LOOMIS CHAFFEE DEBATE TOURNAMENT PACKET: JANUARY 2018

Resolved, that in the United States of America, formal agreements, including Non-disclosure Agreements and Out of Court Settlements, should never include a provision that a victim of sexual harassment is to remain silent about his or her sexual harassment as part of the agreement.

***1) Wikipedia: Settlement (Litigation)

A settlement, as well as dealing with the dispute between the parties is a contract between those parties, and is one possible and common result when parties sue (or contemplate so doing) each other in civil proceedings. The plaintiff(s) and defendant(s) identified in the lawsuit can end the dispute between themselves without a trial.[1]

The contract is based upon the bargain that a party forgoes its ability to sue (if it has not sued already), or to continue with the claim (if the plaintiff has sued), in return for the certainty written into the settlement. The courts will enforce the settlement: if it is breached, the party in default could be sued for breach of that contract. In some jurisdictions, the party in default could also face the original action being restored.

The settlement of the lawsuit defines legal requirements of the parties, and is often put in force by an order of the court after a joint stipulation by the parties. In other situations (as where the claims have been satisfied by the payment of a certain sum of money) the plaintiff and defendant can simply file a notice that the case has been dismissed.

The majority of cases are decided by a settlement. Both sides (regardless of relative monetary resources) often have a strong incentive to settle to avoid the costs (such as legal fees, finding expert witnesses, etc.), the time and the stress associated with a trial, particularly where a trial by jury is available. Generally, one side or the other will make a settlement offer early in litigation. The parties may hold (and indeed, the court may require) a settlement conference, at which they attempt to reach such a settlement.

In controversial cases, it may be written into a settlement that both sides keep its contents and all other information relevant to the case confidential, and/or that one of the parties (usually the one being sued) does not, by agreeing to the settlement, admit to any fault or wrongdoing in the underlying issue.

Usually, lawsuits in the United States end in a settlement, with an empirical analysis finding that less than 2% of cases end with a trial, 90% of torts settle, and around 50% of other civil cases settle.[4] Generally, when a settlement is reached in the U.S., it will be submitted to the court to be "rolled into a court order." This is done so that the court which was initially assigned the case may retain jurisdiction over it. The court is then free to modify its order as necessary to achieve justice in the case, and a party that breaches the settlement may be held in contempt of court, rather than facing only a civil claim for the breach.

***2) Wikipedia: Non-disclosure agreement

A **non-disclosure agreement** (**NDA**), also known as a **confidentiality agreement** (**CA**), **confidential disclosure agreement**(**CDA**), **proprietary information agreement** (**PIA**) or **secrecy agreement** (**SA**), is a legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to or by third parties. It is a contract through which the parties agree not to disclose information covered by the agreement. An NDA creates a confidential relationship between the parties to protect any type of confidential and proprietary information or trade secrets. As such, an NDA protects non-public business information. Like all contracts, they cannot be enforced if the contracted activities are felonies.

***3) From The “Find Law” - a legal information website:

Is Sexual Harassment a Crime?

By George Khoury, Esq. on March 2, 2017 12:51 PM

When an individual is sexually harassed in the workplace, often victims are left feeling violated as if they were victims of a crime. Although an individual can sue after being sexually harassed, sexual harassment is not a crime. But, if it involves unwanted touching, physical intimidation, or even some extreme forms of coercion, it can quickly turn into sexual assault, which is a serious crime.

Types of Sexual Harassment

Sexual Harassment comes in two distinct forms:

- **Quid Pro Quo**: A person in authority demands or requires sexual acts in exchange for preferential treatment, or to avoid punitive actions.
- **Hostile Work Environment**: A person in authority/employer fails to remedy a work environment where sexually inappropriate behavior, comments, or other actions are occurring, making the workplace intimidating or offensive.

Sexual harassment in either form is not a crime. Instead, there are civil liabilities involved.

Is Harassment Different From Sexual Assault?

Yes, harassment is different from sexual assault, which can be a serious crime. Sexual assault involves unwanted sexual contact as a result of force, coercion, or incapacitation.

If a victim of sexual harassment has suffered unwanted sexual touching, they should contact the police. Particularly if the unwanted touching was forceful, contacting the police is the first step in having a person charged with sexual assault.

Victim's Rights Under the Law

Both types of sexual harassment listed above are violations of an individual's civil rights, since they are both considered forms of illegal discrimination under Title VII, under federal law, and under each state's own laws.

However, sexual harassment claims are frequently difficult to prove in court as the evidence generally only includes statements from the victim and the aggressor. Also, hostile work environment claims require the victim to provide their employer with an opportunity to cure the problem, unless the employer had actual notice, or should have had notice, that the aggressor was prone to that sort of conduct.

