

1 HB494
2 213961-3
3 By Representative England
4 RFD: Judiciary
5 First Read: 03-MAR-21

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ENROLLED, An Act,

Relating to contracts; to establish the Alabama Non-Disparagement Obligations Act; to provide for the creation and enforcement of non-disparagement obligations in contracts.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. This bill shall be known and may be cited as the Alabama Non-Disparagement Obligations Act.

Section 2. As used in this act, the following terms shall have the following meanings:

(1) COVERED CONTRACT. Any written employment separation, termination, or post-employment settlement or release agreement written solely for that purpose; any written business relationship termination agreement written solely for that purpose; and any written settlement between parties to a legal dispute written solely for that purpose, whether before, during, or after litigation, and the provisions thereof.

(2) DISPARAGING STATEMENT. Any statement that does any of the following:

a. Discredits or detracts from the reputation of a person's property, product, services, or business.

b. Diminishes or depreciates a person by direct or indirect comparisons to anything invidious, scandalous, criminal, or loathsome.

1 c. Raises doubts or questions about the quality,
2 integrity, honesty, or character of a person or the person's
3 affiliations.

4 d. Discredits or detracts from the reputation of
5 another's character, property, product, or business by
6 disclosing truthful but private information.

7 e. Discredits or detracts from the reputation of
8 another's character, property, product, or business by
9 disclosing truthful, but non-public information, or
10 information gained within the context of a fiduciary
11 relationship between the parties not otherwise protected by a
12 trade secret statute.

13 f. Is knowingly or recklessly made by a party that
14 has clear and direct information that the statement was
15 plainly false or misleading by its unreasonable incompleteness
16 and that the communication of the misleading information would
17 cause specific loss.

18 (3) LIQUIDATED DAMAGES. The dollar sum that the
19 parties have by the covered contract fixed or assessed as
20 damages to be paid as compensation for a breach of contract.

21 (4) PERSON. An individual, corporation, business
22 trust, estate, trust, partnership, limited liability company,
23 association, joint venture, public corporation, government,
24 government subdivision, agency, or instrumentality, or any
25 other legal or commercial entity.

1 (5) STATEMENT. Spoken words, remarks, comments,
2 publications, opinions, and other expressions delivered
3 orally, in writing, or through websites, blogs, postings to
4 the Internet, emails, texts, or by other electronic means,
5 whether done publicly or privately in one's own name,
6 anonymously, or through the use of a pseudonym.

7 Section 3. (a) Non-disparagement obligations in
8 covered contracts, whether unilateral, bilateral, or
9 multilateral, shall be valid and enforceable for any period of
10 time agreed to by the parties.

11 (b) Except as otherwise prohibited by law, any
12 covered contract between two or more persons or parties
13 obligating one or more parties to the covered contract not to
14 disparage one or more other parties to the covered contract is
15 only enforceable by a civil action where all of the following
16 elements are present:

17 (1) The covered contract contains language
18 prohibiting one or more of the parties from disparaging one or
19 more of the other parties, and may include specifically named
20 individuals who are affiliated with, are employed by, or are
21 owners of one or more of the parties.

22 (2) A disparaging statement is made by the person or
23 party who is obligated not to make such statements.

24 (3) Either of the following occur:

1 a. The communication of the disparaging statement
2 proximately results in identifiable damage to the plaintiff.

3 b. The terms of the covered contract automatically
4 activate a liquidated damages provision, as defined in Section
5 2.

6 (c) Nothing in this act creates any cause of action
7 for disparagement at law or equity absent a written
8 non-disparagement obligation in the covered contract between
9 the parties.

10 (d) Nothing in this act has any effect on any other
11 term, condition, or covenant in a covered contract that is not
12 specifically stated in this act.

13 (e) Nothing in this act prevents parties from having
14 bilateral, unilateral, or multilateral non-disparagement
15 obligations in other contracts, including, but not limited to,
16 nondisclosure agreements.

17 Section 4. In order to be valid and enforceable, a
18 covered contract shall be in writing, signed by all parties,
19 and supported by adequate consideration.

20 Section 5. In order to be enforceable, a covered
21 contract shall state in writing that the obligated party may
22 not be held liable for breach of the non-disparagement
23 obligation if the obligated party makes an otherwise
24 disparaging statement in good faith and solely for any of the
25 following purposes:

1 (1) To communicate with a law enforcement officer
2 acting within the line and scope of the officer's law
3 enforcement duties that a violation of the law has occurred or
4 is occurring.

5 (2) To communicate with a government regulator
6 acting within the line and scope of the regulator's regulatory
7 duties that a violation of the law has occurred or is
8 occurring.

9 (3) To respond to a lawfully served judicial, grand
10 jury, or other lawful subpoena.

11 (4) To testify in a judicial or administrative
12 proceeding in response to a lawfully served subpoena or an
13 order of a court of competent jurisdiction.

14 (5) To confer with the obligated party's attorney
15 for the purpose of obtaining legal advice or representation.

