

New Jersey Responds to the #MeToo Era by Broadly Banning “Waiver of Rights” and Nondisclosure Provisions in Employment Agreements

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On March 18, 2019, New Jersey Governor Phil Murphy signed [S121](#) (“Law”), a measure that will have immediate and significant impact on the enforceability of “waiver of rights” provisions in employment contracts and confidentiality provisions in settlement agreements resolving claims under the New Jersey Law Against Discrimination (“LAD”).

Specifically, the Law declares as against public policy and unenforceable:

- any provision in an employment contract that waives an employee’s substantive or procedural right or remedy relating to a discrimination, retaliation, or harassment claim under the LAD or any other statute or case law (a so-called “waiver of rights” provision), and
- nondisclosure provisions in employment contracts and settlement agreements that conceal the details relating to a claim of discrimination, retaliation, or harassment (so-called “NDA” provisions).

The Law took effect immediately and applies to all covered employment contracts and settlement agreements entered into, renewed, modified, or amended on or after March 18, 2019, except for collective bargaining agreements.

Does the Law Apply to All Agreements?

Apparently not. The Law refers only to provisions in an “employment contract” and a “settlement agreement” and uses the terms separately, not interchangeably. The Law does not define the term “employment contract” but, in contrast, describes “settlement agreement” as an “agreement resolving a discrimination, retaliation, or harassment claim.”

That said, employment applications, which may contain agreements that become operative upon commencement of employment, such as jury and class action waivers, would appear to fall within the definition of “employment contract.”

Of importance, the Law makes no mention of severance and release agreements where there has been no claim made by the employee, and the Law appears inapplicable to such agreements.

Furthermore, the Law does not apply to “contracts and agreements entered into, renewed, modified, or amended” before March 18, 2019.

What Does the Prohibition on “Waiver of Rights” Provisions Mean?

Which rights and remedies cannot be waived?

The Law prohibits a provision in an “employment contract” that waives “any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment” under the LAD or “any other statute or case law.”

The Law does not define the terms “substantive,” “procedural,” “rights,” or “remedies.” Courts interpret the LAD broadly, however, because it is a remedial statute; therefore, employers may expect that these terms will be applied expansively.

Notably, the Law does not expressly prohibit arbitration agreements—no doubt, because such an agreement would conflict with the Federal Arbitration Act and be subject to preemption. Thus, attempting to discern or suggest some legislative intent to prohibit pre-dispute arbitration agreements under current federal law is of little value. If federal law changes to bar mandatory agreements to arbitrate certain employment disputes, as has been recently [proposed](#), the applicability of the Law to arbitration claims would likewise be affected.

Nevertheless, the Law appears to bar a prospective class action waiver, which is a procedural right created by a statute other than the LAD. The Law also ostensibly bars agreements to shorten statutes of limitations for laws and claims other than those arising under the LAD (which the New Jersey Supreme Court has ruled cannot be shortened by agreement).

Which laws are covered by the “waiver of rights” ban?

The expanse of the Law’s ban on “waiver of rights” agreements in employment contracts is clear in at least one significant respect—it is not limited to an employee’s prospective rights or remedies under the LAD, which itself grants extensive protections to alleged victims of discrimination, retaliation, or harassment.¹ Rather, as noted, the Law expressly bars a “waiver of rights” provision concerning any rights or remedies an employee may have under “*any other statute or case law*” (emphasis added), another phrase left unclarified by the Law.

¹ In addition to sex discrimination, the LAD prohibits discrimination, harassment, and retaliation on the basis of race, creed/religion, national origin, age, ancestry, nationality, marital, domestic partnership or civil union status, gender identity or expression, disability, military service, affectional or sexual orientation, atypical cellular or blood trait, and genetic information.

Thus, the “waiver of rights” ban applies not only to such claims as sex, race, and age bias or harassment, or retaliation under the LAD, but apparently also to claims of retaliation under such laws as the New Jersey Conscientious Employee Protection Act and the New Jersey Family Leave Act. Add “case law” to the mix, and the Law ostensibly applies to myriad employment-related tort and contract claims as well.

Does the ban on waivers of rights and remedies apply to all agreements?

Apparently not. A fair reading of the Law suggests that the section on waiver provisions applies only to prospective waivers in employment contracts. The waiver provision section does not mention settlement agreements. The portion of the Law on nondisclosure provisions, by contrast, refers to both.

What Are the Restrictions on Nondisclosure Agreements (“NDAs”)?