Fortunately, once a victim reports sexual harassment, even internally, they will be protected by Title VII's anti-retaliation provisions, and likely also the anti-retaliation provisions under state law. However, a victim will still need to file a complaint with the Equal Employment Opportunity Commission, or the state equivalent agency (such as the DFEH in California), regarding the sexual harassment, and/or the retaliation, as a pre-requisite to filing a claim in court. EEOC complaints, generally, must be filed within 6 months from the last discriminatory incident or adverse action.

Although sexual harassment lawsuits may be difficult to prosecute, victims can take some solace in the fact that their allegations will be made part of the public record. This means that the allegations will follow their aggressors, whether found guilty or not, for life.

***4) Washington State Senator Will Introduce Sexual Harassment Transparency Bill – NPR news 10/31/2017

By Grant McHill
OLYMPIA, Wash. (AP) – A Democratic senator in Washington state says she'll introduce a bill next year for transparency related to sexual harassment or assault claims made at the Capitol.
The tweet from Sen. Karen Keiser on Tuesday came following a story by the Northwest News Network and The News Tribune/Olympian that interviewed women who say they have been subject to sexual harassment at the Legislature.
The House and Senate have routinely declined to turn over legislative records – including calendars, emails and disciplinary reports – arguing that they are not public records. Several news organizations, led by The Associated Press, have sued for access to the records.
Keiser tweeted she'll push a bill "to exempt sex harassment and assault cases from gag rules and secrecy." Keiser said later by phone that when it comes to general nondisclosure agreements signed in the private sector, she also wants to allow waivers in cases of sexual harassment and assault.

***5) Inc.com - Pennsylvania thinks about trying to stop sexual predators by

opening documents.

Pennsylvania State Senator Judy Schwank (D-Berks) introduced a bill that would prohibit non-disclosure clauses on sexual harassment settlements. If her bill becomes law, settlements that restrict "the disclosure of the name of any person suspected of sexual misconduct," would become illegal.

Her goal is to stop predators and those who protect them. Surely she is thinking of cases like Harvey Weinstein, where huge swaths of his company and the community knew he was a sexual predator and helped him cover up.

This sounds noble, but it would be a disaster for Pennsylvanians who are the victims of sexual harassment. You may have thought it would be a disaster for the perpetrators, and it would be, but they aren't exactly a group deserving of sympathy. Why would it be bad news for victims? Here are a few reasons.

Why Settle?

Companies often settle because it's cheaper to settle than to fight it out in court. Fighting a court battle is extremely expensive and you can never be sure which side will come out victorious. No matter what happens, if the news picks up on it, your company name gets dragged through the mud.

So, many companies do the logical thing--pay a sum of money to the plaintiff in agreement for everyone keeping their mouths shut. If it becomes illegal to require closed mouths in exchange for the money, you've just decreased the motivation. If you pay someone $50,000 in exchange for a non-disclosure/non-disparagement clause, how much will you be willing to pay to settle the same case where the complainant is legally able to disclose and (by virtue of disclosing) disparage? Chances are, it will be a lot less than $50,000.

Non-Disparagement Goes Both Ways

While I'm not a lawyer, I've been involved in thousands of terminations where non-disparagement clauses were standard. These clauses say (in plain English), "we agree not to say anything bad about you and you agree not to say anything bad about us."

Without these clauses, companies lose the motivation to be kind to the suing employee. While it may seem that this is not a big deal, victims have something to lose by going public as well. All things being equal, you might be hesitant to hire someone who has sued before. In order to win a civil lawsuit you generally only have to prove that it was more likely than not that the harassment took place. Lots of companies do not wish to hire someone who has sued before for fear that they might sue again.

Right now, it's pretty standard for these non-disparagement clauses to say that the company will only confirm dates of employment and job titles, or in some cases, a carefully worded letter of recommendation is included, or the number of people who are authorized to give a reference is limited. This is done to protect the victim as well as the company. This protection goes away.

Cases Are Not Always Black and White

Sexual harassment cases often boil down to he said/she said situations. There are not a lot of witnesses. Sometimes a relationship that starts out as consensual ends up as sexual harassment when one person wants to end the relationship. Sometimes both employees have behaved in questionable ways at the office. It's often cheaper and easier to settle these cases than fight them, even if there's a good chance that the complainant wouldn't prevail in court.

Remember, in a court case, the company won't hold back in looking into the complainant. That may discourage people from coming forward.

