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Reconsidering Confidential Settlements in the #MeToo Era

By MINNA J. KOTKIN*

Introduction

THE #METOO MOVEMENT has cast a new light on confidential settlement agreements, colloquially known as nondisclosure agreements (“NDAs”). Until recently, confidentiality was considered a non-negotiable term in the resolution of any discrimination matter, not only for sexual harassment claims but for all actions brought under equal employment statutes. Employers thought that if a settlement was made public, they would be deluged with frivolous claims brought by disgruntled employees. Further, the accepted wisdom was that confidentiality benefited claimants as well, since a record of litigation would impede their future employment prospects. The resulting norm of secret settlements not only protected serial harassers and employers who repeatedly violated anti-discrimination laws, but also led the judiciary and the public at large to believe that employment discrimination and harassment largely had been rectified in the workplace.

With the #MeToo movement, the harm caused by these presumptions and norms has been revealed. The victims who breached confidentiality agreements were not only applauded, but also faced no enforcement action against them. There is some evidence that the courts, and certainly employers and the public, are taking allegations of harassment more seriously. State and federal legislators¹ have turned their attention to the problem of confidentiality, resulting in

* Professor of Law, Brooklyn Law School, and Director, Employment Law Clinic. Thanks to Hye Zhin Rhee, Brooklyn Law School, class of 2022, for research assistance.

1. See Alexia Fernández Campbell, *A New House Bill Would Bar Companies from Using Nondisclosure Agreements To Hide Harassment*, Vox (Jul. 18, 2018, 3:20 PM), <https://www.vox.com/2018/7/18/17586532/sexual-harassment-bill-ban-nondisclosure-agreements-ndas-congress-metoo> [<https://perma.cc/Q5GW-YHXH>]. I do not analyze the proposed federal legislation here, since it is unlikely to be adopted.

the adoption of new laws in twelve states,² and at least a dozen pending bills, including federal legislation.³ This Article examines whether there has been a significant shift in norms relating to the confidentiality imperative from the perspectives of both the complainant and the employer. It also analyzes three of the most significant enacted statutes, all of which have serious limitations and loopholes, and proposes guiding principles that could serve as a template as more jurisdictions address this issue.

This Article proceeds as follows. In Part I, I consider the various forms of agreements that have come to be known as NDAs and the stages of the employer/employee relationship in which they come into play. Part II analyzes the normative value of confidentiality within this taxonomy. In Part III, I discuss recent legislation that has attempted to remedy the harm caused by confidentiality agreements. Finally, I conclude by proposing some legislative guidelines that address the deficiencies in current legislation.⁴

I. Parsing NDAs

Since the dawning of the #MeToo era, the term NDA has been thrown around indiscriminately to describe various more or less consensual contractual agreements entered into in a wide variety of circumstances. In this part, I define and parse the term so as to facilitate the consideration of legal norms and legislative action.

A. The Parties to an NDA

Much of the media attention addressing NDAs has centered on highly atypical situations involving contracts adopted by a high-profile public figure or a high net worth individual. These may or may not be in connection with a potential or actual sexual or intimate relation-

2. Elizabeth A. Harris, *Despite #MeToo Glare, Efforts To Ban Secret Settlements Stop Short*, N.Y. TIMES (Jun. 14, 2019), <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html?smid=nytcore-ios-share> [<https://perma.cc/A8CM-FAVR>].

3. See *Legislation on Sexual Harassment in the Legislature*, NCSL (Feb. 11, 2019), <https://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx> [<https://perma.cc/KU7Q-JWGA>].

4. For recent scholarship providing a more theoretical consideration of the confidential settlements, see Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311 (2018); Scott Altman, *Sexual Harassment NDAs: Privacy, Complicity, and the Paradox of Blackmail* 19–29 (Univ. of S. Cal. Law Sch. Legal Studies Paper Series, Working Paper No. 305, 2019); David A. Hoffman & Eric Lampmann, *Hushing Contracts*, 94 WASH. U. L. REV. 165 (2019).

ship. These agreements are often unrelated to employment and may not involve a financial payment.

A typical agreement will prohibit, for good and valuable consideration, the disclosure of private and confidential information which is not generally known to the public, including emails, texts, and photographs. Liquidated damages clauses are a common feature. Resolution of any dispute may be governed by private arbitration.⁵

Perhaps the most notorious of these agreements that has come to light involves President Trump and Stormy Daniels, who brought a declaratory judgment action to invalidate their agreement.⁶ In addition to the claim that the agreement was never executed by Trump, Daniels alleged that the agreement was unconscionable and void as violative of public policy.⁷ That action was eventually dismissed as moot after the defendants provided a covenant not to sue to enforce the agreement.⁸ The Harvey Weinstein scandal also involved multiple NDAs, some with employees, but others with actors, writers, and models not in his employ.⁹

These non-employment-related agreements are governed by general principles of contract law and are treated much like trade secret confidentiality provisions.¹⁰ Most importantly, they cannot protect against a party reporting criminal activity. But since they do not arise within an employment relationship, they are not governed by almost all of the proposed or adopted legislation designed to reform the use of confidentiality agreements.

