

Update Your Settlement Agreements After New Jersey Bans Some Non-Disclosure Provisions

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In the wake of the #metoo movement, victims' advocates pushed for measures that would prevent serial harassers, and the companies they work for, from paying to silence those who complain of sexual harassment.

New Jersey recently joined this movement by enacting [Senate Bill 121](#), which prohibits non-disclosure provisions in employment and settlement agreements. Effective March 18, SB 121 says employers cannot enforce non-disclosure provisions in employment contracts and settlement agreements if any such provision "has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment."

While the employer will not be able to enforce the non-disclosure provisions of the agreement *against the employee*, a non-disclosure provision will be enforceable *against the employer* unless the employee "publicly reveals sufficient details of the claim so that the employer is reasonably identifiable." In other words, it is a one-way street. Every settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer must also 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."

SB 121 includes an anti-retaliation provision precluding employers from firing, demoting, refusing to hire, or discriminating against an employee who refuses to enter into such a non-disclosure agreement. It also allows employees to file a private lawsuit and collect monetary remedies as well as attorneys' fees in the event an employer attempts to enforce such a non-disclosure provision, or otherwise violates the new law.

Employer groups fought for and won the carve-out from SB 121 of those employment agreements that protect an employer's confidential and trade secret information, as well as non-competition agreements. Employers in New Jersey, or with employees who work in New Jersey, may still require employees to sign confidentiality agreements and restrictive covenants

Another significant piece of SB 121 states that an employee cannot be forced to waive his or her rights relating to claims of discrimination, retaliation or harassment - past, present or future. "A provision in any employment contracts 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." Moreover, "[n]o right or remedy under the [New Jersey] Law Against Discrimination or any other statute or

caselaw shall be prospectively waived." Thus, the new law prohibits covenants not to sue in employment agreements and settlement agreements. Its impact on the validity of arbitration agreements that address discrimination, retaliation and harassment claims, however, remains to be seen and will likely be the subject of litigation.

The upshot of SB 121, for employers in New Jersey or with employees in New Jersey, is to review non-disclosure provisions in their employment agreements and settlement agreements to be compliant with SB 121. If employers elect to include non-disclosure language in settlement agreements, then the following language required by SB 121 should also be prominently included: "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."

Jill Sebest Welch is a partner in Barley Snyder's Employment Law Practice Group, and is licensed in both Pennsylvania and New Jersey. Should you have any questions on New Jersey's new law or the validity of confidentiality and non-compete agreements in New Jersey following the enactment of SB 121, please contact Jill.

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