April 30, 2021

**TESTIMONY OF MAINE EMPLOYMENT LAWYERS ASSOCIATIONIN SUPPORT OF LD 965**
**AN ACT CONCERNING NONDISCLOSURE AGREEMENTS IN EMPLOYMENT**

My name is Jeffrey Neil Young. I am an attorney with Solidarity Law and practice in Cumberland. I serve as an executive Board member of the National Employment Lawyers Association (NELA), and as vice-president of the Maine Employment LawyersAssociation (MELA). NELA is the largest organization of civil rights lawyers in the country with about 4,000 national and affiliate attorney members. MELA is the largest organization of civil rights lawyers in Maine with about 75 member attorneys who represent employees in labor and employment matters across the state as at least 2/3of their practice. I have been practicing labor and employment law for 35 years, the last 30 years here in Maine.

MELA strongly supports the enactment of LD 965, An Act Concerning NondisclosureAgreements in Employment. Mandatory non-disclosure agreements (NDA's) have proliferated in recent years.[1] NDA's have served to protect serial sexual harassment perpetrators like Harvey Weinstein and Bill Cosby from discovery of their pernicious and predatory behavior. NDA's also serve to shield employers from liability or increased liability in the case of serial harassing and discriminatory conduct, allowing such wanton conduct to continue. NDA's prevent survivors of harassment and discrimination from publicizing their accounts which for some (albeit not all) individuals can help provide closure. Some employers even have required NDA's as a condition of employment, preempting employees from sharing their right to discuss improper and inappropriate treatment, further isolating survivors of harassment and discrimination.

LD 965 contains several provisions which MELA strongly supports:

- LD 965 is not limited to sexual harassment claims but would apply to all claims of harassment and discrimination.[2] MELA feels very strongly that while sexual harassment and the MeToo movement are driving much of the current discussion, other forms of harassment-including harassment based on race, disability, and sexual orientation--as well as plain vanilla discrimination (if there is such a thing)-- are

1 About 1/3 of American workplaces use NDA's. Randall S. Thomas et al., "An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants," Vanderbilt Law Review 68, no. 1 (2015).

2 NDA laws in Illinois, New Jersey, New Mexico, and New York also extend to all claims of harassment, discrimination, or retaliation. Over 50 organizations, including the National Women's Law Center, the ACLU, and the Leadership Conference on Civil and Human Rights, have endorsed this more comprehensive approach. https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp·content/uploads/2018/10/Workplace·Harassment·Legislative·Principles.pdf

also contemptible and should be treated in the same manner, just as the MHRA does not distinguish among them.[3]

- LD 965 protects employees from retaliation.[4]

- LD 965 makes clear that employees who settle their claims, even with confidentiality provisions, still retain the right to bring claims to the MHRC and EEOC. Preventing discrimination and harassment is not merely a private matter but is a matter of the highest public interest. The law is clear that regardless of a private settlement, the Maine Human Rights Commission and the Equal Employment Opportunity Commission cannot be prohibited from protecting the public interest against discrimination and harassment.

- LD 965 ensures that victims of harassment and discrimination are made aware that they have a right to engage in protected concerted activity and discuss their claims with co·workers without fear of retaliation.

- LD 965 ensures that interns and job applicants are not subjected to NDA's.[5]

- LD 965 protects reports to law enforcement.

It is important to note that LD 965 does NOT prohibit NDA's altogether. Rather, LD 965 restores the equilibrium between employers and employees by allowing

3 In fiscal year 2015 (before the Me Too movement), the EEOC received about 90,000 discrimination charges. Nearly 28,000 of these included charges of harassment. About 43% of the charges alleged sex harassment. Hence, other forms of harassment form the majority of such charges. They should not be ignored. https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686298.

4 Since 2010, retaliation has been the single largest complaint filed with the EEOC. In fiscal year 2017, almost 49% of complaints alleged retaliation. https://www.iacksonlewis.com/publication/eeoc·retaliation·tops·discrimination·charges·filed·fiscal·year-2017. 68% of sexual harassment claims are accompanied by charges of retaliation. https://www.umass.edu/employmenteguity/employers·responses-sexual·harassment

5 80% of female interns report being sexually harassed or knowing another intern subjected to such misconduct. https://www.philanthropy.com/article/sexual-harassment-of-female-interns-is-widespread-study-finds/

employees who are the victims of harassment and discrimination to decide for themselves whether an NDA is in their best interest. Many employees prefer to settle their claims confidentially without disclosure of what can be highly private and embarrassing details. Moreover, non-disclosure can help employees avoid potential retaliation. Many employees also prefer to settle privately because they fear that disclosure of litigation will harm future employment prospects.