Consider, for example, an NDA entered into between a public figure (a man) and a potential romantic partner (a woman). If their

5. See generally *Non-Disclosure Agreement Between Charlie Sheen and Scottine Ross*, MSNBC (Dec. 9, 2015, 8:46 PM), <http://www.msnbc.com/msnbc/non-disclosure-agreement-between-charlie-sheen-and-scottine-ross> [<https://perma.cc/7BP3-DXES>].

6. Dylan Matthews, *Stormy Daniels's Legal Battle Against Trump, Explained*, VOX (Mar. 13, 2018, 9:10 AM), <https://www.vox.com/policy-and-politics/2018/3/13/17109656/stormy-daniels-donald-trump-lawsuit-affair-porn-adult-arbitration-michael-cohen-payoff> [<https://perma.cc/KE3D-8GKJ>].

7. See Michelle Mark, *Stormy Daniels Says in Bombshell New Lawsuit that Trump Didn't Sign Their NDA—And There Could Be Photos from Their Alleged Affair*, BUS. INSIDER (Mar. 7, 2019, 8:07 AM), <https://www.businessinsider.com/stormy-daniels-lawsuit-reveals-trump-affair-details-2018-3> [<https://perma.cc/86P2-B7J4>].

8. Civil Minutes at 2–3, *Clifford v. Trump*, No. CV 18-02217-SJO (C.D. Cal. Mar. 7, 2019).

9. Ishani Nath, *The Disturbingly Long List of All the Women Who Have Accused Harvey Weinstein (So Far)*, FLARE (Jan. 21, 2020), <https://www.flare.com/celebrity/harvey-weinstein-victims/> [<https://perma.cc/97P8-6NZ4>].

10. *Nondisclosure Agreement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondisclosure_agreement [<https://perma.cc/RV6G-4HY8>].

involvement results in the man sexually assaulting the woman, she cannot be prevented from reporting the occurrence to the police by virtue of an NDA. However, prosecution of the matter typically would be in the sole discretion of the district attorney. Her civil remedies would be limited to an action for assault, which in many states carries a two-year statute of limitations.¹¹ But under current law, if she described the event publicly in a tweet or blog for example, a contractual claim could be brought against her under the NDA.

If the assault or harassment takes place in the employment context, significantly different remedies are available. In 1986, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment, to include sexual harassment.¹² The Court defined harassment as conduct so severe or pervasive as to interfere with the terms and conditions of employment.¹³

Although Title VII permits a victim of harassment or assault to bring a civil action for damages, the statute contains some significant roadblocks. First, the action can be maintained only against the employing entity, typically a corporation, not the individual harasser.¹⁴ Second, the employer must have fifteen or more employees to be covered by the statute.¹⁵ Third, the employee must file an administrative charge with the Equal Employment Opportunity Commission (“EEOC”) or a state equal employment agency before bringing an action in court.¹⁶ Fourth, the administrative charge must be filed within 300 days of the last act of harassment.¹⁷

11. See *Sexual Assault Civil Statutes of Limitations by State*, FINDLAW, <https://injury.findlaw.com/torts-and-personal-injuries/sexual-assault-civil-statutes-of-limitations-by-state.html> [https://perma.cc/T4MJ-59A6].

12. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

13. Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (forty or older), disability, or genetic information. Harassment becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/harassment.cfm> [https://perma.cc/B9QT-UHGL].

14. Gale Burns, *Civil Rights: Does Title VII Permit Claims Against Supervisory Individuals in Their Official Capacities?*, NAT’L LEGAL RES. GROUP, INC. (Nov. 6, 2013, 12:11 PM), <http://www.nlrg.com/employment-law-legal-research2-/bid/97393/CIVIL-RIGHTS-Does-Title-VII-Permit-Claims-Against-Supervisory-Individuals-in-Their-Official-Capacities> [https://perma.cc/UBR7-BF89].

15. 42 U.S.C.A. § 2000e-5(b) (2012).

16. *Id.*

17. § 2000e-5(e)(1).

Some of these limitations can be overcome by relying on state rather than federal law. Both New York and California permit actions against individual supervisors under statutory language that refers to “aiding and abetting.”¹⁸ California and New York have both recently extended their statutes of limitation to three years.¹⁹ Both state statutes also apply to smaller employers. In New York, until the recent elimination of this provision, an employer had to have four or more employees—but first the law was amended for sexual harassment claims to be brought against employers of any size, and now the limit has been removed altogether.²⁰ California covers employers with five or more employees but also makes an exception for harassment, where only one employee is required.²¹

Even with the more generous provisions of state law, enforcement still requires an employment relationship between the parties. To circumvent enforcement, a small or individual employer will often designate a worker as an independent contractor. Take, for example, the public figure who hires a personal assistant and proceeds to harass her. Until recently, the employer could avoid any liability under equal employment laws because the personal assistant would be defined as an independent contractor. Again, in the wake of #MeToo, some states and localities have attempted to address this issue. Regarding harassment, California law covers any person “providing services pursuant to a contract.”²² Moreover, California recently adopted legislation that makes it more difficult for employers to classify employees—particularly gig workers—as independent contractors.²³ New York City just extended its equal employment protections to independent contractors and freelancers.²⁴

These various limitations on claims for sexual harassment or assault impact the viability of NDAs. These agreements operate in the shadow of possible litigation. Any attempt to restrict their enforceability has to be contextualized by a consideration of who the parties are to the agreement. The existence of an employment relationship is the trigger for most attempts at legislative reform. In the next part, I will consider how the timing of the agreement affects its enforceability.