A Huge Cost for Victims

Employment attorney Marc Alifanz says:

While I understand the objective behind the legislation, a huge part of the reason companies will agree to settle such cases at all is the confidentiality aspect. They are, in part, buying the avoidance of publicity of something that hasn't been proven. While there are certainly other factors to consider (cost of litigation, etc), I think this would have a chilling effect on settlements and put more plaintiffs to their proof. That would prolong the process and possibly end with them getting less, or nothing at all, actually hurting the people this legislator is trying to help. Bad idea.

In reducing the chances of a settlement and increasing the chance of heading into costly court cases, victims without huge pocketbooks or a rock solid case will have a difficult time paying for an attorney. This inadvertently protects big businesses against the individual.

Keep the Government Out of It

Employment attorney Eric Meyer (who brought this case to my attention) points out that in these settlements, both sides are represented by an attorney and that should be sufficient. He writes:

Look, I'm all for taking measures to reduce the risk of sexual harassment in the workplace. And this bill may be well intended, but it goes too far. When two sides agree to resolve a workplace dispute at arm's length -- especially when both sides are represented by counsel -- the government should stay out of their lane.

I'm inclined to agree.

***6) How Legal Agreements Can Silence Victims of Workplace Sexual Assault – The Atlantic, Oct 18, 2017

The law forbids sexual harassment and assault on the job. But it can also discourage employees from speaking up.

On October 5, *The New York Times* detailed the Hollywood producer Harvey Weinstein's alleged decades-long campaign of buying sexual harassment victims' silence through nondisclosure agreements and confidential, out-of-court settlements. These secret deals, according to the *Times*' reporting, buried stories of abuse, extending from Weinstein's alleged harassment of young assistants, temps, employees and executives at the Weinstein Company and Miramax to allegedly assaulting actresses who appeared in films he produced or distributed.

The revelations that led to Weinstein's downfall—he was fired from his namesake company and has resigned from its board—provoke a key question: Did the law help expose the abuse or push it deeper into the shadows?

There is no question that labor and employment law (not to mention criminal law) forbid sexual harassment and assault at work. But the law also plays an important role in protecting workers' right to speak out about harassment.

For example, under the National Labor Relations Act, employers are not allowed to prevent workers from talking about sexual harassment or even gender-inequity complaints at work or when they relate to work. The same is true for non-disparagement provisions in employment contracts: It's an unfair labor practice to have employees agree not to "publicly criticize, ridicule, disparage or defame" a company or its "directors, officers, shareholders, or employees." So while these provisions still persist in boilerplate form in most employment contracts, they can violate federal labor law if put to use.

Moreover, Title VII of the Civil Rights Act, the federal law that protects employees from sexual harassment and sex discrimination at work, invalidates settlement agreements that prohibit settling employees from filing charges with or assisting the Equal Employment Opportunity Commission (EEOC) in its investigation of any sexual-harassment charges. Because the EEOC acts not only on behalf of private parties but also "to vindicate the public interest" in preventing employment discrimination, such settlement terms would impede the enforcement of Title VII. As one court explains: "In many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation."

There are still obstacles to securing these rights, of course. When employers censor, threaten, and retaliate against employees that publicize abuse or take collective action to fight harassment, they often do so with impunity. For a range of reasons—including the dramatic decline in union membership in the private sector—this realm of labor and employment law is generally underenforced, meaning the task of enforcement often de facto falls to companies' human-resources departments. But internal compliance structures are notoriously weak: As is alleged to have happened at the Weinstein Company, those who enforce anti-harassment protections can even be complicit with the harassers. Workers whose employers outsource their HR departments—something that's increasingly common—are no doubt less likely to share sensitive allegations that could end their careers.

Confounding the problems of underenforcement is a network of legal rules that act at cross-purposes with laws encouraging transparency. These include rules governing how to interpret confidentiality requirements—specifically, those in non-disclosure agreements (NDAs), out-of-court settlements, and arbitration provisions—that can limit what employees are allowed to say about sexual harassment. (While Weinstein reportedly deployed NDAs and settlements to silence alleged victims or prevent supervising employees from speaking about reported misconduct, other employers—like Fox News, in response to claims made by Gretchen Carlson, and Sterling Jewelers, to name a couple recent high-profile stories—have reportedly invoked arbitration provisions requiring confidential adjudication of harassment claims.)