16 (6) To respond to lawful discovery in a judicial or
17 administrative action; provided the disparaging statement is
18 either ordered by a court of competent jurisdiction or made in
19 compliance with a protective order entered by the same court.

20 (7) To prosecute or defend a civil action between or
21 among parties to a covered contract; provided the party making
22 the disparaging statement attempts to and, if permitted by
23 law, does file the disparaging statement and any related
24 pleading under seal or in compliance with a protective order

1 entered by a court of competent jurisdiction in the civil
2 action.

3 (8) To exercise federally protected statutory
4 rights, including, but not limited to, the exercise of rights
5 under the National Labor Relations Act or the Civil Rights Act
6 of 1964, as amended.

7 Section 6. (a) A covered contract containing a
8 non-disparagement obligation in writing requires the parties
9 to the covered contract to file under seal all initial and
10 responsive pleadings and motions, including, but not limited
11 to, motions under Alabama Rule of Civil Procedure 65 seeking
12 enforcement of a covered contract.

13 (b) A court of competent jurisdiction may exercise
14 its judgment regarding what, if any, filings filed under seal
15 pursuant to this section must remain under seal. In making
16 this judgment, the court shall consider the extent to which
17 unsealing any or all parts of the record would cause,
18 perpetuate, or increase any injury to any of the litigants or
19 related third parties.

20 (c) If any party files a motion to seal the
21 pleadings, motions, and other filings associated with a claim
22 under this act, the court shall seal or continue to seal the
23 pleadings, motions, and other filings absent a showing by the
24 non-moving party of a compelling public interest to partially
25 or completely unseal the pleadings, motions, or other filings.

1 (d) To the extent allowed by law, the parties may
2 include in a covered contract a requirement that notice be
3 provided prior to providing to outside third parties
4 information protected under this act.

5 (e) In a civil action for breach of a covered
6 contract in which the only damage pleaded and requested by the
7 plaintiff is liquidated damages, there shall be no required
8 proof of actual damage. As used in this subsection, a request
9 for an award of attorneys' fees, costs, and expenses is not
10 considered damages or liquidated damages.

11 Section 7. In the event any provision or provisions
12 of a covered contract are found by a court of competent
13 jurisdiction to be unenforceable as a matter of law, such
14 provisions shall be severable from the covered contract and
15 shall not affect the enforceability of the remainder of the
16 covered contract.

17 Section 8. (a) Nothing in this act affects any
18 defense or immunity otherwise available under applicable law.

19 (b) Nothing in this act shall reduce, void, or
20 diminish any obligations or contractual obligations of any
21 kind or nature between shareholders, owners, members, and
22 officers of any entity that is governed by Title 10A, Code of
23 Alabama 1975.

24 (c) Parties to a covered contract may disclaim the
25 applicability of this act to their covered contract, and

1 thereby make this act inapplicable to their otherwise covered
2 contract, provided the disclaimer expressly and plainly states
3 that the parties to the covered contract are knowingly waiving
4 this act.

5 (d) If the parties exercise the right to disclaim
6 the provisions of this act under subsection (c), this act
7 shall not be the basis for any interpretation or determination
8 of enforceability of any of the provisions of the otherwise
9 covered contract entered into by the parties.

10 Section 9. (a) In an action for breach of a contract
11 governed by this act when actual damages are sought, a
12 defendant may assert affirmative defenses available under the
13 law.

14 (b) If actual damages are sought, the defendant may
15 also assert the following additional affirmative defenses:

16 (1) The disparaging statement was made in good
17 faith.

18 (2) The disparaging statement was made by mistake.

19 (3) The disparaging statement caused no harm to the
20 plaintiff.

21 (4) The disparaging statement was retracted in such
22 a way as to eliminate or reduce the harm to the plaintiff.

23 (c) Unless it is specifically provided in the
24 covered contract, none of the additional affirmative defenses

1 apply to negate or diminish the effects or full enforcement of
2 a liquidated damages provision in the covered contract.

3 Section 10. Upon a finding of whether there has been
4 a breach of a contract governed by this act, the court may
5 order and award any of the following:

6 (1) Injunctive and other equitable relief as may be
7 appropriate with respect to any actual or threatened breach.

8 (2) The actual damages recoverable under existing
9 law that are suffered as a result of the breach of contract.

10 (3) Liquidated damages, but only if provided for in
11 the covered contract.

12 (4) Reasonable attorney's fees and costs, but only
13 if provided for in the covered contract.

14 Section 11. Nothing in this act shall affect any
15 agreement executed prior to January 1, 2022.

16 Section 12. This act shall become effective January
17 1, 2022, following its passage and approval by the Governor,
18 or its otherwise becoming law.

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Speaker of the House of Representatives

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in
and was passed by the House 16-MAR-21.

Jeff Woodard
Clerk

Senate	17-MAY-21	Amended and Passed
House	17-MAY-21	Concurred in Senate Amendment