

## **New Jersey Supreme Court Holds That Non-Disparagement Provisions Seeking to Preclude Discussion About Claims of Discrimination, Retaliation, or Harassment Are Unenforceable**

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In a recent unanimous decision, the New Jersey Supreme Court held that non-disparagement provisions in settlement agreements or employment agreements are against public policy and unenforceable if they seek to bar speech relating claims of discrimination, retaliation, or harassment.

It is well-settled that non-disclosure provisions that relate to claims of discrimination, retaliation, or harassment are prohibited by the New Jersey Law Against Discrimination. N.J.S.A. 10:5-12.8. In 2022, in Savage v. Township of Neptune, the Appellate Division held that a non-disparagement provision is distinct from a non-disclosure provision and is not encompassed by section 12.8's prohibition. On May 7, 2024, the Supreme Court reversed, and held that a non-disparagement provision should be analyzed in the same way as a non-disclosure agreement - if it seeks to preclude a party from providing details about claims of discrimination, retaliation, or harassment, it is against public policy and unenforceable.

The non-disparagement provision in Savage precluded the parties from making any statements that "would tend to disparage or impugn the reputation of any party." The scope of that provision was so broad that it effectively concealed the details of plaintiff's claims of discrimination, and thereby violated section 12.8.

In drafting employment agreements, separation agreements, and settlement agreements, the practical takeaway from Savage is not that non-disparagement agreements are *per se* unenforceable. To the contrary, non-disparagement provisions can be enforceable, as long as they are drafted in a way that allows a party to disclose the details of claims of discrimination, retaliation, or harassment.