

Alert

New Jersey Passes Law Making NDAs in Settlements of Discrimination, Retaliation and Harassment Claims Unenforceable

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On March 18, 2019, New Jersey passed a law rendering unenforceable certain provisions in employment contracts and settlement agreements that are “entered into, renewed, modified, or amended” on or after March 18, 2019. First, provisions in employment contracts that waive prospectively any substantive or procedural right or remedy relating to claims of harassment, retaliation or discrimination are unenforceable. For example, under the law, jury trial waivers with respect to harassment, retaliation or discrimination claims in employment agreements will not be enforceable.

Second, the law renders nondisclosure provisions in agreements that have “the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment” unenforceable against employees and former employees. If, however, the employee publicly reveals enough details about the claim that the employer is reasonably identifiable, then a nondisclosure provision is also unenforceable against the employer. Nondisclosure provisions will therefore only work to prevent the employer from disclosing the details of a claim, unless the employee publicly discusses the matter with enough detail that the employer is reasonably identifiable. In that case, the nondisclosure provision will have no effect. In every settlement agreement resolving an employee’s discrimination, retaliation or harassment claim, the employer must include a bold, prominently placed notice that states 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.” The law does not prohibit employers from requiring their employees to sign non-competition provisions or provisions that protect proprietary and other confidential information.

The law also prohibits employers from retaliating against an employee who refuses to enter into an agreement containing a provision that is unenforceable under the new law. If an employer attempts to enforce such a provision, then the employer will be liable for the employee’s attorneys’ fees and costs.

New Jersey’s law is far more stringent than New York’s recent law limiting nondisclosure provisions. New York’s law prohibits nondisclosure provisions in settlements of sexual harassment claims, except when confidentiality is the claimant’s preference. The claimant has 21 days to consider whether confidentiality is the claimant’s preference. If it is, then, after the 21-day period, the parties must memorialize the claimant’s preference in a written agreement, which the claimant can revoke within seven days.¹ By contrast, New Jersey’s law applies to all forms of harassment, discrimination and retaliation prohibited by New Jersey law and deems all non-disclosure agreements with respect to such claims unenforceable.

¹ See CPLR 5003-B; see also “How Employers Are Responding to New York’s New Anti-Sexual Harassment Laws,” *New York Law Journal*, Nov. 19, 2018, available [here](#); see also “New York State and City to Mandate Anti-Sexual Harassment Training for Private Employers,” *SRZ Alert*, April 12, 2018, available [here](#).

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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