The first of these approaches is NDAs, which employers regularly include in employment agreements. While NDAs are unenforceable when used to silence workers' discussion of sexual harassment at work and in legal claims, they can and are enforced to silence employees' public speech. Employers originally used NDAs to secure control over employees' knowledge of trade secrets. At the end of the 19th century, courts expanded the scope of what NDAs could cover from only the most highly confidential pieces of information to a "general

prohibition on using a wide range of firm-specific information" and to publicly disclosing information about employer misconduct, short of actions that were illegal. State courts now generally enforce these provisions if they're deemed "reasonable," but they *can* be struck down as unenforceable if an employee's interest outweighs an employer's or they're found to go against public policy, such as when they would prevent enforcement of state criminal law.
But it's not as clear whether confidentiality agreements could be enforced when sexual harassment is at issue. Many courts apply balancing tests to determine whether employees can provide evidence in open court against, for example, sexual harassers when doing so would otherwise violate confidentiality agreements with employers. Without the benefit of legal counsel, and when, as may turn out to be the case with some of the Weinstein allegations, sexual harassment does not rise to the level of criminal sexual assault, workers are right to be uncertain about what NDAs prohibit. That, along with the accompanying risk of getting fired, can discourage employees from speaking up.

Out-of-court settlements represent a second obstacle to transparency. In the vast majority of cases, settlement agreements resolving sexual harassment claims in exchange for monetary payments require that victims not speak publicly about the settlement's terms or any details of the circumstances giving rise to the litigation. If, for example, women who have signed such agreements with Weinstein publicly disclose information covered by those agreements' confidentiality provisions, they face a substantial risk of being sued for breaching them. Such a breach could cost them millions. (Some lawyers and legal experts have started questioning whether drafting such settlement provisions is ethical when they concern conduct such as sexual harassment, because it may constitute "conduct that is prejudicial to the administration of justice." But there's currently no legal sanction on lawyers for doing so.) Further, while the EEOC can strike down confidentiality provisions that restrict employees' compliance with its investigations, there is no enforcement authority that, in the absence of a criminal case, can do so for agreements a firm or executive reaches with non-employees.
Given all this, workers who want to disclose confidential information protected by settlement agreements end up with limited options. However, if an alleged harasser publicly discloses or makes denials about the same information, then under confidentiality agreements that are mutually binding on both parties, the harasser could be sued for breach of contract and prevented from being able to in turn sue victims for the same. Herman Cain, for example, made himself vulnerable to a lawsuit when, during his presidential run in 2011, he derided women who went public with their sexual-harassment claims against him, rejected their allegations as false, and denied settlement amounts reached in litigation they brought. Further, when, as in the Weinstein case, the story is so explosive, suing alleged victims for a breach of confidentiality may be too costly in public-relations terms.

***7) Washington Post: How confidentiality agreements hurt — and help — victims of sexual harassment 11/2/2017

For years, a contract enforced the silence of several women who say Harvey Weinstein sexually harassed or assaulted them.
California State Sen. Connie Leyva said it's time to ban such confidentiality agreements, which she said allow wrongdoers to keep their positions of power and hurt more people.
In Weinstein's case, she said, "if there had been no secret settlement in the first case, maybe there wouldn't be an additional 60 women."
Levya said she plans to introduce a bill next year to prohibit nondisclosure agreements in financial settlements that arise from sexual harassment, assault and discrimination cases. The rule would apply to public and private employers, she said.
Across the country, agreements remain routine in these cases. Last year, California became the first state to change that, barring nondisclosure agreements in civil cases that could be prosecuted as felony sex crimes. New York lawmakers, meanwhile, recently introduced legislation that would void any employment contract that orders workers not to go public with harassment or discrimination claims.

The Weinstein revelations, Leyva said, inspired her to take the effort further.
"Whenever a woman is sexually harassed, I think she tends to blame herself," she said. "The secret settlement might look like a way out. But it doesn't help you move on, and it doesn't keep this person from harming other women."

Genie Harrison, an employment and sexual abuse lawyer in Los Angeles, said the reality is more complicated. Confidentiality agreements can lead to larger monetary awards for victims, who often seek time off from work and expensive therapy to heal, she said.
"I don't like the idea of forcing it upon the plaintiff that he or she can't have confidentiality provisions," said Harrison, who runs the Genie Harrison Law Firm.

Some of her clients want to make sure no one finds out about the harassment they endured, she added. Confidentiality agreements can also force employers to say that a former worker has moved on for a better opportunity — rather than because a colleague made unwanted advances toward them, Harrison said.

