

New Jersey Bans Confidentiality Clauses in Employment Agreements and Settlements AND Restricts Waiver of Discrimination Law

In what has become a regular pattern of passing sweeping new employment laws in New Jersey, on March 18, 2019, Governor Murphy signed into law Senate Bill 121. This new law dramatically impacts severance and settlement agreements in employment terminations and lawsuits, by allowing employees to violate any confidentiality clause in those agreements without penalty. In addition, this new law makes unenforceable any waiver in an employment contract of any employee right or remedy relating to a claim of harassment, discrimination or retaliation, setting it up on a possible collision course with federal law over mandatory arbitration agreements.

First, the new law makes confidentiality in any employment agreement something employees can void, at their option. As many employers know, when employees are terminated and offered severance pay, or when claims or lawsuits are settled, employers regularly ask that, in exchange for the payment, the severance or settlement agreement be kept confidential. Those confidentiality clauses provide employers with some certainty that employees will not discuss the terms of their agreement, including primarily the amount of severance or compensation being paid, other than with their spouses or tax advisors. Often, such a confidentiality clause is an important selling point to employers, who are concerned that other employees may bring claims or seek severance if they learn of the severance or settlement paid to other employees.

As a result of the #MeToo movement, however, pressure has grown to allow those claiming discrimination or harassment to speak publicly. The first law that sought to deter confidentiality clauses was in connection with the federal Tax overhaul in 2017, which provided that settlement payments for sexual harassment lawsuits are not deductible business expenses if those settlement agreements contained a confidentiality clause.

This new New Jersey law goes further. Under this new law, effective immediately, any confidentiality clause in a severance agreement or settlement agreement (or any employment agreement) “which has the purpose or effect of concealing the details related to claim of discrimination, retaliation or harassment is now “voidable” at the option of the employee. That is, despite the parties agreeing to confidentiality in any agreement, the employee may violate that clause, and the clause becomes unenforceable against the employee, at least presumably, but based on the poor drafting of the statute, not necessarily limited to discussions of the claims of harassment, discrimination or retaliation. The only limitation is that, if the employee violates the confidentiality clause and reveals sufficient information to identify who the employer was, then the employer is free to ignore the confidentiality provision as well. The bottom line is that in any case or severance arrangement where harassment, discrimination or retaliation are involved, employees may choose not to honor that clause. The only exceptions to this law are that it only applies to agreements entered into on or after March 18, 2019, so it does not apply to existing agreements. The law also clarifies that it does not prohibit non-competition agreements and agreements prohibiting the disclosure of trade secrets or similar proprietary information.

The consequences of this new law are many. In almost any severance or settlement agreement, regardless of whether claims of harassment, discrimination or retaliation have been made, or indeed any claims, employers understandably ask for a release or waiver of all possible claims, including claims

of harassment, discrimination and retaliation. Thus, this new law will apply to all those agreements, even if the primary intent was not to get a release of those types of claims, and the requested confidentiality was not targeted at any such claims. In addition, employers are also now required to include a bold and prominent disclaimer, in the severance or settlement agreement, advising the employee that if he/she discloses the information sought to be kept secret, then the employer may disclose it as well. In essence, employees will be notified of their right to breach the confidentiality clause, as part of each agreement. Lastly, employers now must be concerned over the amount of any severance becoming public knowledge and need to take that into account before making a severance payment decision.

Another area where the law may have significant impact is non-disparagement provisions in agreements with employees. Non-disparagement clauses are often entered into by employees and their employers to provide one or both parties peace of mind that the other will not seek to disparage it and harm its reputation. These agreements, which are very common, are typically designed to prevent a departing employee from going out in the marketplace and attempting to harm his or her former employer’s reputation by, for example, criticizing the organization or its products. However, because such a prohibition on disparagement could have the effect of preventing a former employee from publicly making damaging statements related to harassment, discrimination or retaliation, such clauses may be unenforceable against employees.

The second aspect of the new law signed by Governor Murphy relates to employment agreements which include any waivers of rights under the discrimination laws. The new law provides that no “substantive or procedural” rights or remedies provided by New Jersey employment laws can be waived in an employment agreement. The only exception is for union collective bargaining agreements, which are exempt from this new law. The exact meaning of this language is unclear. Clearly, it has been well recognized that employers cannot force employees to give up rights to sue, or for money damages or other remedies provided under the law. But employers - for example, in arbitration agreements - have required employees to give up a right to a jury trial or to file a claim in court, which this new law seems to prohibit. If so, that might potentially run afoul of the Federal Arbitration Act, the federal law protecting arbitration agreements in the workplace. For now, employers should consult with counsel before drafting or enforcing mandatory arbitration agreements as this law and its full impact will be ultimately decided in court.

If you have questions about whether and how your business will be affected by the this new law, please contact any member of [Archer & Greiner’s Labor and Employment Group](#) in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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