Articles + Publications | September 23, 2026

Public Employers Face Heightened Scrutiny on Investigation Confidentiality Requirements

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KEY POINTS

- New Jersey public employers face heightened First Amendment scrutiny when workplace investigation confidentiality policies broadly prohibit all discussion of investigations without meaningful exceptions, time limits, or allowances for disclosure to counsel.
- The New Jersey Supreme Court in *Usachenok v. State of New Jersey, Department of the Treasury*, invalidated a state regulation directing investigators to request that witnesses not discuss any aspect of a discrimination investigation, finding it unconstitutionally overbroad.
- *Pernell v. University Hospital* tests whether a state-owned hospital's blanket confidentiality policy constitutes an unconstitutional prior restraint on employee speech under the First Amendment.
- New Jersey's S121 law renders unenforceable any provision in a settlement agreement or employment contract with the purpose or effect of concealing details of discrimination, retaliation, or harassment claims, and N.J.S.A. 10:5-12.10 prohibits retaliation against employees who refuse to sign such agreements.
- Public employers can reduce constitutional risk by limiting confidentiality directives to the duration of an investigation, preserving employee access to counsel, and clearly documenting the voluntary nature of any confidentiality request.

The intersection of public employees' First Amendment rights and government employers' ability to impose confidentiality requirements during workplace investigations is being tested in *Pernell v. University Hospital*, a case pending in the New Jersey Superior Court, Law Division, Essex County.

The litigation involves a motion for partial summary judgment on claims challenging the constitutionality of the hospital's confidentiality policy under the First Amendment and alleged retaliation under New Jersey's Law Against Discrimination (LAD) "S121" nondisclosure provisions.

This case underscores the importance of carefully drafted confidentiality policies and highlights the heightened scrutiny public employers face when restricting employee speech on matters of public concern.

BACKGROUND

Dr. Chris Pernell, a former executive at University Hospital, a state-owned hospital, filed suit alleging race and gender discrimination and retaliation after she expressed interest in the CEO position. The hospital initiated an investigation into Dr. Pernell, during which she was instructed by outside counsel to maintain confidentiality regarding the investigation. She also alleged she was subject to the hospital's "Discrimination, Harassment and Other Inappropriate Workplace Conduct Policy," which states that "all participants in the complaint and/or investigation are expected to maintain confidentiality, except if disclosure is required by law, or when lack of disclosure impedes a full and fair investigation of the complaint or implementation of complaint remedies."

During severance negotiations following Dr. Pernell's resignation, the hospital conditioned a severance payment and executive bonus on her agreement to confidentiality and nondisparagement terms. Dr. Pernell refused, citing her desire to speak freely about her experiences of discrimination. When she declined to agree to these terms, the hospital withdrew the severance offer and ultimately did not pay her the incentive bonus.

THE SUMMARY JUDGMENT MOTION

Dr. Pernell moved for partial summary judgment on two claims: (1) a declaratory judgment to invalidate the hospital's confidentiality directive as an unconstitutional prior restraint under the First Amendment; and (2) retaliation under N.J.S.A. 10:5-12.10 (the "S121" anti-retaliation provision) for the Hospital's refusal to pay severance and bonus compensation when she declined to agree to confidentiality and nondisparagement terms.

FIRST AMENDMENT/PRIOR RESTRAINT ISSUE

Dr. Pernell contends that the hospital's policy, like the regulation in *Usachenok v. Department of Treasury*, sweeps too broadly, applies to all investigation participants without meaningful exceptions, fails to permit disclosure to counsel, and has no time limit. 257 N.J. 184, 192 (N.J. 2024). She argues the policy has a "chilling effect" on protected speech because employees dependent on their employer can reasonably be concerned they may face consequences if they fail to comply.

As seen in *Pernell,* non-disclosure agreements that target an individual's speech on all related public concern topics or prohibit communications with lawyers or oversight agencies face constitutional challenges. On the other hand, nondisclosure agreements limited to the duration of an internal investigation, preserving access to counsel, and targeting only speech about the investigation itself have generally been upheld. While the court has not yet ruled, the *Pernell* litigation offers several important lessons for public employers:

KEY TAKEAWAYS

- **Review confidentiality policies in light of *Usachenok*.** Public employers should evaluate whether their workplace investigation confidentiality policies can be distinguished from the regulation invalidated in *Usachenok*. Policies that broadly prohibit all discussion of investigations, without meaningful exceptions and without assurances that compliance is voluntary and unpunished, face heightened constitutional risk.
- **Consider specific, limited confidentiality directives.** Confidentiality policies that are limited to the duration of an internal investigation, preserve access to counsel, and target only speech about the investigation itself have generally been upheld. Policies that attempt to prohibit communications with lawyers or oversight agencies, or that extend beyond the investigation period, face stronger constitutional concerns. Confidentiality exceptions that allow disclosure 'as required by law' are often too vague: the exceptions don't distinguish between federal and state investigation procedures, nor do they account for the specific requirements of individual regulatory agencies.
- **Consider the potential "chilling effect" of confidentiality and nondisparagement requirements in severance agreements.** New Jersey's S121 provisions (N.J.S.A. 10:5-12.7 et seq.) prohibit provisions in settlement agreements or employment contracts that have the purpose or effect of concealing details relating to discrimination, retaliation, or harassment claims. Conditioning severance or other compensation on agreement to such provisions may expose employers to retaliation claims under N.J.S.A. 10:5-12.10, even if the employee refuses to sign the agreement.

- **Distinguish Upjohn warnings from policy-based confidentiality requirements.** The *Pernell* litigation illustrates the risk of conflating legitimate attorney-client privilege instructions (Upjohn warnings) with broader employer confidentiality policies. Employers should ensure that confidentiality instructions related to privileged investigations are clearly grounded in attorney-client privilege and are distinct from any generally applicable workplace policy.
- **Document exceptions and voluntariness.** Where confidentiality is requested (rather than required), employers should clearly communicate that the request is voluntary, that no adverse action will be taken for non-compliance, and that employees may consult with counsel. Such documentation may help distinguish policies from the sweeping prohibitions that have been struck down.

Troutman Pepper Locke is closely monitoring this development in confidentiality and nondisclosure agreements with respect to state employers. If you have questions on how these developments impact your business or wish to begin evaluating your existing compliance programs, please do not hesitate to contact a member of our White Collar Litigation + Investigations team.

Emily Rockwell also contributed to this article. She is not licensed to practice law in any jurisdiction; bar admission pending.

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