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3 SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR SB176
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8 SYNOPSIS: This bill would create the Alabama
9 Non-Disparagement Obligations Act to provide for
10 the creation and enforcement of non-disparagement
11 obligations in contracts.
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13 A BILL
14 TO BE ENTITLED
15 AN ACT
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17 Relating to contracts; to establish the Alabama
18 Non-Disparagement Obligations Act; to provide for the creation
19 and enforcement of non-disparagement obligations in contracts.
20 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

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

25 (1) COVERED CONTRACT. Any written employment
26 separation, termination, or post-employment settlement or
27 release agreement; any written business relationship

1 termination agreement; and any written settlement between
2 parties to a legal dispute, whether before, during, or after
3 litigation, and the provisions thereof.

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

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

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

11 c. Raises doubts or questions about the quality,
12 integrity, honesty, or character of a person or the person's
13 affiliations.

14 d. Discredits or detracts from the reputation of
15 another's character, property, product, or business by
16 disclosing truthful but private information.

17 e. Discredits or detracts from the reputation of
18 another's character, property, product, or business by
19 disclosing truthful, but non-public information, or
20 information gained within the context of a fiduciary
21 relationship between the parties not otherwise protected by a
22 trade secret statute.

23 f. Is knowingly or recklessly made by a party that
24 has clear and direct information that the statement was
25 plainly false or misleading by its unreasonable incompleteness
26 and that the communication of the misleading information would
27 cause specific loss.

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

4 (4) PERSON. An individual, corporation, business
5 trust, estate, trust, partnership, limited liability company,
6 association, joint venture, public corporation, government,
7 government subdivision, agency, or instrumentality, or any
8 other legal or commercial entity.

9 (5) STATEMENT. Spoken words, remarks, comments,
10 publications, opinions, and other expressions delivered
11 orally, in writing, or through websites, blogs, postings to
12 the Internet, emails, texts, or by other electronic means,
13 whether done publicly or privately in one's own name,
14 anonymously, or through the use of pseudonym.

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

19 (b) Except as otherwise prohibited by law, any
20 covered contract between two or more persons or parties
21 obligating one or more parties to the covered contract not to
22 disparage one or more other parties to the covered contract is
23 only enforceable by a civil action where all of the following
24 elements are present:

25 (1) The covered contract contains language
26 prohibiting one or more of the parties from disparaging one or
27 more of the other parties, and may include specifically named

1 individuals who are affiliated with, are employed by, or are
2 owners of one or more of the parties.

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

5 (3) Either of the following occur:

6 a. The communication of the disparaging statement
7 proximately results in identifiable damage to the plaintiff.

8 b. The terms of the covered contract automatically
9 activate a liquidated damages provision, as defined in Section
10 2.

11 (c) Nothing in this act creates any cause of action
12 for disparagement at law or equity absent a written
13 non-disparagement obligation in the covered contract between
14 the parties.

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

18 (e) Nothing in this act prevents parties from having
19 bilateral, unilateral, or multilateral non-disparagement
20 obligations in other contracts, including, but not limited to,
21 nondisclosure agreements.

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

25 Section 5. In order to be enforceable, a covered
26 contract shall state in writing that the obligated party may
27 not be held liable for breach of the non-disparagement

1 obligation if the obligated party makes an otherwise
2 disparaging statement in good faith and solely for any of the
3 following purposes:

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

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

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

14 (4) To testify in a judicial or administrative
15 proceeding in response to a lawfully served subpoena or an
16 order of a court of competent jurisdiction.

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

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

23 (7) To prosecute or defend a civil action between or
24 among parties to a covered contract; provided the party making
25 the disparaging statement attempts to and, if permitted by
26 law, does file the disparaging statement and any related
27 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.

26 (d) To the extent allowed by law, the parties may
27 include in a covered contract a requirement that notice be

1 provided prior to providing to outside third parties
2 information protected under this act.

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

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

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

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

22 (c) Parties to a covered contract may disclaim the
23 applicability of this act to their covered contract, and
24 thereby make this act inapplicable to their otherwise covered
25 contract, provided the disclaimer expressly and plainly states
26 that the parties to the covered contract are knowingly waiving
27 this act.

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

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

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

12 (1) The disparaging statement was made in good
13 faith.

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

15 (3) The disparaging statement caused no harm to the
16 plaintiff.

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

19 (c) Unless it is specifically provided in the
20 covered contract, none of the additional affirmative defenses
21 apply to negate or diminish the effects or full enforcement of
22 a liquidated damages provision in the covered contract.

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

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

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

3 (3) Liquidated damages, but only is provided for in
4 the covered contract.

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

7 Section 11. This act shall become effective January
8 1, 2022, following its passage and approval by the Governor,
9 or its otherwise becoming law.