

Management Alert



Pre-Dispute Arbitration Agreements and Non-Disclosure Provisions on the Chopping Block in New Jersey

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Seyfarth Synopsis: The New Jersey Legislature recently passed Senate Bill 121 affecting claims of discrimination, harassment and retaliation, which if signed into law, would render any prospective waiver of rights against public policy, including pre-dispute mandatory arbitration agreements. In addition, non-disclosure provisions in settlement agreements involving these claims would be unenforceable against employees.

On January 31, 2019, the New Jersey Legislature passed [Senate Bill 121](#), which would prohibit employers from enforcing, among other things, mandatory pre-dispute arbitration and non-disclosure provisions in settlement agreements for claims of discrimination, retaliation, and harassment. The bill seemingly does not affect **existing** waivers or non-disclosure agreements (“NDAs”). Governor Phil Murphy has not commented publicly as to whether he will sign the bill into law. If signed, the breadth of this law would surpass any similar law in the country.

Notably, whereas similar laws in [New York](#), Vermont, Maryland, and Washington prohibit mandatory pre-dispute arbitration of sexual harassment claims, the New Jersey bill would extend such protections to all claims of discrimination, retaliation, and harassment under the New Jersey Law Against Discrimination (“NJ LAD”).

Below is a synopsis of the key provisions of the bill and its potential impact on New Jersey employers.

Prohibition on Prospective Waivers

The bill provides that any provision which “waives any substantive or procedural right or remedy” relating to a claim of discrimination, retaliation, or harassment in an employment contract is against public policy and unenforceable. Thus, the bill would render mandatory pre-dispute arbitration agreements, class action waivers, and jury trial waivers unenforceable with respect to these claims. There is a carve out in the proposed law for employees subject to a collective bargaining agreement.

Additionally, the bill provides that a right or remedy under the NJ LAD or any other statute or case law may not be **prospectively** waived. While it is unclear what the Legislature intended when it included “any other statute or case law” in the text of the bill, this is not expected to affect employment agreements or general releases, which typically do not seek to waive claims that have not yet arisen.

Restriction on Enforcement of NDAs

The bill also provides that a “provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment” is against public policy and will be unenforceable against a current or former **employee** who is a party to the settlement or contract. Notably, provisions that require the parties to keep the settlement agreement and the settlement amount confidential appear to be enforceable against all parties.

As drafted, the bill permits an employee to enforce a non-disclosure provision in a settlement agreement against the employer, **unless** the employee “publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.” Under these circumstances, the non-disclosure provision will also become unenforceable against the employer. The bill does not define how an employer may be “reasonably identifiable,” (i.e., by name or otherwise).

If an employer attempts to enforce an agreement which is unenforceable pursuant to this proposed law, the employer is liable for the employee’s attorneys’ fees.

Notice Requirement in Settlement Agreements

The bill also requires that settlement agreements resolving discrimination, retaliation, and harassment claims include a “bold, prominently placed notice” that despite the parties’ agreement to keep the settlement and underlying facts confidential, the provision will be unenforceable against the employer if the employee “publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.” Employees who enter into such agreements are thus given fair warning that if they disclose details about their claims that render the employer “reasonably identifiable,” the employees can no longer enforce the non-disclosure provision against the employer, and the employer is free to discuss the matter publicly as well.

Carve Outs for Non-Competes and NDAs Concerning Proprietary Information

The bill specifically excludes from its reach non-competition agreements which remain in effect during or after separation of employment. Further, an employer and employee may still enter into an agreement to keep proprietary information confidential, which is limited to “non-public trade secrets, business plan and customer information.”

Private Right of Action and Attorneys’ Fees

An employer may not retaliate because an employee will not enter into a prohibited agreement. The bill creates a private right of action for “[a]ny person claiming to be aggrieved by a violation” of the law, with a statute of limitations of two years. A prevailing plaintiff is entitled to reasonable attorneys’ fees and costs.

Effective Date

Once signed, the law will go into effect immediately and apply to all contracts and agreements entered into, renewed, modified, or amended **on or after the effective date**. As such, existing arbitration agreements concerning discrimination, harassment or retaliation claims remain lawful. In turn, settlement agreements with non-disclosure provisions which were signed prior to the effective date of the law may still be enforced.

Employer Takeaways

If signed into law, this bill will have a significant impact on New Jersey employers. Employers should review their standard employment and settlement agreements and consider revising them to ensure that they will comply with the new standards. Additionally, employers who have previously implemented a nationwide or statewide arbitration agreement must reevaluate their policies. Finally, like similar laws around the country, this bill may face a preemption challenge insofar as it prohibits mandatory pre-dispute arbitration agreements, as the Federal Arbitration Act generally favors enforcement of arbitration agreements. For further analysis of the potential preemption issue, see our [previous alert](#).

For advice concerning this bill's effect on non-disclosure provisions in settlement agreements and mandatory arbitration agreements, or if you have any questions, please contact [Howard M. Wexler](mailto:hwexler@seyfarth.com) at hwexler@seyfarth.com, [Anne R. Dana](mailto:adana@seyfarth.com) at adana@seyfarth.com, [Nila Merola](mailto:nmerola@seyfarth.com) at nmerola@seyfarth.com, [Meredith-Anne Berger](mailto:mberger@seyfarth.com) at mberger@seyfarth.com, Vlada Feldman at vfeldman@seyfarth.com.

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