New Jersey Prohibits Particular Waiver and Non-Disclosure Provisions in Employee Contracts and Settlement Agreements

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New Jersey continues to rewrite the employment law landscape under Governor Phil Murphy. On March 18, 2019, the state amended the New Jersey Law Against Discrimination (NJLAD) in two significant ways.

Non-Disclosure Provisions in Agreements With Employees are Unenforceable

The new legislation—which takes effect immediately—explains that certain non-disclosure provisions contained within either an employment contract or settlement agreement are against public policy, and, therefore, unenforceable. An employer cannot enforce a non-disclosure provision against an employee if the provision is in an employment contract or settlement agreement and has the "purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment..." If the parties decide to include such a non-disclosure provision, it can be enforced against the employer unless the employee has "publicly reveal[ed] sufficient details of the claim so that the employer is reasonably identifiable."

The law also requires that every 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."

No Rights Relating to Discrimination Claims Can Be Waived

The other significant part of this legislation states that "[a] provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable," and "[n]o right or remedy under the 'Law Against Discrimination' or any other statute or case law shall be prospectively waived."

A notable concern here is how this may impact the ability of employers to enforce arbitration agreements or jury-waiver provisions for the types of claims delineated in the statute. It is possible that New Jersey courts will find arbitration agreements that cover employment claims and/or agreements that waive an employee's right to a jury trial for employment claims to be unenforceable under the new legislation, although many authorities believe that the Federal Arbitration Act (FAA) preempts at least the arbitration portion of this provision. Finally, the language of these prohibitions is seemingly expansive enough to encompass other statutes and case law beyond the NJLAD.

Private Right of Action/Anti-Retaliation

The statute provides for a private right of action and, therefore, an employee may bring a claim under the new provisions and be awarded common law tort remedies along with attorney's fees and costs. Moreover, the statute provides for an additional cause of action for any retaliatory action (i.e., failure to hire, discharge, suspension, demotion, discrimination in the terms, conditions, or privileges of employment, or any other adverse
action) taken against any person who refuses to enter into an agreement or contract that contains a provision prohibited by the new legislation.

Based on these changes in the law, employers should be sure to review employment contracts, employee handbooks, arbitration agreements, and any settlement or severance agreements to ensure they are in compliance with the new law.

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