaliation, sexual assault, or conduct against a clear public policy mandate.

Moreover, the legislation also attempts to prevent employers from trying to enforce the NDAs. If an employer attempts to enforce an illegal NDA in the state, they face a possible fine of up to $10,000, in addition to paying attorney’s fees. Washington passing the Silenced No More law may suggest a significant shift towards promoting transparency and protecting employees who want to speak out against unlawful actions within their workplaces.

In January 2019, California passed a similar law addressing non-disclosure agreements (NDAs). Senate Bill 1300, Stand Together Against Non-Disclosures, known as the STAND Act, made it an "'unlawful employment practice, in exchange for a raise or bonus, or as a condition of employment or continued employment' to require an employee to sign 'a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.'" A couple of years later, in October 2021, California passed Senate Bill 331, which was added to the Code of Civil Procedure, §1001, Prohibition of Provisions in Settlement Agreements, that prevents or restricts disclosure of factual information relating to certain claims of sexual assault, sexual harassment, and discrimination based on sex. The law builds upon California’s previous Senate Bill 1300 STAND Act but expands restrictions specifically to NDAs and includes harassment and discrimination claims based on any protected category under the Fair Employment Housing Act (FEHA).

California’s law aims to provide a form of protection to victims of assault and harassment as well as reduce the legal tools provided for their assailants. The law significantly restricts the use of NDAs in employment-related settlement agreements that pertain to claims of

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88 Id.
89 Id.
91 Duberstein, supra note 88.
92 Id.
93 See S.B. 1300, 2021-2022 Leg., Reg. Sess. (Cal. 2021); see also Jason Sockin et al., NON-DISCLOSURE AGREEMENTS AND EXTERNALITIES FROM SILENCE, 11 (Upjohn Institute, 2024).
94 CAL. CIV. PROC. CODE § 1001(a)(3).
95 Id. § 1001(a)(4).
harassment, among other things. The legislative history indicates that the act is intended to block any unlawful acts in the workplace and “Xprohibit an employer from requiring an employee to sign a nondisparagement agreement … denying the employee the right to disclose information about those acts.” The law applies retroactively to all prior NDAs.

Under California law, employers must include specific language that specifies that the NDA cannot prevent someone from "discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful." For example, under California’s law, an employer is barred from the enforcement of the NDA, preventing individuals from seeking help or speaking out about illegal workplace misconduct involving sexual assault and harassment. However, the law does not cover NDAs signed after a lawsuit has been filed or NDAs signed because of a settlement agreement. The law also does not prevent employers from using NDAs to protect trade secrets and other information. It only applies to circumstances involving sexual assault and harassment. California, through legislation, is further articulating the disturbing legal complexities that NDAs create.

A third way in which states have tried to regulate NDAs is New Jersey’s NDA restrictions. On March 18th, 2019, the New Jersey Governor signed Senate Bill 121 into law. The act “[b]ars provisions in employment contracts that waive rights or remedies; bars agreements that conceal details relating to discrimination claims.” The law makes any NDA “that waives any substantive or procedural right or remedy relating to a claim or discrimination, retaliation or harassment ... unenforceable.” The legislation bans any provision that attempts to conceal details regarding claims of discrimination, retaliation, or harassment. The legislation allows individuals to break confidentiality in situations such as harassment, retaliation, and discrimination. The law requires that employers include a notice in any agreement that any provision with an

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96 Id.  
98 See Sockin et al., supra note 94, at 11-12.  
99 S.B. 331, supra note 98.  
100 Id.  
101 Id.  
102 See Sockin et al., supra note 94, at 12.  
105 Id.  
106 Duberstein, supra note 88.  
107 Id.
agreement signed is “unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.”¹⁰⁸ New Jersey’s approach to NDA regulation is broader than some states have taken, applying itself only to NDAs signed retroactively, thus only impacting a limited population.¹⁰⁹ Regardless of these laws’ reach, it is a step in the right direction that states are aware of the public policy concern that NDAs are causing.

V. CONGRESS’S REGULATION OF NONDISCLOSURE AGREEMENTS

The movement of states acting and attempting to curb the use of NDAs in settlement agreements illustrates how much NDAs have changed from being used to protect business trade secrets to a weapon used to benefit the powerful and corrupt and gag victims. After states such as California and New Jersey passed legislation, Congress passed legislation. Congress attempted to regulate this continued problem through different methods, such as amending a federal tax bill and passing a federal law preventing the enforcement of NDAs in specific contexts of sexual assault and harassment.

