KAUFMAN | DOLOWICH

Law Alert: New York Imposes New Restrictions on Release Agreements Involving Discrimination, Harassment, or Retaliation Claims, 12-6-2023

New York employers may now be more reluctant to settle employment disputes with employees. Specifically, New York State employers will now find it much harder to enforce non-disclosure and non-disparagement provisions as a result of new restrictive amendments recently signed into law by Governor Kathy Hochul. On November 17, S4516 took effect, amending Section 5-336 of the New York General Obligations Law, one of the original statutes to come out of the #MeToo movement. The amendments significantly impact employment-related release agreements (i.e., severance, separation, and settlement agreements) by restricting common terms traditionally relied upon by employers in such agreements. The legislation applies to all agreements entered on or after November 17, 2023.

New Restrictions Potentially Nullifying Agreements

Specifically, the Amendments provide that agreements involving discrimination, harassment, or retaliation claims will be *void if:*

- ***The agreement requires the Complainant to pay liquidated damages for violations of a non-disclosure or non-disparagement clause;***
- ***The agreement requires the Complainant to forfeit all or part of the consideration for violations of a non-disclosure or non-disparagement clause; or***
- ***The agreement contains any "affirmative statement, assertion, or disclaimer" by the Complainant denying that they were subjected to unlawful discrimination, harassment, or retaliation.***

Additional Limits on Disclosures Related to Future Claims of Discrimination

Prior to the recent Amendments, employers seeking to limit the disclosure of factual information related to any future claims of discrimination were required to notify the employee or potential employee that they are not prohibited from speaking with certain government entities. The Amendments expanded this requirement in two ways:

First, the Attorney General was added to the list of entities that Complainants can continue to speak with. Employers must now notify Complainants that provisions in agreements that prevent the disclosure of factual information related to any future claim of discrimination do not prohibit the Complainant from speaking with the Attorney General as well.

Second, independent contractors were added as an additional class of individuals and are now afforded these same protections given to employees and potential employees. Going forward, any agreement with an independent contractor that seeks to limit the disclosure of factual information related to a discrimination claim must also notify the independent contractor that they can nevertheless speak with these specific entities and individuals.

21-day Consideration Period for Confidentiality Provisions May Now Be Waivable Pre-Litigation

Under the previous version of Section 5-336, Complainants were *required to take a full 21-days to consider whether they wanted to include a confidentiality provision in the underlying settlement agreement. As employers often condition the settlement on the Complainant's agreement to confidentiality, the effective result was that a settlement agreement could not be signed by the parties until after that 21-day period expired.*

The Amendments changed the 21-day mandate and now provide that the Complainant may take "up to" 21-days to consider a confidentiality provision. This change appears to imply that the 21-day period is *waivable*.

Importantly, the Amendments did not change the corresponding CPLR Section 5003-B, which continues to require Complainants to wait the full 21 days before signing an agreement containing a non-disclosure provision in discrimination claims.

Accordingly, while the 21-day consideration period appears to be waivable pre-litigation (as per Section 5-336), it remains mandatory in New York State Court civil litigation (as per the CPLR).

Practical Considerations for Companies

- **The Amendments apply to employment contracts, independent contractor agreements, release agreements, severance agreements, settlement agreements, and any other company document that includes a release of a claim of discrimination, harassment or retaliation. If employers have grown accustomed to using such documents, employers should review each to ensure compliance with the Amendments.**
- **The Amendments were effective immediately. As a result, all release agreements (such as all company-used severance agreements) that went into effect on or after November 17, 2023, must comply with the Amendments. Employers should review and revise their agreements where needed, including those that are presently being negotiated or are partially executed, to bring them into compliance to avoid the risk of having an unenforceable release provision.**
- **While the 21-day period for considering confidentiality appears to now be waivable pre-litigation, the language in the corresponding CPLR provision was unchanged and there has yet to be any formal guidance issued to address the disparity. Accordingly, while it appears that the 21-day period may be waivable pre-litigation, some employers may want to take a more conservative approach and insist that settling Complainants consider confidentiality for a full 21-days regardless of whether they are already in court.**

Kaufman Dolowich Can Help

The recently enacted amendments significantly restrict an employer's ability to enforce non-disclosure and non-disparagement clauses. If your company needs assistance reviewing or revising any of your policies or agreements, our team of skilled labor and employment attorneys can help.