

Anticipated NJ Law to Prohibit Certain Waiver and Non-Disclosure Provisions in Employee Contracts and Settlement Agreements

Gov. Murphy Expected to Sign into Law a Prohibition Against Employee Waivers of Certain Legal Claims and Non-Disclosure Provisions Relating to Discrimination, Retaliation and Harassment

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In the era of the #MeToo movement, harassment claims have dominated news headlines. One concern that has taken center stage in the discussion is the silencing of victims through the use of non-disclosure provisions in settlement agreements. In light of this concern, the New Jersey State Senate and Assembly have recently approved of a bill, S121 [2R] (the “Act”), which deems such agreements and certain employee waivers as against public policy. Governor Phil Murphy will likely sign this bill into law.

The Act will prohibit any employment contract from waiving a current discrimination, retaliation or harassment claim, as well as any prospective legal rights an employee might have at a later date. The Act will also prohibit employers from enforcing any non-disclosure provisions in either employment contracts or settlement agreements pertaining to discrimination, retaliation or harassment claims. Employers should immediately review their current employment agreements as well as any current or pending settlement agreements they may have.

The Specifics

The Act will prohibit any employment contract, other than collective bargaining agreements, from including a waiver of a discrimination, retaliation or harassment claim. The Act also will prohibit any employment contract – again, other than collective bargaining agreements – from prospectively waiving any legal rights or claims an employee may have at a later date. Of critical note, although the Act is primarily aimed at discrimination, retaliation and harassment claims, the Act prohibits waivers of any prospective right or claims.

The Act will also nullify, in any employment contract or settlement agreement, any provision prohibiting a current or former employee who is a party to that contract from disclosing the details of a discrimination, retaliation, or harassment claim. Such a non-disclosure provision will still be enforceable against the employer unless the employee publicly reveals enough details of the discrimination, retaliation, or harassment claim such that the employer is reasonably identifiable. (The Act will also require prominent language in a settlement agreement stating that the provision is unenforceable against the employer if the employee reveals such identifying information). Effectively, this means that although a non-disclosure provision can exist in employment contracts or settlement agreements, it will only be enforceable, at most, against the employer.

The Act, however, expressly permits employers and employees to enter into non-competition agreements during or after employment, as well as agreements not to disclose non-public trade secrets, business plans and customer information.

The Risks

The Act will also provide some significant remedies to employees if employers improperly attempt to enforce an invalid waiver or non-disclosure provision under the new law, or if employers otherwise retaliate against an employee for not agreeing to such a waiver or non-disclosure. Employees may bring an independent cause of action for a violation of the Act, and if the employee succeeds, he or she may also recover attorney fees and costs.

Timing

The provisions of the Act will take effect as soon as Governor Murphy signs the bill into law. Although the Act states that it will apply to all contracts and agreements entered into, renewed, modified, or amended “on or after the effective date”, it is unclear whether such waiver or non-disclosure provisions in older contracts or agreements will actually be enforceable.

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In light of the expected new law, employers in New Jersey should review their employment agreements and settlement agreements to make sure they will be in conformance with the Act. Employers should also review their anti-discrimination, retaliation and harassment policies, as well as any training programs and procedures related thereto, in light of the expected bar against non-disclosure agreements.

If you have any questions concerning this law and how it may affect your employment policies or procedures, or if you have any other employment law questions, please feel free to contact [Joan M. Schwab](#) or [Monvan Hu](#) of Saiber LLC’s Employment and Labor Law practice.