

Testimony of
Peter M. Gore
On Behalf of the Maine State Chamber of Commerce
In Opposition to
LD 965, An Act Concerning NonDisclosure Agreements in Employment.

Senator Hickman, Representative Sylvester and members of the Joint Standing Committee on Labor and Housing, good morning, my name is Peter Gore. I am the Executive Vice President at the Maine State Chamber of Commerce, a statewide business association representing both large and small businesses writing to convey our opposition to **L.D. 965, An Act Concerning NonDisclosure Agreements in Employment.**

The proposed legislation seeks to regulate non-disclosure agreements in two basic settings: first, when the employee is about to be, or is currently employed, and second when the employee's employment is expected to terminate. With respect to prospective or current employers, Section 2 prohibits an agreement in which an applicant or employee, "waives or limits any right to report or discuss discrimination, retaliation or harassment occurring in the workplace or at work-related events." While we do not object to this language per se, we do believe, however, that a statute should be enacted to address a real concern. As we have many times before this committee, we are always mindful of the law of unintended consequences with enacted statutes. Even the best intended statute can unwittingly cause difficulties and expense. This committee should ask the proponents if they, or anyone has actually seen an agreement from a Maine employer that sought to prohibit an applicant or employee from reporting or discussing discrimination, retaliation or harassment occurring in the workplace or at work-related events. The Chamber is skeptical that such an agreement exists, never mind so many of them existing that a legislative solution is required.

As mentioned, LD 965 also seeks to regulate non-disclosure agreements in settlement, separation, and severance agreements. In Section 3, the bill prohibits absolutely, any language that limits an employee's right to report, testify, or provide evidence to a governmental entity that enforces employment or discrimination laws, prevents an employee from testifying or providing evidence in court proceedings in response to a subpoena, or prohibits an individual from reporting conduct to a law enforcement agency. Again, we do not object to the prohibiting restrictions on testifying or providing evidence language, but again the Chamber is curious to know if anyone has seen an agreement from a Maine employer that sought to restrict the employee from such conduct. Again, we are skeptical that such an agreement exists, never mind so many of them existing that a legislative solution is required.

With respect to the prohibition on “reporting” in Section 3, the Chamber believes that its concerns about Section 4 area also applicable to the prohibition on reporting in Section 3. Section 4 of the bill also regulate nondisclosure agreements with departing employees. It provides that a settlement, separation, and or severance agreement may prohibit the subsequent disclosure of factual information relating to a claim of discrimination, retaliation, or harassment, if (a) the employee “initiates” the request for such a term, (b) the provision applies to all parties, (c) the agreement confirms in writing that the departing employee retains his right to report and otherwise cooperate with the governmental entities and courts, and (d) the employer retains a copy of the agreement for 6 years and that the copy, “be accessible to any representative of the Department of Labor at any reasonable hour.”

LD 965 is predicated on the assumption that nondisclosure agreements are problematic: hiding and therefore implicitly encouraging bad behavior. To be clear, the Chamber is resolute in its commitment to ending illegal employment discrimination of all kinds in Maine, and we have in fact consistently supported legislation that will help to end it. With illegal employment discrimination, there is no ambiguity; it needs to be outlawed and stopped.

The subject of the merits, or lack thereof, with non-disclosure agreements, however, is more ambiguous and complicated.

Maine employers and employees operate in a different sphere for the most part, and often the NDA is a reasonable tool for reaching a compromise and resolving differences, a highly valued policy goal in almost every setting. Not all claims are clear cut, and there can be behavior issues or work performance shortcomings on the part of the employee, the supervisor, or even a co-worker who is not part of the claim. Perspectives on what happened can be honestly different. Is it appropriate public policy for the legislature to be creating impediments to legitimate dispute resolution? Resolution of disputes is a good thing, and it is easier to resolve matters, often for everyone, if there is confidentiality. Without resolution, the parties continue to be adverse, costs for both sides rise, and the company often cannot take corrective measures for fear of incriminating itself. Frequently, the company wants to implement discipline on the supervisor or alleged wrong doer but is concerned that its corrective action will give rise to a claim. The bottom line is that passage of LD 965 will result in the elongation of claims, litigation, and costs – to both parties. This serves neither side well.

With respect to LD 965, the requirement that the employee “initiate” the request for the non-disclosure term is unnecessary and unproductive. From my discussions with attorneys involved with claims settlement, it is rare that an employee is in these negotiations without counsel. The Chamber is unaware of any basis for thinking that a court subpoena compelling testimony would not overrule an NDA, so the language in Section 4 (C) addressing that issue is unnecessary. Should this bill become law, who would enter into a resolution if they thought it was going to still be litigated before the Maine Human Rights Commission, the Department of Labor, or elsewhere? The answer is none. Why do we want to discourage private settlements – even at the request of the victim - which is what this bill intends to do?

In the end, the question that needs to be asked is whether these prohibitions are more or less likely to stop illegal employment discrimination, which we all agree must stop. We do not believe that L.D. 965 moves us closer to that goal. Instead, we think L.D. 965 makes it harder for employees to reach a resolution, close a sad and difficult chapter, and move on. We

think it results in everyone incurring further legal expenses and dragging out settlements – benefitting no one except the attorneys involved. It is for these reasons we remain opposed to L.D. 965 and urge this committee to reject this bill. Thank you.