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3 SMITHERMAN SUBSTITUTE FOR HB494  
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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 written solely for that purpose; any written

1 business relationship termination agreement written solely for  
2 that purpose; and any written settlement between parties to a  
3 legal dispute written solely for that purpose, whether before,  
4 during, or after litigation, and the provisions thereof.

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

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

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

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

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

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

24 f. Is knowingly or recklessly made by a party that  
25 has clear and direct information that the statement was  
26 plainly false or misleading by its unreasonable incompleteness

1 and that the communication of the misleading information would  
2 cause specific loss.

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

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

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

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

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

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

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

8           (3) Either of the following occur:

9           a. The communication of the disparaging statement  
10 proximately results in identifiable damage to the plaintiff.

11           b. The terms of the covered contract automatically  
12 activate a liquidated damages provision, as defined in Section  
13 2.

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

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

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

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

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

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

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

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

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

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

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

26           (7) To prosecute or defend a civil action between or  
27 among parties to a covered contract; provided the party making

1 the disparaging statement attempts to and, if permitted by  
2 law, does file the disparaging statement and any related  
3 pleading under seal or in compliance with a protective order  
4 entered by a court of competent jurisdiction in the civil  
5 action.

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

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

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

23 (c) If any party files a motion to seal the  
24 pleadings, motions, and other filings associated with a claim  
25 under this act, the court shall seal or continue to seal the  
26 pleadings, motions, and other filings absent a showing by the

1 non-moving party of a compelling public interest to partially  
2 or completely unseal the pleadings, motions, or other filings.

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

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

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

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

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

26 (c) Parties to a covered contract may disclaim the  
27 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  
25       apply to negate or diminish the effects or full enforcement of  
26       a liquidated damages provision in the covered contract.



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

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

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

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

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

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

14                  Section 12. This act shall become effective January  
15 1, 2022, following its passage and approval by the Governor,  
16 or its otherwise becoming law.