DISABILITY RIGHTS MAINE

April 29, 2021

Senator Craig Hickman, Chair
Representative Mike Sylvester, Chair
Joint Standing Committee on Labor and Housing
Cross Office Building, Room 202
Augusta, Maine 04333

Re: LD 965, *An Act Concerning Nondisclosure Agreements in Employment.*

Dear Senator Hickman, Representative Sylvester, and Members of the Joint Standing Committee on Labor and Housing:

My name is Kristin Aiello and I am a Senior Attorney at Disability Rights Maine (DRM), Maine's designated Protection and Advocacy agency for individuals with disabilities. On behalf of DRM and the individuals we serve, thank you for the opportunity to submit testimony in support of L.D. 965, *An Act Concerning Nondisclosure Agreements ("NDAs") in Employment*.

Disability Rights Maine is a private, non-profit organization, incorporated in Maine, governed by a volunteer Board of Directors and designated by the Governor of Maine to serve as Maine's independent advocacy agency for people with disabilities. DRM works to ensure autonomy, inclusion, equality, and access for people with disabilities in Maine through education, strategic advocacy and legal intervention. We have over 40 staff, 13 of whom are attorneys, working under 24 funding sources from federal, state and private grants and contracts to ensure that Mainers with disabilities: are protected from abuse; are able to control the decisions that affect their lives; receive the services and supports necessary to live independently; have the opportunity to work and contribute to society; and have equal access to the same opportunities afforded other Mainers.

I come before you with over twenty years of experience litigating and resolving employment discrimination claims on behalf of DRM clients, including those who are blind, Deaf or hard of hearing, those with psychiatric labels, intellectual and developmental disabilities, mobility impairments, or traumatic brain injuries, among other disabilities. Our clients enter the civil justice system after they have been terminated because of their disabilities, denied reasonable accommodation, denied employment or harassed based on disability. Bringing a lawsuit involving a painful experience is taxing, stressful, and time-consuming, therefore, our clients may decide to resolve their claims on fair and reasonable terms if possible, including injunctive relief such as ADA training and ADA-compliant policies to ensure the discrimination will not recur, as well as backpay and other compensation for the discrimination that they may have suffered.

From my experience representing clients with disabilities in employment cases over the past two decades, I have reviewed and negotiated settlement drafts from opposing counsel representing some of the largest and most wealthy employers in the world to the smallest, Maine-based employers. I have found that I am too often spending an inordinate amount of time reigning in proposed settlement terms such as no re-hire provisions[1], mandatory nondisclosure agreements, overreaching release language and non-disparagement clauses, and sometimes even draconian liquidated damages clauses, all in many multi-page, single-spaced legalese. To be sure, parties must be free to resolve cases fairly and they must have confidence in the finality of the resolution. But unfortunately, overreaching settlement provisions and mandatory NDAs, seem to have become the industry standard. While individuals with experienced counsel may receive the guidance they need to resolve a case fairly, pro se individuals as well as new employees signing employment contracts without counsel, are clearly not on an even playing field.

The time is ripe for review of these provisions and their wider impact. The reality is that in Maine and across the country, the vast majority of employment cases in our civil justice system resolve without ever going to trial.[2] Therefore, the majority of litigants will likely resolve their cases through private settlement agreements containing all sorts of provisions, which almost always include mandatory NDAs. Some of the litigants may be well-represented, some not. Some will come to the table having been terminated, broke and desperate to resolve their claim, some will not. Regardless, the price of mandatory NDAs means that nearly every civil rights case that is privately settled comes with a muzzle, which has an impact not only on the individual but on greater public policy.

Disability Rights Maine is in strong support of LD 965. This legislation takes an important step forward towards ensuring that discrimination and harassment are not shielded from the public view, that individuals can get help and do something about it, and that our public agencies, including the EEOC, the MHRC and law enforcement, may take measures to address and correct it.

