



Lum, Drasco & Positan LLC Attorneys At Law Since 1870

New Law Bars Non-Disclosure and Waiver Provisions in Employment Agreements Relating to Discrimination, Harassment, and Retaliation Claims

On March 18, 2019, Governor Murphy signed Senate Bill No. 121 into law, barring provisions in employment contracts or agreements that waive rights or remedies, or otherwise conceal details relating to discrimination, harassment and retaliation claims. The law restricts the following as against public policy and unenforceable against a current or former employee:

- A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation or harassment; and
- A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation and harassment.

Prior to this law, such provisions have been commonly included in employment contracts such as separation agreements and settlement agreements. In cases where claims of discrimination, harassment or retaliation have been raised and negotiations of settlement discussed, such confidentiality or “non-disclosure provisions” have been considered integral components of the agreement between the parties. With the passage of this law, such “non-disclosure provisions” are now prohibited.

Moreover, this new law mandates that: “Every settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer shall include a 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 identified.”

Previously, non-disclosure provisions in settlement agreements required confidentiality by both the employer and employee regarding the details of a discrimination, harassment or retaliation claim, along with a condition that if the details of the claim(s) were disclosed by the employee, thus resulting in a violation of the non-disclosure provision, that the employee would have to repay the cost of the settlement. This new law now denies the employer the option to have such a provision in the settlement agreement, and further mandates that while the employer and employee can theoretically agree to keep the claim details confidential, if the employee discloses information about the claims which ultimately identifies the employer, the employer has no recourse against the employee for “breaching” confidentiality regarding the claim.

While the law references “details relating to a claim of discrimination, retaliation or harassment,” the law does not specifically address whether the amount of the settlement is considered such a “detail.” It is anticipated that attorneys for employees may argue that the restriction on non-disclosure provisions relating to discrimination, harassment and retaliation claims also applies to the settlement sum, while attorneys for employers will argue it does not. Additionally, the law

does not presently apply to other types of employment claims, which do not involve discrimination, harassment or retaliation.

The following conduct is also prohibited under the law:

- Retaliation, including but not limited to failure to hire, discharge, suspension, demotion, discrimination in the terms, conditions, or privileges of employment, or other adverse action, against a person on grounds that the person does not enter into an agreement or contract that contains a restricted non-disclosure provision.

If a party attempts to enforce a restricted non-disclosure provision relating to claims of discrimination, harassment and retaliation, that party “shall be liable for the employee’s reasonable attorneys’ fees and costs.”

An aggrieved party who believes another party has acted in violation of this law may initiate a lawsuit in court within two years after accrual of the cause of action, and seek reasonable attorneys’ fees and costs.

Finally, the law states that it “shall not be construed to prohibit an employer from requiring an employee to sign an agreement:

- (1) In which the employee agrees not to enter into competition with the employer during or after employment; or
- (2) In which the employee agrees not to disclose proprietary information, which includes only non-public trade secrets, business plan and customer information.”

Accordingly, such provisions are still permissible in employment contracts, separation agreements and settlement agreements.

This law takes effect immediately, and applies to all employment contracts, separation agreements and settlement agreements entered into after the law’s effective date of March 18, 2019.

To discuss this new law, or seek assistance with regard to compliance with the law relating to the preparation of employment contracts, separation agreements or settlement agreements, please contact one of the attorneys below:

Wayne J. Positan	(973) 228-6730	wpositan@lumlaw.com
Christina Silva	(973) 228-6763	csilva@lumlaw.com
Daniel M. Santarsiero	(973) 228-6780	dsantarsiero@lumlaw.com
Elizabeth Y. Moon	(973) 228-6792	emoon@lumlaw.com

LUM, DRASCO & POSITAN LLC provides a complete range of legal services in many specialized areas including:
Banking • Corporate • Insurance • Public Finance • Bankruptcy • Creditor’s Rights • Labor and Employment
• Real Estate • Condemnation • Environmental • Litigation • Taxation • Construction • Fidelity and Surety
• Professional Liability • Trusts and Estates

Lum Law Notes is a publication intended for the clients of Lum, Drasco & Positan LLC and other interested persons. It is designed to keep its readers generally informed about developments in the firm and its areas of practice and should not be construed as legal advice concerning any specific factual situation

Tel: (973) 403-9000 / Fax: (973) 403-9021
www.lumlaw.com