

Survivors' Choice: Nullifying NDAs in New Jersey's Employment *and* Family Practices

*Eve Litvak**

I. NDAs & THE #MeToo MOVEMENT	208
II. NEW JERSEY PAVES THE WAY	212
III. ALTERNATIVE NON-APPROACHES: SCANNING THE NATIONAL LANDSCAPE	216
A. Does not statutorily address confidentiality agreements	216
B. Does not statutorily prohibit confidentiality agreements	217
C. Workplace NDAs related to sexual misconduct as a condition of employment prohibited.....	217
D. Workplace NDAs related to sexual misconduct are specifically prohibited.....	218
E. Workplace NDAs related to harassment or discrimination are generally prohibited	218
F. NDAs related to any sexual misconduct or sex-based harassment are prohibited.....	218
IV. SURVIVORS' CHOICE: PRESERVING AUTONOMY & SAVING SOCIETY	219
V. CONCLUSION	223

Sexual violence is a pandemic. An American is sexually assaulted every sixty-eight seconds.¹ In 2019, there were an estimated 459,310 threatened, attempted, or completed sexual assaults against persons over the age of twelve.² Survivors of sexual violence tend to experience shame, guilt, denial, isolation, amnesia, disassociation, and emotional,

*Eve Litvak, J.D., Class of 2023, Seton Hall University School of Law. It was a tremendous privilege to work under the advisement of Professor Charles Sullivan, who has been instrumental to this article's composition and my academic and spiritual development in the legal sphere; I would not be here without him. Much appreciation for the *Seton Hall Legislative Journal*—these editors' care, dedication, and effort makes them truly an all-star team—with special thanks to Jessica Hajdukiewicz, Sam Hourican, and Zach Cimring for going above and beyond in their efforts this year. And a bottomless well of gratitude to my unwavering support system—near and far—for keeping the faith, shining a light, and leading with love.

¹ RAINN, <https://www.rainn.org/statistics> (last visited Oct. 13, 2023).

² Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization, 2019*, BUREAU OF JUSTICE STATISTICS 3, 29 (Sept. 2020).

2023]

LITVAK

207

cognitive, and physical challenges, as well as struggles with trust and boundary-setting.³ This trauma often takes a “long-term emotional and physical toll” on survivors.⁴ Directly or indirectly, “[e]veryone is affected by sexual violence.”⁵

While sexual violence is highly stigmatized and bystanders often do not know how to help, there is evidence-based treatment for overcoming the trauma through story sharing.⁶ Dr. Emily R. Dworkin, a clinical psychologist and professor at the University of Washington School of Medicine, recommends prolonged exposure therapy or cognitive processing therapy to heal trauma caused by sexual violence.⁷ Dr. Dworkin acknowledges that “[w]e’re not comfortable with the idea of hearing about these sorts of assaults . . . [b]ut we need to keep talking.”⁸ Non-disclosure agreements (NDAs), however, that indiscriminately, indefinitely, and insidiously silence survivors are both prolific and antithetical to survivors’ and society’s recovery from this pandemic.

This Comment advocates for more flexible NDAs for survivors of sexual misconduct. Assuming that story sharing is a critical component for healing trauma, the law can—and must—protect and empower victims of sexual misconduct: not by paying to silence victims but by yielding compensation for injuries *and* saving the choice to speak up. Secrecy is endemic to sexual misconduct.⁹ Saving survivors’ choice to autonomously decide whether and when they will share their story is a measure the law can take to better support survivors, mend the fabric of society, and fortify it against future tears.

Part I of this Comment introduces the problem of NDA use in harassment suits and discusses the #MeToo movement. Part II presents New Jersey’s legislative approach to strengthening survivors’ rights in cases of workplace misconduct, which deems confidentiality clauses

³ *The Effects of Sexual Assault*, WASHINGTON COALITION OF SEXUAL ASSAULT PROGRAMS, <https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault> (last visited Oct. 13, 2023).

⁴ April Fulton, *Building Strength And Resilience After A Sexual Assault: What Works*, NPR (Oct. 4, 2018, 9:35 AM), <https://www.npr.org/sections/health-shots/2018/10/04/654151008/building-strength-and-resilience-after-a-sexual-assault-what-works>.

⁵ *Scope of the Problem: Statistics*, RAINN, <https://www.rainn.org/statistics/scope-problem> (last visited Oct. 13, 2023).

⁶ Fulton, *supra* note 4.

⁷ Fulton, *supra* note 4.

⁸ Fulton, *supra* note 4.

⁹ *The Art of Secrecy in Sexual Violence*, CHILD RIGHTS INTERNATIONAL NETWORK (Jan. 10, 2019), <https://home.crin.org/readlistenwatch/stories/2020/5/6/the-art-of-secrecy-in-sexual-violence>.

unenforceable against survivors of harassment in the employment context. Part III contextualizes New Jersey's approach and portrays the national landscape and changing trends in favor of sexual misconduct survivors, primarily in employment law. Part IV proposes a simple solution that preserves survivors' autonomy by saving their option to share their experiences. This Comment aims to familiarize readers with the scope of the sexual violence pandemic and suggests how to best empower survivors and prioritize general welfare in civil suit settlements, particularly in applying NDAs in cases of sexual misconduct.¹⁰

I. NDAs & THE #MeToo MOVEMENT

While NDAs initially served the purpose of protecting trade secrets, supporting business interests, and empowering commercial competition, this form of contract law is now applied liberally.¹¹ New employees are often asked to sign NDAs as a condition of their employment.¹² Neil Mullin, a partner at Smith Mullin, "estimates that 'tens of millions' of employees are likely required to sign an NDA as a condition of employment."¹³ These confidentiality agreements purport to maintain the employer's exclusive control over proprietary work-related information even after an employee leaves the company, despite such information "being embedded in the employee's memory."¹⁴ NDAs benefit employers by serving as an "additional basis for a breach of contract claim" by unambiguously declaring the confidential status of work matters.¹⁵ All trade-related information however is likely covered by the state's rendition of the Uniform Trade Secrets Act (USTA), especially since every state except New York has adopted a version of the USTA as of 2018.¹⁶ Since trade secrets are de facto protected, NDAs provide supplemental protections to employers by extending "an employee's duty of confidentiality related to information that would not

¹⁰ Arbitration clause arguments are beyond the scope of this article.

¹¹ See EJ Dickson, *What, Exactly, Is an NDA?*, ROLLING STONE (Mar. 19, 2019), <https://www.rollingstone.com/culture/culture-features/nda-non-disclosure-agreements-809856/> ("[T]hey initially arose around the 1970s, as a way for nascent tech companies to protect their intellectual property.").

¹² Randall S. Thomas et al., *An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants*, 68 VAND. L. REV. 1, 19 (2015).

¹³ Dickson, *supra* note 11.

¹⁴ Thomas, *supra* note 12, at 20.

¹⁵ Thomas, *supra* note 12, at 21.

¹⁶ Thomas, *supra* note 12, at 21; *Trade Secrets Laws and the UTSA: 50 State and Federal Law Survey*, BECK REED RIDEN LLP (Jan. 24, 2017), <https://beckreeriden.com/trade-secrets-laws-and-the-utsa-a-50-state-and-federal-law-survey-chart/>.

otherwise be protected trade secrets.”¹⁷ While it may be reasonable for a company to protect its business information in order to maintain a competitive advantage, NDAs have been used “to silence otherwise valid whistle-blowing activity.”¹⁸ Although NDAs can neither bar employees from assisting in Equal Employment Opportunity Commission (EEOC) investigations nor bar them from filing charges,¹⁹ “employees are largely uninformed about these protections, and the routinely broad language of confidentiality clauses along with the threat of litigation chills even this protected speech.”²⁰

Since NDAs are secrecy agreements, they can exist wherever “parties [are] specifying information that one or both of the parties consider confidential and [are] prohibiting the other party from disclosing it.”²¹ While NDAs are most common between employers and employees, they can appear in various financial or business relationships.²² These situations include agreements with independent contractors, relationships between institutions of education, government, or religion, and in intimate partnerships.²³ One reported instance occurred at Yeshiva University, where an NDA was incorporated into a sexual assault settlement at the college campus.²⁴ Similarly, a high school student who reported on-campus sexual assault “was told her story had no merit.”²⁵ Then, an administrator gave her a non-disclosure agreement to sign, making her promise not to speak to anyone about what happened until after graduation.²⁶ NDAs even exist

¹⁷ Thomas, *supra* note 12, at 23.