Indeed, there are both pros and cons to nondisclosure agreements. In 2018, when limitations on NDA's began to be introduced, the topic provoked more posts on the NELA Exchange list serve than any topic ever discussed. The consensus, however, was *mandatory* NDA's should be banned. What is appropriate and desirable for one employee may not be right answer for another employee.

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Some concerns have been expressed that if legislation limiting NDA's is passed, cases will not settle. While this concern may have some surface appeal, when one examines it more closely, it obviously is false. Some 15 states have passed legislation to limit non-disclosure agreements.6 These include not only blue states like New York, California, Washington, New Jersey and Maryland, but also red states like Tennessee and Louisiana,7 as well as purple states like Arizona.8

While MELA strongly supports LD 965, it believes the bill can be strengthened in several ways:

1. Add language to clarify that attempts to enforce an NDA are illegal. Such language should state: "PROHIBITION ON ENFORCEMENT. "Subject to paragraph (3) but notwithstanding any other provision of law, it shall be an unlawful practice for an employer or covered establishment to enforce or attempt to enforce a non-disparagement clause or non-disclosure clause that covers prohibited discrimination or harassment in employment or contracting, or retaliation for reporting, resisting, opposing, or assisting in the investigation of such discrimination or harassment. An employer or covered establishment that enforces or attempts to enforce such a non· disparagement clause or such a nondisclosure clause against a worker shall be liable for the reasonable attorney's fees and costs of the worker."
2. Add a new subsection to provide, "Nothing herein shall limit an individual's ability to exercise any rights the individual has under federal, State, or local labor laws to engage in concerted activities with other workers for the purposes of collective bargaining or mutual aid and protection."

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[6] https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report-MM-edits-11.11.pdf

[7] Tennessee prohibits NDA's with regard to sexual harassment while Louisiana prohibits the use of public funds to settle such claims. *Id.*

[8] Arizona prohibits the use of public funds to settle sexual harassment claims. *Id.*

3. Add some reporting requirements. Reporting requirements would help ensure that workplace cultures of harassment and discrimination are eliminated. The requirements need to balance prevention of discrimination, harassment, and retaliation with the right to employee privacy. A victim's identity should not be disclosed or discoverable. MELA recommends that each employer who has settled a claim of harassment, discrimination, or retaliation be required to report to the Maine Human Rights Commission the amount of any settlement. MELA also proposes that the Commission be charged with compiling an annual report of such settlements. Attached hereto as Exhibit A are approaches taken by various states and New York City with respect to such reports.

Two years have now passed since LD 1529, the antecedent to LD 965, was introduced and passed by both houses of this Legislature. It is long past time for Maine to join its sister states, red and blue, and enact NDA legislation.

**EXHIBIT A**

Maryland S.B. 1010 (signed by Governor): requires employers with 50 or more employees to complete a survey from the Maryland Commission on Civil Rights on the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee; the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and the number of sexual harassment settlements that included a provision requiring both parties to keep theterms of the settlement confidential. The aggregate number of responses from employers for each category of information will be posted on the Maryland Commission on Civil Rights' website. The number of times a specific employer paida settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment will be retained for public inspection upon request.

New York City. Stop Sexual Harassment In NYC Act, Int. No.653-A (enacted): requires all city agencies, as well as the offices of the Mayor, Borough Presidents, Comptroller, and Public Advocate, to annually report on complaints of workplace sexual harassment to the Department of Citywide Administrative Services. Department is required to report the number of complaints filed with each agency; the number resolved; the number substantiated and not substantiated; and the number withdrawn by the complainant prior to a final determination. Information from agencies with 10 employees or less will be aggregated together. This information will be reported to the Mayor, the Council and Commission on Human Rights, which shall post it on its website.

New York AB 9511A (signed by Governor): Requires state contractors to report annually to the office of general services the number of sexual harassment violations and/or determinations; the number of sexual harassment settlement agreements including NDAs; and a description of sexual harassment training provided to employees. The office of general services shall prepare an annual report which identifies the aggregate number of sexual harassment violations, the aggregate number of settlement agreements containing nondisclosure provisions, and the aggregate number of businesses providing sexual harassment training in the workplace reported to the office of general services during the preceding year. The report shallbe provided to the governor, the speaker of the assembly and the temporary president of the senate on or before November first of each year commencing withthe November first in the year immediately following the effective date of the legislation.

[Federal] EMPOWER Act (did not pass) Would have required public companies to report to the Securities and Exchange Commission, via form 10-K, information regarding incidents of workplace harassment (including sexual harassment) and retaliation. The company would be required to disclose the number of settlements, judgments orawards; any payments made in connection with a release of claims; the total amount paid for the settlements and judgments; and whether there have been three or more settlements or judgments against the company relating to a particular employee.