18. CAL. GOV'T CODE § 12940 (West 2019); N.Y. EXEC. LAW § 296 (McKinney 2019).

19. The California SHARE Act went into effect on October 10, 2019. See CAL. GOV'T CODE § 12940 (West 2019).

20. § 296.

21. CAL. GOV'T CODE § 12940(j)(4)(A) (West 2019).

22. *Id.*

23. Assemb. B. 5, 2019 Leg., Reg. Sess. (Cal. 2019).

24. N.Y.C., N.Y., Local Law No. 172 (2019).

B. The Timing of an NDA

NDAs can arise at various stages in the employment relationship. Some employers include NDAs as part of an initial employment contract, letter of understanding, or even as part of an employee manual. These agreements typically speak in general terms and prohibit the disclosure of confidential proprietary information learned in the course of employment. The term NDA may also refer to a non-disparagement agreement, which prohibits the employee from publicly communicating negative statements about the employer. Agreements with these terms often state explicitly that the provisions extend beyond employment separation. These same provisions are frequently included in severance agreements, even when there is no dispute involved in the separation. As standard boilerplate provisions, their enforceability rarely becomes an issue.

The real concern regarding the use of NDAs centers upon situations where an employee complains of discrimination, including instances of harassment or assault. Take, for example, the common scenario in which an employee is subject to sexual advances by a supervisor. Equal employment legislation encompasses conduct ranging from repeated verbal remarks to forcible rape. How considerations of confidentiality play out in this context is highly dependent on when a resolution is reached. Below I examine three stages of settlement: (1) internal resolution, (2) agency resolution, and (3) judicial resolution.

1. Internal Resolution

Here the employee follows the procedures established by the employer and reports the conduct through the appropriate channel, typically to the human resources department. Even the most unsophisticated employers now have detailed and well-publicized policies for reporting discrimination and harassment. These were spurred by two companion Supreme Court decisions that established an affirmative defense for employers when they have systems in place to report harassment and an employee fails to utilize them.²⁵

In the event that the employer perceives it may have some liability, it may determine that a monetary settlement is the best solution to avoid the expense, publicity, and uncertainty of litigation. Not infrequently, the employee will consult an attorney, who sends a demand letter to the employer, thereby prompting negotiation. The agree-

25. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2775 (1998); see also *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998).

ment between the employer and employee may involve separation from employment but will invariably include a confidentiality provision. Typically, the agreement will prohibit the disclosure of settlement, the monetary payment, and the underlying facts that precipitated the dispute. In this scenario, there is no public record of the dispute or the resolution.

2. Agency Resolution

As discussed above, if an employee wishes to pursue a claim beyond the internal resolution stage, the next step is filing with a federal or state administrative agency. Under federal discrimination statutes, the complainant must exhaust all administrative remedies before commencing a court action.²⁶ If the employee files with the EEOC, the charge may not be disclosed to the public.²⁷ The EEOC has no adjudicative powers but is required to attempt to conciliate filed charges.²⁸ The agency has a formal mediation program where investigators attempt to reach settlements, and if there is “reasonable cause to believe that discrimination has occurred,” the parties are invited to participate in conciliation conferences and discussions.²⁹ These routes to resolution, however, still result in confidential settlements with non-disclosure provisions if successful. Just as the EEOC charge is protected from public scrutiny, the existence and terms of a settlement are as well.

Many state agencies follow similar procedures to settle complaints, ensuring confidentiality to the parties.³⁰ Some, however, take an adjudicatory approach and permit trial-type public hearings,³¹ which should be considered in the same category as the judicial proceedings discussed below.

3. Judicial Resolution

When agency resolution fails, the complaining party typically has a limited window within which to file a complaint in federal or state

26. See generally 42 U.S.C.A. § 2000-e(5) (2018).

27. See *How To File a Charge of Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/howtofile.cfm> [<https://perma.cc/XDU3-XLMR>].

28. 42 U.S.C.A. § 2000-e(5) (2018).

29. *Resolving a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employers/resolving.cfm> [<https://perma.cc/3UR8-Z4SG>].

30. 42 U.S.C.A. § 2000e-5(f)(2) (2018).

31. See generally N.Y. EXEC. LAW § 292 (McKinney 2019).

court. Federal law requires the EEOC to issue a “right to sue” letter, giving the complaining party ninety days to commence an action.³²

Once judicial proceedings commence, the basic outlines of the dispute become a matter of public record. The complaint will contain the names of the employee and employer. On rare occasions, a court may permit a pseudonymous filing for the plaintiff if the allegations are a highly sensitive or intimate,³³ but the defendant employer’s name is always available. The name of the actual discriminating or harassing co-worker or supervisor is typically included in the allegations.

The ability to extract this information has improved in the last twenty-five years. Until the advent of internet databases, it was virtually impossible to find all complaints filed against a particular employer. Now, services such as Pacer or Bloomberg dockets³⁴ make it possible to search for complaints by defendant name, jurisdiction, and type of action—for example, employment discrimination.³⁵

Other aspects of the litigation process have become less transparent, however. The details of discrimination and harassment allegations come to light in the discovery process: through document production, interrogatory answers, and depositions. Until the year 2000, many federal district courts required the filing of discovery materials, and files were available for public viewing at the courthouse. Federal Rule of Civil Procedure 5 amended this process in 2000 to forbid the filing of these materials because of the cost and burden of maintaining them.³⁶ Although the advent of the Cloud could overcome these issues, there has been no consideration of making discovery materials publicly available again.

