

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

DECEMBER 11, 2023

New York Further Restricts Employers' Use of Non-Disclosure Provisions in Certain Settlement Agreements

Effective Nov. 17, 2023, New York General Obligations Law 5-336 was amended to further restrict employers' use of non-disclosure or confidentiality provisions in settlement agreements when the factual foundation involves discrimination, harassment or retaliation. Since its enactment, the law has broadly prohibited non-disclosure provisions in agreements to settle discrimination claims "unless the condition of confidentiality is the complainant's preference."¹

The amendments made a number of notable changes, including clarification that the law applies not only to discrimination claims, but also the settlement of harassment and retaliation claims. The amendments further broaden the scope of General Obligations Law 5-336 by extending coverage to independent contractors in addition to employees and potential employees.

The amendments also build in additional flexibility with respect to the required consideration period. Complainants previously had an inflexible, unwaivable 21-day period to consider the non-disclosure and confidentiality provisions of a proposed settlement agreement. Under the amendments, complainants still have "up to" 21 days to consider such terms but may opt to execute the agreement earlier. The seven day revocation period following execution remains unchanged.

CPLR § 5003-b – which provides plaintiffs 21 days to consider a settlement agreement containing a provision preventing the disclosure of the facts and circumstances underlying a discrimination claim – was not amended in concert with the amendments to General Obligations Law 5-336. Thus, the non-waivable 21 day consideration period provided by CPLR 5003-b applies to cases that are filed in a court where the CPLR applies.

Perhaps most notably, the amendments to General Obligations Law 5-336 provide that a release of claims contained in an agreement to settle a discrimination, harassment, or retaliation claim will be unenforceable if it:

- requires the complainant to pay liquidated damages for violating a non-disclosure or non-disparagement clause;
- requires the complainant to repay or forfeit any consideration for violating a non-disclosure or non-disparagement clause; *or*
- contains any affirmative statement that the complainant was not, in fact, subject to unlawful discrimination, harassment, or retaliation.²

¹ N.Y. Gen. Oblig. Law § 5-336.

² *Id.*

Language that was previously included in employers' settlement agreements as a matter of course may now run afoul of the amended law. To avoid enforceability challenges, employers should review their settlement agreements to ensure compliance with these amendments.

If you have any questions about the amendments to General Obligations Law § 5-336, or any of the information contained in this memo, please contact [Adam Mastroleo](#), [Hannah Redmond](#) or the Bond attorney with whom you are in regular contact.

