WBAI NEWSLETTER

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CONFIDENTIALITY AND NDA: DON'T LEAVE THESE ISSUES UNTIL LAST IN EMPLOYMENT DISPUTE NEGOTIATIONS

LEGAL DEVELOPMENTS

By: Hon. Margaret A. Brennan, (Ret.) | Bio on page 4

Good work, you are trying to resolve an employment dispute short of trial or hearing. At some point during your discussions, however, one or both sides will add—often at the last minute—something akin to "And of course we will include an NDA and confidentiality." What? Whoa. Hold up there. These terms are not always so simple and should not be a mere afterthought to settlement negotiations. Illinois and federal law have much to say about their use, and as is often the case, their inclusion in settlement agreements can impact a settlement's monetary value. Thinking about these issues ahead of time and using them in the right way during the negotiation process, therefore, is crucial in employment dispute negotiations.

How does this work in practice during those negotiations?

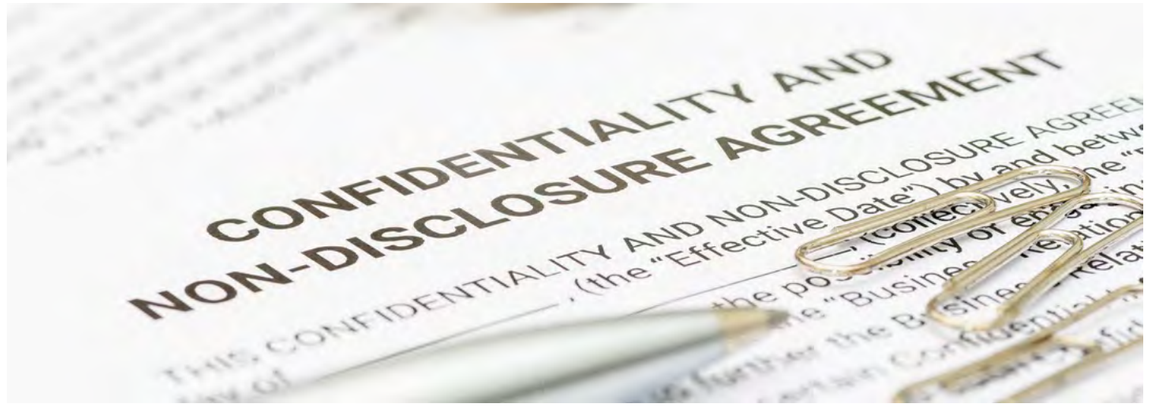
First, assemble the relevant documents and understand the applicable law. The Illinois Workplace Transparency Act (IWTA), 820 ILCS 96, is an important statute here because it secures individuals' freedom from unlawful discrimination and harassment in the workplace, and it recognizes the parties' right to freely contract over terms, privileges and conditions of employment. Under the Act, valid and enforceable settlement agreements can contain confidentiality promises related to alleged unlawful employment practices, but these promises must be stated in particular ways.

The agreement must state that the confidentiality is the preference of the employee and is mutually beneficial to both parties; that the employer has notified the employee of the right to have an attorney or representative review the agreement before execution; that there is bargained-for consideration; that there is no waiver of any claim accruing after the date of execution; and that the employee has 21 calendar days to consider the agreement (although the employee may knowingly sign earlier if knowingly and voluntarily waiving the additional time) and unless knowingly waived, will have 7 days to revoke. (820 ILCS 96/1-30).

Second, address confidentiality and NDA provisions at the outset of negotiations and make sure everyone is on the same page. Given the requirements of the IWTA, counsel should discuss any non-disclosure, non-disparagement or confidentiality provisions early in the settlement negotiations. Not only will this necessarily help establish the requirement of bargained-for consideration, but it may also warrant a discussion of whether there is any value in including NDA and confidentiality clauses in a settlement agreement. Monetization of the NDA and confidentiality clauses can often be a driver of settlement amounts.

