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New York State Amends Requirements for Non-Disclosure Provisions in Settlement Agreements and Expands Statute of Limitations for NYSHRL Claims

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The amendments impact settlement agreements entered into on or after November 17, 2023. The expanded statute of limitations applies to claims arising on or after February 15, 2024. New York recently passed two noteworthy employment laws. First, it expanded restrictions on the use of non-disclosure and non-disparagement provisions in agreements settling claims of discrimination, harassment, or retaliation. These expanded restrictions impact settlement agreements entered into on or after November 17, 2023. Second, effective February 15, 2024, New York extended the statute of limitations from one to three years for all claims resulting from unlawful discriminatory practices under the New York State Human Rights Law (NYSHRL). ***Expanded Restrictions on Non-Disclosure and Non-Disparagement Provisions in Settlement Agreements***: Calculating damages arising from a breach of a confidentiality/non-disparagement restriction can often be challenging for employers. As a result, settlement agreements frequently include a liquidated damages provision whereby the complainant agrees to pay a specified amount of damages to an employer (including some or all of the settlement payment) in the event of a breach. Such provisions are no longer permissible in New York as the newly enacted amendments to New York General Obligations Law § 5-336 state that in any agreement settling claims involving discrimination, harassment, or retaliation, a release is unenforceable if the agreement requires the complainant to pay liquidated damages or forfeit all or part of the consideration for the agreement for violation of a non-disclosure or non-disparagement provision. The newly enacted amendments also invalidate a release in a covered settlement agreement if it contains or requires any affirmative statement, assertion, or disclaimer that the complainant was not in fact subject to unlawful discrimination, harassment, or retaliation. ***Changes Regarding the Procedure to Memorialize a Complainant's Preference for Confidentiality***: NY General Obligations Law § 5-336(1) sets out a particular process and timeframe for employers to memorialize a complainant's preference for confidentiality in a settlement agreement where the factual foundation of the settlement involves claims of discrimination, harassment, or retaliation. Specifically, employers must ensure: (i) the non-disclosure provision is the complainant's preference; (ii) the non-disclosure provision is set forth in writing; and (iii) the complainant has up to 21 days to consider such terms and 7 days to revoke their acceptance. New York law previously required that complainants be given a non-waivable 21-day consideration period for covered settlement agreements. Now, for pre-litigation settlements, the amendments allow a complainant to waive the 21-day consideration period and sign the agreement before that period expires. Still, the agreement cannot be effective until after the expiration of the 7-day revocation period. Employers should take note that NY CPLR § 5003-B—which applies to settlements reached after a lawsuit has been filed in New York state court—requires plaintiffs to wait the full 21-day consideration period before signing a settlement agreement that would prevent the disclosure of the underlying facts and circumstances of any discrimination claim. Accordingly, the 21-day consideration period is still not waivable in agreements settling a discrimination claim that has been filed in court. ***Independent Contractors Covered***: The recent amendments

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state that NY General Obligations Law § 5-336 now applies to independent contractors, in addition to employees and potential employees. Accordingly, any covered settlement agreement with an independent contractor is now subject to § 5-336. ***Communications with Attorney General Added to Protected Activity***: Since § 5-336's passage in 2018, New York employers have been required to notify complainants that provisions in any agreement (not just settlement agreements) that prevent the disclosure of factual information related to any future claim of discrimination do not prohibit the complainant from speaking with law enforcement, the EEOC, the New York State Division of Human Rights, a local commission of human rights, and attorneys. The amendments further require that complainants be notified that they are not prohibited from speaking with the New York Attorney General. Accordingly, employers should review and update their agreements to include the requisite carve-outs. ***Expanded Statute of Limitations***: As previewed above, in addition to amending § 5-336, New York enacted a separate law extending the statute of limitations for all claims resulting from unlawful discriminatory practices under the NYSHRL from one to three years. The new statute of limitations applies to claims arising on or after February 15, 2024. **Takeaway** Employers in New York State should review relevant agreements to ensure compliance with these amendments and be prepared to face a potential uptick in lawsuits over time in light of the impending extended statute of limitations under the NYSHRL.

The following Gibson Dunn attorneys assisted in preparing this update: Harris Mufson, Danielle Moss, Hayley Fritchie, and Tia Kerkhof.

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