

## Employment Counseling & Litigation

March 29, 2019

# New Jersey Voids Non-Disclosure Agreements for Claims of Discrimination, Retaliation or Harassment and Effectively Bans Arbitration Agreements Relating to Those Claims

By **Amy Komoroski Wiwi** and **Lauren M. Hollender**

### What You Need To Know:

On March 18, 2019, Governor Murphy signed Senate Bill 121. For all contracts and agreements entered into, renewed, modified, or amended on or after that date:

- Non-disclosure provisions in an employment contract or settlement agreement that conceal the details of claims of discrimination, retaliation, or harassment are unenforceable against a current or former employee.
- Any provision in any employment contract that prospectively waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment—such as an arbitration provision or clause requiring waiver of a jury trial—is prohibited.

The new law necessitates a careful review of multiple standard contract terms including, but not limited to, non-disclosure, non-disparagement, confidentiality, and mandatory arbitration.

#### Non-Disclosure Agreements

The legislation, enacted in the wake of the #MeToo movement, is in response to criticism that mandatory non-disclosure and arbitration agreements relating to sexual harassment claims silence victims of sexual assault and harassment; however, the new law applies not only to harassment claims but to *all* claims of workplace discrimination and retaliation.

The law continues to allow clauses that prohibit the disclosure of “the settlement and underlying facts” (i.e., the fact of settlement and its terms), provided the agreement contains a bold and prominently placed notice stating the clause is unenforceable against the employer if the

employee publicly reveals sufficient details of the claim that the employer is reasonably identifiable.

The new law makes clear it does not prohibit an employer from requiring an employee to sign an agreement containing a covenant against competition or a restriction upon the employee’s disclosure of proprietary information.

#### Arbitration Agreements

The new law’s ban on waiver provisions does not apply to collective bargaining agreements.

It remains to be seen whether the law will survive expected challenge on preemption grounds

under the Federal Arbitration Act (FAA). The FAA allows employers to enter into binding alternative dispute resolution agreements with employees.

### **Penalties, Anti-Retaliation, and a Private Cause of Action**

Employers who enforce or attempt to enforce an agreement containing prohibited non-disclosure or waiver provisions will be held liable for the employee's reasonable attorney fees and costs.

The legislation expressly prohibits retaliation (including failure to hire or adverse employment action) against individuals who refuse to

sign agreements containing those prohibited provisions. Any person subject to retaliation in violation of the new law may bring suit against the offending employer, and all common law tort remedies as well as attorney fees and costs are available to the prevailing plaintiff.

### **Advice to Employers**

We urge all New Jersey employers to review post-March 18, 2019, employment and separation agreements for compliance. This should include any agreements that renew, modify, or amend pre-existing agreements. We at Lowenstein Sandler will gladly assist as needed.

## **Contacts**

Please contact the listed attorneys for further information on the matters discussed herein.

### **AMY KOMOROSKI WIWI**

Partner

**T: 973.597.2336**

[awiwi@lowenstein.com](mailto:awiwi@lowenstein.com)

### **LAUREN M. HOLLENDER**

Counsel

**T: 973.597.2530**

[lhollender@lowenstein.com](mailto:lhollender@lowenstein.com)

---

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

This Alert has been prepared by Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Lowenstein Sandler assumes no responsibility to update the Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation. Attorney Advertising.