"I have represented women in high-profile positions, and they don't want a word breathed of it," she said. "They don't want it to affect their jobs or relationships."
Others, though, would take the right to share their experience over money.
"They want to be able to scream it at the top of the hills," Harrison said. "Those plaintiffs can decline to settle and take their case to trial."
Confidentiality agreements in a sexual harassment case typically require a plaintiff to stay quiet about what transpired, except to a spouse or a domestic partner. Subpoenas trump the contracts, though, as do interviews initiated by law enforcement officers.
Breaking these rules could risk a lawsuit, although lawyers argue that, in this climate, Weinstein accusers, in particular, probably are safe.
The fallen Hollywood mogul has offered his victims a public apology. "I cannot be more remorseful about the people I hurt and I plan to do right by all of them," Weinstein pledged in a statement.
However, most victims of harassment do not receive such acknowledgment. John Manly, founder of the Manly, Stewart & Finaldi law firm in Los Angeles, said some of his clients have come to regret signing confidentiality agreements — precisely because it keeps such incidents underground.
"What I tell clients when they come to me is: If you're here for money, you're making a mistake," he said. Healing, he argues, comes from talking about what happened, rather than burying it inside.
Manly, who represents victims of sexual assault, said nondisclosure contracts allow the cycle of abuse to continue.
"It makes them carry their perpetrator's secret, and the secret of the people who protected their perpetrator," he said. "We should not allow that."

*****8) Opinion piece in "Motto" – from the editors of Time Magazine – 11/28/2017 "How NDAs Help Some Victims Come Forward Against Abuse" By attorney Areva Martin**

When allegations of Harvey Weinstein's abhorrent behavior dating all the way back to the 1980s were revealed, many asked how he could have gotten away with it for so long. One answer was the Weinstein Company's reliance on non-disclosure agreements in its employment contracts, prohibiting staff from speaking out about anything that could harm the reputations of the company and its leaders.

In the weeks since Weinstein's rampant sexual harassment and abuse allegations were revealed in bombshell reports by the New York *Times* and the *New Yorker*, many have called for the elimination of NDAs and confidential settlements, claiming they harm victims by preventing them from speaking out and allow perpetrators to act again. Weinstein settled with at least eight women dating back decades — and went on to allegedly abuse more and more. (He admits to some claims and denies others, including all allegations of non-consensual sex.) The popular argument is that if the women Weinstein settled with hadn't been prohibited by NDAs from discussing his abuse, others might have been spared.

Lawmakers in New York, New Jersey and California are considering legislation that would limit the use of NDAs in cases of sexual misconduct. This is a mistake.

The impact of NDAs and secret settlements is complicated — and in many ways, ultimately benefits victims. I have represented dozens of women who have experienced workplace sexual harassment not unlike the claims shared by Weinstein's victims and victims of the others who have been accused in his wake. In many of those cases, my clients were grateful for a confidentiality agreement.

There are very real reasons why victims might prefer to keep their cases confidential. There's the fear of being retaliated against or ostracized by their employers, potential future employers and even entire industries. There's concern for how their friends and family might treat them differently, or might themselves suffer from unwanted attention. There's the completely understandable aversion to undergoing a humiliating and demoralizing public trial. The cold reality is that defendants come after victims hard, smearing their reputations by casting them in whatever negative light they can, often accusing them of promiscuity, gold-digging and flat-out lying. Private settlements protect victims from all the painful ugliness that comes with litigation in the public eye.

Then there's the matter of financial restitution — which has nothing to do with greed and everything to do with a victim's ability to continue living without her paycheck, since she's likely to have been forced out of her job, and to pursue any help she may need as she recovers. Bill O'Reilly allegedly paid $32 million dollars to settle a sexual harassment claim made by a Fox News analyst. Would he have settled at all, not to mention for that amount, without the promise that the story would remain confidential?

And the consequences of breaking an NDA, if the need to speak out overrules the need to honor the contract, is a calculated risk. Breaching such a contract can result in the loss of settlement money and gives the defendant the right to sue — but sometimes, speaking up comes out in the victim's favor.

Zelda Perkins, a former assistant to Weinstein, broke her NDA in an interview with the *Financial Times*last month, coming forward to share her story of being sexually harassed while working for the producer in 1990s. Weinstein has not retaliated against Perkins, and it's fair to assume he won't — doing so would only further damage his reputation.

Andrea Constand, whose sexual assault allegations against Bill Cosby brought the comedian to trial earlier this year, was sued by the comedian in February 2016 after she shared her story with law enforcement officials. Constand had signed an NDA settling the 2004 claim in 2006. But a federal judge ruled Cosby could not sue Constand for speaking to law enforcement investigators about the accusations (though he did say he could sue her for speaking to a news outlet and writing tweets).

