



New Jersey Bars Common Workplace Contract And Settlement Terms

Insights

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Employers in New Jersey will need to immediately adjust their employment contracts and settlement agreements to come into compliance with a sweeping new law that just took effect. New Jersey's governor just signed Senate Bill 121, which limits employment contracts and settlement agreements in two major ways:

- It renders unenforceable any nondisclosure clause that would conceal any details relating to claims of discrimination, retaliation, or harassment; and
- It prohibits any agreement that waives any substantive or procedural rights or remedy in cases of discrimination, retaliation, or harassment— such as the right to a court and jury trial – effectively barring mandatory workplace arbitration provisions.

In response to critics' complaints that mandatory arbitration and nondisclosure agreements relating to sexual harassment claims silence workplace victims of sexual assault and harassment, several other states have already banned these commonplace agreements. Under its new law, however, New Jersey goes further than any other state, banning such agreements with respect not just to harassment but to *all* claims of workplace discrimination and retaliation. Here's an overview:

Effective Date Is Already Here

The new law became effective March 18, 2019, when Governor Phil Murphy signed it. The law applies to all contracts and agreements entered into, renewed, modified, or amended on or after March 18. If there is any good news to report, it's that the new law does not apply to agreements in place prior to March 18.

Ban On Mandatory Arbitration And Other Waivers Of Rights

Under the new law, any provision in an employment contract that waives substantive or procedural rights or remedies relating to claims of discrimination, retaliation, or harassment (Waiver Provision) is now deemed to violate public policy and is unenforceable. No right or remedy under the New Jersey Law Against Discrimination (NJLAD), any other statute, or any case law may be waived prospectively.

This expansive prohibition effectively voids arbitration agreements relating to claims of discrimination, harassment, or retaliation. It also precludes such other common provisions as jury trial waivers, damages caps, and shortened statutes of limitations (the last already prohibited by the

that waivers, damages caps, and shortened statutes of limitations (the last already prohibited by the New Jersey Supreme Court with respect to NJLAD claims). The law does not apply to collective bargaining agreements.

It remains to be seen whether the arbitration prohibition will be struck down on preemption grounds under the Federal Arbitration Act (FAA). After all, Congress enacted the FAA to combat the longstanding judicial hostility toward arbitration agreements and to encourage the use of arbitration to avoid costly litigation. In fact, the FAA requires courts to place arbitration agreements on equal footing with other contracts and to enforce them according to their terms, and this new law may very well violate this legal standard. There seems little doubt that the law will soon be challenged in court, but the outcome of any such litigation cannot be predicted.

Ban On Nondisclosure Agreements

The ban on nondisclosure agreements has an interesting twist. Under the new law, any provision in an employment contract or settlement agreement that has the purpose or effect of concealing the details relating to claims for discrimination, retaliation, or harassment (Non-Disclosure Provision) is deemed to violate public policy and is unenforceable against an employee or former employee. However, it is enforceable against the employer. If the employee publicly reveals enough detail to render the employer “reasonably identifiable,” then the Nondisclosure Provision will also be unenforceable against the employer.

The law expressly provides that it does not prohibit an employer from requiring an employee to sign a non-compete agreement or an agreement not to disclose proprietary information. However, such nondisclosure agreements must be limited to non-public trade secrets and business plan and customer information.

Notice Requirement For Settlement Agreements

The law requires every settlement agreement resolving a claim of workplace discrimination, retaliation, or harassment to include a bold, prominently placed notice indicating that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision is unenforceable against the employer if the employee publicly reveals sufficient details of the claim that the employer is reasonably identifiable.

Penalties for Attempting to Enforce Agreements: Miscellaneous Provisions

The new law also says that any person who enforces or attempts to enforce a Waiver Provision (such as an arbitration provision) or a Nondisclosure Provision is liable for the employee’s reasonable attorneys’ fees and costs.

Further, the law prohibits retaliation against anyone who does not enter into an agreement that contains a Waiver or Nondisclosure Provision. Examples of prohibited retaliation include failure to hire, discharge, suspension, demotion, and discrimination in the terms, conditions, or privileges of employment. This is a non-exhaustive list.

A claim of retaliation may be filed in court within two years after the alleged mistreatment. In addition to statutory remedies, all common law tort remedies – as well as attorneys’ fees and costs – are available to present or former employees who prevail on a retaliation claim.

What Should Employers Do Now?

It is commonplace for employers to enter into workplace agreements containing mandatory arbitration and confidentiality provisions. For this reason, you should carefully review and evaluate all of your form agreements – such as employment agreements, arbitration agreements, severance agreements, confidentiality agreements, and non-disclosure agreements – to determine if they contain the now-prohibited Waiver or Non-Disclosure Provisions.

While such provisions continue to be enforceable for agreements entered into before March 18, 2019, they are not enforceable for any agreements entered into, modified, amended, or renewed on or after that date. In addition, going forward, you should ensure that you take no adverse action against any prospective, current, or former employee who refuses to sign an agreement with a Waiver or Non-Disclosure Provision.

Finally, the new law is yet another reason to ensure your workplace anti-harassment and nondiscrimination policies are robust, clear, up-to-date, and specifically prohibit retaliation. You should train your managers regarding their obligations to prevent harassment, discrimination, and retaliation and how to handle complaints. HR professionals and managers must also be trained and ready.

For more information, or if you have any questions about complying with this new law, contact your Fisher Phillips attorney or any attorney in the [New Jersey](#) office.

This Legal Alert provides information about a specific state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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