

Amendment to New Jersey Anti-Discrimination Law Poses Challenges to Using Non-Disclosure and Jury Trial Waiver Provisions

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An amendment to the New Jersey Law Against Discrimination (LAD) to prohibit enforcement of non-disclosure provisions in certain agreements, including employment contracts and settlement agreements, has been passed by the New Jersey Legislature. The amendment could also potentially impact use of jury trial waivers, given the LAD's jury trial provision. Governor Phil Murphy is expected to sign this legislation into law.

The amendment prohibits enforcement of agreements that:

1. "[W]aive[] any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment";
2. [P]rospectively waive a right or remedy under the LAD or any other statute or case law; and
3. "[Have] the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment."

The amendment states that such agreements are against public policy.

The amendment further provides that agreements containing such a provision will be invalid and unenforceable, and aggrieved workers may file suit in New Jersey state court to recover common law tort remedies, in addition to reasonable attorneys' fees and costs.

Employers, the New Jersey State Bar Association, and members of the defense bar have criticized the amendment, which is expected to make resolving employment disputes more difficult. In the past, non-disclosure provisions in employment contracts and settlement agreements have served as a partial incentive for settlement. For example, it is common for settlement agreements in LAD cases to contain provisions prohibiting the employee from disclosing the terms of the settlement and the factual specifics of the matter, and to say only that the matter has been resolved. This language is now considered against public policy and unenforceable.

The amendment also requires an employer to provide notice. Employers are directed to include "a bold, prominently placed notice that 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." The promise of confidentiality has motivated employers to resolve LAD claims against them by way of settlement, rather than by litigation, which would create a public record.

The amendment also prohibits prospective waiver of any right or remedy under the LAD "or any other statute or case law." The sweeping language of the amendment appears to prevent an employee from agreeing to a jury-trial waiver, which is a common part of

agreements to arbitrate LAD claims. Such waivers have been found, in certain circumstances, to be enforceable in New Jersey. Moreover, the enforceability of this amendment as it relates to jury trial waivers and arbitration agreements is still uncertain. The amendment may conflict with the Federal Arbitration Act (FAA), which preempts state law that prohibits the use of arbitration agreements. *See, e.g., Kindred Nursing Centers L.P. v. Clark*, 581 U.S. ___, (2017) (State law violates the FAA by singling out arbitration agreements for disfavored treatment); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”).

It will be important for employers not only to consider restructuring settlement agreements to resolve claims, but also to review and revise their employment contracts, other agreements, and employee handbooks to address this amendment.

The amendment comes on the heels of the #MeToo movement, and in response to non-disclosure provisions in settlement agreements between certain well-known media personalities and their alleged victims. New York and California have enacted similar laws. (See our article, [Claims of Workplace Harassment in California to Receive Greater Protections under New Law.](#))

Jackson Lewis attorneys are available to answer inquiries regarding the LAD and assist employers in achieving compliance with its requirements.

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