The NDA provision applies to “discrimination, retaliation, and harassment” claims.

What disclosures are covered by the prohibition on NDAs?

The Law declares that an NDA in an employment contract or a settlement agreement (more often referred to as a confidentiality provision) contravenes public policy and thus is “unenforceable against a current or former employee who is a party to the contract or settlement.” The Law defines a prohibited NDA as one that “has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment.”

Again, however, the extent of the ban is uncertain, as terms like “concealing” and “details” are undefined. Nevertheless, the NDA section appears to apply only where there has been a “claim” for which there are “details” to “conceal.”

Commonly, employers enter into confidential severance and release agreements where employees have made no claim, for example, when there has been a reduction in force. In such instances, the general release agreement under the Law’s NDA section appears to be inapplicable. To avoid unwittingly running afoul of the Law, however, employers may wish to consider including a carve-out in the confidentiality provision of severance/separation agreements, which states that an employee remains free to discuss his or her employment and the termination thereof.

Where the severance/separation agreement is being offered to an employee who at some time may have made a claim of discrimination, retaliation, or harassment, the carve-out should certainly be included.

Whether the details of the settlement agreement, such as the amount of consideration paid, can be the subject of an enforceable NDA is likely to be a matter requiring case-by-case determination. Where, for example, an employee has asserted an LAD claim and it is resolved as part of a severance agreement, the amount of the settlement could be considered a detail related to a claim (e.g., back wages paid in settlement of an Equal Pay Act claim) and thus subject to the NDA ban. In another instance, however, it

may not be a covered “detail” (e.g., a flat amount of unspecified consideration). Non-disparagement provisions might pose similar issues.

Are there exceptions to the NDA prohibition?

The Law contains two specific exceptions to the NDA prohibition: (i) non-competition agreements and (ii) confidentiality agreements concerning an employer’s proprietary information, which includes only non-public trade secrets, business plans, and customer information. Accordingly, employers may continue to include NDA provisions in such agreements.

Must NDAs be mutual? If so, are there any exceptions to the ban on employer disclosure?

The Law does not expressly require or prohibit mutually agreed to NDAs. Under the Law, NDA provisions that prohibit disclosure of details relating to a covered claim are never enforceable against employees. At the same time, the Law appears to limit an employer’s ability to disclose such details and mandates language that employers must include in the employment contract or settlement agreement if it contains an NDA.

Specifically, the Law provides that an NDA is unenforceable against the employer if the employee “publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.” To this point, the Law requires that every settlement agreement resolving a discrimination, harassment, or retaliation claim by an employee against an employer include “a bold, prominently placed notice” stating the following:

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.

Here again though, the Law does not define critical terms, such as “reasonably identifiable” or describe how that determination will be made.

In effect, the Law’s NDA “ban” gives the employee ultimate control over disclosure. If the employee chooses to disclose details of the claim that are likely to reveal the employer’s identity, then—and only then—is the employer free to discuss the claim and agreement publicly.

Is There an Anti-Retaliation Provision?

The Law forbids taking any retaliatory or other adverse action against a person who refuses to enter into an agreement containing a provision deemed against public policy and thus unenforceable under the Law.

What Are the Penalties for Violation?

Any person who enforces or attempts to enforce a “waiver of rights” or NDA provision prohibited by the Law will be liable for the employee's reasonable attorney fees and costs. In addition, an individual aggrieved by a violation of the Law may recover any remedies available in common law tort actions, as well as reasonable attorney fees and costs.

What New Jersey Employers Should Do Now

- Be aware that any employment contracts or settlement agreements that contain now-prohibited provisions remain lawful and enforceable if they were entered into, modified, or renewed prior to March 18, 2019.
- Review employment contracts and employment applications to determine whether they contain any provisions that might be construed as prospective waivers of rights or remedies. If so, consider revising such provisions, but, at the least, be aware that enforcement of such provisions may be subject to challenge.
- Review the confidentiality provisions in template employment contracts and settlement agreements, and, if necessary, consider revising, eliminating, or narrowing the limitations on disclosure and/or adding the notice to the employee quoted above.
- Be mindful that as of March 18, 2019, any settlement of a discrimination, retaliation, or harassment claim, under the LAD or otherwise, will potentially be subject to public disclosure regardless of an employee's agreement to a confidentiality clause in the settlement agreement.
- Due to the degree of uncertainty inherent in the Law, consult with counsel concerning any issues that require legal risk assessments.

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