

Legal Trends: The #MeToo Movement's Influence on Certain State Laws Relating to Nondisclosure Agreements

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New Jersey recently enacted legislation (NJ SB 121) prohibiting the use of nondisclosure provisions regarding “the details relating to a discrimination, retaliation, or harassment claim,” on the grounds that such provisions violate public policy and are therefore unenforceable.

While New Jersey is not the first state to pass such legislation, its law is somewhat unique in that it is not limited to sexual harassment, assault, or sex discrimination claims. Instead, New Jersey's law goes further and seeks to prohibit nondisclosure provisions regarding the details of any and all discrimination, retaliation, or harassment complaints in employment and settlement agreements. While the full scope of the information subject to the nondisclosure prohibition will ultimately require resolution by the New Jersey courts, the law appears to extend to both the circumstances that gave rise to the claim and the terms of any relevant settlement or separation agreement.

New Jersey's law also requires that settlement agreements in discrimination, retaliation, and harassment claims include language in the agreement itself that confidentiality provisions would be unenforceable against the employer if the employee publicly reveals details of the claim which render the employer “reasonably identifiable.”

Although broad, the law does contain two major exceptions: it allows for (1) noncompetition agreements; and (2) nondisclosure agreements that prohibit disclosure of proprietary information, including nonpublic trade secrets, business plans, and customer information.

Violation of the law by the employer, including through an attempt to enforce a nondisclosure agreement or a waiver of rights or remedies, could subject employers to payment of the employee's attorneys' fees and costs. Employers should also be wary of the law's grant of a private right of action to employees that provides employees with the ability to seek certain common law remedies. Finally, the law specifically prohibits retaliation against employees who decline to enter into agreements containing provisions that run afoul of Senate Bill 121.

The law applies to all agreements entered into, renewed, modified, and amended after March 18, 2019.

New Jersey's law distinguishes itself from New York where, last year, Governor Cuomo signed into law a state budget which included a prohibition on mandatory arbitration clauses for sexual harassment claims in employment agreements. The New York law also prohibits confidentiality provisions in settlement agreements involving sexual harassment claims, unless the complainant

consents to the inclusion of such a provision. Similarly, California recently passed Senate Bill 820, which prohibits nondisclosure provisions in settlement agreements in cases involving sexual assault, sexual harassment, and workplace harassment or discrimination based on sex (but allows for confidentiality of the settlement amount).

Employers with employees in New Jersey, New York and California should review any employment agreements, handbooks, or policies that include nondisclosure provisions to ensure that these provisions comply with applicable state laws.

For more information on this topic, please contact a member of the firm's Labor & Employment Practice Group.

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