First, unlike legislation in other states, LD 965 extends to disability harassment and discrimination claims, and is not limited to sex harassment. This extension to disability is crucially important, as disability discrimination is the most frequently alleged protected class in Maine, at 47.3%, or 338

[1] The "no-rehire" aka "don't darken our doorway" clause is standard practice in employment discrimination settlement agreements, despite the EEOC's position that such clauses constitute retaliation. "No-rehire" clauses ban employees or applicants from ever again seeking employment with an employer or its parent organization and affiliates. But a number of states have recently prohibited no-rehire clauses, such as California in 2020 and Vermont in 2018. In California, AB-749, signed by Governor Newson on October 12, 2019, specifically "prohibits an agreement to settle an employment dispute from containing a provision that prohibits, prevents, or otherwise restricts a settling party that is an aggrieved person, as defined, from working for the employer against which the aggrieved person has filed a claim or any parent company, subsidiary, division, affiliate, or contractor of the employer." No-rehire clauses are still routinely included in settlement agreements in Maine.

[2] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. Empirical Leg. Stud. 459 (2004), online at http://epstein.wustl.edu/research/courses.judpol.Galanter.pdf The results of this study were published in the Louisiana Law Review at Louisiana State University, online at https://www.americanbar.org/content/dam/aba/administrative/american_jury/2020-reasons-for-the-disappearing-jury.pdf

of 715, of the cases filed at the Maine Human Rights Commission ("MHRC").[3] This is unsurprising, as nearly 1 in 5 people have a disability, or 19 percent of the United States population.[4] Clearly, people with disabilities must enjoy the same protected status as other classes, and LD 965 achieves this.

Second, DRM supports the balance that LD 965 has reached, to allow employees to decide and initiate whether they wish to have an NDA in their private settlement or severance agreement. Some individuals will want the opportunity to discuss their experiences, which may have been life-changing, and they do not want to be silenced as a mandatory price for resolving their claim. On the other hand, some individuals may not wish to discuss their experience and they would readily agree to an NDA as a part of their private settlement agreement. Of course, if the MHRC, the Equal Employment Opportunity Commission ("EEOC") or the Department of Justice is a party to the case, then there is no confidentiality in either public reports or Settlement/Terms in the Public Interest, so some cases may still be public regardless of the individual's choice.

Third, DRM supports LD 965's prohibitions on requiring an employee, intern or applicant to enter into a contract or agreement that waives their right to report or discuss retaliation, as well as the bill's clear directives that employers may not prevent an employee, intern or applicant from testifying at the MHRC or the EEOC, in court, or to a law enforcement agency. These provisions help ensure that discrimination is not hidden, that individuals do not suffer discrimination in silence, and that our public agencies may be able to perform their work "to protect the public health, safety and welfare, [as] it is declared to be the policy of this State to keep continually in review all practices infringing on the basic human right to a life with dignity, and the causes of these practices, so that corrective measures may, where possible, be promptly recommended and implemented."[5]

Finally, in addition to prohibiting the use of mandatory NDA clauses in settlement agreements, DRM respectfully proposes the following additional language to LD 965, to prohibit the use of no-rehire clauses in settlement agreements. Such language could be borrowed from the following recently enacted provision:

> An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer. A provision in an agreement entered into on or after [date], that violates this section is void as a matter of law and against public policy.[6]

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[3] Maine Human Rights Commission, 2019 Annual Report, July 1, 2018-June 30, 2019, online at https://www.maine.gov/mhrc/sites/maine.gov.mhrc/files/inline-files/MHRC%202019%20ANNUAL%20REPORT_0.pdf

[4] From the United States Census Bureau, online at https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html

[5] 5 M.R.S.A. § 4552.

[6] For the full language of this California provision, see AB-749, Settlement agreements, restraints in trade, online at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB749

An individual who is discriminated against at work, and who chooses to resolve their claim with their employer, should not be barred from re-employment with the company and its affiliates as a condition of settlement. Just as in California, Maine could include additional provisions to ensure that "nothing would prohibit the employer from refusing to hire an individual if a good faith determination if there is a legitimate, nondiscriminatory reason or non-retaliatory reason for terminating the employment relationship or refusing to hire the person…"

As it stands now in Maine, settling an employment case may come at the very high, mandatory price for employees of a ban on ever seeking re-employment with the former employer or employment with any of its affiliates. Maine individuals subject to such no-hire provisions are especially aggrieved when the employer is large, has jobs to offer, and is located in their city or town. Regardless of how qualified the individual is, how much they need the job, and how much the employer needs applicants, these individuals are banned from applying because of the no-rehire clause. Like mandatory NDAs, this widespread employment practice must cease, and we respectfully request addition of this prohibition.

On behalf of our clients and all people with disabilities in Maine, we thank Representative Harnett and all the sponsors of LD 965 for bringing these crucially important issues to light.

Respectfully,

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