

Governor Hochul Signs New Law Amending Limitations on Settlement Agreement Confidentiality and Providing Roadmap for Permissible Non-Disclosure Provisions

Section 5-336 of the New York General Obligations Law was enacted in 2018 in response to the #MeToo movement in order to impose certain safeguards against stifling employee-complainants from discussing alleged claims of sexual harassment related to settlement agreements governing the confidentiality of the facts and circumstances underlying such claims. The law was later amended to, among other things, expand protections to claims of unlawful discrimination, including, but not limited to, claims under the New York State Human Rights Law ("HRL"), rather than just claims of sexual harassment. The law required any settling complainant to consider for a full 21-day period whether they "preferred" that the terms of their settlement agreement remained confidential and not subject to disclosure.

While the law was initially designed to protect employee-complainants from entering into settlement agreements containing confidentiality provisions without having enough time to consider whether they truly preferred to keep the terms thereof confidential, practitioners representing both employees and employers have found it cumbersome and difficult to implement, causing unnecessary delays where both parties are represented by counsel, confidentiality is a specifically negotiated term, and the parties are desirous of an expedited resolution of the matter.

However, in an apparent effort to address these concerns and provide other clarifications and conditions to settlement agreements which waive claims of unlawful discrimination, Governor Kathy Hochul signed into law, on November 17, 2023, Senate Bill S4516, which significantly modifies and amends Section 5-336 of the New York General Obligations Law. The amended law became effective immediately upon signing, and makes key changes to Section 5-336 of which employers and practitioners must be specifically aware when drafting and implementing settlement agreements involving claims of employment discrimination, harassment, or unlawful retaliation under New York law.

Significantly, the amended law now permits complainants who have expressed a preference for confidentiality of settlement agreement terms to avoid the full 21-day waiting/consideration period before signing their settlement agreements and waive all or a portion thereof. In other words, complainants now have "up to 21 days" to consider a term or condition prohibiting the disclosure of the underlying facts or circumstances of their discrimination, harassment, or retaliation claim. While such complainants are entitled to waive all or a portion of the 21-day waiting/consideration period, they are still prevented from waiving – similar to the requirements of the Older Workers Benefit Protection Act – the 7-day revocation period, which permits complainants to change their mind about their preference for confidentiality after having signed the agreement.

Separately, while Section 5-336 previously addressed only claims of employment discrimination, the updated provision now explicitly prohibits provisions in settlement agreements involving claims of unlawful *harassment* or *retaliation* that would prevent the disclosure of the underlying facts and circumstances of such claims, unless the condition of confidentiality is the complainant's preference.

The amended law also provides that a settlement agreement resolving a claim of unlawful discrimination, harassment, or retaliation that includes a release of claims will be deemed unenforceable if the agreement includes: (1) a requirement that the complainant pay liquidated damages for a violation of a nondisclosure clause or non-disparagement clause; (2) a requirement that the complainant forfeit all or part of the consideration for the agreement for a violation of a nondisclosure clause or non-disparagement clause; or (3) any affirmative statement,

assertion, or disclaimer that the complainant was not in fact subject to unlawful discrimination, harassment, or retaliation (i.e., “by signing this agreement and accepting the agreed upon settlement proceeds, I now affirmatively state for the record that I was not a victim of unlawful discrimination, harassment or retaliation”).

The amended law also provides protections for independent contractors who were previously not covered under Section 5-336. Specifically, the law now provides that any agreement between an employer and an independent contractor entered into after January 1, 2020 that includes a provision preventing the disclosure of factual information related to any future claim of discrimination is void and unenforceable as a matter of law, unless such provision notifies the independent contractor that they are not prohibited from speaking with law enforcement, the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the attorney general, a local commission on human rights, or retained counsel about such claim.

To be clear, the new law applies only to settlement agreements entered on or after November 17, 2023 and has no retroactive effect. Thus, employers and practitioners should ensure that all such agreements signed on or after November 17, 2023 are in full compliance with the amended provisions of Section 5-336 of the New York General Obligations Law.

Employers doing business in New York will want to familiarize themselves with these new laws and update their policies and practices prior to the 2024 effective dates. Employers should therefore consider updating employee handbooks and conducting manager trainings to ensure policies and practices comply with these new New York requirements, as well as updating employment agreements and other documentation as soon as possible.

Key Contacts

Our Labor & Employment Law team is available to help employers and others navigate these updated statutory provisions regarding the form and substance of settlement agreements, including that pertinent to a complainant’s preference for confidentiality, as well as to provide guidance regarding all other labor and employment-related matters.

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