Patterson Belknap

**Employment Law Alert**
December 22, 2023

# 2023 Amendments to General Obligations Law 5-336

On November 17, 2023, New York State Governor Kathy Hochul signed into law Senate Bill 4516, amending General Obligation Law Section 5-336 (GOL 5-336). As set forth in our earlier alert from when the law was first enacted, Section 5-336 limited employers' use of nondisclosure provisions in agreements releasing claims involving sexual harassment. The most recent amendments broaden the law's scope to include all harassment and retaliation claims in addition to discrimination claims and to protect independent contractors; add new limitations on an employer's ability to use several common enforcement mechanisms for nondisclosure clauses; and permit individuals to waive the 21-day waiting period to sign a preference agreement in connection with a pre-litigation settlement.

Passed in response to the issues and concerns of employees raised in the #MeToo movement, the new law furthers New York State's effort to create a safe and equitable workplace. The amendments became effective on November 17, 2023 and apply to agreements entered into on or after that date.

**Changes to New York Law**

*Section 5-336's Protections Now Include all "Harassment and Retaliation" Claims and Apply to Independent Contractors*

As originally drafted, Section 5-336(1) barred the use of non-disclosure clauses in settlement agreements releasing claims of sexual harassment, unless the employee expressed a preference for such a clause in a separate written agreement. A 2019 amendment expanded these protections to apply to releases of all discrimination claims. Under the most recent amendment, the requirement to use a preference agreement now extends to all claims the factual foundation for which involves "discrimination, harassment, or retaliation . . . including "discriminatory harassment or retaliation."

The most recent amendment also expands the scope of Section 5-336(2), which bars the use of confidentiality provisions in any employment agreement that would prevent the disclosure of the factual foundation for a potential discrimination claim unless the agreement includes a disclaimer making clear that employees may still contact enforcement officials—including the attorney general (a new addition)— regarding such claims. Pursuant to the new amendments, this provision now also extends to agreements with independent contractors.

*Employees May Waive the 21-day Consideration Period to Agree to Non-Disclosure Provisions in Pre-Litigation Settlements*

Importantly, the new amendment to Section 5-336 provides greater flexibility with respect to the use of preference agreements before litigation commences. The original version of the law required employees to wait a full 21 days before signing an agreement memorializing their preference to include a nondisclosure clause in a settlement agreement. The law has now been amended, to provide an employee ***"up to"*** 21 days to sign such an agreement. Thus, an employee may now sign a preference agreement prior to the expiration of the consideration period without jeopardizing the enforceability of the agreement.

This new amendment notwithstanding, Section 5003-B of the New York Civil Practice Law & Rules (CPLR) continues to require employees to wait the full 21 days before signing an agreement containing a nondisclosure provision that would prevent the disclosure of the underlying facts and circumstances of any discrimination claim. Thus, the 21-day consideration period for preference agreements is not waivable if the discrimination claim is filed in court, where the CPLR applies.

Patterson Belknap

*Contracts Containing Certain Provisions Will Be Unenforceable*

Most importantly, the amendment adds a new Section 5-336(3) to the law, which bars the use of several clauses that are commonly found in employment settlement agreements. Pursuant to this new provision, in any settlement, agreement, or other release-of-claims that involves discrimination, harassment, or retaliation, an employer may not include any provision that requires the employee to:

(1) pay liquidated damages as a result of the employee's breach of a non-disclosure or non-disparagement clause;

(2) "forfeit all or part of the consideration for the agreement" as a result of the employee's breach of a non-disclosure or non-disparagement clause; or

(3) state that they were "not in fact subject to unlawful discrimination, including discriminatory harassment, or retaliation.

Should a settlement agreement include any of these three provisions, the release itself will be deemed void and unenforceable.

**Take-Aways for Employers**

Employers should immediately and carefully review agreements dated from November 17, 2023 to the present. While the amendments are more likely to primarily impact settlement and separation agreements, the law applies broadly to all contracts related to the resolution of discrimination, harassment, or retaliation claims.

As part of their review, employers should modify impacted agreements, where necessary, to ensure compliance with the new amendments to Section 5-336. Specifically, employers should ensure that any impacted agreement:

- Does not require the employee to pay liquidated damages or forfeit consideration as a consequence of breaching a confidentiality provision; and

- Does not require the employee to affirm that they were not subject to unlawful discrimination, harassment, or retaliation.

Additionally, employers should be mindful that employees can now waive the 21-day consideration period when releasing claims prior to litigation.

Patterson Belknap

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.


| | | |
|---|---|---|
| Lisa E. Cleary | 212.336.2159 | lecleary@pbwt.com |
| Douglas L. Tang | 212.336.2844 | dtang@pbwt.com |
| Jacqueline L. Bonneau | 212.336.2564 | jbonneau@pbwt.com |
| Ryan J. Kurtz | 212.336.2405 | rkurtz@pbwt.com |
| Jabari I. Matthew, Law Clerk | 212.336.2203 | jmatthew@pbwt.com |


To subscribe to any of our publications, call us at 212.336.2000, email mktg@pbwt.com or sign up on our website, https://www.pbwt.com/subscribe/.

This publication may constitute attorney advertising in some jurisdictions.
© 2023 Patterson Belknap Webb & Tyler LLP

Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036–6710
212.336.2000
www.pbwt.com