¹⁸ Thomas, *supra* note 12, at 23.

¹⁹ See U.S. EQUAL EMPL. OPPORTUNITY COMM’N, EEOC-CVG-1997-3: Enforcement Guidance on Non-waivable Employee Rights Under EEOC Enforced Statutes (1997); *see also* EEOC v. Astra USA, 94 F.3d 738, 744–45 (1st Cir. 1996).

²⁰ Orly Lobel, *NDAs Are Out of Control. Here’s What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change>.

²¹ REBECCA K. MYERS, CONFIDENTIALITY, NONDISCLOSURE AND SECRECY AGREEMENTS, (Dec. 1, 2015), Lexis Practical Guidance.

²² *Id.*

²³ *Id.*

²⁴ Jeremy Sharon, *YU Student Claims She Was Raped by Fellow Student, but School Took No Action*, THE JERUSALEM POST, (Aug. 26, 2021, 11:33 PM), <https://www.jpost.com/diaspora/yu-student-claims-she-was-raped-by-fellow-student-uni-took-no-action-677795>; *see also*, Julie Macfarlane, *How a Good Idea Became a Bad Idea: Universities and the Use of Non-Disclosure Agreements in Terminations for Sexual Misconduct*, 21 CARDOZO J. CONFLICT RESOL 361, 377–78 (2020) (discussing the failures of NDAs used by universities).

²⁵ *Local Spotlight: Reporting Sexual Assault at High Schools*, WAMU (Dec. 7, 2021), <https://wamu.org/story/21/12/07/local-spotlight-reporting-sexual-assault-at-high-schools/>.

²⁶ *Id.*

in the marital context in prenuptial and postnuptial agreements and in marital settlements.²⁷

[P]renuptial agreements are now more likely to include NDA language that provides future spouses with ground rules for what each can and can't share publicly throughout the marriage or in the event of a divorce. These clauses are nicknamed "social media prenups" for their increasing popularity since the advent of Facebook and other sharing sites.²⁸

"The second most common context in which an NDA is seen is in the negotiations process for . . . a sexual harassment lawsuit. . . . In such cases, a settlement will usually be accompanied by the plaintiff signing an NDA."²⁹ There are numerous accounts of NDAs covering up sexual misconduct and intimate partner violence (IPV) with shrouds of silence. A notorious instance in the political world includes the NDA between Stormy Daniels—whose real name is Stephanie Clifford—and Donald Trump, which blocked Daniels from revealing details of her alleged affair with Trump.³⁰ In the entertainment industry, a chronicled NDA was arranged between Andrea Constand and Bill Cosby.³¹ Another notable NDA example that comes from the sports field revolves around the numerous confidential settlements arranged by baseball player Yasiel Puig in response to allegations of his sexual misconduct and violence against women.³²

Despite how commonplace such agreements have become, these standard operating procedures—for those who can afford them—tax survivors, too. "[T]he emotional cost of reaching a financial settlement under these terms can be devastating."³³ So devastating, in fact, that

²⁷ Bari Weinberger, *NDAs: When Can Divorcing Spouses Prevent Social Posting?*, N.J. L.J. (Oct. 29, 2021, 10:00 AM), <https://www.law.com/njlawjournal/2021/10/29/ndas-when-can-divorcing-spouses-prevent-social-posting/>.

²⁸ *Id.*

²⁹ Dickson, *supra* note 11.

³⁰ James Hill, *Trump Won't Enforce Stormy Daniels Nondisclosure Agreement*, ABC NEWS (Sept. 8, 2018, 6:40 PM), <https://abcnews.go.com/Politics/trump-enforce-stormy-daniels-nondisclosure-agreement/story?id=57697574>.

³¹ Maryclaire Dale, *Andrea Constand Writes of Cosby Trial, #MeToo in New Memoir*, ABC NEWS, (Sept. 7, 2021, 1:04 AM), <https://abcnews.go.com/Entertainment/wireStory/andrea-constand-writes-cosby-trial-metoo-memoir-79867063>.

³² Gus Garcia-Roberts, *The Secret Settlements That Helped a Baseball Star Play On*, WASH. POST (Dec. 13, 2021, 1:33 PM), <https://www.washingtonpost.com/sports/2021/12/13/yasiel-puig-mlb-dodgers-sexual-assault-allegations/>.

³³ Dickson, *supra* note 11. ("[T]hey initially arose around the 1970s, as a way for nascent tech companies to protect their intellectual property.").

2023]

LITVAK

211

numerous individuals who had been bound to NDAs in sexual misconduct settlements began breaking the binds of the contracted confidentiality clauses in late 2017.³⁴

Such was the case with Zelda Perkins, who “broke a nineteen-year-old agreement in which she agreed not to reveal that [Harvey Weinstein] had harassed her in return for £250,000.”³⁵ Perkins’s disclosure came on October 23, 2017, about two weeks after the New York Times published detailed allegations against Weinstein.³⁶ Between the *Times*’s October 5, 2017 publication date and February 28, 2018, reports arose of dozens of sexual misconduct allegations against Weinstein.³⁷ This crack in the confidentiality-clause dam caused a current to flow against the “regime of silencing.”³⁸ The initial handful of voices disclosing their sexual trauma evolved into a cacophony after Alyssa Milano tweeted “[m]e too” on October 15, 2017.³⁹ Milano elaborated on a friend’s suggestion: “[i]f you’ve been sexually harassed or assaulted write ‘[m]e too’ as a reply to this tweet.”⁴⁰ #MeToo encourages “people to share their stories of sexual harassment and abuse in order to illustrate the near universality of the problem.”⁴¹

The critical component of “#MeToo” is the “too,” which encapsulates the intention of the movement Tarana Burke started in 2006: to express empathy and understanding through connection.⁴² “The movement’s purpose is to convey a simple, yet loud, message to victims of sexual abuse around the world: you are not alone.”⁴³ Burke

³⁴ See David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 167 (2019).

³⁵ *Id.*

³⁶ *Harvey Weinstein timeline: How the Scandal Unfolded*, BBC NEWS (June 30, 2021), <https://www.bbc.com/news/entertainment-arts-41594672>.

³⁷ *Id.*; Elena Nicolaou & Courtney E. Smith, *A #MeToo Timeline to Show How Far We’ve Come & How Far We Need To Go*, REFINERY29 (Oct. 5, 2019, 12:55 PM), <https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein>.

³⁸ Dickson, *supra* note 11.

³⁹ @Alyssa_Milano, TWITTER (Oct. 15, 2017, 4:45 PM), https://twitter.com/Alyssa_Milano/status/919665538393083904.

⁴⁰ @Alyssa_Milano, TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976.

⁴¹ Elena Nicolaou & Courtney E. Smith, *A #MeToo Timeline to Show How Far We’ve Come & How Far We Need to Go*, REFINERY29 (Oct. 5, 2019, 12:55 PM), <https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein>.

⁴² See METOO, <https://metoomvmt.org/get-to-know-us/history-inception/> (last visited Oct. 13, 2023).