There are some protections already in place for those who would speak out. States like California prohibit the use of confidentiality provisions if the underlying facts could be prosecuted as a felony sexual offense. Some states have similar laws that prohibit such agreements if they conceal facts related to a public hazard. And in Kalinauskas v. Wong, a 1997 sex discrimination case, the plaintiff was allowed to depose another woman who'd been harassed at the same company and signed a confidentiality agreement. The decision set a precedent used in future federal court decisions that confidential settlement agreements can be discoverable in litigation involving the same employer when similar facts are alleged.

Yes, NDAs prevent the public from knowing about predatory conduct that harms us and stop government officials from being able to perform critical law enforcement duties that are designed to protect us. And by concealing sexual harassment and abuse, we lose the deterrent effect that results when we shine a light on offenders.

But we cannot ignore the practical reality of the fear, intimidation and destruction that come with publicly exposing victims. By passing laws that ban all NDAs, we will marginalize rather than empower the people we're aiming to protect. Many of my clients would never have come forward if they knew the only option was full public disclosure of their experiences. And what matters most is that women and men who experience sexual harassment feel free to seek justice, whether public or not.

Areva Martin is Motto's Sexist Laws Explained columnist. She is an attorney, advocate, television host, legal and social issues commentator and author.

***9) Kansas City Star: Non-disclosure agreements don't silence the victims of sexual predators – 11/1/2017 BY MARY SANCHEZ *msanchez@kcstar.com*

When sexual harassers prey on victims, the American way has been to hush it up, to pressure the victim with legal agreements to never speak of it.

Non-disclosure agreements were Hollywood mogul Harvey Weinstein's modus operandi. And his behavior was deplorable.

For decades, he allegedly sexually attacked actors, often talented up-and-coming women whom he could threaten with torpedoing their careers. Now, they are speaking out, with some breaking the silence required by their previous financial settlements.

Weinstein's escapades have brought attention to the legal mechanism that shrouded so many of his misdeeds.

The assumption is that when victims sign on the dotted line of non-disclosure agreements and accept money, they essentially agree never to sound an alert, never to let another woman know what dangers might lurk in a particular workplace with a certain boss or the guy in the next cubicle.

It's a debilitating, isolating proposition that too often further damages the victim.

So the outcry to outright ban non-disclosure agreements in sexual assault cases is as understandable as it is unproductive.

In New York, New Jersey and California, legislators are mulling the introduction of such legislation. And the public is pressing for change, too.

Yet there is a real danger with either the courts or Congress legislating what people can agree to in a voluntarily negotiated settlement. It's not the right approach.

Non-disclosure agreements do not preclude a person from speaking to the U.S. Equal Employment Opportunity Commission or other government agencies.

Nor do they bar filing criminal charges or helping with that investigation.

Those who sign them are kept off of the talk-show circuit, but they're not banned from cooperating in investigations. And the EEOC can act, even if an agreement requires the person to withdraw a previously filed claim.

For the average person, that is important.

Language advising of these rules for such agreements is required by the EEOC and by the U.S. Securities and Exchange Commission for publicly traded companies.

Most women who experience harassment are not actors. They have no deep pockets, no pending movie deals or publicists to help them manage. Nor are most women involved in highly-publicized cases that compel more victims to speak out, as has happened with Weinstein.

Further, there is some cover for breaking a non-disclosure agreement if enough people are speaking out and if thresholds of what is considered public information are crossed. That's happening in Weinstein's case and could in others as well.

But to really move society forward, what's needed are strong mechanisms to encourage reporting of unwanted or inappropriate behavior. And businesses must be held accountable when they do not respond to such complaints.

Non-disclosure agreements do not preclude those outcomes.

As one woman, a sexual assault survivor pointed out, financial compensation would have helped her a great deal. The cost of her therapy alone is five figures. A single mother, she files it under "coping and self care," but knows that it depleted her savings.

The shaming of Weinstein is encouraging. It signals that a wider swath of America will no longer put up with such abuses of power. And certainly, a woman resolutely standing up against her perpetrator is a praiseworthy image of strength.

But we cannot expect all women (or all male victims) to be as vocal as Rose McGowan. She's boldly spoken out about an alleged rape by Weinstein and her reportedly $100,000 agreement with him. In part, her outreach has lead to the onslaught of other women coming forward _ more than 80 women _ with their own accounts of forced sexual encounters with the producer.

Many people will not want to be that public. And they shouldn't have to be for the law to protect them.

They want the harassment to stop. They want to ensure that it doesn't happen to another person. And they want the perpetrator punished.

All of that can still be accomplished. Even after signing a non-disclosure agreement.

