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New Jersey Adopts Limitations to Non-Disclosure Provision in Contracts and Settlement Agreements in Response to #MeToo

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March 21, 2019

On March 18, 2019, Governor Phil Murphy signed an amendment to the New Jersey Law Against Discrimination (NJLAD) which invalidates and renders unenforceable any provision in an employment contract or settlement agreement “which has the purpose or effect of concealing . . . details relating to a claim of discrimination, retaliation, or harassment.”

The amendment, commonly referred to as the “non-disclosure provision,” takes effect immediately and is broadly viewed as a response to the ongoing #MeToo movement. It applies prospectively to all contracts and agreements “entered into, renewed, modified, or amended on or after the effective date.”

As adopted, the non-disclosure provision does not contain a blanket ban on the inclusion of language prohibiting the disclosure of details relating to a claim of discrimination, retaliation, or harassment. Instead, such language can be included, but the employee retains complete control over whether any details of the alleged misconduct are revealed. However, if an employee “reveals sufficient details of the claim so that the employer is reasonably identifiable,” the employer may then respond to the allegations. On the other hand, the employer may not seek to enforce the non-disclosure provision, and shall be held liable for reasonable attorney’s fees and costs incurred by the employee if they attempt to do so.

The inclusion of specific language in settlement agreements which resolve claims of discrimination, retaliation, or harassment is mandated by the non-disclosure provision. Specifically, parties must include, boldly and prominently, “that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an

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agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.” The non-disclosure provision is not applicable to non-compete contracts and contractual agreements that prohibit an employee from disclosing proprietary information.

The new non-disclosure provision prohibits employers from taking “any retaliatory action, including but not limited to failure to hire, discharge, suspension, demotion, discrimination in the terms, conditions, or privileges of employment, or other adverse action, against a person, on grounds that the person does not enter into an agreement or contract that contains a provision deemed against public policy and unenforceable.”

Finally, the amendment creates a private cause of action for those persons aggrieved by a violation of the non-disclosure provision and creates a two-year statute of limitations for the filing of such claims.

Moving forward, employers are cautioned to review all standard employment contracts and settlement agreements to ensure compliance with the new non-disclosure provision. Further, employers should revise their standard settlement agreements to include the pertinent language required by the non-disclosure provision, and should be wary that even when such language is included, it is unenforceable should the employee subsequently decide to reveal pertinent details of her or his claim.

Please contact the authors of this Alert, **Maja M. Obradovic** and **Punam P. Alam**, with any questions.