

New Jersey Prohibits Enforcement of Non-Disclosure Provisions in Settlement Agreements, Other Contracts

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A sweeping amendment to the New Jersey Law Against Discrimination (LAD) bars enforcement of non-disclosure provisions in settlement agreements and employment contracts, and prohibits the waiver of substantive and procedural rights under the statute. The amendment applies to all contracts and agreements entered into, renewed, modified, or amended on or after the effective date, March 18, 2019.

Highlights

The amendment has the practical effect of prohibiting typical confidentiality provisions that accompany settlements of LAD claims. The amendment provides that non-disclosure provisions in employment contracts and settlement agreements are against public policy, and deemed to be unenforceable against a current or former employee if they have “the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment.”

Under the amendment, every settlement agreement resolving a LAD discrimination, retaliation, or harassment claim by an employee against an employer must include a bold and prominently placed notice stating that *“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.”*

In addition to the practical impact of the amended LAD regarding confidentiality of settlement terms, employers should determine whether existing contracts and agreements contain waivers of procedural and substantive rights guaranteed by LAD. The amendment provides that “[a] provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.” The amendment further provides that “[n]o right or remedy under the [LAD] or any other statute or case law shall be prospectively waived.”

This language likely will lead to litigation over the effectiveness of jury-waiver provisions and agreements to arbitrate LAD claims against an employer on or after the effective date of the amendment. While what impact the amendment will have on arbitration is unclear, legal challenge is expected as the amendment appears to conflict with the Federal Arbitration Act, which preempts state law that prohibits the use of arbitration agreements. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”).

In addition, if an employer seeks to enforce a provision prohibited by the new law,



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aggrieved employees may file suit in New Jersey state court to recover common law tort remedies, in addition to reasonable attorneys' fees and costs associated with the filing.

Given the broad language in the amendment and its effect on all types of agreements relating to employment (even severance agreements after assertion of LAD claims), it is important that employers seek guidance regarding modifying settlement agreements when resolving LAD claims with current or former employees, and reviewing employment contracts and other agreements that may conflict with the new law.

The Legislature introduced the amendment at the height of the #MeToo movement, after news reports revealed that settlement agreements of high-profile cases involving well-known entertainment and media personalities accused of sexual harassment included non-disclosure provisions. The amendment's supporters in the Legislature have praised the amendment for allowing purported victims of unlawful conduct to discuss their claims publicly. Critics note that the promise of confidentiality that incentivized many employers and employees to resolve discrimination, harassment, or retaliation claims through settlement has largely been eliminated by this amendment.

Jackson Lewis attorneys are available to answer questions regarding the LAD and to assist employers in achieving compliance with its requirements.

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