

New York Bars Liquidated Damages for Non-Disclosure Breaches in Workplace Discrimination Settlements

Law and the Workplace on **November 22, 2023**

New York Governor Kathy Hochul has recently [signed into law](#) a bill that impacts settlement agreements entered into by employers and employees that resolve claims of harassment, discrimination and retaliation. The recent amendment prohibits any settlement or other resolution of a claim involving sexual harassment or any other form of unlawful discrimination or harassment from including any term or condition requiring the complainant to pay the defendant liquidated damages in the event that the plaintiff violates a non-disclosure provision. The law took effect immediately upon signing on November 17, 2023 and applies to agreements entered into on or after that date.

Additionally, Governor Hochul [signed into law](#) a bill extending the statute of limitations for all unlawful discriminatory practices claims under the New York State Human Rights Law to three years. That law will take effect on February 15, 2024 and will apply to all unlawful discriminatory practices claims arising on or after such date.

Expanded Restrictions and Other Changes for Non-disclosure Provisions in Settlement Agreements

The [first new law](#) amends the NY General Obligations Law to state:

“Notwithstanding any other law to the contrary, no release of any claim, the factual foundation for which involves unlawful discrimination, including discriminatory harassment, or retaliation, shall be enforceable, if as part of the agreement resolving such claim:

- The complainant is required to pay liquidated damages for violation of a nondisclosure clause or nondisparagement clause;
- The complainant is required to forfeit all or part of the consideration for the agreement, for violation of a nondisclosure clause or nondisparagement clause; or

- It contains or requires any affirmative statement, assertion, or disclaimer by the complainant that the complainant was not in fact subject to unlawful discrimination, including discriminatory harassment, or retaliation.”

As such, parties entering into settlement agreements that resolve claims of discrimination or retaliation will not be able to agree upon liquidated damages or forfeiture of the settlement payments in the event that the complainant is found to have breached a non-disclosure or non-disparagement clause contained in the agreement.

The recent amendment also eliminates the previous requirement that a complainant, regardless of their age, be provided a firm 21-day period to consider any confidentiality provisions in a settlement or resolution of a discrimination claim before the agreement may be finalized. Now, complainants (again, regardless of age) must be provided “up to 21 days” to consider such terms, and may therefore enter into the agreement sooner than the 21-day period if they so elect. Complainants must still be provided with a 7-day period to revoke their assent after signing before any such confidentiality provisions may take effect.

The new law also:

- clarifies that confidentiality provisions must be the preference of the complainant in any settlement, agreement or other resolution of claims the factual foundation for which involves discriminatory harassment or retaliation, as well as other forms of discrimination; and
- expands protections regarding the disclosure of factual information related to any future claim of discrimination to independent contractors, as well as employees. Specifically, the law had previously stated that any agreements between an employer and employee (or potential employee) to keep future claims of discrimination confidential, which would include, for example, agreements to arbitrate future claims, were unenforceable unless the agreement notifies the employee (or potential employee) of their right to speak with law enforcement, administrative agencies or an attorney retained by the individual. The amendment now extends this provision to agreements entered into between employers and independent contractors.

Extended Statute of Limitations Under New York State Human Rights Law

The [second new law](#) will extend the statute of limitations for any claim of a unlawful discriminatory practice under the New York State Human Rights Law to three years. Currently, only claims of sexual harassment in employment are subject to a 3-year limitations period – all other unlawful discriminatory practices claims are subject to a 1-year limitation. As noted above, the expanded statute of limitations will take effect on February 15, 2024 (90 days after signing) and will apply to all unlawful discriminatory practices claims arising on or after such date.

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The new laws come as New York's Adult Survivors Act – which provided for a one-year period in which complainants could file civil suits for certain sexual offenses regardless of whether the statute of limitations on the claim had ended – is set to expire on November 24, 2023.

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[Related Professionals](#)

- **Laura M. Fant**
Special Employment Law Counsel
- **Evandro C. Gigante**
Partner