

Alert | Labor & Employment



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New Jersey Passes Law Eroding Bedrock of Settlement – Confidentiality Provisions Relating to Discrimination, Retaliation, and Harassment Claims No Longer Enforceable

On March 18, 2019, landmark legislation was passed that could dramatically impact the resolution of discrimination, retaliation, and harassment claims under the New Jersey Law Against Discrimination (“NJLAD”), and “other” statutes – presently undefined. Employers: pay close attention. The bill takes effect ***immediately*** and applies “to all contracts and agreements entered into, renewed, modified, or amended on or after [March 18].” The legislation addresses – and substantially impacts – employment contracts *and* settlement agreements. While ostensibly intended to prevent victims of unlawful harassment from forced secrecy about their experiences – potentially perpetuating the alleged harm – the desirability of settlement rests strongly on the foundation of confidentiality. Without it, the motivation to resolve these types of claims informally may diminish considerably.

Settlement Agreements May Not Conceal Claim “Details”

Pursuant to the March 18 amendment and in a radical departure from the well-established status quo, settlement agreements may no longer contain any provision that “has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation or harassment.” To the extent such provisions remain in a settlement agreement, they are unenforceable against the employee. If the employee chooses

to reveal claim specifics in a way that the culpable employer is “reasonably identifiable,” the employer may likewise reveal formerly confidential information. In that case, the non-disclosure provision would also be unenforceable against the employer.

To achieve the law’s stated goal, applicable settlement agreements must “include a bold, prominently placed notice that although the parties may have agreed to keep the ***settlement and underlying facts*** confidential,” this provision is unenforceable against the employer if the employee decides to reveal settlement and claim details in such a way that the employer is “reasonably identifiable.” (Emphasis added). While not expressly stated, this provision appears to release employers from an obligation of confidentiality if the employee has chosen to disclose details relating to the claim.

Stated plainly, New Jersey employers who settle discrimination, retaliation, and harassment claims now do so with the knowledge that the “details” may be publicly disclosed. The potential impact is difficult to overstate given the longstanding importance of secrecy as a settlement driver. And while “details” are undefined, they may very well include the settlement amount.

No Waivers of Rights or Remedies Relating to Claims of Discrimination, Retaliation, or Harassment Permitted in Most Employment Contracts

In addition to the provisions relating to settlement agreements, the legislation also has broad application to employment contracts. The new law prohibits employers from including provisions in “**any** employment contract” that waive substantive or procedural rights or remedies relating to a claim of discrimination, retaliation, or harassment under the NJLAD or “any other statute or case law.” (Emphasis added). This sweeping language appears to prohibit as against public policy any employment agreement that requires arbitration of discrimination, retaliation, or harassment claims. The phrase “any employment contract” is not defined, and only time will tell the full extent of its breadth here. Only collective bargaining agreements are expressly excluded from the legislation’s reach.

Retaliation Prohibited and Attorney’s Fees Awarded to “Prevailing Plaintiff”

As one might expect, the legislation prohibits retaliation against any employee who refuses to enter into an agreement or contract that contains a provision that violates the act. “Retaliatory action” is broadly defined as including, but not limited to, “failure to hire, discharge, suspension, demotion, discrimination in the terms, conditions or privileges of employment, or other adverse action.” Finally, an employee claiming to be aggrieved by a violation of this act may seek “all remedies available in common law tort actions,” as well as “reasonable attorney fees and costs.”

What Should Employers Do Now?

Employers should immediately review their form or template employment contracts, particularly those associated with onboarding, so they can address contractual provisions affected by this legislation’s broad scope. Employers facing active litigation must, in evaluating settlement strategy, bear in mind that the confidentiality assurances once taken for granted may no longer apply.

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