

# Employment, Separation, and Settlement Agreements: Limitations on Confidentiality and Non-Disparagement Clauses



# FAQ

California laws prohibit certain terms in employment, separation, and settlement agreements between employers and employees, former employees, and job applicants. These laws aim to ensure that individuals are able to speak out about discrimination, harassment, and other types of unlawful conduct in the workplace. This document contains answers to common questions about these laws. This guidance only addresses the requirements of Government Code section 12964.5 and Code of Civil Procedure sections 1001 and 1002.5, and does not address other limitations.

## EMPLOYMENT AGREEMENTS

Sometimes employers ask employees to sign agreements as a condition of employment. There are restrictions on what these agreements may include. The following three questions address what is allowed and what is not allowed in employment agreements under Government Code section 12964.5.

### 1 | Can an employment agreement prohibit an employee from talking about discrimination, harassment, retaliation, or other unlawful acts at work?

No. If an employment agreement contains a “non-disparagement” clause, it cannot stop the employee from speaking about discrimination, harassment, retaliation, or other “unlawful acts” at work.<sup>1</sup> Unlawful acts include, but are not limited to, acts that an employee reasonably believes to be unlawful.<sup>2</sup> If the employment agreement contains a non-disparagement clause, it must state the following (or something substantially similar): “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.”<sup>3</sup> If a non-disparagement clause in an employment agreement violates these rules, the clause is unlawful and unenforceable, and the employer violates the Fair Employment and Housing Act.<sup>4</sup>

- *Example:* The following non-disparagement clause would be unlawful under Government Code section 12964.5: “Employee agrees that she will not make any statement, directly or indirectly, verbally or in writing, that would cause harm or embarrassment to the Company.”

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1 Gov. Code § 12964.5(a).  
2 Gov. Code § 12964.5(c).  
3 Gov. Code § 12964.5(b).  
4 Gov. Code § 12964.5(a).

### 2 | Can an employment agreement include language requiring a job applicant or employee to give up claims or rights in exchange for employment or an employment benefit?

No. An employment agreement cannot require an employee to give up their rights or their claims against the employer in exchange for employment, continuing employment, a raise, or a bonus.<sup>5</sup> Further, an employment agreement cannot require an employee to state that they do not have any injuries or claims against the employer.<sup>6</sup>

- *Example:* The following language in an employment agreement would be unlawful under Government Code section 12964.5: “Employee hereby acknowledges that continued employment is contingent upon a release of both current and future claims against the Company, known and unknown, including any claims under the California Fair Employment and Housing Act. By signing below, Employee acknowledges the above and agrees to release any such existing or future claims.”

In addition, an employment agreement cannot require an employee to release their right to file a court or administrative complaint, or to notify a state agency, law enforcement agency, or any other governmental entity about complaints against the employer.<sup>7</sup>

- *Example:* The following provision in an employment agreement would be unlawful under Government Code section 12964.5: “In the event Employee believes they have been subjected to discrimination, harassment, retaliation, or other unlawful conduct, Employee agrees that they shall not report any such alleged conduct to a state or federal administrative department or agency, including the California Civil Rights Department. In the event a state or federal administrative department or agency contacts Employee regarding alleged unlawful conduct against Employee or another individual employed by the Company, Employee agrees not to grant an interview with or provide testimony before any such department or agency.”

Any provision in an employment agreement that violates these rules is unlawful and unenforceable, and the employer violates the Fair Employment and Housing Act.<sup>8</sup>

### 3 | Can an employment agreement prohibit the employee from disclosing the employer’s “trade secrets” or other proprietary information?

Yes. An employment agreement may prohibit the employee from disclosing the employer’s trade secrets, proprietary information, or confidential information that is unrelated to unlawful acts in the workplace.<sup>9</sup>

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5 Gov. Code § 12964.5(a).

6 Gov. Code § 12964.5(a).

7 Gov. Code § 12964.5(a).

8 Gov. Code § 12964.5(a).

9 Gov. Code § 12964.5(f).

## SEPARATION AGREEMENTS

Sometimes when an employee is separating from employment (leaving a job), the employer and employee work out a separation agreement. These are also known as severance agreements. There are restrictions on what these agreements may include. The following five questions address what is allowed and not allowed in separation agreements under Government Code section 12964.5.

### 4 | Can a separation agreement prohibit a separating employee from talking about discrimination, harassment, retaliation, or other unlawful acts at work?

No. If a separation agreement contains a “non-disparagement” clause, it cannot stop the employee from speaking about discrimination, harassment, retaliation, or other “unlawful acts” at work.<sup>10</sup> Unlawful acts include, but are not limited to, acts that an employee reasonably believes to be unlawful.<sup>11</sup> If the separation agreement contains a non-disparagement clause, it must state the following (or something substantially similar): “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.”<sup>12</sup>

- *Example:* The following non-disparagement clause would be unlawful under Government Code section 12964.5: “Former Employee agrees that they will not make any statement, directly or indirectly, verbally or in writing, that would cause harm or embarrassment to the Company.”

