
ARE YOU TALKING TO ME? New Jersey imposes further limits on non-disparagement clauses.

Legal Alert

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The Supreme Court of New Jersey has just made it even harder for employers to prevent harmful comments from employees and former employees. Specifically, non-disparagement clauses have been the primary tool employers use to prevent employees and former employees from damaging their reputation with negative comments and typically apply to any statements, whether in-person, online, or to news media. Now, the Supreme Court has held that such clauses are unenforceable when they prohibit comments relating to claims of discrimination, retaliation, or harassment.

As you may recall, 2019 amendments to New Jersey's Law Against Discrimination ("LAD"), for the first time, created liability for employers attempting to enforce a provision in an agreement with an employee or former employee that has the purpose or effect of concealing details relating to a claim of discrimination, retaliation, or harassment. (Source). This legislative change was largely a reaction to the "me too" movement and the realization that agreements restricting disclosure created an environment where harassment could proliferate.

Since 2019, employers have often used non-disparagement clauses, i.e., provisions that prevent employees and/or former employees from commenting negatively about an employer, to secure silence. Indeed, this approach was expressly endorsed by New Jersey's Appellate Division in a case called Savage v. Neptune Township. In the Savage case, a former police officer settled her employment dispute with the township and her settlement agreement included a provision prohibiting Savage from making "*any statements written or verbal, or cause or encourage others to make any statements, written or verbal regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of [the township].*" After Savage settled her case, she gave a TV interview in which she made comments about the township and police department, such as "*[Y]ou abused me, you abused me for about 8 years*"; "*I'm being financially choked out*"; and "*It has not changed, not for a minute. It's not gonna change, it's the good ol' boy system,*" among other comments.

In response to her interview, the township brought an application to enforce its rights under its agreement with Savage. Initially, the trial court found that Savage violated her non-disparagement obligations and Savage appealed. The New Jersey Appellate Division affirmed that the non-disparagement provision was enforceable, although it held the trial court erred in finding the comments in the interview violated the non-disparagement obligations.

On appeal the Supreme Court unanimously reversed the Appellate Division's decision and held that the non-disparagement provision was too broad because it was being used to silence Savage in a way that violated the 2019 amendments to the LAD.

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What does this mean going forward?

Employers may still use non-disparagement provisions for New Jersey employees and/or former employees, however, they must be narrowly-tailored and clear that they do not restrict disclosure of details relating to a claim of discrimination, retaliation, or harassment under the LAD. It is important to note, provisions restricting other disclosures, such as the employer's confidential information or the amount and terms of a settlement, may still be subject to confidentiality.

Employers should carefully consider the impact of this law and consult their counsel in evaluating how best to protect the reputation of the company from harmful comments by employees and former employees going forward. Employers also must consider this ruling in attempting to enforce provisions that are now unenforceable because the 2019 amendments to the LAD create a private right of action by the employee for such conduct. Finally, employers should carefully review the policies in their handbooks because many include non-disparagement clauses that are now overly broad.

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

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