⁴³ Vasundhara Prasad, Note, *If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2511 (2018).

expresses, “I know exactly how you feel. That happened to me too.”⁴⁴ The “too” repeatedly shows how commonplace sexual harassment continues to be.⁴⁵ #MeToo “was tweeted over 2.3 million times across 85 different countries and shared in over 77 million posts or comments on Facebook” over the course of a few weeks.⁴⁶ “*Time Magazine* encapsulated this movement by naming as its Person of [the] Year ‘The Silence Breakers,’ to honor the collective group of women who spoke up and confronted their abusers.”⁴⁷

As it was for the LGBTQ+ coming out movement, #MeToo shifts lived experiences from the private sphere into the public by lending language to silence and giving truth narrative form.⁴⁸ #MeToo empowers survivors “to be counted not only in numbers but in stories.”⁴⁹ Gymnast McKayla Maroney’s shared story on October 18, 2017—in breach of her settlement agreement signed the previous year—inspired “more than 150 other women [to] come forward with similar stories.”⁵⁰ These individual narratives, flowing together, came on like a wave of courageous communal truth-telling and silence-breaking. As a result, the perpetrator was sentenced to sixty years in prison a few months later.⁵¹ Although NDAs have been weaponized to require silence as a condition of injury compensation, “[s]exual harassment or discrimination scandals have multiplied in recent years . . . [and] in the wake of the #MeToo movement,” survivors are tearing off the contractual muzzles and speaking up.⁵²

II. NEW JERSEY PAVES THE WAY

In response to the #MeToo movement disrupting rape culture, legislatures around the country have acknowledged the externalities

⁴⁴ METOO, <https://metoorising.withgoogle.com/about> (last visited Oct. 13, 2023).

⁴⁵ Hoffman & Lampmann, *supra* note 34, at 182.

⁴⁶ Prasad, *supra* note 43, at 2511.

⁴⁷ Prasad, *supra* note 43, at 2511–12.

⁴⁸ Hoffman & Lampmann, *supra* note 34, at 181.

⁴⁹ Hoffman & Lampmann, *supra* note 34, at 182.

⁵⁰ Elena Nicolaou & Courtney E. Smith, *A #MeToo Timeline To Show How Far We’ve Come & How Far We Need To Go*, REFINERY29 (Oct. 5, 2019, 12:55 PM), <https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein>.

⁵¹ Elizabeth Joseph et al., *Ex-USA Gymnastic Doctor Sentenced to 60 Years on Child Porn Charges*, CNN (Dec. 7, 2017, 3:50 PM), <https://www.cnn.com/2017/12/07/us/larry-nassar-usa-gymnastics-sentence/index.html>.

⁵² *California Restricts Gagging for Employee Complaints*, RFI, (Oct. 09, 2021, 3:28 PM), <https://www.rfi.fr/en/business-and-tech/20211009-california-restricts-gagging-for-employee-complaints>.

2023]

LITVAK

213

caused by permitting discriminators, harassers, and assailants to settle for silence by purchasing confidentiality through NDAs. New Jersey took a leading stance by introducing a bill in early 2018, which deems certain non-disclosure provisions unenforceable against current or former employees.⁵³ This bill would have amended New Jersey's Law Against Discrimination (NJLAD), which protects employees from discrimination in the workplace.⁵⁴ Expanding upon NJLAD protections, Senate Majority Leader Loretta Weinberg introduced another bill, "Provisions in Employment Contracts That Waive Rights," on January 9, 2018.⁵⁵ New Jersey's Senate overwhelmingly voted in favor of this bill, with Democrats voting unanimously for it, and all but three Republicans voting in favor.⁵⁶

On March 18, 2019, Governor Phil Murphy signed the bill into law.⁵⁷ The law bars non-disclosure agreements—whether in an initial employment contract or subsequent settlement—by declaring them invalid and unenforceable against employees who claim discrimination, harassment, or retaliation.⁵⁸ The statute states:

2. a. A provision in any 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. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the non-disclosure provision shall also be unenforceable against the employer.
- b. Every settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer shall include a bold, prominently placed notice that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the

⁵³ N.J. REV. STAT. § 10:5-12 (2019).

⁵⁴ *5 Things You Should Know About The New Jersey Law Against Discrimination*, N.J. OFF. ATT'Y GEN. DIV. C.R., (Jan. 1, 2021), https://www.njoag.gov/wp-content/uploads/2021/09/fact_LAD.pdf.

⁵⁵ 2018 Voting Record NJ S.B. 121.

⁵⁶ *Id.*

⁵⁷ Susan L. Nardone, *Governor Murphy Signs Bill Making Nondisclosure Provisions Unenforceable and Against Public Policy*, GIBBONS LAW ALERT (Mar. 19, 2019), <https://www.gibbonslawalert.com/2019/03/19/governor-murphy-signs-bill-making-nondisclosure-provisions-unenforceable-and-against-public-policy/>.

⁵⁸ N.J. REV. STAT. § 10:5-12 (2019).

employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.⁵⁹

New Jersey's recent bill permits survivors of abuse in the workplace to enter into confidential settlement agreements with their employers and enforce the terms of these agreements against employers. The employers, however, cannot enforce confidentiality stipulations against survivors of the abuse.⁶⁰ If the employees (current or former) wish to publicly discuss the factual details of their settlements, they are free to do so without penalty, at which point employers may follow suit.⁶¹ Employers may not break the silence unless and until the employees "reveal sufficient details of the claim so that the employer is reasonably identifiable; in that case, the non-disclosure provision shall also be unenforceable against the employer."⁶²

Not only does the added NJLAD provision prohibit NDAs "in employment contracts and settlement agreements where they have 'the purpose or effect of concealing the details' of discrimination, retaliation, and/or harassment claims," but there is an additional requirement for employers to "explicitly place employees on notice of this in any settlement agreement resolving [these] claims."⁶³

While the statutory language is so broad that it also encapsulates employee protections provided under the Conscientious Employee Protection Act (CEPA) and the Civil Rights Act of 1964, it does not impede "collective bargaining agreements, non-competition agreements, or confidentiality agreements that protect 'proprietary information' such as trade secrets and customer information."⁶⁴

Section 10:5-12 tangibly counteracts abusers' impunity by deeming their confidentiality provisions unenforceable against survivors who choose to break the silence.⁶⁵ Weinberg, the bill's

⁵⁹ N.J. STAT. ANN. § 10:5-12.8 (2019).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ N.J. Bus. Litig. § 19-6 Employment Contracts (2022), Lexis.

⁶⁴ *Id.*; see also Keith S. Anderson, *Bag the Gag Provision: New Jersey Is the Latest State to Restrict Non-disclosure Agreements in Settlements*, LAB. & EMP. INSIGHTS (May 14, 2019), <https://www.employmentlawinsights.com/2019/05/bag-the-gag-provision-new-jersey-is-the-latest-state-to-restrict-non-disclosure-agreements-in-settlements/> ("There are two exceptions to the New Jersey statute: (1) Noncompetition agreements are allowed, and (2) NDAs that prohibit disclosure of proprietary information, including trade secrets, business plans, and customer information, are permitted.").

⁶⁵ John MacDonald & Robin E. Shea, *NJ Ban on Nondisclosure Agreements: What Does It Mean For Employers?*, JD SUPRA, (Apr. 11, 2019),

2023]

LITVAK

215

original sponsor, explained, “[t]hese secret settlements can ultimately endanger the public by hiding sexual predators from law enforcement and the public . . . [and] are being used by those who have the money to pay for privileged immunity.”⁶⁶ With this restriction on NDA enforceability, victims of workplace sexual misconduct have the agency to exercise the option of maintaining confidentiality regarding factual disclosures underlying civil settlements.⁶⁷ New Jersey has provided these survivors of sexual violence with choice and control: they can decide for themselves whether they want to maintain the veil of secrecy for their own protection or speak about what they have endured.

