Sills Cummis & Gross P.C.

Client Alert Employment & Labor

"Can We Still Keep It a Secret?"

New Jersey Adopts Extreme Stance Against Non-Disclosure Provisions in Agreements Settling Claims of Discrimination, Retaliation and Harassment

On March 18, 2019, Governor Murphy signed a controversial bill into law which deems a non-disclosure agreement ("NDA") in connection with the settlement of claims of discrimination, harassment or retaliation to be unenforceable and against public policy. The new law immediately became effective on its signing date, and it applies to all covered agreements entered into on or after March 18, 2019.

The new law is even more expansive than similar laws that have emerged from the #MeToo movement in other states, because it applies to all forms of discrimination and harassment claims, not just sexual harassment claims. The substantial impact this new law has on a NJ-based employer's ability to resolve both pre- and post-filing claims of discrimination, retaliation and harassment, and on its right to require arbitration as the exclusive forum for pursuing such claims, cannot be overemphasized.

The law provides that a "provision in any *settlement 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 against a current or former employee . . . who is a party to the contract or settlement." [emphasis supplied]. The foregoing italicized terms are not defined by the law, leaving their scope and interpretation open to debate. For example:

- Does "*claim*" apply solely to claims raised in a court complaint or an administrative charge, or is it broad enough to cover claims informally raised internally by employees with their employers or through a demand letter from an attorney representing an employee?

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- Do "*details relating to a claim*" only apply to the underlying facts that gave rise to the claim, or do they also extend to the dollar amount of the settlement?

- Does "*settlement agreement"* include a separation agreement reached with an employee suffering a job loss due to performance deficiencies or a reduction in force, where the employee has not raised, in any form, a discrimination, harassment or retaliation claim but receives severance benefits in exchange for a broad release of employment law claims, including those arising under the NJ Law Against Discrimination?

- If a settlement agreement apportions settlement payments solely to non-discrimination, non-harassment and non-retaliation claims, even though one or more of those statutory claims were in fact raised against the employer, do the statutory NDA prohibitions still apply?

- Does "*claim*" solely mean claims arising under the New Jersey Law Against Discrimination, or does it also encompass claims arising under federal employment discrimination laws?

The law further states that "[e]very settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer shall 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." [emphasis supplied]. Simply stated, if an employee breaches an NDA in the settlement agreement after receiving such notice, the employer is relieved of its own NDA obligation. But this is small solace for employers – because employers cannot enforce an employee's NDA to prevent the disclosure the employee pledged to keep confidential.

Employer groups predict that this law may serve to reduce the dollar amount of offers employers are willing to make to settle these types of claims, and even result in fewer voluntary settlements by employers.

Elsewhere, the law provides that any provision in any employment contract other than a collective bargaining agreement which "waives any substantive or procedural right or remedy" relating to a claim of discrimination, retaliation or harassment is likewise against public policy and unenforceable. Since many employer/employee arbitration agreements waive an employee's right to a jury trial and to otherwise proceed in court with respect to these types of claims, this law may render any such waiver unenforceable. Employer groups are expected to take the position that any such waiver, as applied

to an arbitration agreement, is preempted by the Federal Arbitration Act and federal judicial precedents upholding agreements to arbitrate these types of disputes.

We strongly recommend that New Jersey employers revisit their standard arbitration, settlement and separation agreements, as well as any one-off settlement or separation agreements they may be negotiating, and seek legal guidance on what language in those agreements may no longer be enforceable in light of this new law, whether a "broad, prominently placed notice" must be included in the agreement, and whether the language of any such notice is sufficient.

Legal counsel should also be consulted on other options that may be available to limit the impact of this law with respect to certain settlement agreements, and to help weigh the risks of compliance with the new law vs. refusing to settle these types of claims altogether.

Reminder for New York City Employers:

New York City employers with at least 15 employees are required to conduct annual anti-sexual harassment training for all employees starting April 1, 2019, which is in addition to similar requirements under New York State law. See our June 2018 alert for additional details and the New York City Commission on Human Rights (the "Commission") FAQ on the training requirements. In the near future, the Commission is expected to publish training materials on its website. If you have any questions about these requirements, please contact us.

Attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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