What New Jersey's New Law On Employment Contracts Means for Employers: Are Non-Disclosure and Arbitration Provisions Out?

March 20, 2019
Adam E. Gersh
Cherry Hill, NJ

On March 18, 2019, New Jersey Governor Phil Murphy signed a new law, which, among other things, bars employers from requiring employees to sign or enforcing employment contracts that require employees to agree to waive certain rights or remedies and bars agreements that conceal details relating to discrimination claims.

Here's what employers need to know:

- Any provision in an employment contract that waives or limits any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment will now be deemed against public policy and unenforceable;
- No right or remedy under New Jersey's "Law Against Discrimination," or "any other statute or case law" shall be prospectively waived;
- A provision in any employment contract or agreement that has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable;
- For unionized work forces, this law does not restrict agreements to waive rights contained in collective bargaining agreements, but it does extend its prohibition to clauses designed to conceal details of a discrimination claim from unionized employees;
- Attempting to enforce an agreement that is unenforceable under this law will give employees a private right of action to sue in court and the right to recover their attorney's fees and costs of suit if they prevail;
- The law protects employees from retaliation for refusing to enter into an agreement that violates their rights under this new law;
- The law does not restrict an employer's right to impose and enforce restrictions on the use of the employer's confidential and proprietary information other than with respect to the details of discrimination claims;
- The law does not expressly prohibit confidentiality provisions in settlement agreements meant to prevent disclosure of the amount of a settlement;
- The law does not require disclosure; rather it leaves the choice in the hands of the individuals involved; and
- The law took effect immediately and applies to all new contracts and agreements and existing contracts that are renewed, modified, or amended going forward.

Although the law is aimed primarily at prospective waivers of rights and clauses concealing the details of discrimination claims, the full scope of this law's applicability will become clear only after it has been interpreted by the courts. For example, one of the most significant open questions is whether New Jersey courts will deem mandatory arbitration provisions in employment agreements unenforceable as to discrimination claims and, if they do, whether the Federal Arbitration Act will, in turn, be deemed to preempt such a limitation on the enforcement of arbitration clauses. Another important question is whether courts will construe this law to bar confidentiality provisions in settlement agreements that restrict employees from disclosing the terms of the settlement.

As we wait for the courts to resolve these and other open questions, employers should proceed thoughtfully when seeking confidentiality in connection with a claim of discrimination. A precisely drafted confidentiality agreement or policy might be desirable in some situations, such as to preserve the integrity of an ongoing investigation, but employers need to be mindful of this law and understand the limitations and potential consequences of requiring confidentiality and/or taking disciplinary action when confidentiality is breached. Employers relying on mandatory arbitration provisions should also consider the impact of this law and consult their counsel in evaluating whether to exclude discrimination claims from arbitration.

If you have any questions about this legal alert or if you run across a related issue in your workplace, please feel free to contact Adam Gersh or any other member of Flaster Greenberg's Labor & Employment Department.

ATTORNEYS MENTIONED

Adam Gersh