As commendable as it may be to grant sexual violence survivors the legal ability to reclaim their power by owning their narrative experience, volitionally exercising their freedom of speech, and being heard and related to in story sharing, this legislation has a limited scope, and therefore a limited impact. First, this law applies only to agreements entered or modified on or after March 18, 2019.⁶⁸ Secondly, confidentiality holds for the terms of an agreement, “but not the *underlying facts* related to th[e] dispute.”⁶⁹ Thirdly, it only applies in the context of employment agreements.⁷⁰ With this law, Weinberg’s goal is to “lift the secrecy that allows abusers to carry on abusing and make our workplaces safer for everyone.”⁷¹ Unfortunately, § 10:5-12 is a far, exasperated cry from preventing the privileged from both silencing their victims in secret settlements and acting with impunity. Given the limited scope of preserving this right to share experiences only in the context of employment agreements, survivors of sexual violence in all other spaces are left unprotected and voiceless. While § 10:5-12 is a step towards the effective defense of victims’ rights, New Jersey is yet to enact a law that protects the voices of sexual violence survivors beyond the workplace, for example in education, intimate partnerships, or marriage.

<https://www.jdsupra.com/legalnews/nj-ban-on-nondisclosure-agreements-what-55560/>.

⁶⁶ David Wildstein, *Weinberg Bill to End NDAs for Sexual Harassment, Assault Signed Into Law*, NEW JERSEY GLOBE (Mar. 18, 2019, 4:11 PM), <https://newjerseyglobe.com/legislature/weinberg-bill-to-end-ndas-for-sexual-harassment-assault-signed-into-law/>.

⁶⁷ N.J. REV. STAT. § 10:5-12 (2019).

⁶⁸ MacDonald & Shea, *supra* note 65.

⁶⁹ *Id.*; Bayda v. Howmet Castings & Servs., No. 2:18-cv-17419-BRM-JAD, 2019 U.S. Dist. LEXIS 188678, n.4 (D.N.J. Oct. 31, 2019).

⁷⁰ N.J. REV. STAT. § 10:5-12 (2019).

⁷¹ Wildstein, *supra* note 66.

III. ALTERNATIVE NON-APPROACHES: SCANNING THE NATIONAL LANDSCAPE

In addition to New Jersey, there are sixteen other states (Arizona, California, Hawaii, Illinois, Louisiana, Maryland, Nevada, New Mexico, New York, Oregon, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia) that statutorily limit the use of NDAs.⁷² The general national trend concentrates on the employment context, with statutory language focusing restrictions on certain NDA obligations as conditions of employment.⁷³ While policies regulating work relations appear to be the comfort zone for legislating contractual NDA prohibitions, the states, Congress, and D.C. run the gamut of liberal to conservative limitations, ranging from no regulations regarding sexual misconduct NDAs to a total ban.⁷⁴

The chart in this Comment's appendix (section VI) illustrates enacted statutes and introduced bills pertaining to statutory restrictions on NDA use. In addition to the highlighted legislative limitations, the chart also includes the limitations' restrictions: what could be—but is not—covered by the statutes. Identified through this fifty-state survey are sub-categories of the various legislative groupings, discussed below, that all ultimately point to the uniqueness of New Jersey's approach.

A. Does not statutorily address confidentiality agreements

There are eleven states that do not address *confidentiality clauses by legislation*.⁷⁵ Alabama, Alaska, Colorado, Delaware, Michigan, Mississippi, Nebraska, North Dakota, Oklahoma, South Dakota, and Wyoming have not legislatively engaged with the #MeToo movement or contributed to the national trend of limiting NDA use in sexual misconduct suits and settlements. These states not only sustain statutory silence on NDAs in situations of sexual misconduct, but also do not regulate confidentiality clauses in any regard.

Additionally, there is no federal law limiting the use of confidentiality agreements, although the EMPOWER Act, intended to ban workplace harassment NDAs, was introduced to the Senate in 2018 and again in 2019.⁷⁶

⁷² See *infra* Figure 1.

⁷³ See *infra* Figure 1.

⁷⁴ See *infra* Figure 1.

⁷⁵ See *infra* Figure 1.

⁷⁶ See *infra* Figure 1 (noting S. 2994).

2023]

LITVAK

217

B. Does not statutorily prohibit confidentiality agreements

A significant portion of states offer various statutory expressions acknowledging NDAs and confidentiality clauses.⁷⁷ These twenty-two states, however, (Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, and Wisconsin) and the District of Columbia, do not prohibit or restrict non-disclosure use.⁷⁸

C. Workplace NDAs related to sexual misconduct as a condition of employment prohibited

Nine states prohibit employers from requiring prospective or current employees (“employees”) to sign NDAs related to sexual misconduct as a condition of employment. Arizona,⁷⁹ Hawaii, Illinois, Maryland, New Mexico, Tennessee, Texas,⁸⁰ Vermont, and Virginia offer these protections in the employment context only. While employees are protected from being coerced into silence as a condition of employment, there is no requirement to notify employees of their rights to report or speak on workplace sexual misconduct.⁸¹ Since many workers are unaware of the unenforceability of the NDA agreements they sign, workers might stay silent from fear of legal repercussions absent explicit notification of their rights.⁸²

Moreover, there is no protection from confidentiality clauses beyond the employment context in these states.⁸³ Additionally, these workplace protections are limited to prohibiting NDAs as conditions of employment—but not in settlements after the fact, except for Texas, Vermont, and Virginia.⁸⁴

⁷⁷ See *infra* Figure 1.

⁷⁸ See *infra* Figure 1.

⁷⁹ See *infra* Figure 1 (noting H.B. 2752 (Ariz. 2021) is introduced, but not enacted).

⁸⁰ See *infra* Figure 1 (referring to S.B. 209 (Tex. 2021) (introduced); H.B. 1980 (Tex. 2021) (pending)).

⁸¹ See *infra* Figure 1 (referring to H.B. 2752 (Ariz. 2021); HAW. REV. STAT. ANN. § 378-2.2 (2020); H.B. 3418 (Ill. 2021); S.B. 1010 (Md. 2018); H.B. 21 (N.M. 2020); TENN. CODE § 50-1-108 (West 2018); S.B. 209 (Tex. 2021); H.B. 1980 (Tex. 2021); VT. STAT. ANN. tit. 21, § 495h (West 2018); VA. CODE ANN. § 40.1-28.01 (West 2019)).

⁸² Ifeoma Ozoma, *An NDA Was Designed to Keep Me Quiet*, N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2021/04/13/opinion/nda-work-discrimination.html>.

⁸³ See *infra* Figure 1 (referring to H.B. 2752 (Ariz. 2021); HAW. REV. STAT. ANN. § 378-2.2 (2020); H.B. 3418 (Ill. 2021); S.B. 1010 (Md. 2018); H.B. 21 (N.M. 2020); TENN. CODE § 50-1-108 (West 2018); S.B. 209 (Tex. 2021); H.B. 1980 (Tex. 2021); VT. STAT. ANN. tit. 21, § 495h (West 2018); VA. CODE ANN. § 40.1-28.01 (West 2019)).

⁸⁴ See *infra* Figure 1.

D. Workplace NDAs related to sexual misconduct are specifically prohibited

Texas,⁸⁵ Vermont, and Virginia prohibit NDAs specifically related to sexual misconduct in the workplace.⁸⁶ Encompassing NDA limitations from the previous category, these three states expand NDA restrictions by banning confidentiality clauses not only as conditions of employment, but in any employment context.⁸⁷

E. Workplace NDAs related to harassment or discrimination are generally prohibited

The prior two categories specifically prohibit NDAs in the workplace pertaining to sexual misconduct. California, Louisiana, New Jersey, New York, and Oregon expand the scope of NDA restrictions by including workplace harassment generally—not merely in circumstances pertaining to sexual misconduct. As above, these restrictions are limited to the employment context.⁸⁸

However, there are two caveats. The first is New Jersey's approach, which is not a prohibition on NDAs, but a limitation that the state will not enforce NDAs against complainants.⁸⁹ The second is New York's approach, which also does not prohibit NDAs entirely, but reserves the right to request confidentiality clauses, with twenty-one days to consider the agreement terms.⁹⁰ Again, these NDA restrictions are limited to the employment context and, except in New Jersey, constitute total bans on confidentiality clauses in their pertinent scope.