A. Federal Tax Amendment to Regulate the Use of Nondisclosure Agreements

First, in 2017, Congress passed and President Trump signed The Federal Tax Cuts and Jobs Act (“TCJA”) to limit the deductibility of costs associated with settlements from allegations of sexual misconduct containing an NDA.¹¹⁰ The new law, also known as the “Weinstein Tax,” prevents attorney’s fees that deal specifically with NDAs from being deductible.¹¹¹ The new tax reform applies only to amounts paid to settle allegations of sexual misconduct containing an NDA.¹¹²

The amendment to federal tax law, section 162 of the Internal Revenue Code, makes any settlement or payment related to sexual harassment or abuse subject to an NDA or attorney’s fees related to

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¹⁰⁸ Id.
¹⁰⁹ Id.
¹¹² Id.
such payment an un-deductible expense.\textsuperscript{113} Through the taxability of payouts, Congress uses the tools at its disposal to deter persons with power from using NDAs to silence victims. Additionally, by regulating what is allowed to be deductible when it comes to settlements, Congress is attempting to unify the states and provide a foundation for courts to follow on the restriction and use of NDAs. This suggests Congress likely finds a profound and unsettling misuse of NDAs in specific situations where employers try to conceal unlawful workplace misconduct.

\textbf{B. Public Law 117-224: “The Speak Out Act”}

In addition to section 162 of the tax, Congress has attempted to further regulate the use and enforcement of NDAs in situations involving the concealment of unlawful workplace misconduct, such as sexual assault and harassment, by a federal bill that requires each state to nullify any pre-dispute employment contract NDA.\textsuperscript{114} The act provides some uniformity across the states on how to proceed with enforcing NDAs that violate public policy concerns. The act is intended to limit further the use of NDAs in sexual assault and harassment contexts.\textsuperscript{115}

The Speak Out Act, also known as S.4524, was introduced in the Senate on July 13th, 2022, and successfully navigated the legislative process, receiving approval from the Senate on September 29th, 2022.\textsuperscript{116} The act passed the House on November 16th, 2022, with an overwhelming majority vote in favor of the bill.\textsuperscript{117} President Biden endorsed the legislation, signing it on December 7\textsuperscript{th}, 2022, formalizing it as Public Law.\textsuperscript{118}

This enacted public law specifically inhibits courts from enforcing nondisclosure clauses or non-disparagement clauses that are entered into before the occurrence of a sexual assault or harassment dispute.\textsuperscript{119} Within the act, a "nondisclosure clause" is defined as "a provision in a contract or agreement that requires the parties to the contract or 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

\textsuperscript{113} Id.
\textsuperscript{114} See generally Speak Out Act, S. 4524,117th Cong. (2022).
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} S. 4524 § 4(a).
agreement.” Thus, this law prevents employers from enforcing blanket nondisclosure and non-disparagement provisions signed before an allegation of workplace sexual assault and harassment arises. The text and the legislative history of the Speak Out Act make clear that the Speak Out Act was drafted with the idea of preventing women’s forced silence throughout the #MeToo movement, silencing victims, and keeping perpetrators hidden from the public. The Speak Out Act puts power back into the hands of the victims and creates a space for them.

There are, however, limitations to the Speak Out Act. The Act applies only to NDAs entered before a dispute arises; it does not apply to NDAs entered as part of a settlement agreement after the allegations. This poses the perplexing question of what to do when NDAs are signed post-dispute. Essentially, the act applies only to pre-dispute non-disparagement and NDAs but not to post NDAs (contracts entered into after the fact, such as a term to a settlement agreement). The public law will nullify some NDAs when employees allege sexual harassment or assault. While this act demonstrates significant progress towards abolishing the abuse that NDAs and their victims have endured, it still leaves many vulnerable individuals involved in post-dispute nondisclosures at risk.

