

Blog Post

The Secret Is Out: Updates to New York's Non-Disclosure Law

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New York is closing out 2023 by ushering in sweeping amendments to its law governing non-disclosure agreements (NDAs) in certain settlement agreements. The amendments represent the next step in New York's ongoing effort to regulate the use of NDAs, particularly when confidentiality is not a complainant's preference. The changes took immediate effect on November 17, 2023, when Governor Hochul signed [SB S4516](#). Here is what employers need to know so they don't drop the ball when crafting settlement agreements relating to employment claims.

Settlement Agreements Involving "Harassment" and "Retaliation" Claims are now Covered

Previously, New York only prohibited employers from including or agreeing to include an NDA in a settlement agreement where the factual foundation of a complainant's claim involved discrimination, and where the NDA prevented disclosure of the underlying facts or circumstances of a claim (unless the complainant preferred inclusion of the NDA).

With the recent amendments, the law has been significantly broadened to cover more than just discrimination-related agreements. Now,

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agreements relating to claims of harassment or retaliation are also covered.

Removal of the Previously Non-Waivable 21-Day Consideration Period for Pre-Litigation Agreements

Prior to the recent amendments, complainants were required to wait for a non-waivable 21-day period before signing an agreement containing an NDA. This had the effect of dragging out the settlement process — particularly where complainants were over the age of 40 and could still use an additional 21-day (waivable) consideration period to review an agreement, and then have an opportunity to revoke for an additional seven days, before the agreement would typically become effective. In practice, such delays might lead to complainants changing their mind about preferring confidentiality, or even settling at all. It also delayed the employer's ability to satisfy its obligations under any such agreement.

With the latest amendment, complainants now may opt to waive their 21-day period to consider whether they prefer inclusion of an NDA in their settlement agreement. Notably, this change to the law only applies to pre-litigation agreements; where an agreement is resolving a matter in a litigation context, the 21-day period remains non-waivable.

Independent Contractors are now Protected

Where the prior iteration of New York's NDA law only covered employees and potential employees, the new amendments broaden that protection to also reach independent contractors. Now, NDAs preventing the disclosure of factual information relating to any future claim of discrimination are void and unenforceable with respect to contractors as well, unless the NDA makes clear that the individual is not prohibited from speaking to law enforcement, the Equal Employment Opportunity Commission, the state division of human rights, the attorney general, a local commission on human

rights, or attorney. This provision appears to apply retroactively to agreements entered into on or after January 1, 2020.

Restrictions on Releases

Lastly, the amended law now provides that a release of a claim involving discrimination, including discriminatory harassment or retaliation, is unenforceable where:

- the complainant is required to pay liquidated damages for violating an NDA or non-disparagement clause;
- the complainant is required to forfeit all or part of the consideration for the agreement for violating the NDA or non-disparagement; or
- the release contains or requires an affirmative statement, assertion, or disclaimer by the complainant that he or she was not in fact subject to unlawful discrimination, including discriminatory harassment or retaliation.

Takeaway for Employers

New York employers seeking to include NDAs in agreements with employees, potential employees, and independent contractors should ensure that these agreements now comply with New York's updated standards. Likewise, employers should ensure that agreements entered into as of January 1, 2020, are compliant with the new requirements and consider amending them where appropriate. Before that cork is popped off that champagne, or a settlement is "toasted," employers should take heed of the new, broader application and parameters for NDAs, before "times gone by."

For guidance on New York's ever-broadening approach on NDAs and other workplace issues, consult your Akerman Labor and Employment attorney.

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