

NY GENERAL OBLIGATIONS LAW AMENDED TO LIMIT FURTHER PRO-EMPLOYER PROVISIONS IN SETTLEMENT AGREEMENTS

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Recently, New York Governor Kathy Hochul signed S. 4516, an amendment to New York General Obligations Law Section 5-336. This new law bars settlements of harassment, discrimination, and retaliation claims from including any terms or conditions requiring a complainant (plaintiff) to pay liquidated damages for violating a non-disclosure or non-disparagement clause. Additionally, such settlement or separation agreements may NOT require the complainant to forfeit part or all of the consideration for violating any non-disclosure or non-disparagement provisions, nor may the complainant be required to sign an affirmative statement, assertion, or disclaimer stating that he or she was not subject to discrimination, harassment, or retaliation. Moreover, if a settlement or separation agreement includes any of these terms, the amended law provides that the release shall not be enforceable.

In other words, an employer cannot stop making settlement payments to a former employee who has violated a non-disclosure or a non-disparagement clause in a separation or settlement agreement. The employer's only remedy is to sue the employee for breach of the agreement.

Section 5-336 had already prohibited an agreement that bars a complainant from disclosure of the underlying facts and circumstances of a discrimination, harassment, or retaliation claim unless the condition of confidentiality is the complainant's preference. Even where such a non-disclosure agreement is the complainant's preference, Section 5-336, as amended, now requires that the complainant have up to twenty-one days in which to consider such an agreement, and then seven days in which to revoke it. This amendment removes the previous requirement that a complainant, in a situation where litigation has not yet commenced, consider the confidentiality provision for at least twenty-one days. Now, a complainant in such circumstances may elect to sign the agreement earlier. However, the seven-day revocation period remains unchanged.

Further, where the Complainant has already filed a discrimination, harassment, or retaliation claim in court, New York Civil Practice Law and Rules (CPLR) Section 5003-B continues to require that the employee consider such a non-disclosure agreement for the full twenty-one days. In such circumstances where the CPLR applies, the complainant cannot waive the twenty-one-day consideration period.

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The new law also expands the application of Section 5-336 to independent contractors, as well as employees.

The amendment to Section 5-336 took effect on November 17, 2023, and applies to agreements entered on or after that date. Employers need to make sure that their separation and settlement agreements with employees, and now also with independent contractors, comply fully with this amended statute.

If you have any questions about Section 5-336, or more generally about separation and settlement agreements with former employees or independent contractors, please contact [Charles H. Kaplan](#) (646.218.7513), [Kinsey A. O'Brien](#) (716.848.1287), or [Glen P. Doherty](#) (518.433.2433), or any other member of Hodgson Russ LLP's [Labor & Employment Practice](#))).

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