

1 SB176  
2 209084-1  
3 By Senator Smitherman  
4 RFD: Judiciary  
5 First Read: 03-FEB-21

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, a contract governed  
20 by this act shall be reduced to writing, signed by all  
21 parties, and supported by adequate consideration.

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

25           (b) Nothing in this section prohibits a court of  
26 competent jurisdiction from making its own judgment regarding  
27 what, if any, filings filed under seal pursuant to this

1 section should be made public. In making this judgment, the  
2 court shall consider the extent to which unsealing parts of  
3 the record would cause, perpetuate, or increase injury to any  
4 of the litigants or related third parties.

5 (c) To the extent allowed by law, the parties may  
6 include in a contract governed by this act a requirement that  
7 notice be provided prior to providing to third parties  
8 information protected under this act.

9 Section 7. In the event any portions of an agreement  
10 or contract governed by this act are found by a court to be  
11 unenforceable, those provisions shall be severable from the  
12 remainder of the agreement or contract.

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

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

20 (c) Parties to an agreement or contract containing a  
21 provision governed by this act may disclaim the applicability  
22 of this act to their agreement or contract, provided such  
23 disclaimer expressly and plainly states that the parties to  
24 the agreement or contract are aware they are waiving the act.

25 Section 9. A defendant in an action for breach of a  
26 contract governed by this act may mitigate damages by proving  
27 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 apply to all contracts  
16 entered into on or after January 1, 2022.

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