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Settlement Pitfalls: Confidentiality Is Prohibited but Non-Disparagement Provisions Are Not (for Now), NJLJ, authors Gregory Hyman and Brandon Lee Wolff, August 19, 2022

While non-disparagement provisions are currently allowed in settlement agreements and employment contracts, they could follow the same fate as confidentiality agreements and be banned.

By **Gregory S. Hyman and Brandon Lee Wolff**

Employers may not have non-disclosure provisions in their employment-related settlement agreements or employment contracts, but they can still include non-disparagement provisions to prevent negative comments by former employees.

Non-Disparagement Provisions: Allowed (for Now)

On May 31, 2022, the New Jersey Superior Court, Appellate Division, published its decision in *Savage v. Twp. of Neptune, 472 N.J. Super. 291 (App. Div. 2022), holding that non-disparagement provisions are enforceable in settlement agreements resolving claims under New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 to -50 ("LAD"), notwithstanding the Legislature's earlier rejection of non-disclosure provisions. A non-disparagement clause is a contractual provision prohibiting the parties from publicly communicating anything negative about each other.*

The court states that when the New Jersey Legislature passed L. 2019, c. 39, §2, which supplemented the LAD (codified at N.J.S.A. 10:5-12.8(a)), it prohibited non-disclosure provisions and "could have, but did not, prohibit the enforcement of non-disparagement provisions." Id. at 308. The court continues to state that the "omission is noteworthy given that both non-disclosure and non-disparagement provisions are often included in employment agreements." Id. Judge Haas, writing for the panel, noted that the plain language of the law and extrinsic evidence (such as committee and sponsor statements) only refer to non-disclosure agreements, concluding that "neither the language of N.J.S.A. 10:5-12.8(a), nor the legislative history, indicate an intent by the Legislature to prohibit the enforcement of non-disparagement provisions." Id. at 307-309.

For context, the employer in Savage filed a motion to enforce a settlement agreement resolving a former plaintiff employee's LAD allegation that the defendants engaged in harassment, sexual discrimination and retaliation. The settlement agreement contained a mutual non-disparagement provision in which the parties agreed not to make negative written or verbal statements about the parties' "past behavior" which would "disparage or impugn the reputation of any party." Id. at 299-300. The parties agreed that the non-disparagement provision was a material term of the settlement agreement and would apply to statements to the news media such as television interviews. Id. at 300. The parties further agreed that if either party breached the provision, the non-breaching party could file an action to enforce the non-disparagement provision.

The employer alleged that the plaintiff violated the non-disparagement provision by speaking to a network television reporter not long after she received settlement funds—specifically commenting that the employer "has not changed, not for a minute. It's not gonna change, it's the good ol' boy system"—and the trial court enforced the non-disparagement provision. On appeal, the employee claimed that the non-disparagement provision was unenforceable and against public policy because "it prohibits her from making any statements about defendants' past behavior and thus has the purpose or effect of concealing the details relating to her claims of employment discrimination, retaliation, and harassment." Id. at 304. The National Employment Lawyers Association of New Jersey (NELA-NJ), as amicus curiae, joined in the employee's argument.

The Appellate Division, however, agreed with the trial court that the non-disparagement provision was enforceable and not against public policy, finding that the non-disparagement provision benefited both parties, as the employer agreed to only provide prospective employers with a neutral reference about the former employee and was not meant to silence the former employee like a non-disclosure provision. Id. at 309-10. Thus, "the provision did not have the purpose or effect of barring plaintiff from discussing the details of the

settlement agreement or her underlying LAD claims as prohibited under N.J.S.A. 10:5-12.8(a)." *Id.*

The Appellate Division also acknowledged that there could be overlap ("describing the details of a LAD claim could be disparaging") but concluded that is not what happened in this case. The employer did not object to the former employee discussing the details and terms of her discrimination. Further, the employer did not claim that the former employee had violated the non-disparagement provision by discussing the details of her discrimination claim. The court noted that the statements were not about the former employee's discrimination claim but, rather, were her "impressions of defendants' present and future behavior" and thus not in violation of the non-disparagement provision. Notwithstanding, the appellate panel enforced the non-disparagement provision but reversed the trial court's decision that the employee's televised interview ran afoul of the provision inasmuch as the employee did not discuss any specifics of the settlement itself. The court's distinction between past behavior and present/future behavior provides useful insight on which statements may violate a non-disparagement provision.

Confidentiality 'Non-Disclosure Provisions': Not Allowed

In contrast to non-disparagement provisions, the enforcement of confidentiality provisions (also known as non-disclosure agreements or NDAs) in settlement agreements or employment contracts have been "deemed against public policy and unenforceable" since early 2019 when the Legislature supplemented the LAD. An NDA is a clause prohibiting the parties to an agreement from disclosing to non-parties the terms of the agreement and, often, anything related to the formation of the agreement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, any non-disclosure provision shall be unenforceable against the employer. Under New Jersey law, even if an employee wants a confidentiality provision because the employee was terminated for a legitimate reason (and would not want the employer to disclose the reason), confidentiality provisions are unenforceable.

The LAD, as supplemented, specifically prevents agreements or contracts which have the "purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment." N.J.S.A. 10:5-12.8(a). Notably, the text and legislative history of the LAD focuses only on non-disclosure agreements rather than non-disparagement provisions. It is worth noting that this clarification came forth in the aftermath of the #MeToo movement in order to encourage victims to report discrimination, sexual assault, sexual harassment or retaliation and to help eliminate the secrecy regarding NDAs that may have allowed abuses to continue.

What's Next

While non-disparagement provisions are currently allowed in settlement agreements and employment contracts, they could follow the same fate as confidentiality agreements. The New Jersey Senate appears to have taken notice of the trial court's opinion in *Savage that the Legislature "could have, but did not, prohibit the enforcement of non-disparagement provisions." Savage, 472 N.J. Super. at 308. On June 27, 2022, a few weeks after the Savage decision was published, a bill, S2930, was introduced into the Senate and referred to the Senate Labor Committee, which would prohibit non-disparagement clauses by amending the 2019 law to explicitly mention that non-disparagement provisions shall be deemed against public policy and be prohibited in any employment contract or settlement agreement. See S2930. The statement regarding the bill specifically notes that "the bill clarifies that the current law on non-disclosure provisions also prohibits certain non-disparagement provisions in employment contracts." Id.*

What Should Employers Do Now?

The legislative activity since the 2019 supplement to the LAD is but one example of the law's broad impact. In addition, the manner in which employers view settlements continues to evolve as the preclusion of confidentiality in settlement agreements effectively removes a major incentive for employers to settle employment claims and predictably has led many employers proceeding to litigate these cases to conclusion. If non-disparagement provisions are also not allowed, this may further incentivize employers not to settle cases which will increase court filings and could cause a further backlog in New Jersey courts.

Given the current legislation, New Jersey employers must continue to refrain from using non-disclosure agreements in their employment-related settlement agreements or employment contracts, but can (for now) continue to include non-disparagement provisions to prevent disparaging comments by former employees. However, employers should be cautious regarding the specific

language that is used and not use language that could be interpreted as hiding details related to any discrimination, harassment or retaliation claim. Finally, New Jersey employers should closely monitor S2930 as non-disparagement provisions may soon be on the chopping block and also prohibited by the Legislature.

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