New Jersey Invalidates Non-Disclosure Provisions In Discrimination, Harassment, and Retaliation Settlements, and Prohibits Preemptive Waiver of Statutory Rights

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As of March 18, 2019, employers covered by New Jersey law can no longer enforce employment contracts or settlement agreements that conceal the details of alleged claims of discrimination, harassment, or retaliation. This change in the law comes as an amendment to the New Jersey Law Against Discrimination (NJLAD), *N.J.S.A*. 10:5-1, et seq. The amendment, which was brought about by Senate Bill 121, and signed into law by New Jersey Governor Phil Murphy, also renders unenforceable any contractual provision wherein an employee agrees to waive any substantive rights relating to claims of discrimination, retaliation, or harassment, including any prospective waiver of rights under NJLAD, or any other statute or case law.

Employees, on the other hand, still can enforce non-disclosure agreements against employers, but waive their right to do so in the event that the employee "publicly reveals sufficient details of the claim so that the employer is reasonably identifiable." Any settlement agreement resolving a claim of discrimination, retaliation, or harassment must contain a bold, prominently placed notice setting forth the employee's right to enforcement as well as this limitation. Employers are prohibited from retaliating against an employee who refuses to enter into an agreement that would be unenforceable under the new law, and an employer who attempts to enforce such an agreement against an employee must pay the employee's reasonable counsel fees and costs.

Notably, the Legislature specifically carves out certain exceptions, expressly stating that the law does not apply to the terms of collective bargaining agreements, non-compete agreements, and non-disclosure agreements that prohibit only the disclosure of proprietary information, which is limited to include only "non-public trade secrets, business plan and customer information."

Consistent with NJLAD, the new law contains a two-year statute of limitations and awards counsel fees to a prevailing plaintiff who claims to be aggrieved by a violation of the law. The amendment diverges from NJLAD's other employment

law provisions where it entitles aggrieved employees to common law tort remedies rather than statutorily recognized emotional distress damages. The law takes effect immediately and applies to "all contracts and agreements entered into, renewed, modified, or amended on or after the effective date."

The general prohibition on waiver of statutory rights does not mark a new direction for New Jersey anti-discrimination law. Employee agreements to shorten statutes of limitations, for example, have been unenforceable in New Jersey since 2016. See *Rodriguez v. Raymours Furniture Co., Inc.*, 225 N.J. 343 (2016). Additionally, non-disclosure provisions in settlement agreements resolving discrimination, harassment, and retaliation claims long have been prohibited in matters involving public entities. The greatest impact of the new law likely will be felt by private employers who previously have been able to negotiate for the discretion of former employees in severance and settlement agreements, and by employees who otherwise might have sought to offer their silence as a bargaining chip. However, private employers are not left without incentive to settle cases, as fee-shifting provisions in NJLAD, Title VII, the New Jersey Conscientious Protection Act (NJCEPA) and related legislation likely are to continue to encourage dispute resolution.

It is unclear whether the amendment will be held to invalidate jury waivers, class action waivers, or arbitration agreements. While the Amendment's broad language can be read to support a conclusion that such provisions now will be unenforceable, precedent in New Jersey and federal courts discourages such an interpretation. In 2017, the United States Supreme Court overturned a ruling of the Kentucky Supreme Court, holding that the Federal Arbitration Act preempts state-level actions that treat arbitration agreements less favorably than other contracts. See *Kindred Nursing Centers, L.P. v. Clark,* 137 S.Ct. 1421 (2017). Additionally, prior decisions from the New Jersey Supreme Court and the District of New Jersey have distinguished arbitration agreements from other substantive rights addressed in the new law. For example, in *Rodriguez, supra,* the New Jersey Supreme Court distinguished arbitration agreements from agreements to limit the statute of limitations on employment discrimination claims, stating, "[T]he employment application at issue in [*Martindale v. Sandvik, Inc.,* 173 N.J. 76 (2002)] did not restrict the rights of employees to bring claims; it merely utilized an arbitration clause to agree in which forum to bring them." *Rodriguez,* 225 N.J. at 367 (2016). The United States District Court for the District of New Jersey since has declined to interpret *Rodriguez* as a per se bar to arbitration agreements in NJLAD cases. See *Allen v. Bloomingdales, Inc.*, 225 F. Supp. 3d 254, 260-261 (D. N.J. 2016).

Although the new law does not expressly apply retroactively, employers should take care to note that its mandate will be triggered by any contractual modification. Employers, therefore, would be wise to review existing contracts for compliance, and should engage legal counsel with specific knowledge of state and federal antidiscrimination, anti-harassment, and anti-retaliation laws to review any agreements that limit the rights of employees in any substantive way. This would include severance agreements. Employers who find themselves litigating claims arising under those laws also are encouraged to be informed about the limitation on their rights to enforce non-disclosure agreements prior to commencing settlement negotiations.