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Weinstein Scandal Not Enough To Kill Confidentiality Pacts, Law360, ft. Philip Voluck

Philip R. Voluck, managing partner of the firm's PA Offices and Co-Chair of KD's Employment Group, was quoted in a Law360 article written by Vin Gurrieri which was published on October 25, 2017. . .

The number of women who have come forward accusing Harvey Weinstein of sexual misconduct is raising questions about whether the movie mogul's use of nondisclosure agreements is what allowed him to allegedly harm so many over such a long period of time, but experts say employers aren't likely to stop using such agreements any time soon.

Nondisclosure provisions, or NDAs, which can appear in employment contracts and are standard inclusions in settlement agreements, place restrictions on parties' ability to divulge information to others that is deemed confidential.

In Weinstein's case, he was reported to have used such provisions as a legal tool to keep his sexual misconduct out of the public eye for years, according to a report earlier this month by *The New York Times. The Times' lengthy expose reported in part that Weinstein had reached at least eight settlements with women over the years and used other methods to keep claims against him out of the public spotlight.*

"[Employers] need to get rid of NDAs as a condition of employment . . .

But management-side attorneys said that such changes likely aren't on the horizon, either in terms of NDAs in employment contracts or in other types of agreements.

Philip Voluck, co-chair of Kaufman Dolowich Voluck LLP's labor and employment practice, took a similar position, saying that NDAs are an "almost boilerplate provision" in nearly all settlements and that he "doesn't see it changing any time soon."

"What are you going to do, cut out allegations of sexual malfeasance? No. I don't think that is going to happen," he said, noting that individuals who signed such agreements received sums of money in exchange while businesses received "peace of mind."

While Voluck also acknowledged there might be public pressure on employers to change their practices related to NDAs, he said they've also been "part of the fabric of litigation for nearly 40 years that I've been practicing and before that," and that employers may actually step up their enforcement of alleged NDA violations.

"I see the defense bar getting more vigilant on NDAs, increasing damages for a breach," Voluck said, while still cautioning that going after an employee to keep certain matter confidential "can backfire."

If any changes were to occur to business' use of NDAs, Voluck said they are likely to come through federal courts, which can strike down agreements it deems "unreasonable" either in terms of time, scope or the level in which it suppresses an individual's right to speak freely.

But whether any changes are made to way businesses use NDAs, Voluck said that the Weinstein saga shows "it's never been truer than now that a commitment to having a harassment-free workplace starts at the top."

The best steps businesses can take to avoid becoming the next to be ensnared a similarly high-profile sexual harassment scandal, Voluck said, is to train staff, educate supervisors and inform employees "in how to recognize and, more importantly, report harassment without retaliation."

“There may be nothing you can do to corral a rogue [employee's behavior], but you can discipline and discharge them,” Voluck said.

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