

NEW JERSEY'S LATEST #METOO LAW GOES BEYOND SEXUAL HARASSMENT

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Labor, Employment and Workplace Safety Alert

New Jersey recently joined a growing number of states limiting the use of non-disclosure agreements when settling claims of sexual harassment - and then took it one step further. On March 18, 2019, Governor Phil Murphy signed into law highly debated legislation prohibiting waivers of discrimination claims in employment agreements and rendering unenforceable by the employer certain non-disclosure provisions in employment and/or settlement agreements concerning the details relating to claims of discrimination.[1] The law goes into effect immediately.

While several other states have also enacted legislation limiting the use of waivers or non-disclosure provisions relating to claims of sexual harassment, New Jersey's new law applies to all claims of discrimination, harassment, or retaliation.

The new law prohibits provisions in employment contracts that waive "any substantive or procedural right" relating to any claim of discrimination, harassment, and retaliation. Further, no right or remedy available under New Jersey's Law Against Discrimination,[2] or any other statute or case law, may be waived prospectively.[3] To the extent this provision can be interpreted to prohibit mandatory arbitration of discrimination, harassment, or retaliation claims, this portion of the law has already drawn criticism as potentially in conflict with the Federal Arbitration Act.

Also under the new law, certain non-disclosure provisions included in employment contracts or agreements settling claims of discrimination, harassment, or retaliation are against public policy and unenforceable against the employee. In particular, the law provides that non-disclosure provisions that have "the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment ... shall be deemed against public policy and unenforceable" against the employee. The law does, however, provide the employee the right to enforce a non-disclosure should he or she choose to. It is up to the employee whether he or she goes public or not. However, once the employee has chosen to go public, the non-disclosure may no longer be enforced against the employer either. To that end, the law requires that any settlement agreement containing a non-disclosure provision clearly place the following statement in bold:

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 provides a private right of action with a two-year statute of limitations. It also creates a retaliation claim, prohibiting any retaliatory action taken against a person who refuses to enter into an agreement containing any of the provisions now deemed against public policy.

The law applies to all agreements entered into after March 19, 2019. Employers should immediately seek counsel to review and revise all form employment related contracts and arbitration and settlement agreements, as well as assess their philosophy towards settlement of discrimination, harassment, and retaliation claims going forward.

Notes:

[1] 2019 New Jersey Senate Bill No. 121

[2] N.J.S.A. 10:5-1 *et seq.*

[3] Collective bargaining agreements are excepted from these new requirements

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