While allegations are made public in filed complaints, the resolution of litigation in the employment arena remains largely secret and invisible to the public. Approximately 5000 discrimination cases are filed each year in federal court—including state courts the figure is

32. 42 U.S.C.A. § 2000-e5 (2018).

33. See Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential*, 37 HASTINGS L.J. 1 (1985).

34. *Dockets Overview*, BLOOMBERG L., <https://help.bloomberglaw.com/docs/blh-040-dockets.html#dockets-overview> [https://perma.cc/D5WM-NZ8Q].

35. See generally *25 Years Later, PACER, Electronic Filing Continue To Change Courts*, U.S. CTS. (Dec. 9, 2013), <https://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts/> [https://perma.cc/NYY8-EEPU].

36. See FED. R. CIV. P. 5.

close to 7500.³⁷ It is estimated that between one percent and six percent of these will go to trial.³⁸ Some percentage of cases result in dismissals by virtue of summary judgment or Rule 12 motions to dismiss.³⁹ But the largest group by far—estimates range from sixty percent to seventy-eight percent—appear to result in secret settlements.⁴⁰

These cases are resolved by contractual settlement agreements that are not part of the court record. All that appears in the docket is a stipulation of dismissal. As described above, the agreements bar the plaintiff employee from revealing the fact of the settlement itself, its amount, and often the underlying facts upon which the complaint was based.

Ten years before the #MeToo movement, I analyzed at length the harm created by the secret settlement norm.⁴¹ The concern has less to do with secret settlements protecting serial harassers, since the complaint allegations are public. What is more problematic is that judges and the general public came to believe that employment discrimination and harassment were a thing of the past. The cases simply disappeared through the device of stipulations of dismissal, without judicial approval or a record of the details of the resolution. A second distinct harm is created by the difficulty secret settlements create in valuing cases. Without settlement data, plaintiffs form unrealistic expectations based on a few high-profile matters that receive press attention. Finally, secret settlements spare employers the public censure attached to significant monetary payment for a discrimination claim. The lack of public attention vitiates the deterrence function of the discrimination statutes.

II. Confidentiality Norms by Resolution Stage

In this part, I will consider the competing values and norms for the employee and the employer at each of the resolution stages outlined above: pre-dispute, internal resolution, agency resolution, and judicial resolution.

37. Donald Tomaskovic-Devey, *When Discrimination Goes to Court*, CONTEXTS (Aug. 11, 2018), <https://contexts.org/articles/when-discrimination-goes-to-court/> [<https://perma.cc/AYQ7-RFNF>].

38. *Id.*

39. Sean Captain, *Workers Win only 1% of Federal Civil Rights Lawsuits at Trial*, FAST COMPANY (July 31, 2017), <https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits> [<https://perma.cc/JUD5-85CU>].

40. *Id.*

41. See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006).

At the pre-dispute stage, as discussed above, boilerplate NDAs as part of employment contracts appear to be proliferating.⁴² They raise the question: What right does an employer have to silence its workers? The old adage tells us that the First Amendment stops at the factory doors. It is well established that non-governmental employers may control the speech of its workers inside the workplace and to some extent outside as well.⁴³ A non-disclosure agreement simply memorializes employer control.

But when it comes to discrimination and harassment, the exceptions may overtake the general rule. First, NDAs cannot prevent the disclosure of criminal conduct. Enforcement of the NDA in these circumstances would be found violative of public policy and might also run afoul of state whistleblower protections.⁴⁴ Even short of criminal conduct, employees have several additional avenues of protection.

First, Title VII and the related anti-discrimination statutes governing age and disability, as well as other employee rights statutes such as the Family and Medical Leave Act and the Fair Labor Standard Act, contain anti-retaliation protections.⁴⁵ Thus, regardless of any NDA, an employee who “opposes” an act that she reasonably believes is violative of these statutes by complaining internally, to a governmental agency, or publicly is entitled to protection. An employer cannot take any action against the employee that would dissuade a reasonable person from speaking out.⁴⁶ Such prohibited actions would include not only termination, but reductions in position or pay, or significant workload changes.⁴⁷

42. EJ Dickson, *What, Exactly, Is an NDA?*, ROLLING STONE (Mar. 19, 2019, 6:17 PM), <https://www.rollingstone.com/culture/culture-features/nda-non-disclosure-agreements-809856/> [<https://perma.cc/QB3Q-R4L3>].

43. Tom Spiggle, *Your Free Speech Rights (Mostly) Don't Apply at Work*, FORBES (Sept. 28, 2018, 9:56 AM), <https://www.forbes.com/sites/tomspiggle/2018/09/28/free-speech-work-rights/#757f4bd438c8> [<https://perma.cc/R9FK-DLUR>].

44. N.Y. LAB. LAW § 740 (McKinney 2019).

45. See, e.g., National Labor Relations Act, 29 U.S.C. § 158 (2018); Fair Labor Standards Act, 29 U.S.C. §§ 215 (a), 216 (b) (2018); Age Discrimination in Employment Act, 29 U.S.C. § 623 (2018); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2018); Family Medical Leave Act, 29 U.S.C. § 2614(a) (2018); Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3 (2018); Americans with Disabilities Act, 42 U.S.C. § 12203 (2018); Railroad Employers Act, 45 U.S.C. § 60 (2018).

