HB494

213961-3

By Representative England

RFD: Judiciary

First Read: 03-MAR-21
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.
c. Raises doubts or questions about the quality, integrity, honesty, or character of a person or the person's affiliations.

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

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

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

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

(4) PERSON. An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, government subdivision, agency, or instrumentality, or any other legal or commercial entity.
(5) STATEMENT. Spoken words, remarks, comments, publications, opinions, and other expressions delivered orally, in writing, or through websites, blogs, postings to the Internet, emails, texts, or by other electronic means, whether done publicly or privately in one's own name, anonymously, or through the use of a pseudonym.

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

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

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

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

(3) Either of the following occur:
a. The communication of the disparaging statement proximately results in identifiable damage to the plaintiff.

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

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

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

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

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

Section 5. In order to be enforceable, a covered contract shall state in writing that the obligated party may not be held liable for breach of the non-disparagement obligation if the obligated party makes an otherwise disparaging statement in good faith and solely for any of the following purposes:
(1) To communicate with a law enforcement officer acting within the line and scope of the officer's law enforcement duties that a violation of the law has occurred or is occurring.

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

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

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

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

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

(7) To prosecute or defend a civil action between or among parties to a covered contract; provided the party making the disparaging statement attempts to and, if permitted by law, does file the disparaging statement and any related pleading under seal or in compliance with a protective order.
entered by a court of competent jurisdiction in the civil action.

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

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

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

(c) If any party files a motion to seal the pleadings, motions, and other filings associated with a claim under this act, the court shall seal or continue to seal the pleadings, motions, and other filings absent a showing by the non-moving party of a compelling public interest to partially or completely unseal the pleadings, motions, or other filings.
(d) To the extent allowed by law, the parties may include in a covered contract a requirement that notice be provided prior to providing to outside third parties information protected under this act.

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

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

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

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

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

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

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

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

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

(2) The disparaging statement was made by mistake.

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

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

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

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

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

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

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

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

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

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

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