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Testimony of
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Before the Joint Standing Committee on Labor and Housing
Neither for Nor against
L.D. 1529, *An Act Concerning Nondisclosure Agreements in Employment*

April 24, 2019

Sen. Bellows, Rep. Sylvester and members of the Joint Standing Committee on Labor and Housing, my name is Peter Gore and I am the Executive Vice President of the Maine State Chamber of Commerce, a statewide business association representing both large and small businesses, to provide you with our comments with respect to **L.D. 1529,** *An Act Concerning Nondisclosure Agreements in Employment.*

We are not sure exactly what this bill seeks to accomplish, but we are concerned with the law of unintended consequences should it pass as drafted.

With respect to Subsection 1, we question what this section seeks to accomplish. Specifically, what employer would have an agreement with current or prospective employees that states you cannot discuss harassment that happens at work? None that we know of. But the purpose of the section remains unclear, and frankly meaningless.

Subsection 2, however, seems very problematic, and may well lead to unintended consequences in the workplace.

As a preliminary note, the term "discrimination" is very vague. L.D. 1529 is not being driven by illegal employment discrimination in general; claims about a missed promotion or a different wage payment are not the focus of this bill, or this level of protection. The focus of the bill appears to be about "sexual harassment." If this is the case, then the committee should consider substituting that phrase instead of the word "discrimination." Discrimination in this context is amorphous, and far too broad. It doesn't even refer "discrimination that is illegal under the Maine Human Rights Act. "

The draft initially seems to allow agreements requiring non-disclosure on factual information relating to a claim of discrimination, including harassment – if requested by the employee, BUT – Subsection 1 seems to undercut this point by prohibiting agreements that limit an individuals' ability to provide testimony or evidence, **file claims,** or make reports to a governmental agency. With Subsection 2, if there's a non-disclosure agreement, the employer needs to advise the employee that the employee retains the right to testify, provide evidence, **file claims**, or make reports of discrimination.

So, one reading is that if a settling employer does not have a non-disclosure provision, then the employer can obtain a meaningful release from the employee of her claims. However, it is unclear if the opposite is true - that the intent of the language is that an employer with a non-disclosure agreement (at the request of the employee under this bill) *cannot ever* obtain a release of a claim of discrimination without the claim first going through the MHRC.

The intent seems to be to end private settlements and have all claims go to the MHRC before a *final*, enforceable settlement can be reached. But what if the employee wants to settle and even asks for the non-disclosure provision, which is not uncommon. Under this bill the employer is likely to balk, because the employer who is writing the settlement check, sees the value being somewhat and sometimes largely based on (1) privacy and 2) obtaining a release from further claims.

Why would an employer make any payment if the employee can still publicly talk about it? And who would pay anything if the employee can take your check and then file a claim with the MHRC after the payment is made. The employer is not getting the closure they may desire with a settlement, and hence will be less likely to settle, *to the detriment of the employee*. In discussing this bill with several attorney's, they indicated that, in their experience, most victims of illegal employment discrimination do not want their experience to be public. The statute's prohibition of the parties being able to agree to a release of claims under the MHRC or EEOC means employers will not settle and it makes it harder for victims to assert claims, resolve them and move on. It also forces victims, who may wish to keep their stories private, into the public spot light by requiring MHRC action before the final release is given. We would ask, who benefits when it is harder for employees to assert and or settle their claims?

It could certainly be argued that if the employee has counsel, why is any of this needed. One fix, if there is a problem about the use of NDA's that could be considered, is to adopt language that there can be a valid non-disclosure agreement, and a fully enforceable general release, if the employee is represented by counsel. In pursuing this route, the legislature would be respecting the decision of the claimant and counsel if the individual is fully informed.

Thank you for the opportunity to provide you with our comments. I would be pleased to answer any questions you may have.