46. Burlington N. & Santa Fe R.R. Co. v. White, 548 U.S. 53 (2006).

47. See Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1 (1977).

Second, speaking out about discrimination or harassment may also be protected by the National Labor Relations Act (“NLRA”).⁴⁸ The NLRA protects the ability of employees to engage in “concerted activities” for the purpose of “mutual aid and protection” and covers workers whether or not they are unionized.⁴⁹ Boilerplate NDAs that are used to prohibit public statements about discrimination or harassment have been found to violate the NLRA.⁵⁰

The next stage—internal resolution—perhaps raises the most difficult questions of competing norms and values. A settlement reached at this stage is a purely private contract negotiated outside the pendency of agency or judicial oversight. It is an exchange of money for silence. There are those who posit that employees, as much as employers, seek confidentiality at this stage. Employees may want to move on with their careers without the stigma attached to making waves or litigiousness. And employers may agree to settle for reasons having nothing to do with the legitimacy of the claim simply to avoid litigation. If both parties enter into the agreement freely and without coercion, it is no different from settlements that are reached regarding many other harms—for example, medical malpractice. The public may have an interest in the underlying facts and the settlement amount, but the same can be said for the substance of many contracts.

One caveat should be considered in relation to the enforceability of NDAs in this context. General principles of contract law relating to unconscionability might apply to void NDAs in some circumstances. This defense to enforcement applies when one party is highly disadvantaged in the negotiation (for example, if an employee was denied the opportunity to consult with a lawyer) or the terms are grossly one-sided (for example, a million-dollar liquidated damages clause for a breach).⁵¹

Nevertheless, accepting the general legitimacy of NDAs at the pre-filing internal resolution stage may have some salutary effect if the norm of confidentiality ceases to apply thereafter. If employers have no guarantee that they can negotiate secrecy after the point at which

48. 29 U.S.C. §§ 151–169 (2018). *See also* Emma J. Roth, *Is a Nondisclosure Agreement Silencing You From Sharing Your ‘Me Too’ Story? 4 Reasons It Might Be Illegal*, ACLU (Jan. 24, 2018, 9:45 AM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too> [<https://perma.cc/DHF2-TQ3H>].

49. 29 U.S.C.A. §§ 151–169 (2018).

50. *See generally* Phoenix Transit Sys., 337 N.L.R.B. 510 (2002).

51. Hill, *supra* note 47, at 8–9.

an administrative charge is filed, the incentive to settle early in the process would be substantial.

At the federal agency stage, and in most cases at state agencies as well, proceedings—both complaints and resolutions—are entirely shielded from public access. The policy justification presumably is tied to encouraging settlement. The agency process was conceived as a simple, expeditious, and inexpensive way to resolve discrimination claims,⁵² under which complainants could proceed without legal representation, and agency personnel would investigate and conciliate.⁵³ In actuality, however, the EEOC is overwhelmed with charges—more than 75,000 were filed in fiscal year 2018,⁵⁴ and the agency has a backlog of close to 50,000 matters.⁵⁵ The average time to complete an investigation is ten months. While the agency is authorized to take meritorious claims that it cannot resolve to federal court, it brought only 199 cases in 2018.⁵⁶ Many attorneys who represent employees at this stage decide to bypass the EEOC process entirely. After 180 days, a complainant can seek a “right to sue” letter and proceed to court.⁵⁷ Employers also do not necessarily take the EEOC investigatory procedures seriously since few cases are actively pursued.

The EEOC has recently taken a more proactive approach to addressing harassment in the workplace. It convened a task force that in 2016 made numerous recommendations concerning training, investigations, leadership, and accountability.⁵⁸ In 2018, after the #MeToo revelations, the EEOC held a hearing to renew efforts to prevent harassment.⁵⁹ But it has done nothing about its black box procedures.

I, along with other scholars, have suggested that, at the very least, the EEOC should collect and make available aggregate data concerning charges filed against particular employers. Ian Ayres⁶⁰ and Samuel

52. *See id.*

53. *Id.*

54. *EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Apr. 10, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm/> [<https://perma.cc/C9YC-369H>].

55. *Id.*

56. *Id.*

57. 42 U.S.C.A. § 2000-e (5) (2018).

58. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [<https://perma.cc/68QK-TQWZ>].

59. *Id.*

60. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. 76, 76 (2018).

Estreicher⁶¹ have both proposed schemes by which the agency would establish an information escrow of harassers, which would be released upon repeated charges.

Whatever the specifics, the agency process should allow for some form of intermediate level of confidentiality. For example, for larger employers, it could make public the number of charges filed and how they were resolved. In fact, the EEOC does make a determination in many cases of “no probable cause” to believe a violation occurred. Employers would have the benefit of vindication in these matters. On the other hand, there would be a public record of employers with repeated filings and determinations of probable cause. This intermediate level of confidentiality should not deter individual settlements.

At the court filings stage, I have argued that confidentiality in discrimination actions is wholly contrary to the legislative intent of the anti-discrimination statutes and also creates negative externalities, as discussed above. Transparency here does nothing to protect the employee since the complaint is already a matter of public record and can be easily discovered through a database search. It is only the employer who benefits from a confidential settlement.

