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New York Non-Disclosure Agreements Law Amended, Affecting Settlements of Discrimination, Harassment, and Retaliation Claims

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On November 17, 2023, New York Governor Kathy Hochul signed Bill S4516 into law, which amends the requirements for non-disclosure and non-disparagement provisions in certain settlement agreements. Previously, New York law prohibited employers from including provisions in settlement agreements that resolved discrimination claims if those provisions would preclude the disclosure of the underlying facts and circumstances of the claims, unless confidentiality was the employee's preference. If the employee preferred confidentiality, the parties had to agree separately to that provision a full 21 days in advance of signing a settlement agreement. Now, this legal requirement to "pre-agree" on confidentiality extends to harassment and retaliation claims and to any such claims asserted by independent contractors.

S4516 also contains new limitations on releases obtained in connection with discrimination, harassment, and retaliation claims and the contractual consequences for a breach of any related non-disclosure and non-disparagement provisions.

This law takes effect immediately and applies to all agreements signed or entered into after November 17, 2023.

Allowing Confidentiality Only Where It Is the Complainant's Preference

S4516 prohibits employers from including provisions in settlement agreements resolving discrimination, harassment, or retaliation claims that would "prevent the disclosure of the underlying facts and circumstances" of the claims, unless confidentiality is the complainant's preference. These provisions are therefore only lawful where the employer provides the complainant with the non-disclosure or confidentiality provision in plain English (and the complainant's primary language, as applicable) and gives the complainant *up to* 21 days to consider it. Then, the complainant can express their preference for confidentiality by signing a separate agreement indicating as much, so long as the complainant also has seven days to revoke that agreement after signing.

In the prior version of the law, the 21-day consideration period appeared to be mandatory. Now, the complainant need not wait until the full 21-day period has elapsed to sign the agreement. The seven-day revocation period remains the same.

Voiding Certain Releases of Discrimination, Harassment, and Retaliation Claims

S4516 also *voids* all releases of discrimination, harassment, or retaliation claims if:

1. the complainant must pay liquidated damages for violation of a non-disclosure or non-disparagement clause;

2. the complainant must forfeit all or part of the consideration for violating a non-disclosure or non-disparagement clause; or

3. the agreement contains any "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."

In other words, in settling discrimination, harassment, or retaliation claims, if the settlement agreement were to contain *any* of the above three provisions, the release would be void.

The Ramifications of S4516

In addition to creating new hoops employers must jump through to obtain confidentiality in settling discrimination, harassment, and retaliation cases, S4516 may impact settlement dynamics and incentives.

The principal remedy for a complainant's violation of a non-disclosure or non-disparagement clause is actual damages, which can be difficult to prove. That is why employers have turned to liquidated damages or forfeiture clauses in the past. Given that S4516 voids releases in settlement agreements that resolve discrimination, harassment, and retaliation claims if they contain liquidated damages or forfeiture provisions, enforcement of non-disclosure and non-disparagement clauses may prove challenging. To bolster a claim for damages, employers should consider spelling out in non-disclosure and non-disparagement clauses the ways in which breach would damage the employer's business.

Still, employers may now be unwilling to pay a premium to obtain confidentiality or non-disparagement if there are no meaningful enforcement mechanisms. Additionally, because confidentiality and non-disparagement clauses would be difficult to enforce without liquidated damages or forfeiture clauses, employers may reconsider requesting them at all, especially when such requests (particularly for non-disparagement clauses) often result in a reciprocal request from the complainant.

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