F. NDAs related to any sexual misconduct or sex-based harassment are prohibited

Beyond the scope of employment relations, California, Louisiana, Nevada, Washington, and West Virginia ban confidentiality clauses in any sexual misconduct suits.⁹¹ By far the most expansive NDA prohibition, this conservative restriction eliminates the ability of sexual

⁸⁵ See *infra* Figure 1.

⁸⁶ See *infra* Figure 1 (noting S.B. 209 (Tex. 2021); H.B. 1980 (Tex. 2021); VT. STAT. ANN. tit. 21 (2018); VA. CODE ANN. § 40.1-28.01 (West 2019)).

⁸⁷ *Id.*

⁸⁸ See *infra* Figure 1 (noting CAL. CIV. PROC. CODE § 1001(a) (West 2021); LA. STAT. ANN. § 9:2717 (2018); N.J. STAT. ANN. § 10:5-12.8 (West 2019); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019); OR. REV. STAT. ANN. § 659A.875 (West 2019)).

⁸⁹ See *infra* Figure 1 (noting N.J. STAT. ANN. § 10:5-12.8 (West 2019)).

⁹⁰ N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019).

⁹¹ See *infra* Figure 1 (noting CAL. CIV. PROC. CODE § 1001(a) (West 2021), LA. STAT. ANN. § 9:2717(A)(1) (2018), NEV. REV. STAT. ANN. § 10.195 (West 2019), WASH. REV. CODE ANN. § 4.24.840 (West 2018), H.B. 3011, 2019 Leg., Reg. Sess. (W. Va. 2019)).

2023]

LITVAK

219

violence victims to decide whether they want to maintain confidentiality regarding the underlying facts of their settlements.

There is a wide range of regulations, stretching from no statutory regulation to a total ban, insofar as sexual misconduct is involved. Only New Jersey offers the option for sexual violence victims to exercise their voices at their own discretion, albeit only in an employment NDA context.

IV. SURVIVORS' CHOICE: PRESERVING AUTONOMY & SAVING SOCIETY

Neither courts nor legislatures should force the hands of abuse victims. Current legislation in this area oscillates in extremes, from prioritizing privacy and autonomy via volitional confidential contracts or altogether banning confidentiality in circumstances where sexual violence is being covered up. Legislatures ought to create the space for survivors to decide in their own time if, and when they wish to break their settled silence. It is critical to preserve and protect the autonomy of survivors of sexual violence for their recovery and well-being.⁹² Default non-disclosure agreements, whether in employment contracts or more generally in settlement agreements, have the effect of taking over the trauma by eliminating victims' rights to their own story.⁹³ Because of these agreements, victims "can't own their own trauma, they can't talk about what happened in the past and they can't move on with their lives."⁹⁴

At times NDAs may be merited, such as in circumstances where frivolous lawsuits derail reputations and resources. "[R]ather than participat[ing] in a lengthy and expensive litigation, the employer might make a business decision to settle it."⁹⁵ Such an NDA would protect employers from lengthy and expensive litigation in addition to discouraging other frivolous claims.⁹⁶ It could also be in the employee's interest to maintain secrecy, since public lawsuits against employers may make it more challenging for the employee to find employment

⁹² U.N. Office of High Comm'r for Hum. Rts., *Protection of Victims of Sexual Violence: Lessons Learned*, at 7, U.N. REP. (2019), <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ReportLessonsLearned.pdf>.

⁹³ Emma Nolan, *Harvey Weinstein's Former Assistant's Mission to Ban NDAs Explained*, NEWSWEEK, (Sept. 20, 2021), <https://www.newsweek.com/harvey-weinstein-pa-ban-ndas-explained-zelda-perkins-1630784>.

⁹⁴ *Id.*

⁹⁵ *California Restricts Gagging for Employee Complaints*, RFI, (Oct. 09, 2021), <https://www.rfi.fr/en/business-and-tech/20211009-california-restricts-gagging-for-employee-complaints>.

⁹⁶ *Id.*

afterward.⁹⁷ Moreover, some consider NDAs useful tools to avoid litigation for all parties, as well as to avoid “increased stress and potential costs of insurance.”⁹⁸ Jonathan Chamberlain, a partner from Gowling WLP, believes that “[v]ictims are likely to lose out and the proposal may ‘have the perverse effect of making things harder for women who have been very badly wronged.’”⁹⁹ He continues, “[t]he NDA is one of the few assets they have. Many victims of harassment don’t want to litigate[.] [T]hey want compensation[;] and a company is much less likely to do a deal if the allegation becomes a public point anywhere.”¹⁰⁰ NDAs can provide benefits to survivors of sexual abuse, including protection from public scrutiny, a shield from reputational stigma, and a means of circumventing a psychologically scarring and emotionally vulnerable litigation where tangible evidence may be lacking.¹⁰¹ All things considered, “accusers may prefer NDAs because silence is their only leverage in a settlement negotiation and the accusers may want to protect their own privacy.”¹⁰²

The benefits of NDAs in sensitive settlements must be balanced by their detriments: their use as silencing weapons.¹⁰³ “Sexual harassment or discrimination scandals have multiplied in recent years in Silicon Valley, in the wake of the #MeToo movement.”¹⁰⁴ The proliferation of sexual misconduct survivors speaking up offers some insight into how “NDAs have morphed into a powerful tool for silencing sexual harassment accusers.”¹⁰⁵ Founding partner of Cole Khan Solicitors, Shazia Khan, urges us to “not forget that the origins of NDAs were to protect commercial interests, they were never intended to be used as a means to ‘gag.’”¹⁰⁶ The “abhorrent ongoing practice to buy silence from employees packaged up in a NDA” need not and should not come as a

⁹⁷ *Id.*

⁹⁸ Varsha Patel, ‘Adding Injury to Injury’: Lawyers Split on Push to Revamp NDA Use, LAW.COM INT’L (Sept. 15, 2021), <https://www.law.com/international-edition/2021/09/15/adding-injury-to-injury-lawyers-split-on-push-to-revamp-nda-use/?slreturn=20210920154911>.

⁹⁹ Patel, *supra* note 98.

¹⁰⁰ Patel, *supra* note 98.

¹⁰¹ Prasad, *supra* note 43, at 2516.

¹⁰² Rachel S. Spooner, *The Goldilocks Approach: Finding the “Just Right” Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases*, 37 HOFSTRA LAB. & EMP. L.J. 331, 334 (2020).

¹⁰³ *California Restricts Gagging for Employee Complaints*, RFI, (Oct. 09, 2021), <https://www.rfi.fr/en/business-and-tech/20211009-california-restricts-gagging-for-employee-complaints> (Anonymous Google employee said, “NDAs are a common weapon in the industry.”).

¹⁰⁴ *Id.*

¹⁰⁵ Spooner, *supra* note 102, at 333–34.