Employers insist on the importance of keeping settlements secret, believing that they will be deluged with similar actions from disgruntled employees. A lack of confidentiality available in court would incentivize employers to seek resolution at the agency level.

There is nothing out of the ordinary in requiring settlement agreements to be a matter of public record. When the EEOC brings an action, its internal rules prohibit secret settlement.⁶² When state and local governments reach settlements, these also become publicly available.⁶³ In an analogous area of employee rights, the Fair Labor Standards Act, which governs minimum wage and overtime pay, requires that all settlements be approved by the court, thus placing the agreement on the publicly available docket.⁶⁴

61. See Samuel Estreicher, *How To Stop the Next Harvey Weinstein: Viewpoint*, INS. J. (Nov. 17, 2017), <https://www.insurancejournal.com/news/national/2017/11/17/471533.htm> [<https://perma.cc/37NV-JY5T>].

62. *Settlement Standards and Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/litigation/manual/3-4a_settlement_standards.cfm [<https://perma.cc/P575-SG3E>].

63. See Jon Campbell, *New York Paid \$11M in Harassment Settlements Since '08*, DEMOCRAT & CHRON. (Feb. 22, 2018), <https://www.democratandchronicle.com/story/news/politics/albany/2018/02/22/database-new-york-paid-11-m-harassment-settlements-since-08/330942002/> [<https://perma.cc/3CB8-N6J8>].

64. 29 U.S.C.A. § 216 (2018); see generally *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982).

Stripping discrimination settlements of confidentiality could be accomplished by various means: an amendment to the underlying federal or state discrimination statutes; separate federal legislation; an amendment to the Federal Rules of Civil Procedure; a provision in local court rules; or agency rules. Consideration of each of these avenues is beyond the scope of this Article, but in the following part, I will analyze several state statutory attempts to address this issue.

III. State Statutes Addressing Confidentiality

In the wake of #MeToo, a number of states have attempted to address the secrecy surrounding workplace harassment settlements that came to public attention. Various states have enacted bills, and legislation is pending in a number of others.⁶⁵ Many of the statutes are poorly conceived, do not actually remedy the issue, or are under inclusive. In this part, I will consider the statutes enacted in three states: New York, California, and New Jersey.

A. New York

New York was the first state to enact legislation addressing confidential settlements. The original statute, passed in 2018,⁶⁶ provided:

[N]o employer . . . shall have the authority to include or agree to include in [a settlement agreement] . . . the factual foundation for which involves sexual harassment, any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action *unless the condition of confidentiality is the complainant's preference.*⁶⁷

In August 2019, New York enacted additional legislation expanding this provision to cover all claims of “discrimination,” and not just “sexual harassment.”⁶⁸

To satisfy the “plaintiff’s preference” exception, an employee “shall have twenty-one days to consider” an agreement containing a non-disclosure provision, and even where the employee executes the agreement because such a provision “is the plaintiff’s preference,” the

65. See *Legislation on Sexual Harassment in the Legislature*, *supra* note 3.

66. Blythe E. Lovinger & Jonathan A. Wexler, *New York State and City Pass Sweeping Anti-Sexual Harassment Laws Amid #MeToo*, NAT’L L. REV. (Apr. 23, 2018), <https://www.natlawreview.com/article/new-york-state-and-city-pass-sweeping-anti-sexual-harassment-laws-amid-metoo> [https://perma.cc/NB2M-ERUP].

67. N.Y. Gen. Oblig. Law § 5-336 (McKinney 2018) (emphasis added).

68. S.B. 6577, 2019–2020 Leg., Reg. Sess. (N.Y. 2019); Assemb. B. 8421, 2019–2020 Leg., Reg. Sess. (N.Y. 2019).

employee will be permitted to “revoke the agreement” for a period of seven days after the employee’s execution.⁶⁹

New York’s law also addresses pre-dispute NDAs, providing:

[A]ny provision in a contract or other agreement between an employer or an agent of an employer and any employee or potential employee of that employer . . . that prevents the disclosure of factual information related to any future claim of discrimination is void and unenforceable unless such provision notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee.⁷⁰

There are several positive aspects of the New York statute. First, and mostly importantly, the Legislature realized the need to address confidential settlements pertaining to all forms of discrimination, not just sexual harassment, and amended the statute accordingly.⁷¹ While it is sexual harassment that has garnered the great bulk of media attention, there are other forms of harassment—relating to race, national origin, and religion—that are every bit as destructive and demeaning. Take, for example, cases in which African American employees find nooses left in their workspaces,⁷² or a person of Arab descent is repeatedly called a terrorist.⁷³

Even employment discrimination on the basis of sex or race without harassment should not be the subject of secret settlements. When

69. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2018) (“Any such term or condition must be provided to all parties, and the plaintiff shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the plaintiff’s preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the plaintiff may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.”).

70. N.Y. GEN. OBLIG. LAW § 5-336(2) (McKinney 2019).

71. At legislative hearings held regarding this legislation, I testified at length about the importance of addressing all forms of employment discrimination. *Sexual Harassment in the Workplace: Hearing Before N.Y. State Joint S. & Assemb.*, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (statement of Minna J. Kotkin, Professor of Law, Brooklyn Law School), available at <https://perma.cc/3RRY-GGPJ>.