VI. THE CURRENT LEGISLATION IS NOT ENOUGH

The legal system has been manipulated to maintain a public façade while suppressing survivors. Attempts by States and Congress to limit the use of pre-dispute NDAs in cases of sexual assault and harassment have led to many advances in this area of law. However, the effectiveness of such legislation has encountered some challenges. Courts grapple with enforcing these contracts due to a lack of uniformity among the states and public policy concerns.

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120 Id. § 3(1).
123 Id.
124 Id.
125 Spiggle, supra note 123.
First, laws vary in their restrictions, scope, and exemptions at the state level, with certain jurisdictions imposing severe penalties for failure to comply. This causes an issue with federal courts when determining cases and may even lead to confusion regarding what court/how to bring a claim forward. There is a lack of uniformity regarding enforcing NDAs in sexual assault and harassment cases. Each state decides whether to enforce these contracts, creating confusion and unfairness between the states. Depending on where a business has employees, these NDAs may conform to one state law but not another.

Second, the Speak Out Act does not fine employers from placing blanket NDAs, such as new employee hiring and onboarding documents, within employment contracts. The act simply precludes the court's enforcement of blanket NDAs regarding allegations of sexual assault and harassment. Another problem that may arise is that while the NDA may not be enforceable, individuals signing the contracts may not be aware of the unenforceability of these contracts. If they are unaware, they may adhere to the NDA and not speak out about the injustice they suffered, even though the NDA may not be legally enforceable.

In conjunction with the Speak Out Act and existing state legislation, an additional mechanism should be established to deter employers from exploiting NDAs. One viable solution may involve adopting a practice similar to that in Oregon and Washington. Both jurisdictions have enacted laws that impose monetary sanctions and discretionary additional penalties, such as punitive damages, enhancing the deterrent effect.

Under Oregon Law §659.885, an aggrieved individual has the right to initiate a civil suit against their employer for entering into an agreement that prevented the employee from discussing certain unlawful conduct. The Oregon law allows employers to be civilly prosecuted, and punitive damages may be awarded in addition to what is authorized under the statute. Oregon law goes further than other laws passed, and the addition of punitive damages in addition to the statutorily authorized damages may create more of a deterrent effect.

Typically, punitive damages are not recoverable except, perhaps, in those exceptional cases where the breach amounts to an

127 Id.
129 Or. Stat. § 659A.885(1).
130 Id. § (3).
independent willful tort, in which even they may be recovered under proper allegations of malice, wantonness, or oppression, according to the courts. However, under Oregon law, these punitive damages would be allowed to compensate victims. One could argue that the enforcement of NDAs, particularly blanket statements NDAs used to silence victims of sexual assault and harassment, demonstrates malice and oppression toward individuals, specifically the victims of these heinous crimes. Punitive damages should be applied to any company or employer that tries to impose a blanket NDA in its contracts. Employers are discouraged from using NDAs despite the fact that they initially appear to be a long-term solution. However, we cannot assume that workers would be as knowledgeable about the enforceability of these contracts or that employers will follow the law. The regulations don't forbid companies from using nondisclosure clauses in their employment agreements; they merely forbid them from being enforced when it comes to claims of sexual harassment and assault.

Post the #MeToo movement, NDAs within settlement agreements may empower victims and prompt quicker and more substantial settlements. However, without increased education and awareness of existing laws, there is a risk that these legal instruments may inadvertently aid perpetrators and perpetuate a cycle of abuse and concealment.

CONCLUSION

"It is the personal narrative that has the power to reshape social discourse and provide an impetus for change."

The pervasive use of NDAs in the workplace poses a significant challenge in addressing and preventing sexual assault and harassment. The alarming frequency with which NDAs are employed to conceal misconduct perpetuates a society that silences victims of sexual assault and harassment. The #MeToo movement has highlighted the issues and legal barriers that have prevented many women from sharing their stories of sexual harassment. The Speak Out Act seeks to address the legal obstacles hindering victims from sharing their experiences, aiming to guide the enforcement of NDAs and related legislation. Despite efforts at both state and federal levels to regulate and limit the use of NDAs in situations of sexual misconduct, the most effective approach remains uncertain. California’s and Oregon’s incorporation of NDAs regulations as a civil action may provide a potential model for other states to emulate.

132 Zucker, supra note 16.
offering a promising avenue for regulating nondisclosures and empowering victims to reclaim their voices in the face of this pervasive problem.