

New Jersey Prohibits Nondisclosure Agreements and Waivers of Rights in Connection with Discrimination, Retaliation or Harassment Claims

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In response to the increased attention on sexual harassment claims and settlements, New Jersey has enacted new legislation (New Jersey Senate Bill 121, which amends the New Jersey Law Against Discrimination (“NJLAD”)) that prohibits certain nondisclosure agreements in employment contracts and settlement agreements. The prohibition extends to secrecy requirements that attempt to conceal “the details relating to a discrimination, retaliation, or harassment claim.”

The law’s prohibitions are prospective and apply to all agreements entered into, renewed, modified, and amended after March 18, 2019.

New Jersey is the third state to pass legislation curtailing the use of nondisclosure agreements. Unlike New York and California, however, this law is not limited to sexual harassment, assault, or sex discrimination claims. Rather, it extends to attempt to prohibit disclosure of the details of any and all discrimination, retaliation, or harassment complaints in employment agreements and settlement agreements. The “details” as to which nondisclosure is prohibited likely include not only the circumstances underlying a “claim,” but also the terms of any settlement or separation agreement itself.

This amendment to NJLAD also requires that settlement agreements resolving a discrimination, retaliation or harassment claim contain the following language in bold text and in a “prominent” location in such agreements:

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

Therefore, if an employee publicly reveals details of a claim that identify an employer, an employee cannot enforce the nondisclosure agreement against the employer. ¹

New Jersey has two exceptions to this prohibition on nondisclosure provisions. First, this amendment does not preclude noncompetition agreements. Second, nondisclosure agreements that prohibit disclosure of proprietary information—nonpublic trade secrets, business plans, and customer information—are also permissible.

The statute also prohibits the waiver of any substantive or procedural right or remedy relating to a claim of discrimination, retaliation or harassment in an employment contract. As written, the statute does not define what is a “substantive or procedural right or remedy.” But, it appears that mandatory arbitration agreements, jury waivers or attempts to shorten NJLAD’s two-year statute of limitations will be deemed to be unenforceable. Notably, the non-waiver of rights provision does not apply to the terms of a collective bargaining agreement.

¹ This is a curious provision in that it is generally the employer that wants the circumstances underlying an employment-related claim to be kept confidential. Also, since the point of the amendment is the prohibition of nondisclosure agreements, it is unclear why this language has as its premise the employer’s and employee’s agreement to maintain the confidentiality of a settlement.

If an employer attempts to enforce a nondisclosure agreement or a waiver of rights or remedies, it may be liable for the employee's attorneys' fees and costs. Additionally, the statute provides for a private right of action, and employees may file suit in New Jersey state court and attempt to recover common law remedies as well as attorneys' fees. Furthermore, retaliation against an employee who declines to enter into an agreement that contains provisions that are made unlawful by this amendment is specifically prohibited.

Employers with employees in New Jersey should revisit their employment contracts and settlement/separation agreements to ensure that employees are not being asked to sign documents that contain provisions that have been made unlawful by this amendment to NJLAD.

If you have any questions regarding the topics discussed in this article, please contact **Jonathan A. Wexler** at +1 (212) 407 7732, **Kathryn A. Rosenbaum** at +1 (312) 609 7973 or any Vedder Price attorney with whom you have worked.

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