72. See Sana Siwolop, *Nooses, Symbols of Race Hatred, at Center of Workplace Lawsuits*, N.Y. TIMES (Jul. 10, 2000), <https://www.nytimes.com/2000/07/10/business/nooses-symbols-of-race-hatred-at-center-of-workplace-lawsuits.html?smid=nytcore-ios-share> [https://perma.cc/DZH6-MF8X].

73. *Selected List of Pending and Resolved Cases Alleging Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Jan. 2016), https://www.eeoc.gov/eeoc/litigation/selected/religion_nationalorigin.cfm [https://perma.cc/8ZLM-YTSR].

a company, for example, refuses to promote a woman beyond a certain level, pays her less than her male counterparts, or terminates her because she complains about discrimination, the settlement of her claims should be available to the public. Otherwise, there is little to deter a company from continuing these policies. Women can just be paid off without disrupting the culture of discrimination in the workplace.

Second, the statute effectively addresses the pre-dispute situation relating to boilerplate NDAs. While the statute in effect simply reiterates existing principles of anti-retaliation discussed above, it takes the important step of ensuring that employees are aware of these protections. It has been widely reported, for example, that workers who observed Harvey Weinstein's conduct were under the belief that entering into NDAs prevented them from reporting to or speaking with law enforcement authorities.⁷⁴ This portion of the New York statute requires that NDAs be drafted to make these protections explicit.⁷⁵

Despite these positive elements, this statute undoubtedly will fail to accomplish any significant change in the status quo due to the inclusion of "plaintiff's preference." The statute simply does not address the realities of settlement negotiations. It permits the employer's attorneys to make the following offer: "We will settle this matter for \$10,000 or for \$100,000 if 'confidentiality is the plaintiff's preference.'" Moreover, there is nothing in the statute that prevents an employer from asserting that it will not settle the matter unless confidentiality is the employee's preference.⁷⁶ Clearly, an employee's preference cannot be divorced from monetary considerations, and nothing in the statute prevents this negotiating posture.

Third, the statute does not address at which stage of the dispute it attaches. The statutory language in the New York General Obligations Law, which governs contract law, refers to "the complainant."⁷⁷ The New York civil procedure code, New York Civil Practice Law and Rules, similarly uses the term "plaintiff."⁷⁸ It could be argued that

74. Luchina Fisher, *Harvey Weinstein Scandal Puts Nondisclosure Agreements in the Spotlight*, ABC NEWS (Oct. 24, 2017, 4:46 PM), <https://abcnews.go.com/Entertainment/harvey-weinstein-scandal-puts-nondisclosure-agreements-spotlight/story?id=50680794> [https://perma.cc/T7ZR-75HT].

75. N.Y. GEN. OBLIG. LAW § 5-336(2) (McKinney 2019).

76. In two cases that were settled by Brooklyn Law School's Employment Law Clinic, which I direct, since the effective date of the statute, this was the employer's position.

77. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019).

78. N.Y. C.P.L.R. § 5003-b (McKinney 2019).

these provisions do not reach contractual agreements entered into before any “claim or cause of action” is formally asserted.

Finally, it is unclear whether the confidentiality prohibition extends to the amount of the settlement rather than just to the “underlying facts and circumstances.” Other jurisdictions have explicitly adopted the view that any monetary payment can remain confidential even when the facts may be disclosed.⁷⁹ Employers may take the position that settlement amounts are still protected under this new legislation.

B. California

California’s statute, the Stand Together Against Non-disclosures Act (“STAND”), took effect in January 2019 and contains no provision relating to “plaintiff preference.”⁸⁰ It explicitly pertains to settlement agreements “related to a claim filed in a civil action or a complaint filed in an administrative action,”⁸¹ thus eliminating any ambiguity as to whether the law applies to contracts negotiated at the pre-filing stage. It prohibits any provision within a settlement agreement that “prevents the disclosure of factual information” related to the claim.

The subject areas of settlements that come within the statute’s purview are both broader and narrower than its New York counterpart. Settlements need not fall within the confines of employment discrimination protections, and no employer-employee relationship is necessary to make the prohibition applicable.⁸² Thus, STAND applies to acts that could be charged as criminal sexual assault, civil sexual assault, or civil sexual harassment.⁸³ This is a significant improvement in that it addresses many of the #MeToo-type revelations, such as those involving an aspiring actor seeking career help from an established producer or a young entrepreneur seeking capital from an investor.

The statute covers both sexual harassment and sex discrimination in the workplace. However, unlike the New York law, STAND as amended does not address other prohibited forms of employment discrimination, such as race and religion. For the reasons discussed

79. See *infra* Part III.B.

80. *Governor Brown Signs Leyva Bill Banning Secret Settlements in Sexual Assault and Harassment Cases*, CAL. STATE SENATE, 20TH DISTRICT (Sept. 30, 2018), <https://sd20.senate.ca.gov/news/2018-09-30-governor-signs-leyva-bill-banning-secret-settlements-sexual-assault-and-harassment> [<https://perma.cc/QM9J-KMG2>].

81. CAL. CIV. CODE § 1001 (West 2018).

82. 42 U.S.C. § 2000-e (5) (2018).

83. CAL. CIV. CODE §§ 1001–02 (West 2018).

above, this is a major failing of the legislation. Those subject to racial discrimination should not be silenced any more than the victims of sex discrimination.