***10) Forbes 10/26/2017 - The Harvey Weinstein Effect: The End Of Nondisclosure Agreements In Sexual Assault Cases?

Zelda Perkins, former assistant to Hollywood producer Harvey Weinstein, has broken a nondisclosure agreement (NDA) regarding her monetary settlement for sexual harassment during her employment at Miramax. Her speaking out has helped fuel a dialogue on whether confidentiality agreements should be permitted in these types of cases at all.

Perkins said Weinstein asked for a massage while in his underwear, wanted her in the room while he bathed and often tried to pull her into bed when she woke him up. She also alleged that Weinstein sexually assaulted a colleague and that both women settled claims because they felt they had no other options. *The New York Times*uncovered similar settlements between Weinstein and at least eight women, and this isn't the first time NDAs in sexual assault and harassment cases have been in the news lately. Fox News founder Roger Ailes and former host Bill O'Reilly have personally or through their company, 21st Century Fox, paid tens of millions of dollars for the silence of several women who claim to have been sexually harassed by them.

Details vary, but generally, NDAs are common features of settlements in these kinds of claims through which the aggrieved party agrees not to pursue litigation or discuss terms of the deal in exchange for a sum of money. If the NDA is violated, the other party may sue for injunctive relief, which would stop the release of information, and recover damages.

Why did Perkins speak out despite the NDA? In her own words, "Unless somebody does this there won't be a debate about how egregious these agreements are and the amount of duress that victims are put under. My entire world fell in because I thought the law was there to protect those who abided by it. I discovered that it had nothing to do with right and wrong and everything to do with money and power."

The Debate Ensues

As Perkins had hoped, a debate has indeed been ignited. Many people—both inside and outside legal circles—are asking the question: Should NDAs even be allowed in situations that involve sexual assault and harassment?

One California state representative has responded with a resounding "no." Sen. Connie Leyva (D-Chino) has announced her plan to introduce a bill that would ban confidentiality provisions such as NDAs in monetary settlements for sexual assault and harassment.

“Secret settlements in sexual assault and related cases can jeopardize the public—including other potential victims—and allow perpetrators to escape justice just because they have the money to pay the cost of the settlements,” Leyva said. “These secret settlements in workplace and other settings can ultimately endanger the public by hiding sexual predators from law enforcement and the public.”

Leyva's proclamation comes on the heels of a letter by women political leaders in California that calls the problem of sexual harassment "pervasive." The letter has nearly five pages of signatures—more than 140 women—who have “endured, or witnessed or worked with women who have experienced some form of dehumanizing behavior by men in our workplaces.”

It's important to note, however, that confidentiality agreements could sometimes benefit those who have suffered sexual assault and harassment as well, protecting them from unwanted negative attention or even retaliation. Moreover, it's possible that payout amounts could drop if silence is no longer one of the benefits of settling a claim. These concerns may urge a more nuanced approach to the use of NDAs in these types of claims rather than a complete ban.

What’s Next in the Weinstein Affair?

Weinstein, who has been fired by The Weinstein Company, could sue Perkins for breaking the NDA, though it’s unlikely he would do so in the current climate. Not only would it be difficult to find a sympathetic judge, but it would also run counter to his public pledge, "I cannot be more remorseful about the people I hurt and I plan to do right by all of them."

The settlement NDAs aren't the only confidentiality agreements that Weinstein has to worry about, either. As a condition of employment, Weinstein Co. employees are required to sign NDAs, and recently some staff members, who insist they didn't know they were "working for a serious sexual predator," published a letter asking to be let out of their NDAs so they can speak openly about their work atmosphere.

Besides that, the New York Attorney General is investigating the Weinstein Co. to determine whether it was in violation of any civil rights or anti-discrimination laws, and actress Dominque Huett has sued the company for $5 million, alleging it knew of Weinstein's inappropriate behavior and failed to take action.

What’s Next for NDAs in Sexual Assault and Harassment Claims?

While Leyva's potential bill is something to keep an eye on in California, contractual confidentiality provisions are governed by state law, which means each state would have to address the issue individually.

If state legislatures can't or don't want new laws on the subject, another avenue could be through court challenges to the enforcement of NDAs in these cases. Some states have "sunshine in litigation" laws that prohibit courts from enforcing confidentiality provisions in settlement agreements regarding "public hazards," and most states have more generalized laws that prohibit any agreement that conceals a public hazard.

Florida attorney Chloe J. Roberts believes NDAs in sexual harassment cases could be challenged under these laws. "In the employment context," she wrote at Law360, "sexual harassers are arguably individuals and workplace conditions that cause injury to the unknowing public and create a public hazard."