¹⁰⁶ Patel, *supra* note 98.

condition of employment or compensation for enduring sexual misconduct.¹⁰⁷ Improper use of NDAs leads to two externalities: (1) emotional, psychological, and social damage to innocent parties and (2) immoral application of law to shield employers who “routinely cover up abuses without consequence.”¹⁰⁸ “The evidence also shows it takes a huge personal toll on victims, leaving them emotionally and psychologically drained, disillusioned, and left with a total loss of faith in the legal system.”¹⁰⁹

Even beyond the sphere of employment relations, “[t]here is . . . something offensive about a contract of silence, particularly in cases of sexual assault and sexual harassment.”¹¹⁰ An agreement to give away one’s freedom of speech in this context “undermines the public’s interest in knowing about these repeat sexual offenders.”¹¹¹ Some settlements are so stringent that they include terms forbidding parties from speaking about the existence of the settlement itself, not merely its underlying facts.¹¹² Consequences for breaking contracted confidentiality terms can be punitively high—at times not only demanding a return of the full settlement amount, but also charging legal fees, and additional financial penalties.¹¹³

These conditions and consequences are fundamental to contract law, which “is based on the principle that courts will enforce agreements that parties enter into voluntarily.”¹¹⁴ The critical term of concern in these arrangements is “voluntary.” The power disparity between alleged perpetrators and victims of sexual misconduct is often vast, as evidenced by the experiences of Harvey Weinstein’s assistant, Zelda Perkins.¹¹⁵ Victims, who have already been disempowered through the abuse, might further be undermined by their legal representation, as was the case for Perkins.¹¹⁶ Perkins’s lawyers told her she “had no power in this situation and that going to court would probably . . . ruin [her life], [her] family’s lives, etc.”¹¹⁷ Perkins explained that, at the time,

¹⁰⁷ Patel, *supra* note 98.

¹⁰⁸ Ashleigh Webber, *MP Seeks Ban on NDA Use in Sexual Harassment Cases*, PERSONNEL TODAY, (Sept. 14, 2021), <https://www.personneltoday.com/hr/mp-seeks-ban-on-nda-use-in-sexual-harassment-cases/>.

¹⁰⁹ *Id.*

¹¹⁰ Prasad, *supra* note 43, at 2508–09.

¹¹¹ Prasad, *supra* note 43, at 2509.

¹¹² *See* Prasad, *supra* note 43, at 2514.

¹¹³ Prasad, *supra* note 43, at 2515.

¹¹⁴ Prasad, *supra* note 43, at 2524.

¹¹⁵ *See* Nolan, *supra* note 93 (commenting on the relative power between Harvey Weinstein and his twenty-four-year-old victim).

¹¹⁶ Nolan, *supra* note 93.

¹¹⁷ Nolan, *supra* note 93.

the settlement agreement with non-disclosure clauses was presented as “the only weapon” to “stop Weinstein’s behavior . . . [her] silence was in return for his behavior being stopped.”¹¹⁸ This perspective raises the question: what does compensation for injuries suffered have to do with the additional consideration of silence in exchange for payment?

The approach of several states has been to prohibit non-disclosure clauses in cases pertaining to sexual misconduct altogether.¹¹⁹ Other approaches argue for heavier regulations of NDAs, via court-lead initiatives that encourage courts to “take on a heightened role in determining whether NDAs in such cases are unconscionable, made under duress, or unenforceable as against public policy.”¹²⁰ These arguments include liability stipulations for both alleged abusers and their lawyers when they draft “a confidentiality clause that conceals conduct that can be prosecuted as a felony sex offense, or even [advise] a client to sign such an agreement.”¹²¹ Unfortunately, these stringent approaches and “the recent step taken by some state legislatures to completely prohibit NDAs in cases of sexual harassment and sexual assault lacks foresight and careful thought.”¹²²

While the intention to protect the public and advocate for victims’ rights is pure, the penal and prohibitive nature of the enacted and advocated-for approaches misses the mark. Ultimately, the fundamental issue in using NDAs in situations of sexual misconduct is one of choice: does the victim get to re-establish agency after surviving a traumatizing experience where bodily integrity has been undermined? Eliminating choice through total NDA bans is not the solution for supporting survivors in reclaiming their autonomy. “[W]e need to capitalize on this moment to show victims that they are not alone, and that the legal system works to protect them and other potential victims down the line, should they choose to speak out.”¹²³ In truly advocating for victims, New Jersey’s novel approach to preserving NDA enforceability at the discretion of survivors is precise. By presenting both options on the table—maintaining confidentiality regarding underlying facts of the sexual misconduct allegations and holding the option of speaking out in the future—victims’ privacy can be protected at the most tenuous moment of the legal process. Subsequently, if and when they wish to speak to their experience, sexual violence survivors

¹¹⁸ Nolan, *supra* note 93.

¹¹⁹ See *infra* Figure 1.

¹²⁰ Prasad, *supra* note 43, at 2509.

¹²¹ Prasad, *supra* note 43, at 2548.

¹²² Prasad, *supra* note 43, at 2549.

¹²³ Prasad, *supra* note 43, at 2549.

2023]

LITVAK

223

reserve the rights to their personal narratives; a right that empowers them with the decision of how to present themselves in articulating their life story. Besides, the option for victims to speak out in the future may add pressure to perpetrators of sexual violence to cease their behavior or push institutions that protect such individuals to cut ties under threat of future public scandal.

V. CONCLUSION

Getting proximate and embracing discomfort by providing survivors with space to share their stories is a method of healing; both for those individual survivors, for the communities from which they come, and, more holistically, for all of society.¹²⁴ Empowering victims of sexual misconduct involves compensating them for their injuries, protecting their bodies by preventing further abuse, and safeguarding their psyche by preserving their voices. To that end, New Jersey's approach to confidential settlements is the fairest way to handle such situations in the employment space and beyond encounters at work.

Paid-for silence has no place in sexual misconduct settlements, and voices are inadequate consideration for just compensation. New Jersey's recent NDA law permitting survivors of discrimination, harassment, and assault to choose if and when they maintain confidentiality in their NDA settlement agreements with employers should be applied to all sexual misconduct settlements.

¹²⁴ Fortune Magazine, *The Power of Proximity | CEO Initiative 2018*, YOUTUBE (June 27, 2018, 17:40-48), <https://www.youtube.com/watch?v=1RyAwZIH04Y&t=1080s> ("Proximity is a pathway and through that pathway we have insights, we learn things, we discover things . . ."); Leandra Fernandez, *Empathy and Social Justice: The Power of Proximity in Improvement Science*, Carnegie Commons Blog (Apr. 21, 2016), <https://www.carnegiefoundation.org/blog/empathy-and-social-justice-the-power-of-proximity-in-improvement-science/> ("We must get 'proximate' to suffering and understand the nuanced experiences of those who suffer from and experience inequality.").

Appendix

Figure 1. States' Introduced, Pending, or Enacted NDA Legislation

State	Statute Status	What it covers	What is missing
Arizona	2021 AZ H.B. 2752 Introduced 2/2/21	Prohibits employers from mandating that employees sign NDAs regarding work-related sexual harassment or sexual assault as a condition of employment. ¹²⁵ Proposed legislation carves out the potential for settlement agreements to maintain confidentiality provisions. ¹²⁶	Protected choice to disclose beyond the employment context; Protected choice to disclose in settlement agreements; and Explicit prospective/employee notification of rights.
California (1)	2018 CA S.B. 820 Settlement agreements: confidentiality "Stand Together Against Non-Disclosures (STAND) Act of 2018" Enacted 9/30/18 Effective	Prohibits NDAs that prevent the disclosure of facts pertaining to: (1) sexual assault; (2) sexual harassment; (3) sex-based harassment or discrimination at work; and (4) retaliation for	Protected choice to maintain confidentiality regarding sexual misconduct; and Explicit prospective/employee notification of rights.

¹²⁵ H.B. 2752, 55th Leg. 1st Reg. Sess. (Ariz. 2021).

¹²⁶ *Id.*

2023]

LITVAK

225

	1/1/19	reporting such offenses. ¹²⁷ Reserves claimant's right to shield facts pertaining to claimant's identity, should claimant request such a provision in the settlement agreement (though not if a government agency or official is party to the settlement). ¹²⁸	
California (2)	2021 CA S.B. 331 (NS) Settlement and nondisparagement agreements "Silenced No More Act (SNMA)" Enacted 10/7/21 Effective 1/1/22	Amends and expands on the above by prohibiting NDAs that prevent disclosure of workplace harassment or discrimination more generally (beyond sex-based offenses). ¹²⁹ Reserves the right to enforce confidentiality clauses pertaining to	Protected choice to maintain confidentiality regarding workplace harassment.

