

New Jersey Expands Leave Laws and Restrictions on Non-Disclosure Provisions

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New Jersey has continued its trend of enacting employee-friendly laws through a recent expansion of its leave laws and new restrictions on the enforceability of non-disclosure provisions in employment contracts and settlement agreements. New Jersey now touts itself as soon having “the most expansive paid family leave time and benefits in the nation” and finds itself in the company of New York and California as states that have in recent years placed limitations on enforcement of privately negotiated non-disclosure agreements.

Expansion of New Jersey’s Employee Leave Laws

On February 19, Governor Phil Murphy signed legislation amending the New Jersey Family Leave Act (NJFLA), the New Jersey Family Leave Insurance law (NJFLI), and the New Jersey Security and Financial Empowerment Act (SAFE Act). Employers with operations or employees in New Jersey will need to update their policies and practices to comply with these new laws.

The NJFLA currently requires employers with 50 or more employees (counting both in-state and out-of-state employees) to provide their in-state employees with up to 12 weeks of employment-protected leave in a 24-month period to care for a family member with a serious health condition, or to bond with a newly born or adopted child. Effective June 30, 2019, the law will apply to employers with 30 or more total employees. In addition, other provisions that went into effect immediately upon the law’s signing include a broadening of the family members for whom the law is applicable (to include, among others, any blood relation of the employee and any individual with whom the employee has “the equivalent of a family relationship”), as well as the accordance of leave for bonding with a newborn child conceived through a gestational carrier agreement or with a newly placed foster child.

The amendments to the NJFLI, the law providing wage replacement benefits to employees on family leave through the state’s temporary disability leave benefits program, will take effect on July 1, 2020. These amendments include doubling the number of weeks of paid leave benefits from six to 12 within a 12-month period, as well as raising the cap on the weekly benefit amount from two-thirds to 85 percent of an employee’s weekly salary, to a maximum of 70 percent of the statewide weekly remuneration average, which means the weekly maximum benefit will increase from \$633 per week to \$859 per week in 2020. The amendments also prohibit employers from requiring employees to use up to two weeks of PTO in lieu of NJFLI benefits (but still allow employees to elect to use PTO in lieu of NJFLI

benefits), eliminate the seven-day waiting period for NJFLI benefits, and include an expansive anti-retaliation provision and a private right of action for the aggrieved employee.

Finally, the New Jersey SAFE Act amendments, which also become effective July 1, 2020, include, among other things, (i) the accord of wage replacement benefit eligibility from the state for employees who are victims of domestic violence or sexual assault, or have a family member who is a victim, as well as (ii) an expansion of the definition of “family member” under the Act that mirrors the new definition in the NJFLA discussed above.

New Jersey’s Limitations on the Enforcement of Nondisclosure Provisions in Employment Contracts and Settlement Agreements

On March 18, Governor Murphy signed into law a bill that restricts the enforcement of non-disclosure provisions in employment contracts and settlement agreements. The new law, which applies to all such contracts or agreements entered into, renewed, modified, or amended on or after March 18, 2019, amends the New Jersey Law Against Discrimination (NJLAD) to render unenforceable (i) “[a]ny provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment”¹ and (ii) “a[n]y provision in any employment contract or settlement agreement which has the purpose of concealing the details relating to a claim of discrimination, retaliation, or harassment[.]”

The new law also requires that settlement agreements resolving a discrimination, retaliation or harassment claim brought by an employee against an employer include the “bold, prominently placed notice” 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.”* In other words, this notice alerts settling employees that if they exercises their right to publicly disclose the details relating to their claims of discrimination, retaliation, or harassment in a manner that identifies their employer, then the employer will itself be free to respond publicly with its own version of events, notwithstanding a confidentiality provision in the settlement agreement.

The new law creates a private right of action whereby “[a]ny person claiming to be aggrieved” by a violation of the law (e.g., an attempt by an employer to enforce an unenforceable contract provision) may file suit in New Jersey state court for the recovery of common law remedies and reasonable attorney’s fees and costs.

Employers of all sizes who maintain operations in New Jersey should review their current policies, practices, forms, and agreements to ensure compliance with these new laws, paying particularly close attention to areas where New Jersey’s new requirements differ from federal requirements. Such employers must also be mindful that they will not be able to contractually compel confidentiality of the details relating to claims of discrimination, retaliation, or harassment made by their New Jersey employees.

¹ There has been discussion within the legal community that the language in the new law regarding waiver of substantive and procedural rights could be read to prevent employers from enforcing pre-dispute arbitration agreements entered into with employees, in which employees agree to forgo the right to bring a claim in court and have the matter tried before a jury. However, while employers should take note of the new law, to the extent that it purports to bar the use of or impede the enforcement of arbitration agreements, there is a strong argument that it is preempted by the Federal Arbitration Act. We will continue to monitor and report on further developments concerning the new law.

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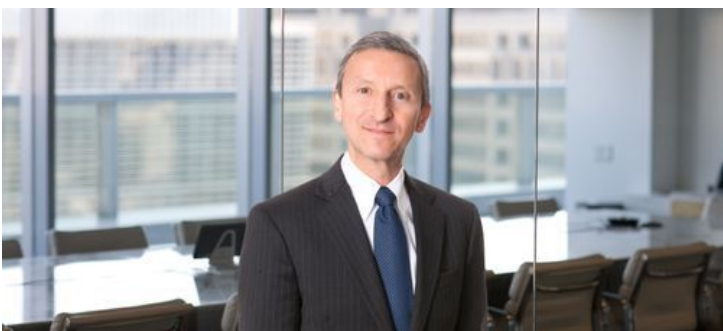
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