

New Jersey Closer to Bar on Jury Waivers, Arbitration Agreements, Secrecy of Harassment Settlements

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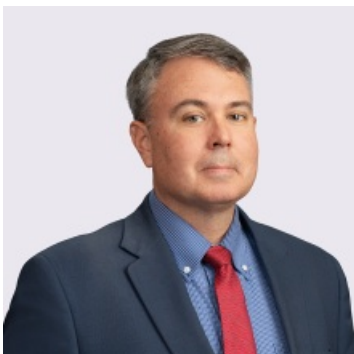


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The New Jersey Senate has passed a bill that would prohibit jury waivers and agreements that conceal the details of discrimination claims under the New Jersey Law Against Discrimination, N.J.S.A. § 10:5-1, *et seq.* (LAD). [The bill](#), which passed by a vote of 34-1, also would call into question the enforceability of agreements to arbitrate LAD claims. The significant support it received in the Senate may signal quick passage in the Assembly and the likelihood of signature by the Governor.

The LAD makes it unlawful to subject individuals to differential treatment based on race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability, perceived disability, and AIDS and HIV status.

An earlier version of the bill was introduced in 2017 and fast-tracked for consideration by the Senate. (For more on the 2017 bill, see our article, [Bill Would Revise New Jersey Law Against Discrimination to Limit Employment Agreements.](#))

Similar to the 2017 bill, S-121 states broadly that employment contracts that waive “any substantive or procedural right or remedy” relating to a claim of discrimination, retaliation, or harassment are contrary to public policy and would be unenforceable. Furthermore, S-121 would prohibit any prospective waiver of rights or remedies (*e.g.*, a jury trial) under the LAD. If the bill is enacted, the enforceability of arbitration clauses with respect to LAD claims may be deemed unenforceable, although this is certain to raise arguments of preemption under the Federal Arbitration Act.

S-121 also contains a #MeToo provision designed to eliminate non-disclosure provisions in agreements resolving claims under the LAD. It provides as follows:

A provision in any employment contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.

If the bill is signed into law, an employer that seeks to resolve a claim under the LAD would be unable to enforce any confidentiality or non-disclosure provisions in settlement agreements. That would eliminate the incentive of many parties seeking to settle harassment and discrimination claims. Confidentiality is a key term required by most employers (and other parties, including those subjected to the conduct) in settlement agreements. By removing the ability to keep the claims and settlement confidential, many parties may choose to litigate a case to conclusion and a full vindication on the record.

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Additional protections are afforded to individuals who refuse to enter into an agreement with provisions contrary to the legislation. The bill prohibits an employer from taking retaliatory action (*e.g.*, refusal to hire, discharge, suspension, demotion, and so on) on the grounds that an individual refuses to enter into an agreement with terms contrary to S-121.

Lastly, to the extent an employer seeks to enforce an agreement contrary to the bill, the aggrieved employee may collect costs and reasonable attorney's fees for defending against any such suit.

The bill would affect agreements prospectively. It expressly does not apply to the terms of collective bargaining agreements.

If passed, S-121 would affect the strategy and settlement of LAD claims significantly. The inability of an employer to utilize arbitration procedures or insist upon confidentiality in settlement agreements may result in fewer out-of-court resolutions and more protracted and costly litigation.

If you have any questions about the bill and its potential ramifications, please reach out to a Jackson Lewis attorney. We will keep you apprised of developments.