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## Connecticut **LawTribune**

# Should Connecticut Ban Nondisclosure Agreements? Proposed Law in Works



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By Emily Cousins  
[Litigation Reporter](#)

Some legislators want to ban nondisclosure agreements that silence victims in situations involving discrimination, harassment or retaliation against an employee.

But some labor attorneys worry this could backfire and prevent employers from settling.

Senate Bill 1035, an act concerning limitations on the use of nondisclosure agreements, or NDAs, mirrors similar laws passed in California, New Jersey and Washington.

Steven Frederick, co-managing partner of Connecticut firm Wofsey Rosen, said when working in other jurisdictions, he has seen the confines of similar NDA laws get in the way of settling a case.

"It's a complicated issue because there are very strong public policy arguments in favor of banning nondisclosure agreements," Frederick said. "We don't want, from a public policy perspective, to silence victims or survivors. We don't want to shield perpetrators from accountability, because that might enable them and others to continue harassing people and discriminating against people and retaliating against people. We also don't want to intensify the harm to the victim by preventing them from seeking support and sharing their stories or warning other people."

However, Frederick said the bill could have "unintended consequences" and could "conflict with the practical realities."

"For example, an employer might be unwilling to settle a case without the protection of an NDA that keeps the employee from talking about what happened to them, which means that a case that might ordinarily settle won't settle, and the victim might have to engage in a public and potentially expensive fight that the victim doesn't want," Frederick said.

Frederick said some cases that allege discrimination, harassment or retaliation are often not black and white or blatant like some high-profile lawsuits, but an employer might still be motivated to settle with an NDA.

"There's a legitimate business reason that companies use to settle cases, even though they think there's no liability," Frederick said. "But one of the motivating factors is that they don't want this spoken about. They don't think they did anything wrong ... but they think they're better off making this go away. They're willing to compensate the employee, but they're not willing to compensate the employee in a case that they don't honestly think is valid if the employee can talk about it, because that may make them a target unfairly."

New Jersey attorney Nancy Erika Smith of Smith Mullin, known for representing Fox & Friends co-host Gretchen Carlson in her sexual harassment case against former Fox News Chairman Roger Ailes, had a different perspective. Smith said it's been seven years since New Jersey banned these post-dispute nondisclosure agreements, and she has settled just as many cases as before the law took effect.

"You still settle cases, but people aren't afraid to talk about what happened to them," Smith said. "We don't silence women so that we can protect serial harassers and abusers."

Frederick also had concerns that some individuals may want to remain below the radar and might still want the option to sign an NDA.

But Smith said an employer is not likely to discuss sexual allegations against it, and the victim can choose to keep it to themselves without an "abuser [telling] you what you can say in your own home; to your own family; at a cocktail party; or when another woman approaches you to discuss her trauma, and you have to be afraid, because the person who abused you is looking over your shoulder your whole life with the threat that I'm going to come after you again."

During a public hearing about SB 1035 on March 4, Republican State Sen. Robert Sampson argued that a nondisclosure agreement did not mean an employer was "silencing" an employee because the employee voluntarily signed the contract.

Smith said during her practice from 1980 through 2018, the choice was to either sign the NDA to settle the case or go to trial.

"What choice is there?" Smith asked. "Wait another year. Go to trial. You might win. Then they'll appeal. A very expensive, time-consuming, stressful and risky choice."

Deb McKenna, partner of Connecticut boutique firm Hayber, McKenna & Dinsmore, said she understands the argument that this bill could chill employers from settling, but recent protections granted by the National Labor Relations Board in 2023 and the Speak Out Act, a federal law passed in 2022, have not lowered the number of cases she has settled.

The NLRB determined employers cannot offer severance agreements that prevent employees from making truthful statements about the terms of their employment, while the Speak Out Act banned nondisclosure and nondisparagement clauses agreed to pre-dispute in instances involving sexual assault or harassment.

"I'm not sure if the fears of these types of expansions are going to bear out in settlements," McKenna said. "There's already mechanisms where some of this information can come out," whether that is public filings in court or the Commission on Human Rights and Opportunities.

Joshua Goodbaum, partner at Garrison, Levin-Epstein, Fitzgerald & Pirrotti, said even if employers were less likely to settle because of this

bill, it could be argued "that empowering survivors is more important than settling cases."

"Unlawful discrimination—including most especially sexual harassment—is often deeply personal and traumatizing for survivors, and Connecticut should favor a law that empower survivors to decide for themselves when and how to tell their stories," Goodbaum said. "Would that law undermine employment lawyers' ability to settle cases? My understanding is that the scholarship on this question is mixed, and my sense from my colleagues who represent employees in California and New Jersey—which have banned post-dispute non-disclosure agreements for years—is that the dynamics around settlement negotiations have not materially changed."

In the end, Frederick said employers have good intentions, and he doesn't want the "unintended consequences" of this bill, if it passes, "that might make the cure as bad as the disease."

"Employers are just groups of people," Frederick said. "In my experience representing management, most people want to do the right thing. They don't always do the right thing, maybe because they're not thinking about it from someone else's perspective, or they're not appropriately trained, and that's where the employment lawyer comes in ... They don't want to have the friction of potential litigation hanging over them. They want to have good morale in the workplace. They want to focus on their business."