Whether this whole situation ends with new legislation or legal precedent or not, the Weinstein matter—and the courageous actions of Perkins and several other women who have come forward to share their experiences—has shone a Hollywood-sized spotlight on NDAs in sexual assault and harassment cases that will be difficult, if not impossible, to dim.

***11) CNN – Nov. 24 2017:

As more and more women come forward with sexual harassment allegations in the workplace, others are remaining silent -- not because they don't want to share their powerful stories, but simply because, legally, they can't.
These are the women who have signed non-disclosure agreements.
Instead, they are forced to watch as their peers courageously share instances of sexual harassment in the

workplace, all because these women sought to bring justice to their harassers, and to do so, they compromise with silence.
On Capitol Hill, they are particularly restricted, several people told CNN.

"It's hard," said one woman who signed an NDA after making a sexual harassment claim to the Congressional Office of Compliance. CNN is withholding her name because she is not supposed to speak about her settlement.

"I understand that I signed the agreement and so that's the way it is, but I do feel as if my voice is missing from the chorus of women speaking now," she said. "You do feel silenced and that's something I've had to grapple with."

'Nothing about it felt right': More than 50 people describe sexual harassment on Capitol Hill
This woman made her claim in the last five years, well before the reckoning that has brought down men in powerful positions in Hollywood, media and politics.
"The climate back then was different than right now. Back then it seemed untenable," she said. "It just seemed like the best option for me at the time. ... But the positive is that I'm able to put that part of my life behind me without constantly having to revisit it."
In hers and many cases, part of the strict confidentiality provisions of the complaint process on Capitol Hill preclude her from revealing any information, or speaking disparagingly about the congressman she accused.
The Congressional Accountability Act, set up by Congress in 1995, was set up in part to deal with charges of sexual harassment, as well as other labor disputes within Congress, and does include some confidentiality provisions.
According to the statute within the law, as an accuser takes their complaint through the process within the Office of Compliance, there is strict confidentiality in the counseling process, strict confidentiality in the second step, the mediation stage, and confidentiality is a bit looser in the hearing stage.
Sources within OOC tell CNN that employees are able to waive confidentiality during the first counseling stage. But once the parties enter mediation there is confidentiality in terms of the materials produced within the mediation.
The non-disclosure agreements that many sign, however, are something separate, outside of the Office of Compliance's process.
"The NDAs at the end, that is something else that parties come up with themselves," Susan Tsui Grundmann, executive director of the OOC, told CNN. "We don't demand it. It's something that binds them. We don't control it." However, this is often a gray area. The office of Rep. Jackie Speier, who has been one of the leaders on Capitol Hill to overhaul the process, says it is their understanding from the mediators, lawyers and accusers they've spoken with that there are discrepancies between the letter of the 1995 law and what victims have been subjected to.

Aides in Speier's office say they have been told by those who have been through the process that they must remain silent, and agree to the NDA in perpetuity, to progress and file a complaint.
"Taxpayers foot the bill and the harasser goes on with his or her life," Speier said during congressional hearings on the topic in November. "There is zero accountability and zero transparency. I might also add that during that process, the victim can't even communicate that they are going through an OOC process to their family, to their friends or to anyone in their religious community. So it's really no wonder that staffers do not seek this process at all."
This is one of the chief areas of focus for her legislation, proposed on Capitol Hill -- to spell out specifically that NDA agreements would be voluntary.
Congress paid out $17 million in settlements. Here's why we know so little about that money.
"It's extremely one-sided and heavy-handed, and basically imposes confidentiality and non-disclosure for life," said attorney Debra Katz, who has handled several Capitol Hill cases.
Contrast that to the accused, who can defend themselves, Katz said, referencing Michigan Democratic Rep. John Conyers, who denied wrongdoing after a BuzzFeed News report made public that he settled a wrongful dismissal complaint in 2015 after allegedly sexually harassing a staffer.
"I think that when you have an agreement that's so broad that says you cannot discuss -- with no carve out for accountants, advisers, therapists," Katz said. "People feel completely trapped and unable to move forward in their lives. NDAs don't allow them to heal. They can't talk about it and can't recover."
The women who often seek help from the OOC need paychecks and jobs to survive in Washington.
"And they make a calculation that it's not going to be good for their careers going forward to make a (public)

claim, and they'd rather get something than nothing," Katz said.
The roughly $27,000 settlement revealed by Buzzfeed against Conyers is an average settlement for Congressional cases, Katz said, even though they are very low compared to the private sector.
"People get very lowballed in Congress," she said. "It's ridiculously low, it's paltry. Someone with these claims in the private sector, this would be a highly monied claim."

CNN's Juana Summers contributed to this report.