

1 SB170
2 202510-8
3 By Senator Smitherman
4 RFD: Judiciary
5 First Read: 11-FEB-20

SYNOPSIS: This bill would create the Alabama
Non-Disparagement Obligations Act to provide for
the creation and enforcement of non-disparagement
obligations in contracts.

A BILL
TO BE ENTITLED
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) INJURIOUS STATEMENT. Any statement that does any
of the following:

1 a. Falsely discredits or detracts from the
2 reputation of another's character, property, product, or
3 business.

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

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

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

17 (2) PERSON. An individual, corporation, business
18 trust, estate, trust, partnership, limited liability company,
19 association, joint venture, public corporation, government,
20 government subdivision, agency, or instrumentality, or any
21 other legal or commercial entity.

22 (3) PRIVATE INFORMATION. Any information of such a
23 personal or private nature that the parties to the contract
24 would reasonably expect the information not to be made public.

25 (4) PROPRIETARY INFORMATION. Non-public information
26 that is described with reasonable specificity in the contract

1 such that the parties to the contract would be on reasonable
2 notice of the scope of the contract provision.

3 Section 3. (a) Except as otherwise prohibited by
4 law, any contract or provision of a contract between two or
5 more persons not to disparage each other is only enforceable
6 by a civil action where all of the following elements are
7 present:

8 (1) The contract between the persons contains
9 language prohibiting the parties from disparaging one or more
10 persons, including specifically named third-parties.

11 (2) An objectively injurious statement is made that,
12 based on objective facts, is reasonably expected to cause
13 harm.

14 (3) The communication of the objectively injurious
15 statement results in specific loss to the plaintiff.

16 (b) Nothing in this act creates any cause of action
17 for disparagement at law or equity absent a contractual
18 obligation between the parties.

19 Section 4. In order to be valid, any contract
20 governed by this act shall be reduced to writing, signed by
21 all parties, and supported by adequate consideration.

22 Section 5. In order to be enforceable, a contract
23 governed by this act shall include a notice stating that a
24 party may not be held liable for breaching a contract governed
25 by this act if a disclosure is made for any of the following
26 purposes:

1 (1) Communicating with a law enforcement officer
2 acting within the line and scope of the officer's law
3 enforcement duties.

4 (2) Communicating with a government regulator acting
5 within the line and scope of his or her regulatory duties.

6 (3) Responding to a grand jury subpoena.

7 (4) Testifying in a judicial or administrative
8 proceeding.

9 (5) Conferring with an attorney for the purposes of
10 obtaining legal advice or representation.

11 (6) Responding to discovery in a judicial or
12 administrative action; provided, the disclosure is either
13 ordered or made in compliance with a protective order entered
14 in the action.

15 (7) Prosecuting or defending a civil lawsuit between
16 or among parties to a contract governed by this act; provided,
17 the disclosing party seeks to make any filing containing the
18 disclosure under seal or in compliance with a protective order
19 entered in the civil lawsuit.

20 Section 6. A contract governed by this act may
21 require the parties to the contract to file under seal initial
22 or responsive pleadings and motions under Alabama Rule of
23 Civil Procedure 65 regarding the enforcement of a contract
24 governed by this act. Nothing in this section prohibits a
25 court of competent jurisdiction from making its own judgment
26 regarding what, if any, filings filed under seal pursuant to
27 this section should be made public. In making this judgment,

1 the court shall consider the extent to which unsealing parts
2 of the record would cause, perpetuate, or increase injury to
3 any of the litigants or related third parties. To the extent
4 allowed by law, the parties may include in a contract governed
5 by this act a requirement that notice be provided prior to
6 providing to third parties information protected under this
7 act.

8 Section 7. A court may void a contract governed by
9 this act in whole or in part, including, but not limited to, a
10 fee shifting provision, if the court finds that the contract
11 is overly broad, unconscionable, or unduly lacking in
12 mutuality.

13 Section 8. Nothing in this act affects any defense
14 or immunity otherwise available under applicable law. Nothing
15 in this act shall reduce, void, or diminish any obligations or
16 contractual obligations of any kind or nature between
17 shareholders, owners, members, and officers of any entity that
18 is governed by Title 10A, Code of Alabama 1975. Shareholders,
19 owners, members, and officers may disclaim rights and
20 obligations under this act, provided that the disclaimer
21 expressly and plainly states that the signatories to the
22 contract are aware they are waiving their rights under this
23 act.

24 Section 9. A defendant in an action for breach of a
25 contract governed by this act may mitigate damages by proving
26 either of the following:

1 (1) The injurious statement was made in good faith
2 or by mistake.

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

5 Section 10. Upon a finding as to whether or not
6 there has been a breach of a contract governed by this act,
7 the court may order any of the following:

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

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

13 (3) Attorneys' fees and costs, if provided for in
14 the contract or otherwise provided for by law.

15 Section 11. This act shall become effective on the
16 first day of the third month following its passage and
17 approval by the Governor, or its otherwise becoming law.