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New Jersey Becomes First State to Ban Employers From Using Arbitration, Nondisclosure and Confidential Settlement Agreements for All Claims of Discrimination, Harassment or Retaliation

In the aftermath of the #MeToo movement, a number of states across the country have enacted or considered legislation to ensure that sexual harassment victims can publicly share their experiences. To effectuate this goal, lawmakers have sought to limit employers' ability to use nondisclosure agreements and/or mandatory arbitration agreements to prevent employees' claims from proceeding to court or otherwise seeing the light of day. On March 18, New Jersey upped the ante when Governor Murphy signed into law the most comprehensive legislation combating employers' use of nondisclosure and arbitration agreements to date. The law encompasses claims not only of sexual harassment (as is the case in several states), but also other types of unlawful harassment, discrimination and retaliation. We previously highlighted an earlier version of the law here. The new law contains three key provisions, each of which materially affects workplace agreements:

1. The new law deems unenforceable any provision in an employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation or harassment.
2. The new law makes any nondisclosure provision in an employment contract or settlement agreement that has the "purpose or effect" of concealing the details relating to a claim of discrimination, retaliation or harassment unenforceable *against the employee*. Employers, however, are bound by such provisions unless and until the employee first chooses to reveal publicly the details of his or her claim such that the employer may be reasonably identified.
3. The new law requires settlement agreements resolving discrimination, harassment or retaliation claims to include a bold, prominently placed notice indicating that although the parties may have agreed to keep the settlement and the 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 also prohibits employers from requiring a prospective waiver of employee rights under the New Jersey Law Against Discrimination or any other statute or case law. Employees may bring a private right of action against their employer and are entitled to attorney fees for any violations. Retaliation related to an employee's refusal to sign prohibited agreements is unlawful under the law. The law makes clear that it is not intended to prohibit employers from entering into noncompetition agreements with employees or agreements protecting the employer's proprietary information, such as nonpublic trade secrets, business plans and customer information.

The key provisions of the law create uncertainty. For example, while it is clear that nondisclosure provisions prohibiting disclosure of the *underlying facts* of the employee's claim are not enforceable under the law, it is not clear whether the employer and the employee may agree to keep the *settlement amount* confidential. Requiring employers to disclose settlement amounts may discourage them from resolving claims for fear of setting a public precedent for other employees. Disclosure may not only discourage settlements, it may also reduce the amounts employers are willing to pay, because of the lost value of confidentiality. Moreover, disputes may arise over whether the term "employment contract" includes severance and separation agreements. Severance and separation agreements, which usually contain general releases of all actual and potential claims, may arise without any underlying allegation of discrimination or harassment. The nondisclosure provision in

these agreements primarily ensures that severance and other benefits are not publicly disclosed. Arguably, the new law was not designed to address confidentiality in severance and separation agreements, but the scope of the statute is open to debate. Ultimately, the courts may have to make that determination.

In July 2018, New York enacted similar, albeit narrower, legislation (discussed here). That law prohibits employers from including in any settlement agreement or other resolution of a claim involving sexual harassment any provision that would prevent the disclosure of the underlying facts and circumstances. The New York law, however, allows an employee to agree to a nondisclosure provision, provided the employee receives at least 21 days to consider the provision before accepting it and another seven days to revoke his or her acceptance. New York's law also prohibits any written contract from including a clause requiring the parties to submit to mandatory arbitration to resolve any allegation or claim of unlawful sexual harassment.

As discussed above, New Jersey's law is much broader because it extends beyond claims of sexual harassment to other claims of discrimination, harassment and retaliation. And, unlike New York's law, the New Jersey statute has no exception that allows employees to accept nondisclosure provisions under certain conditions. New Jersey's law not only prohibits arbitration agreements, but also waivers of any substantive or procedural right, which would include, for example, the right to a jury trial.

Insofar as the New York and New Jersey statutes prohibit arbitration agreements, they may be subject to attack under the Federal Arbitration Act, which ensures the enforceability of arbitration agreements in contracts involving interstate commerce. By its terms, the Federal Arbitration Act does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The U.S. Supreme Court has interpreted this exception to apply to "only contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Thus, to the extent the New York and New Jersey statutes prohibit arbitration agreements in employment contracts for workers not engaged in transportation, these state laws may be preempted by the Federal Arbitration Act.

The law takes effect immediately and applies to all employment contracts and agreements entered into, renewed, modified or amended after the effective date. New Jersey employers must ensure that at a minimum, any future settlement, nondisclosure and arbitration agreements comply with this law. Employers must also consider the effect of this law when settling current or future discrimination, harassment or retaliation claims, including the potential for employees to take the position that they may legally disclose the settlement amount paid, as well as the underlying allegations. Although New Jersey is the latest state to enact this type of legislation, employers throughout the country should stay alert as similar legislation sweeps the country.

Authors



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com



Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com