In any negotiation, it is most beneficial to be clear when discussing particular terms. Neither side wants to create confusion when using the term 'NDA,' but that often happens. Is one side referring to a non-disclosure agreement and is the other side referring to a non-disparagement agreement? These terms are more than horses of different colors. Importantly, whether the clause may be considered valid depends greatly on whether the agreement documents that these terms were bargained for and not mere afterthoughts.

Third, take note if you are dealing with non-disparagement provisions. When negotiating a settlement to an employment dispute, it is important to keep in mind that non-disparagement agreements under the IWTA require that the complained-of dispute arose before the settlement agreement's execution (820 ILCS 96/1-15) and cannot restrict an employee, prospective or former, from reporting any allegations of unlawful conduct to federal, State or local officials for investigation, including alleged criminal conduct or unlawful employment practices (820 ILCS 96/1-20). In a typical settlement negotiation, the parties will address an existing alleged harm that previously occurred. As for the other items, a well-drafted settlement agreement will contain provisions that reflect existing law so that the settlement agreement will be valid and enforceable.



Another area where the non-disparagement provisions of the ITWA applies arises where a non-disparagement agreement was entered into as a unilateral condition of employment rather than in settlement negotiations. If this is the case, then the non-disparagement agreement cannot prevent an employee from making truthful statements or disclosures about alleged unlawful employment practices (820 ILCS 96/1-25 (a)) and cannot require an employee to waive, arbitrate, or diminish an existing or future claim (820 96/1-25 (b).

To that end, counsel should analyze whether any clauses against public policy meet the statutory requirements of a bilateral agreement. An employment agreement can contain non-disparagement, non-disclosure and confidentiality clauses that would otherwise be against public policy as a unilateral condition of employment or continued employment so long as certain requirements are met (820 ILCS 96/1-25(c)). Specifically, the agreement must be in writing; demonstrate actual, knowing, and bargained-for consideration from both parties; and acknowledge the rights of the employee or prospective employee to: 1) report any good faith allegation of unlawful employment practices to federal, State or local government agencies enforcing discrimination laws; 2) report any good faith allegation of criminal conduct; 3) participate in a proceeding enforcing discrimination laws; 4) make any truthful statements or disclosures required by law, regulation, or legal process; 5) request or receive confidential legal advice (820 ILCS 96/1-25(c)). Without complying with the above requirements, a rebuttable presumption that the agreement was unilateral exists. Additionally, the IWTA provides that the employee shall be entitled to reasonable attorney's fees and costs incurred in challenging a contract for violating the IWTA (820 ILCS 96/1-35).

What other laws should attorneys consider in employment negotiations?

Practitioners should also familiarize themselves with the Speak Out Act 42 U.S.C.A. § 19403. The Speak Out Act applies to pre-dispute nondisclosure and non-disparagement agreements in employment agreements in which sexual harassment or sexual assault is alleged. Additionally, the Speak Out Act aims to prohibit prospective, pre-dispute nondisclosure and non-disparagement agreements entered into before the unlawful conduct begins. It is not as broad as the IWTA, especially as the IWTA refers to unlawful employment practice as any form of discrimination, harassment, or retaliation that is actionable under Article 2 of the Illinois Human Rights Act, Title VII of the Civil Rights Act of 1964, or any related State or federal rule or law that is enforced by the Illinois Department of Human Rights or the Equal Employment Opportunity Commission.

What's the bottom line?

To date there is limited caselaw regarding the IWTA, with no significant discussion regarding non-disparagement, non-disclosure and confidentiality clauses. See *Howard v. Proviso Twp. High Sch. Bd. of Educ.* 21-CV-3573, 2023 WL 358796, at *5 (N.D. Ill.Jan. 23, 2023). The Speak Out Act is an even fresher piece of legislation than the IWTA. Even so, counsel representing clients in employment disputes should thoroughly understand these state and federal statutes to more effectively craft and negotiate the terms that will ultimately settle their disputes in mediation.