

## New Amendment to NJ Law Against Discrimination Renders Common Employment Agreement Provisions Unenforceable

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New Jersey employers should take note of a newly enacted amendment to the New Jersey Law Against Discrimination (LAD) that directly impacts employment agreements and settlement agreements of discrimination claims. The amendment was signed by Governor Phil Murphy on March 18, 2019 and is effective immediately.

The law is seen as a response to the "Me Too" movement, which brought public scrutiny of certain commonly used employment practices, such as confidentiality clauses in settlement agreements of employment claims. Such clauses are perceived, rightly or wrongly, as enabling repeat sexual harassment offenders. Arbitration agreements which compel the private arbitration of employment discrimination lawsuits have also come under attack in conjunction with the "Me Too" movement. Activists argue that sexual harassment claims should be adjudicated in the court system, not in private arbitration forums.

New Jersey has responded to the criticism of these employment practices by passing an amendment to the New Jersey LAD which is broad in scope and impact. The amendment "forbids" confidentiality clauses in employment agreements pertaining to all claims of "discrimination, retaliation, or harassment" under the LAD, not just sexual harassment claims. The amendment also "prohibits" any provision in an employment contract that "waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment," and "prohibits" prospective waivers of rights or remedies under the LAD. This language seemingly may curtail use of arbitration agreements of discrimination claims, but it remains to be seen how this amendment will be implemented. In addition, the regulation of arbitration by state law may be questionable in light of the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that in an analogous context involving issues of class-wide representation in arbitration involving consumer contracts, the Federal Arbitration Act, 9 U.S.C. §2, displaces state law that prohibits outright the arbitration of a particular type of claim).

### The key provisions of the LAD amendment include:

- Any provision in an employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation or harassment is against public policy and unenforceable.
- No prospective waiver of rights or remedies under the LAD.
- No confidentiality provisions in employment contracts or agreements pertaining to discrimination claims. The amendment states that any provision in an employment contract or agreement that has the purpose or effect of "concealing the details relating to a claim of discrimination, retaliation, or harassment" is against public policy and unenforceable.
- Settlement agreements with a confidentiality clause must include a notice. In the case of a settlement agreement resolving a discrimination, retaliation or harassment claim, the employer must include a "bold, prominently placed notice" stating 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."

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The amendment clarifies that it does not prohibit non-compete agreements, nor does it prohibit non-disclosure agreements of proprietary information such as non-public trade secrets, business plans and customer information. The amendment forbids retaliation against a person who declines to enter into an agreement that contains a provision that is against public policy and unenforceable. The amendment provides for a private right of action and includes common law tort remedies and reasonable attorneys' fees and costs for the prevailing party.

All employers in New Jersey should be aware of this groundbreaking amendment as it relates to provisions that are commonly used in employment agreements. If you would like additional details about the amendment or assistance with its implications please contact James Anelli (anellij@whiteandwilliams.com; 201.368.7224), Tanya Salgado (salgadol@whiteandwilliams.com; 215.864.6368) or another member of our Labor and Employment Group.

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