¹²⁷ CAL. CIV. PROC. CODE § 1001(a) (West 2018).

¹²⁸ CAL. CIV. PROC. CODE § 1001(c) (West 2018).

¹²⁹ CAL. CIV. PROC. CODE § 1001(a) (West 2021).

		<p>settlement amounts.¹³⁰ Prohibits any clause in a settlement agreement “that prevents or restricts the disclosure of factual information” by an employee regarding certain workplace conditions.¹³¹ Requires workplace NDAs to explicitly include: “Nothing in this agreement prevents you 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.”¹³²</p>	
--	--	---	--

¹³⁰ CAL. CIV. PROC. CODE § 1001(c) (West 2021).

¹³¹ CAL. CIV. PROC. CODE § 1001(a) (West 2021).

¹³² CAL. GOV. CODE § 12964.5 (West 2022).

2023]

LITVAK

227

Hawaii	HRS § 378-2.2 Effective 9/15/20	Prohibits employers from mandating that employees sign NDAs regarding work-related sexual harassment or sexual assault as a condition of employment. ¹³³	Protected choice to disclose beyond the employment context; Protected choice to disclose in settlement agreements; and Explicit prospective/employee notification of rights.
Illinois	2021 IL H.B. 3418 (NS) Engrossed 4/14/21	Prohibits employers from mandating that employees sign NDAs regarding work-related sexual harassment or sexual assault as a condition of employment. ¹³⁴ Carves out the option for employees to request such confidentiality provisions to protect themselves from being publicly identified. ¹³⁵	Protected choice to disclose beyond the employment context; Protected choice to disclose in settlement agreements; and Explicit prospective/employee notification of rights.
Louisiana	LSA-R.S. 9:2717 Effective 8/1/18	Invalidates and deems unenforceable any contract	Protected choice to maintain confidentiality.

¹³³ HAW. REV. STAT. ANN. § 378-2.2(a)(2) (West 2020).

¹³⁴ H.B. 3418(a), 102nd Gen. Assemb., 1st Reg. Sess. (Ill. 2021).

¹³⁵ *Id.*

		contrary to public policy. ¹³⁶ This includes those agreements that prevent parties “from disclosing factual information related to acts that if proven would establish a cause of action for civil damages. . . .” ¹³⁷	
Maryland	Disclosing Sexual Harassment in the Workplace Act of 2018 (S.B. 1010) Enacted 5/15/18	Employee contract provisions that waive “any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment is null and void as being against the public policy of the state.” ¹³⁸	Protected choice to disclose beyond the employment context; Protected choice to disclose in settlement agreements; and Explicit prospective/employee notification of rights.

¹³⁶ LA. STAT. ANN. § 9:2717(A)(1) (2018).

¹³⁷ LA. STAT. ANN. § 9:2717(B)(1) (2018).

¹³⁸ S.B. 1010(A), 438th Gen. Assemb., Reg. Sess. (Md. 2018).

2023]

LITVAK

229

		<p>Prohibits employers from mandating that employees sign NDAs regarding work-related sexual harassment or sexual assault as a condition of employment.¹³⁹ “[E]mployers with 50 or more employees must disclose the number of settlements made after a sexual harassment allegation, the number of settled allegations of sexual harassment against the same employee, and the number of settlements of sexual harassment complaints that included a non-disclosure provision. This information must be ...</p>	
--	--	--	--

¹³⁹ S.B. 1010(B), 438th Gen. Assemb., Reg. Sess. (Md. 2018).

		publicly available." ¹⁴⁰	
Nevada	N.R.S. 10.195 Prohibition of provisions in settlement agreement prohibiting or restricting disclosure of certain information; exceptions Effective 7/1/19	Prohibits provisions in settlement agreements that restrict disclosure of facts pertaining to sexual offenses that would be felonies if criminal liability were imposed for the allegations. ¹⁴¹ Reserves right for claimants to maintain a confidential identity, if so requested. ¹⁴² This bill is not limited to the employee-employer context. ¹⁴³ Moreover, it does not provide confidentiality for: (1) the	Protected choice to maintain confidentiality regarding underlying facts of sexual violence.

¹⁴⁰ Keith S. Anderson, *Bag the Gag Provision: New Jersey is the Latest State to Restrict Non-disclosure Agreements in Settlements*, BRADLEY ARANT BOULT CUMMINGS LLP: LAB. & EMP. INSIGHTS (May 14, 2019), <https://www.employmentlawinsights.com/2019/05/bag-the-gag-provision-new-jersey-is-the-latest-state-to-restrict-non-disclosure-agreements-in-settlements/>.

¹⁴¹ NEV. REV. STAT. ANN. § 10.195(4) (West 2019).

¹⁴² *Id.*

¹⁴³ See *New Nevada Law Restricts Confidentiality Provisions in Sexual Harassment Settlement Agreements*, SUTTON HAGUE L. CORP.: SHLC BLOG (Aug. 23, 2019), <https://suttonhague.com/new-nevada-law-restricts-confidentiality-provisions-sexual-harassment-settlement-agreements/>.

2023]

LITVAK

231

		harasser's identity; (2) underlying facts describing the harassment, discrimination, or retaliation; and (3) the employer's adverse action or failure to act. ¹⁴⁴	
New Jersey	NJ ST 10:5-12.8 Non-disclosure provisions in employment contracts or settlement agreements; enforceability; notice Effective 3/18/19	Deems unenforceable against the employee provisions in employment contracts or settlement agreements which have "the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment." ¹⁴⁵ Requiring settlements pertaining to discrimination, retaliation, or harassment claims by employees against employers	Protected choice to disclose beyond the employment context; and Explicit prospective/employee notification of rights.

¹⁴⁴ *Id.*

¹⁴⁵ N.J. STAT. ANN. § 10:5-12.8(a) (West 2019).

		“include a bold, prominently placed notice that ... an agreement is unenforceable against the employer if the employee publicly reveals sufficient details ... so that the employer is reasonably identifiable.” ¹⁴⁶	
New Mexico	2020 NM H.B. 21 (NS) Prohibit NDA For Sexual Harassment Cases Effective 3/4/20	Prohibits employers from mandating that employees sign NDAs for employee-initiated sexual harassment, discrimination, or retaliation relating to the workplace. ¹⁴⁷ Carves out option for confidentiality clauses preventing disclosure of the claim’s underlying facts or employee-identifying information,	Protected choice to disclose beyond the employment context; and Explicit prospective/employee notification of rights.

¹⁴⁶ N.J. STAT. ANN. § 10:5-12.8(b) (West 2019).

¹⁴⁷ H.B. 21, 54th Leg., 2d Sess. (N.M. 2020).

2023]

LITVAK

233

		<p>should the complainant-employee rest so.¹⁴⁸</p> <p>Emphasizes the onus placed upon the employee to request confidentiality if seeking non-disclosure coverage.¹⁴⁹</p>	
New York	<p>NY GEN OBLIG § 5-336 Nondisclosure agreements Effective 10/11/19</p>	<p>Prohibits nondisclosure clauses in workplace discrimination settlements pertaining to “the underlying facts and circumstances and circumstances to the claim or action unless the condition of confidentiality is the complainant’s preference.”¹⁵⁰</p> <p>Provides complainant with “twenty-one days to consider such</p>	<p>Protected choice to disclose beyond the employment context; and Explicit prospective/employee notification of rights.</p>

¹⁴⁸ *Id.*

¹⁴⁹ Patrick Clark, *New Mexico Prohibits Nondisclosure Agreements Related to Sexual Harassment, Discrimination, and Retaliation Claims*, JDSUPRA (Mar. 9, 2020), <https://www.jdsupra.com/legalnews/new-mexico-prohibits-nondisclosure-74172/>.

