Timothy Ford Quoted In Law360 Article Discussing NJ's Bill Targeting Harassment Deals

As published in Law360, July 16, 2018, 3:25 PM EDT

4 Things to Know about NJ's Bill Targeting Harassment Deals

Pending New Jersey legislation that would bar workplace harassment settlements subject to nondisclosure agreements captures the zeitgeist of the #MeToo movement on its surface, but Garden State attorneys who analyzed the measure say there's more to the proposal than meets the eye.

The Senate last month unanimously blessed the initiative, which was instituted by both legislative chambers in the wake of high-profile sex scandals that felled the careers of film producer Harvey Weinstein, late Fox News chief Roger Ailes and countless other celebrities. Now pending before the Assembly in two identical bills, the lesser known parts of the legislation have sparked discussions in legal circles.

Here are four takeaways attorneys should know about S121 and A1242.

The Measure Doesn't Require Disclosure

While the defense bar and the New Jersey Bar Association have raised concerns that the ban on nondisclosure agreements could tread on victims' privacy, the legislation doesn't force victims to talk, said plaintiffs attorney Nancy Erika Smith.

Rather, the measure would leave whether or not to disclose up to the victim, according to Smith.

“If the victim doesn’t want to talk about harassment or discrimination, of course she doesn’t have to. And the employer never wants to talk about it. The bill just takes the victim’s choice out of the employer’s hands,” said Smith, a civil rights lawyer whose clients have included Gretchen Carlson.

The New Jersey Bar Association has also expressed concerns about the proposal’s potentially chilling effect on settlements: If the discretion to disclose is left to the victim, employers may be less inclined to settle in the first place.

“An unintended consequence is that if you have all these cases not being settled, the court dockets, which are way overloaded already, will be even more burdened,” said Greenbaum Rowe Smith & Davis LLP counsel Maja M. Obradovic, a management-side employment attorney.

Cases that do go to trial could make for a “long, emotionally taxing” experience for a victim, Obradovic added.

It Doesn’t Just Apply to Sexual Misconduct Claims

The proposal may be driven by the onslaught of sexual misconduct revelations plaguing power brokers, from A-list actors to Hollywood chefs, but it actually encompasses claims stemming from not only harassment but also discrimination and retaliation, according to McCarter & English LLP partner Christopher S. Mayer, whose practice includes labor and employment law matters.

"It’s not even remotely that narrow," Mayer said about the perception that it’s limited to claims arising from unwanted sexual advances.

In fact, the legislation’s language addresses rights and remedies under the the state’s broad Law Against Discrimination, which protects those targeted not only for their sex but also race, age and other factors.

Employers Who Try to Enforce Nondisclosure Agreements Could Get Sued

The legislation creates a private right of action for aggrieved persons, which means employers who try to enforce a nondisclosure clause can find themselves fending off a state court lawsuit. Under the proposal, litigants would have two years to sue and would get attorneys' fees and costs if they prevail.

In addition to facing a lawsuit for trying to enforce a nondisclosure clause, employers could also be held liable for retaliating against employees or potential employees who refuse to sign. Among those adverse actions are failure to hire; a discharge, suspension or demotion; and discrimination in the terms, conditions, or privileges of employment.

The Language Suggests That Arbitration Agreements Could Be Nixed

The proposal warns that any employment contract clause that waives rights and remedies relating to harassment, discrimination or retaliation claims can't be enforced — language that may be interpreted to preclude arbitration agreements for dispute resolution, according to Timothy J. Ford, an Einhorn, Barbarito, Frost & Botwinick, PC attorney who has represented both employers and employees.

The Federal Arbitration Act, which requires enforcement of arbitration agreements, has been held to preempt any conflicting state law, Ford noted. That point was underscored by the U.S. Supreme Court's ruling in Epic Systems Corp. v. Lewis, Ford said, and could signal a day in court for this proposal.

"As a result, the legislation, if enacted could face a legal challenge based on that argument. This is an open issue as it relates to arbitration agreements generally," Ford said.

-Editing by Rebecca Flanagan and Orlando Lorenzo.

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