

## A Practical Guide to New York's Confidentiality Waiver Requirements for Employment Discrimination Settlement Agreements

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In what seems like much simpler times, parties to New York employment disputes, including disputes involving claims of discrimination or harassment, could settle the claims by simply signing an agreement and making payment to the claimant by an agreed-upon date. Now, however, because of legislative mandates arising out of the #MeToo movement, any agreement involving a confidentiality provision, which the vast majority do, gives rise to a more protracted minuet-like dance of separate agreements, unwaivable consideration periods, and overall complexity. Below, we examine issues presented by §5-336 of New York General Obligations Law and §5003-b of the New York State Civil Practice Law and Rules and the various ways in which clients and their counsel are addressing and implementing them.

Section 5-336 of New York General Obligations Law was amended in 2018 to prohibit employers from requiring confidentiality of underlying facts in sexual harassment settlement agreements unless the confidentiality provision is the alleged victim's preference. The statute has been amended multiple times since then, including in 2019 to expand the scope to cover settlement agreements for all employment discrimination claims. Section 5-336 currently prohibits agreements "that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference." The statute further provides:

Any such term or condition must be provided in writing to all parties in plain English, and, if applicable, the primary language of the complainant, and the complainant shall have twenty-one days to



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consider such term or condition. If after twenty-one days such term or condition is the complainant's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the complainant may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

N.Y. GOL §5-336(1)(b). These provisions are echoed in §5003 of the New York State Civil Practice Law and Rules.

While the policy impetus behind the confidentiality prohibition—

preventing employers from silencing complaints about harassment and discrimination—may be worthy, the reality is that employers will normally not settle without a confidentiality provision. As a practical matter, then, it will almost always be the employee’s “preference” to actually get paid, so they will more likely than not agree to the confidentiality provision.

But that is just the start. Employment law practitioners from both sides of the aisle have struggled to adapt the language of §5-336 of New York General Obligations Law and §5003-b of the New York State Civil Practice Law and Rules to the nitty gritty work of drafting and executing settlement agreements. The manner of implementing the confidentiality waiver requirements can be a confusing minefield; difficult for both attorneys and clients to follow. Here are some of the basic questions and the trends that we have seen in our practice along with some practical guidance.

**Is a separate agreement required?** The short answer is that, from the perspective of New York State Division of Human Rights at least, a separate confidentiality preference agreement is preferred. See [Combating Sexual Harassment: Frequently Asked](#)

**Questions.** Most employers from the onset of negotiations of a written settlement require a separate signed agreement attesting to the confidentiality preference.

While some employers still seek to incorporate this provision into the central agreement, we believe, in line with guidance from New York state, that a separate agreement should be executed. Sometimes the separate confidentiality preference agreement is referenced as an exhibit to the main settlement agreement, and other times it is a stand-alone document.

**When does the 21-day consideration period start, and can it be waived?** It is the general consensus that unlike the 21-day consideration period required by the federal Age Discrimination in Employment Act (ADEA), the 21-day consideration period for the confidentiality preference in connection with employment discrimination settlements may not be waived.

Accordingly, from the perspective of the claimant who normally wants to be paid sooner rather than later, the sooner the period starts the better. The statute provides that the written disclosure to all parties of the “term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action” (N.Y. GOL §5-336(1)



(a)) triggers the clock to begin.

Counsel have taken differing views of what that actually means. Some require a fully executed confidentiality preference agreement to trigger the 21-day period countdown and will hold the preference agreement “in escrow” until the 21-day period has elapsed. Other attorneys consider transmission of the initial draft of the agreement containing the confidentiality preference to start the consideration period, and will agree to negotiate the relevant language of both agreements while the consideration period runs.

To date, there has been no clarification from the New York State Human Rights Division or the courts. We recommend that counsel confer early in the process to make sure everyone is on the page as to when the consideration period and revocation periods expire and when agreement is truly effective.

**When should the confidentiality preference agreement be signed vis à vis the settlement agreement?** While there does not

appear to be any uniform practice on timing, and the statutes themselves do not provide any guidance, language from New York state indicates that the confidentiality preference agreement should be signed before the main settlement agreement. See **Combating Sexual Harassment: Frequently Asked Questions** (“State law requires a separate agreement to be executed after the expiration of the 21-day consideration period before the employer is authorized to include confidentiality language in a proposed resolution”). In practice, we have seen signing occur 21 days or more before execution the main agreement, at the time of execution of the main agreement and various times in between. Again, early communications between counsel regarding the signing process to be followed is recommended.

Generally speaking, employers will not pay the settlement amount until the 21-day consideration period and the seven-day revocation period for the preference agreement have expired. (The ADEA contains a similar revocation period.) In some instances, shortly after the law was passed, employers may have allowed the confidentiality agreement to be executed after the settlement agreement was signed

or even after payment was made, but that is no longer standard practice and should be avoided.

**What happens if no confidentiality preference agreement is signed or the timing provisions are not followed?** If the procedures set forth in the statute are not followed, what are the consequences? Is the entire settlement agreement invalidated or just the confidentiality provision? Although the courts have not yet weighed in on this question, and the statutes are silent about the result if no waiver agreement is included or the required time provisions are not enforced, additional requirements in the statute suggest that the law is focused on voiding the confidentiality requirement rather than the underlying settlement.

For example, New York §GOL 5-336(1)(c) provides that the “term or condition” imposing confidentiality is void if the agreement places restrictions on revealing relevant facts in connection with an employee complying with a subpoena or government investigation or disclosing facts necessary for insurance or public assistance. The provision makes no reference to the underlying settlement agreement itself.

Additionally, to the extent that a court were asked by an

employee to determine that a confidentiality provision contained in a settlement agreement is deemed unlawful for violation of the relevant statutes, the court may refuse to invalidate the entire settlement agreement by giving credence to the typical severability provisions in such agreements that hold that if one provision of the settlement agreement is unenforceable, other provisions will remain binding on the parties.

### Conclusion

In some ways, the confidentiality preference provisions of the New York statute are a lesson in unintended consequences. They do add complexity and delay to the process of settling discrimination and harassment claims. Permitting a claimant to waive the 21-day consideration period, as is often done in the ADEA context, may be one way in which to simplify the process.

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