

Nondisclosure vs. Non-disparagement: The Current Loophole In Employer-Employee Settlement Agreements Arising Under The Law Against Discrimination

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Most employers probably know New Jersey law prohibits certain “non-disclosure” or “confidentiality” provisions in employment contracts and employer-employee settlement agreements. The statutory language of the New Jersey Law Against Discrimination (“NJLAD”) states that a “non-disclosure” provision is any provision in a contract which has “the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment,” and that such provisions are against public policy and therefore void. This particular language was added to the NJLAD in 2019 in response to the #MeToo movement, and most attorneys and legislators interpreted its purpose as a proactive measure to allow victims of sexual harassment to speak freely without interference from their employers.

As it turns out, this seemingly straightforward language contains an unusual loophole which benefits employers, one a recent Appellate Division decision revealed, *Savage v. Township of Neptune*, __ N.J. Super. __, No. A-1415-20 (App. Div. May 31, 2022). There, the Appellate Division determined that although the NJLAD bars “non-disclosure” clauses, it does not bar “non-disparagement” clauses.

The facts are as follows. Plaintiff Christine Savage worked as a sergeant for the Neptune Police Department and sued the Department for sexual harassment, discrimination, and retaliation under the NJLAD; the case ultimately settled. Although the settlement agreement did not contain a non-disclosure clause, it did contain a non-disparagement clause. That clause provided that neither party would “make any statements written or verbal, or cause or encourage others to make any statements, written or verbal regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of any party.”

Plaintiff later appeared on a television news interview and discussed her experiences with the Department, stating that she was “oppressed” and “abused” while employed there, and she did not believe the Department would change. Almost immediately, the Department moved to enforce the settlement agreement’s non-disparagement clause and sought damages. Plaintiff argued in response that her statements were lawful because the settlement agreement’s non-disparagement clause was void under the amendments to the NJLAD prohibiting non-disclosure clauses. By plaintiff’s logic, a non-disparagement clause is indistinguishable from a non-disclosure clause because either would “prohibit her from making any statements about defendants’ past behavior and thus” both would have “the purpose or effect of concealing the details relating to her claims of employment discrimination, retaliation, and harassment.”

Grappling with these issues on appeal, the Appellate Division tried to find a middle ground. The panel first held that, although the NJLAD expressly prohibits non-disclosure clauses, it does not prohibit non-disparagement clauses. The panel recognized that there may be “overlap” between the two in certain cases, but determined that there was no such overlap here. Rather, the panel held that the non-disparagement agreement was enforceable, but that plaintiff had not violated its plain terms because her comments were “about present or future behavior, not comments about past behavior prohibited under the plain language of the agreement.” Clearly, the panel felt compelled to acknowledge that there is a distinction between non-disclosure and non-disparagement clauses, and that the NJLAD prohibits the former and not the latter, but also felt forced to interpret the settlement agreement’s language narrowly to provide plaintiff an avenue to discuss her story publicly.

This somewhat strained decision likely arose because the Appellate Division stumbled upon a legislative oversight, and was eager to avoid exposing the plaintiff to liability. For now, employers may include non-disparagement clauses in employment contracts and settlement agreements, even though non-disclosure clauses are prohibited. Employers should be wary, however, because -- as the Appellate Division’s decision shows -- courts are likely to interpret such clauses narrowly and to provide employees with every opportunity to speak freely about issues such as discrimination and harassment. An employer who wishes to include any such provision in an employment agreement should be careful to ensure that the provision is not construed as a non-disclosure agreement, while also broad enough to encompass reasonably foreseeable disparaging comments from former employees. Given that any such clause would be highly technical, employers should seek legal counsel before drafting the clause.

Employers may also wish to add these provisions soon. Two state senators recently have introduced legislation to specifically prohibit non-disparagement clauses in the same way that the NJLAD prohibits non-disclosure clauses. For the time being, however, one of the NJLAD’s more unusual and employer-friendly loopholes remains.