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Employee Benefit Plan Review

New Jersey Governor Signs 'Me Too' Bill, Potentially Impacting All Employment and Settlement Agreements and Curbing Use of Confidentiality Provisions

KEVIN M. PASSERINI AND ASIMA J. AHMAD

New Jersey Governor Phil Murphy has signed Senate Bill 121. This bill has two primary effects:

(1) "A provision in any employment contract [(other than a collective bargaining agreement, which is excepted)] that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment" is now against public policy and unenforceable.
(2) "A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" is now unenforceable "against a current or former employee who is a party to the contract or settlement," but remains enforceable against the employer unless "the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable."

The practical effect of these provisions is a ban on companies' use and enforcement of nondisclosure provisions to conceal claims of discrimination, retaliation, and harassment and a ban on companies' efforts to avoid or frustrate application of New Jersey law through, among other things, forum-selection, dispute resolution, and choice-of-law provisions. While the law does permit employers to defend themselves against an employee who publicizes information related to such claims, in order to exercise that right, the law requires 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.

There are Many Questions

As is often the case following a rushed legislative process, it is not clear how broadly this new law will apply, or even how broadly the legislature intended it to apply. It's not even clear who is bound by this new law.

- Does it apply only to protect employees who live and work in New Jersey?
- What about employees who are citizens of other states but who work in New Jersey?

- Does it apply only to restrict employers in New Jersey?
- Does it matter if the employer itself is a citizen of or headquartered in another state?

These questions are critical because they are often the subject of conflict-of-law disputes that parties seek to avoid through contracting, but prong one of the law may prohibit companies from including routine choice-of-law and forum-selection provisions in employment and settlement agreements.

There are many other unanswered questions beyond those threshold issues.

- Does the first prong apply to settlement agreements (which are expressly identified only in the second prong)?
- Do references to a "claim" also encompass grievances or allegations of discriminatory, retaliatory, or harassing actions or environments?
- Do the provisions apply to those who have knowledge of such activities but who were not themselves involved in them?
- Are standard provisions setting forth the confidentiality of the terms of a settlement agreement or non-disparagement provisions also impacted by the law?

And, although the law allows employers to address these matters publicly if they've been revealed by an employee, the law may actually discourage employers from commenting out of fear that the details revealed by the employee were not "sufficient," disseminated broadly enough to be considered "publicly reveal[ed]," or sufficient for the employer's identity to be "reasonably identifiable."

What To Do

The new law applies "to all contracts and agreements entered into, renewed, modified, or amended on or after the effective date" of March 18, 2019. While we all await answers from the courts on these questions, and hopefully greater clarity from the legislature, it is imperative that businesses with operations and employees in New Jersey consider the law's impact on their own employment agreements, confidentiality agreements, and settlement agreements, as well as the law's impact on any related policies and practices.

Companies should also consider the law's impact on employees' renewal or reaffirmation of existing contractual obligations as is sometimes the case with employees' ongoing participation in incentive, stock option, equity, and deferred compensation plans. At minimum, such businesses should consider adding "savings clauses" to such agreements to state expressly that the agreements and any confidentiality or non-disparagement provisions in them do not have the purpose or effect of concealing the details relating to any claim of discrimination, retaliation, or harassment, and to make clear that any confidentiality or non-disparagement provisions apply only if not otherwise prohibited by applicable law.

Where there is little or no doubt about the applicability of New Jersey law, the mandatory notice provision in the agreement should also be included conspicuously, in "bold, prominently placed," as is required by the law.

Lastly, stay tuned for litigation challenging the new law as preempted by federal law to the extent it impacts arbitration provisions and agreements.

Kevin M. Passerini is a partner at Blank Rome LLP providing legal counsel to clients in a wide range of business issues, concentrating on the prevention and litigation of disputes between competitors and the drafting and enforcement of restrictive covenants. Asima J. Ahmad is an associate at the firm concentrating her practice on labor and employment litigation and counseling. The authors may be reached at *passerini@blankrome.com* and *aahmad@blankrome.com*, respectively.