

# New York Amends Its Release Agreement Law for the Third Time

Article By:

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On November 17, 2023, New York Governor Kathy Hochul signed a new law that further limits the terms employers may include in release agreements relating to claims of harassment, discrimination, and retaliation. The law took effect immediately and further broadens the restrictions on release agreements already contained in [New York General Obligations Law Section 5-336](#) (“Section 5-336”).

## History

Enacted as a part of [New York’s 2018-2019 budget bill](#), Section 5-336 was one of the first state laws targeting confidentiality provisions contained in release agreements passed in the wake of the #MeToo movement.<sup>[1]</sup> [As we discussed at that time](#), Section 5-336 prohibits employers from including in any agreement that resolves a sexual harassment claim, “a term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action”—in other words, a confidentiality provision—unless the inclusion of such a clause is the employee’s choice.

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As a result, any release agreement containing a confidentiality provision that covers sexual harassment claims or their underlying facts must be executed in two parts. [As explained in a FAQ by the New York State Division of Human Rights](#), the first part must state that it is the employee's preference to enter such an agreement and that the employee has been given 21 days to consider the agreement and 7 days to revoke consent after the 21-day period has expired. The second part includes "whatever documents incorporate" the preferred terms or conditions "as part of a larger overall resolution between the parties." Under the original version of Section 5-336, the employee could not execute the second part until after the 21-day period expired.

Section 5-336 was subsequently amended in 2019 to expand its restrictions to more than sexual harassment claims. [As we previously covered](#), this amendment substantially expanded the types of release agreements covered by Section 5-336 by applying these requirements to all claims of "discrimination, in violation of laws prohibiting discrimination, including, but not limited to, [the NYSHRL]." This remained the state of the law until November 2023.

## **2023 Amendment**

On November 13, 2023, [New York State Senate Bill S4516](#) was delivered to Governor Kathy Hochul, and it was signed into law four days later. This bill amended Section 5-336 and created further restrictions on confidentiality agreements related to harassment, discrimination, and retaliation. This amendment made several notable additions and changes to Section 5-336.

First, and most significant, the amendment adds a new subsection (3) which renders some agreements unenforceable as a matter of

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law. That subsection states that “no release of any claim, the factual foundation for which involves unlawful discrimination, including discriminatory harassment, or retaliation . . . shall be enforceable, if as part of the agreement resolving such claim: (a) the complainant is required to pay liquidated damages for violation of a nondisclosure clause or nondisparagement clause; (b) the complainant is required to forfeit all or part of the consideration for the agreement, for violation of a nondisclosure clause or nondisparagement clause; or (c) it contains or requires any affirmative statement, assertion, or disclaimer by the complainant that the complainant was not in fact subject to unlawful discrimination, including discriminatory harassment, or retaliation.”

Second, the amendment also widened the coverage of Section 5-336 by adding additional classes of individuals covered by the law. Previously, only employees and potential employees were covered by the law. But with the passage of S4516, the same restrictions now apply to confidentiality provisions related to harassment, discrimination, and retaliation against independent contractors.

Lastly, this amendment revised Section 5-336 to allow employees to accept the terms of a release agreement containing a confidentiality provision prior to the expiration of the 21-day period. Previously, the statute required the 21 days to pass before the employee could sign any such agreement.

## **Key Takeaways**

While it is yet to be seen how courts will interpret and enforce the new provisions of Section 5-336, employers should review any agreements that include confidentiality provisions and consult counsel to ensure compliance with Section 5-336.

## FOOTNOTES

[1] This budget bill also created § 5003-b of the New York Civil Practice Law & Rules. S4515 does not address the provisions of § 5003-b.

*Wolfram Ott contributed to this article.*

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