The California statute contains a section that permits an agreement that “shields the identity of the complainant and all facts that could lead to the discovery of his or her identity, including pleadings filed in court . . . at the request of the claimant.”⁸⁴ The motivation behind this section is clearly to protect victims from having their identity revealed without their consent. If, for example, a settlement agreement came to the attention of the press, the victim’s name would not be immediately discoverable.

Finally, the California law explicitly permits the enforcement of NDAs that bar “the disclosure of the amount paid in settlement of a claim,”⁸⁵ thus eliminating the ambiguity found in New York’s statute. This aspect of the statute is problematic. The settlement amount is the only means of discovering the justification or severity of the claims made. There is clearly an immense difference between a sexual harassment claim settled for five or ten thousand dollars and one for a million dollars. If the facts of the claim are public, it appears disingenuous to shield the settlement amount. Indeed, while this provision was presumably intended to protect the accused, it ignores the fact that many claims are settled for what is regularly referred to as “nuisance value.”⁸⁶ And when settlements are substantial, it allows the payor to belittle the claims by suggesting that the parties only reached an agreement to avoid the cost of litigation.

In addition, as I have previously argued, keeping settlement amounts secret hampers the realistic assessment of claims in two ways.⁸⁷ First, complainants develop inflated expectations based on press accounts of million-dollar settlements.⁸⁸ Second, attorneys who represent complainants cannot accurately value claims and provide appropriate guidance to their clients when settlement data is structurally concealed and impossible to discover.

84. § 1001(c).

85. § 1001(e).

86. David Rosenberg & Randy J. Kozel, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004).

87. Kotkin, *supra* note 41.

88. See Bill Chappell, *Fox Will Pay Gretchen Carlson \$20 Million To Settle Sexual Harassment Suit*, NPR (Sept. 6, 2016, 9:42 PM), <https://www.npr.org/sections/thetwo-way/2016/09/06/492797695/fox-news-will-pay-gretchen-carlson-20-million-to-settle-sexual-harassment-suit> [<https://perma.cc/WN7V-P8R6>].

C. New Jersey

New Jersey enacted its statute addressing NDAs in March 2019.⁸⁹ The new law states that any provision in an employment contract or settlement agreement “which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment . . . shall be deemed against public policy and unenforceable against a current or former employee who is a party to the contract or settlement.”⁹⁰

To the extent such provisions remain in a settlement agreement, they are unenforceable against the employee. If the employee chooses to reveal claim specifics in a way that makes the culpable employer “reasonably identifiable,” the employer may likewise reveal formerly confidential information.⁹¹ In that case, the non-disclosure provision would also be unenforceable against the employer.⁹²

Like the New York law, the New Jersey statute covers all forms of employment discrimination, not just sexual harassment; but unlike the California law, the New Jersey statute does not extend to sexual assault outside of the employment relationship.⁹³ It refers to employment contracts as well as settlement agreements,⁹⁴ so it appears to cover pre-dispute agreements without specifying whether the settlement must be in the context of agency or court filings. It also contains no explicit protection for settlement amounts, leaving the same ambiguity as the New York law.

One puzzling aspect of the law is it seems to suggest that NDA language can still be included in a settlement agreement, even though it is not enforceable at the employee’s option. The statute states that every settlement agreement that resolves discrimination, harassment, or retaliation claims must include a “bold, prominently placed notice” indicating that the confidentiality provision would be unenforceable against an employer if the “employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.”⁹⁵ This provision only serves to confuse the issue of confidentiality by sug-

89. Evandro Gigante & Arielle E. Kobetz, Proskauer, *New Jersey Enacts Law Limiting Non-Disclosure Obligations in Settlement Agreements* (Mar. 21, 2019), <https://www.lawandtheworkplace.com/2019/03/new-jersey-enacts-law-limiting-non-disclosure-obligations-in-settlement-agreements/> [<https://perma.cc/KK95-5XS6>].

90. N.J. STAT. ANN. § 10:5-1 (West 2019).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

gesting that NDAs may be enforceable unless the employee speaks out.

Conclusion

The #MeToo movement has shed light on the long-accepted practice of silencing—through the use of NDAs—those who choose to resolve legitimate claims against harassers and abusers. Employees and other victims had no leverage in the negotiation of these agreements and were powerless to insist that they be a matter of public record. The power of these agreements is demonstrated by the fact that there are almost no reported cases in which employers have sought to enforce them, and no precedent suggests that they are in fact not enforceable.

Apparently aware that the courts were not inclined to address the concerns raised by NDAs, a number of state legislatures have taken on the issue. However, the enacted statutes leave a lot to be desired, as discussed above.

With regard to employment contracts, agreements, manuals, and separation agreements, legislatures should require that any non-disclosure provision include language informing employees that the provision does not bar them from reporting unlawful criminal conduct or conduct that violates the anti-discrimination laws.

I suggest the following guidelines for all legislative efforts seeking to address settlement confidentiality:

- (1) The statute should bar the use of NDAs in relation to all employment discrimination claims that are filed with an agency or a court;
- (2) The statute should bar the use of NDAs in the non-employment context in cases of sexual assault or harassment;
- (3) The statute should not permit an escape hatch based on so-called “plaintiff’s preference”; and
- (4) The statute should not except from disclosure the amount of the settlement.

It is only through the application of these principles that settlement transparency will actually have a chance of success.