If a non-disparagement clause in an separation agreement violates these rules, the clause is unlawful and unenforceable, and the employer violates the Fair Employment and Housing Act.<sup>13</sup>

### 5 | Can a separation agreement include a general release and waiver of claims in a separation agreement?

Yes. Assuming the release is otherwise lawful and valid, an employer may include a general release or waiver of claims related to an employee’s separation from employment.<sup>14</sup>

### 6 | Can an employer require a separating employee to sign a separation agreement on the same day it is offered?

No. An employer offering a separation agreement to an employee must both (1) notify the employee of their right to consult an attorney about the agreement and (2) provide the employee at least five business days to do so.<sup>15</sup>

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10 Gov. Code § 12964.5(b).

11 Gov. Code § 12964.5(c).

12 Gov. Code § 12964.5(b).

13 Gov. Code § 12964.5(b).

14 Gov. Code § 12964.5(b).

15 Gov. Code § 12964.5(b).

## 7 | Can a separation agreement prohibit the employee from disclosing the employer’s “trade secrets” or other proprietary information?

Yes. A separation agreement may prohibit the former employee from disclosing the employer’s trade secrets, proprietary information, or confidential information that is unrelated to unlawful acts in the workplace.<sup>16</sup>

## 8 | Can a separation agreement prohibit the employer and employee from disclosing the amount paid by the employer to the employee?

Yes. A separation agreement may prohibit disclosure of the amount paid in a severance agreement.<sup>17</sup>

## SETTLEMENT AGREEMENTS

When someone files a complaint with CRD, another agency, or in court against an employer, or notifies the employer that they have a complaint prior to filing it, the law restricts which terms can be included in an agreement to settle the complaint. The following five questions address what is allowed and what is not allowed under California Code of Civil Procedure sections 1001 and 1002.5.

## 9 | Can a settlement agreement prohibit the employee or job applicant from disclosing factual information related to unlawful discrimination and harassment?

No. A settlement agreement that resolves a CRD or other administrative complaint or a court case cannot restrict or prevent the complainant/plaintiff from disclosing factual information related to any of the following:

- An act of sexual assault;
- An act of workplace harassment or discrimination based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, veteran or military status, or any other characteristic(s) protected by the Fair Employment and Housing Act;
- Failure to prevent an act of workplace harassment or discrimination based on any characteristic(s) protected by the Fair Employment and Housing Act; or
- An act of retaliation against a person for reporting or opposing harassment or discrimination based on any characteristic(s) protected by the Fair Employment and Housing Act.<sup>18</sup>

Any settlement agreement that restricts or prohibits any of these disclosures is unlawful and unenforceable.<sup>19</sup>

<sup>16</sup> Gov. Code § 12964.5(f).

<sup>17</sup> Gov. Code § 12964.5(e).

<sup>18</sup> Code Civ. Pro. § 1001(a).

<sup>19</sup> Code Civ. Pro. § 1001(d).

## 10 | Can a settlement agreement prohibit a party from disclosing the amount of the settlement?

Yes. A settlement agreement may prohibit disclosure of the amount paid in a settlement agreement.<sup>20</sup>

## 11 | Can a settlement agreement prohibit a party from disclosing the identity of the complainant or plaintiff?

Yes. A settlement agreement may prohibit disclosure of the identity of the complainant/plaintiff as well as facts that could lead to the identification of that person.<sup>21</sup> However, that is lawful only if (1) it is at the request of the complainant/plaintiff and (2) a government agency or public official is not a party to the settlement.<sup>22</sup>

## 12 | Can a settlement agreement include a “no-rehire clause”?

Usually, no. According to California Code of Civil Procedure section 1002.5, clauses in settlement agreements that prohibit, prevent, or restrict an individual from obtaining future employment with an employer against whom they have asserted a claim are unlawful and unenforceable, unless either of the following apply:

- The employer has determined in good faith that the individual engaged in sexual harassment or sexual assault; or
- A legitimate, non-discriminatory reason exists for terminating and refusing to rehire the individual.<sup>23</sup>

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**If you think you have been a victim of employment discrimination, please contact CRD.**

## TO FILE A COMPLAINT

### Civil Rights Department

calcivilrights.ca.gov

Toll Free: 800.884.1684

TTY: 800.700.2320

Have a disability that requires a reasonable accommodation?  
CRD can assist you with your complaint.

For translations of this guidance, visit: [www.calcivilrights.ca.gov/posters/employment](http://www.calcivilrights.ca.gov/posters/employment)

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<sup>20</sup> Code Civ. Pro. § 1001(e).

<sup>21</sup> Code Civ. Pro. § 1001(e).

<sup>22</sup> Code Civ. Pro. § 1001(c).

<sup>23</sup> Code Civ. Pro. § 1002.5.