¹⁵⁰ N.Y. GEN. OBLIG. LAW § 5-336(1)(a) (McKinney 2019).

		term or condition.” ¹⁵¹ Voids terms that restrict complainants from: (1) participating in local, state, or federal agencies; and (2) disclosing necessary facts for receiving public benefits. ¹⁵²	
Oregon	O.R.S. 659A.370 Effective 10/1/20	Makes it “an unlawful employment practice for an employer to enter into an agreement with an employee ... that contains a nondisclosure provision ... that has the purpose or effect of preventing the employee from disclosing or discussing conduct.” ¹⁵³	Protected choice to disclose beyond the employment context; and Explicit prospective/employee notification of rights.
Tennessee	T. C. A. § 50-1-108 Non-disclosure agreements relating to workplace	Prohibits employers from mandating that employees or prospective employees sign NDAs “with respect to sexual	Protected choice to disclose beyond the employment context; Protected choice to disclose in

¹⁵¹ N.Y. GEN. OBLIG. LAW § 5-336(1)(b) (McKinney 2019).

¹⁵² N.Y. GEN. OBLIG. LAW § 5-336(1)(c) (McKinney 2019).

¹⁵³ OR. REV. STAT. ANN. § 659A.370 (West 2020).

2023]

LITVAK

235

	sexual harassment Effective 5/15/18	harassment in the workplace as a condition of employment.” ¹⁵⁴	settlement agreements; and Explicit prospective/employee notification of rights.
Texas (1)	2021 TX S.B. 209 (NS) Relating to the prohibition of certain required nondisclosure and arbitration agreements Introduced 3/3/21	Prohibits employers from mandating that employees sign NDAs regarding “sexual assault or sexual harassment committed: (1) by an employee of the employer; or (2) at the employee’s place of employment” as a condition of employment. ¹⁵⁵ Pertains to agreements that prevent or limit “the employee’s ability to notify a local or state law enforcement agency.” ¹⁵⁶ Deems such provisions against public policy and	Protected choice to disclose beyond the employment context; Protected choice to disclose in settlement agreements; and Explicit prospective/employee notification of rights.

¹⁵⁴ TENN. CODE ANN. § 50-1-108(a) (2022).

¹⁵⁵ S.B. 209, 2021 Leg., 87th Sess. (Tex. 2021).

¹⁵⁶ *Id.*

		consequentially void and unenforceable. ¹⁵⁷	
Texas (2)	2021 TX H.B. 1980 (NS) Relating to prohibiting certain nondisclosure or confidentiality provisions in employment agreements Pending 5/12/21	Repeats the above (Texas (1)). ¹⁵⁸ Expands to pertain to agreements that prohibit “an employee from disclosing to <i>any</i> person ... facts surrounding any sexual assault or sexual harassment committed by an employee of the employer or at the employee’s place of employment ...” ¹⁵⁹	Protected choice to disclose beyond the employment context; and Explicit prospective/employee notification of rights.
Vermont	VT ST T.21 § 495h Effective 7/1/18	Prohibits employers from mandating that employees or prospective employees sign NDAs “[that] restricts the employee or prospective employee from	Protected choice to disclose beyond the employment context; and Explicit prospective/employee notification of rights.

¹⁵⁷ *Id.*¹⁵⁸ H.B. 1980, 2021 Leg., 87th Sess. (Tex. 2021).¹⁵⁹ *Id.*

2023]

LITVAK

237

		<p>opposing, disclosing, reporting, or participating in an investigation of sexual harassment” as a condition of employment.¹⁶⁰ A settlement agreement with the employer pertaining to sexual harassment cannot restrict the complainant’s right to: (1) lodge a complaint of sexual harassment with a state or federal agency; (2) participate in “an investigation related to a claim of sexual harassment” conducted by a state or federal agency; (3) comply with civil litigation discovery requests; and (4) exercise rights pursuant to labor</p>	
--	--	---	--

¹⁶⁰ VT. STAT. ANN. tit. 21, § 495h (West 2018).

		relations laws. ¹⁶¹	
Virginia	VA Code Ann. § 40.1.-28.01 Nondisclosure or confidentiality agreement; provisions regarding sexual assault; condition of employment Effective 7/1/19	Prohibits employers from mandating that employees or prospective employees sign NDAs “that [have] the purpose or effect of concealing the details relating to a claim of sexual assault ... as a condition of employment.” ¹⁶² Deems such provisions against public policy and consequentially void and unenforceable. ¹⁶³	Protected choice to disclose beyond the employment context; Protected choice to disclose in settlement agreements; and Explicit prospective/employee notification of rights.
Washington	WA ST 4.24.840 Effect of sexual harassment or sexual assault nondisclosure agreements on discovery and witness availability Effective 6/7/18	Prohibits NDAs that prevent <i>any person</i> from providing “evidence regarding past instances of sexual harassment or sexual assault”	Protected choice to maintain confidentiality regarding underlying facts of sexual violence.

¹⁶¹ *Id.*

¹⁶² VA. CODE ANN. § 40.1-28.01(A) (West 2019).

¹⁶³ *Id.*

2023]

LITVAK

239

		<p>in a civil action.¹⁶⁴</p> <p>Deems any such provision as “contrary to public policy and unenforceable.”¹⁶⁵</p> <p>Maintains confidential “the identity of any person who is or is alleged to be a victim of sexual harassment or sexual assault.”¹⁶⁶</p>	
West Virginia (1)	2019 WV H.B. 3011 (NS) Settlement agreements; confidentiality Introduced 2/12/19	<p>Prohibits NDAs that prevent the disclosure of facts pertaining to: (1) sexual assault; (2) sexual harassment; (3) sex-based harassment or discrimination at work; and (4) retaliation for reporting such offenses.¹⁶⁷</p> <p>Reserves claimant’s right to shield facts pertaining to</p>	Protected choice to maintain confidentiality regarding underlying facts of sexual violence.

¹⁶⁴ WASH. REV. CODE ANN. § 4.24.840(1) (West 2018).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ H.B. 3011, 2019 Leg., Reg. Sess. (W. Va. 2019).

		claimant's identity, should claimant request such a provision in the settlement agreement. ¹⁶⁸	
West Virginia (2)	2021 WV H.B. 2231 (NS) Prohibiting confidential settlement terms of a contested case involving sexual harassment, sexual abuse, or sexual assault in a state administrative proceeding Introduced 2/10/21	Prohibits confidentiality pertaining to both the financial terms and the accused's identity in settlement agreements where claims of sexual harassment, sexual abuse, or sexual assault are concerned. ¹⁶⁹	Protected choice to maintain confidentiality regarding settlement terms.
Congress	S.2994 "Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act-Part I" or "EMPOWER Act-Part I" Introduced 6/5/18 Reintroduced ¹⁷⁰	Prohibits NDAs relating to "workplace harassment, including sexual harassment or retaliation for reporting, resisting, opposing, or assisting in the investigation of workplace harassment." ¹⁷¹	Protected choice to disclose beyond the employment context; Protected choice to maintain confidentiality regarding workplace harassment; and Explicit prospective/employee notification of rights.

¹⁶⁸ *Id.*

¹⁶⁹ H.B. 2231, 2021 Leg., 85th Reg. Sess. (W. Va. 2021).

¹⁷⁰ EMPOWER Act—Part 1, S. 575, 116th Cong. (2019).

¹⁷¹ S. 2994, 115th Cong. (2018).

2023]

LITVAK

241

	2/27/19	Deems unilateral NDAs that solely benefit employers as unlawful. ¹⁷² Reserves any right “to report a concern about workplace harassment.” ¹⁷³	
--	---------	---	--

¹⁷² *Id.*

¹⁷³ *Id.*