

**Disclaimer:** The timeframe, process and complexity of this pilot did not provide sufficient opportunity for collaboration among all of the members of the research team. Thus, the data collection and analysis provided in this preliminary statement reflects only the work of those research team members affiliated with the University of Maine System.

## **Preliminary Racial Impact Statement for LD 965, *An Act Concerning Nondisclosure Agreements in Employment***

Drafted by Dmitry Bam, Vice Dean/Provost University of Maine School of Law  
[dmitry.bam@maine.edu](mailto:dmitry.bam@maine.edu)

February 28, 2022

*This document has been presented pursuant to the plan established by the Legislative Council Subcommittee to Implement a Racial Impact Statement Process Pilot pursuant to Public Law 2021, chapter 21. The University of Maine System and The Permanent Commission on Racial, Indigenous and Maine Tribal Populations have agreed to conduct an analysis for selected bills which are subject to consideration during the Second Regular Session of the 130th Legislature. This statement is governed by an analysis framework as established by the Subcommittee. A copy of the Subcommittee's report can be found at <https://mainelegislature.org/legislative-council-subcommittee-to-implement-a-racial-impact-statement-process-pilot>.*

### **Introduction**

You asked me to review LD 965, *An Act Concerning Nondisclosure Agreements in Employment* to determine whether the legislation may have a positive or negative racial impact. Similar legislation has been proposed, and adopted, throughout the country at the state and federal level.<sup>1</sup> This law attempts to remedy an important problem, and while it is not certain that, in Maine, the legislation would reduce inequalities for historically disadvantaged racial groups, the legislation has a good likelihood of doing so (and is, in many ways, intended to do so). Even if it does not, by increasing the opportunities for the public and state and federal regulatory agencies obtain information necessary to enforce employment discrimination laws, and by making it more difficult for employers to silence employees who have been victims of racial discrimination and harassment, LD 965 almost certainly does not exacerbate any existing inequalities or create a disparate impact on the basis of race.

### **Discussion**

#### **1. What problem is this policy/legislation addressing?**

In recent years, many employers have required employees to sign nondisclosure agreements designed to prevent the disclosure and publication of allegations of workplace misconduct by supervisors. These agreements have sometimes been used as part of a general pre-employment or employment agreement, as part of a severance package, or as part of settlement of employment-related litigation. These

---

<sup>1</sup> In the United States, over a dozen states have passed such legislation. See, for example, California's Silenced No More Act.

NDAAs can limit the public's access to information about misconduct at corporate employers.

NDAAs have become especially prevalent in cases involving discrimination and harassment. In recent years, the "Me Too" movement has highlighted the prevalence of NDAAs, and how they have shielded perpetrators of sexual harassment from scrutiny.

This has allowed perpetrators of illegal workplace conduct to get away with their misconduct. In Maine, just like the rest of the United States, "enforcement of anti-discrimination laws "rests almost entirely on the shoulders of employee victims, who must first file charges with a government agency and then pursue litigation themselves." If potential victims of discrimination are unaware of the discrimination, harassment, and retaliation that may have happened at an employer, they may not be able to consider that as a factor in accepting employment, and are therefore more likely to be victims of discrimination. In addition, governmental entities charged with the enforcement of state and federal anti-discrimination laws, including the Maine Human Rights Commission and the Equal Employment Opportunity Commission, are deprived of critical information when former employees are silenced about discrimination and harassment that may be taking place in the course of employment.

The proposed legislation bans certain kinds of NDAAs, allowing them only if certain conditions are met. An NDA that "[l]imits an individual's right to report, testify or provide evidence to a federal or state agency that enforces employment or discrimination laws[, p]revents an individual from testifying or providing evidence in federal and state court proceedings in response to legal process[,] or [p]rohibits an individual from reporting conduct to a law enforcement agency" will be illegal. These provisions will make it less likely that an employer can conceal wrongful conduct in the workplace from public scrutiny or the attention of enforcement agencies.

## 2. Is the problem the legislation is addressing one that is worse or exacerbated for historically disadvantaged racial populations?

I am not aware of Maine-specific data showing that nondisclosure agreements are used more frequently in cases involving historically disadvantaged racial groups. We do know, however, that discrimination lawsuits are more likely to be brought by members of those groups,<sup>2</sup> and therefore it is likely that potential victims of nondisclosure agreements (i.e. members of the general public who remain unaware

---

<sup>2</sup> There has been a significant rise in the number of discrimination claims brought by white employees and applicants for employment.

of potential employment-related problems at particular companies as well as the victims of discrimination who are unable to speak out) are more likely to be members of those groups.

3. What factors contribute to or compound racial inequities around this problem?

As discussed above, I am unaware of Maine-specific data showing that nondisclosure agreements cause greater harm on the basis of race. However, throughout the nation, despite the rise of race discrimination claims by white plaintiff, race discrimination claims are still more likely to be brought by members of historically disadvantaged racial groups. Title VII and the Maine Human Rights Act were passed in part to address problems of race discrimination in employment, and many of those problems continue to exist decades after the passage of that legislation.

4. More specifically, what policies, institutions, or actors have shaped these inequalities, disparities, and/or disparate impacts?

Reliance on employees to bring cases, combined with the prevalence of NDAs, has made it more difficult for employees to avoid employers that engage in problematic practices, and to establish discrimination claims against such employers because potentially supporting evidence is being suppressed.

Employers, fearing negative public exposure, have a strong incentive to include an NDA in a severance package or a settlement offer to avoid the negative publicity and the risk of investigation by a state and federal agency. Due to the power disparity, and money being at stake, employees have a strong incentive to accept such offers, waiving their right to speak publicly about their experience.

5. If inequities are exacerbated, what actors, at what levels of influence, could reduce these inequities?

N/A, as this legislation does not exacerbate existing inequities.

### **Conclusion**

**The proposed legislation likely reduces inequities for historically disadvantaged racial populations.** It will allow victims of race discrimination to disclose their experience to administrative agencies, making it more likely that future violations of civil rights law will be discovered (and, hopefully, avoided). Allowing victims to speak out can help them feel empowered to hold perpetrators

accountable.<sup>3</sup> Additional data would be required to determine the particular effect of this legislation in Maine. The legislation may not have a significant racial impact if NDAs in Maine are not disproportionately used in race discrimination cases or for employees from historically disadvantaged racial groups. At a minimum, however, the legislation would have a neutral impact on inequities among historically disadvantaged racial populations.<sup>4</sup>

**Disclaimer:** The timeframe, process and complexity of this pilot did not provide sufficient opportunity for collaboration among all of the members of the research team. Thus, the data collection and analysis provided in this preliminary statement reflects only the work of those research team members affiliated with the University of Maine System.

---

<sup>3</sup> It is possible that severance and settlement offers to victims of race discrimination will be reduced in light of this legislation. This could happen because secrecy and confidentiality have an economic value to companies and that value could be reduced if the NDA provisions would either be struck down (when not permissible under LD 965) or subject to future litigation (even when permissible under LD 965). Further empirical work is required to evaluate this possibility and any reductions.

<sup>4</sup> Although I was not asked to address the gender-based impact of this legislation, the statute can also improve the enforcement of sexual discrimination and harassment laws. NDAs have often been used to silence victims of sexual harassment, and to protect perpetrators of sexual harassment in the workplace. Some of the legislation passed throughout the nation was in response to the Me Too and Time's Up movements.