
Fourth Session, Forty-second Parliament
1 Charles III, 2023
Legislative Assembly of British Columbia

BILL M 215

NON-DISCLOSURE AGREEMENTS ACT

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Explanatory Note

This Bill restricts the use and content of non-disclosure agreements relating to discrimination, harassment and allegations of discrimination and harassment.

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NON-DISCLOSURE AGREEMENTS ACT

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HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Definitions

1 In this Act:

“**discrimination**” has the same meaning as in section 1 [*definitions*] of the *Human Rights Code*;

“**harassment**” means any action, conduct or comment that could reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to a person, including, without limitation, sexual harassment;

“**non-disclosure agreement**” means a settlement agreement, or a part of a settlement agreement, between a respondent and a relevant person that

- (a) prohibits or restricts the relevant person from disclosing information about discrimination or harassment experienced, or alleged to have been experienced, by the relevant person, or
- (b) prohibits or restricts disparagement by the relevant person, if the purpose or effect of the prohibition or restriction is to conceal details relating to discrimination or harassment experienced, or alleged to have been experienced, by the relevant person;

“**relevant person**”, in relation to discrimination or harassment or allegations of discrimination or harassment, means the person who experienced, or alleges that the person experienced, the discrimination or harassment;

“respondent”, in relation to discrimination or harassment or allegations of discrimination or harassment, means either of the following:

- (a) the person who committed, or is alleged to have committed, the discrimination or harassment;
- (b) a responsible person in relation to the discrimination, harassment or allegations;

“responsible person”, in relation to discrimination or harassment or allegations of discrimination or harassment, means a person who has a legal obligation to take reasonable steps to prevent or eliminate discrimination and harassment at the place where the discrimination or harassment occurred or is alleged to have occurred;

“settlement agreement” means an agreement, however described, between two or more parties that disposes of one or more issues in dispute between the parties in relation to discrimination, harassment or allegations of discrimination or harassment;

“sexual harassment” means

- (a) an unwelcome action or comment or unwelcome conduct of a sexual nature, including, without limitation,
 - (i) a sexual solicitation or advance,
 - (ii) a sexually suggestive remark, joke or gesture,
 - (iii) the circulation or sharing of an inappropriate image, and
 - (iv) physical contact,
- (b) an action or comment or conduct that could reasonably be perceived as placing a condition of a sexual nature on employment, an opportunity for training or a promotion, and
- (c) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.

Non-disclosure agreement restrictions

- 2 (1) A respondent must not enter into a non-disclosure agreement in respect of discrimination or harassment or allegations of discrimination or harassment with a person who is a relevant person in relation to the discrimination, harassment or allegations unless
 - (a) the agreement is the expressed wish and preference of the relevant person,
 - (b) before entering into the agreement, the relevant person has a reasonable opportunity to receive independent legal advice,
 - (c) there are no undue attempts to influence the relevant person in relation to the decision to enter into the agreement,
 - (d) the agreement does not adversely affect the health or safety of a third party or the public interest,
 - (e) the agreement includes
 - (i) an opportunity for the relevant person to waive the relevant person’s own confidentiality, and
 - (ii) a process for waiving confidentiality, and
 - (f) the agreement is of a set and limited duration.

(2) A non-disclosure agreement entered into in contravention of subsection (1) is void.

Plain language

3 A non-disclosure agreement must use language that is clear and understandable to the person who is the relevant person in relation to the discrimination or harassment, or allegations of discrimination or harassment, to which the agreement applies.

Void provisions of non-disclosure agreement

4 (1) A non-disclosure agreement between a respondent and a relevant person is void to the extent that the non-disclosure agreement prohibits or restricts any of the following:

(a) the disclosure of information protected or required under the *Employment Standards Act*, the *Human Rights Code*, the *Workers Compensation Act*, another enactment of British Columbia or an enactment of Canada;

(b) a communication relating to the discrimination or harassment or alleged discrimination or harassment between the relevant person and

(i) a person whose duties include the enforcement of an enactment of British Columbia or Canada, in relation to a matter within the person's power to investigate,

(ii) a lawyer,

(iii) a medical practitioner,

(iv) a nurse practitioner,

(v) a person who is a registrant under the bylaws of the British Columbia College of Nurses and Midwives and is authorized to use the title "registered nurse" or "registered psychiatric nurse",

(vi) a person who is a registrant under the bylaws of the College of Psychologists of British Columbia and is authorized to use the title "registered psychologist",

(vii) a person who is a registrant as defined in the *Social Workers Act*,

(viii) a person who provides a victim service as defined in the *Victims of Crime Act*,

(ix) a community elder, spiritual counsellor or counsellor who is providing culturally specific services to the relevant person,

(x) an officer of the Legislature,

(xi) a friend, family member or personal supporter, as specified or approved in the non-disclosure agreement,

(xii) a member in good standing of the BC Association of Clinical Counsellors, or

(xiii) a prescribed person or a member of a prescribed class of persons;

(c) artistic expression by the relevant person that does not identify

(i) the respondent, or

(ii) the terms of the non-disclosure agreement.

- (2) A non-disclosure agreement between a respondent and a relevant person is void to the extent that the agreement prohibits or restricts disclosure of the fact that the relevant person entered into a non-disclosure agreement or a settlement agreement if
 - (a) the disclosure is made in the course of providing information about the relevant person's employment history for the purposes of obtaining employment, and
 - (b) the disclosure does not communicate the particulars of the discrimination or harassment or alleged discrimination or harassment.

Agreement prohibited

- 5 (1) A responsible person must not, for the purposes of preventing or interfering with a lawful investigation into discrimination, harassment or allegations of discrimination or harassment, enter into an agreement with a person who committed, or is alleged to have committed, the discrimination or harassment.
- (2) An agreement entered into in contravention of subsection (1) is void.

Rights cannot be waived

- 6 This Act applies despite an agreement to the contrary, and any waiver or release of the rights, benefits or protection provided by this Act is void.

Act does not apply

- 7 (1) Subject to subsections (2) and (3), this Act does not apply in relation to
 - (a) a provision in a settlement agreement with a relevant person that prohibits or restricts the disclosure of a monetary amount paid to the relevant person, or
 - (b) a non-disclosure agreement entered into before this section comes into force.
- (2) A provision referred to in subsection (1) (a) is void to the extent that it prohibits or restricts disclosure of the amount to a person referred to in section 4 (1) (b) *[void provisions of non-disclosure agreement]*.
- (3) Section 4 applies in relation to a non-disclosure agreement entered into before or after this section comes into force.

Offence

- 8 (1) A person who is an individual and contravenes section 2 (1) *[non-disclosure agreement restrictions]*, 3 *[plain language]* or 5 (1) *[agreement prohibited]* commits an offence and is liable on conviction to a fine of not less than \$2 000 and not more than \$10 000.
- (2) A person who is not an individual and contravenes section 2 (1), 3 or 5 (1) commits an offence and is liable on conviction to a fine of not less than \$10 000 and not more than \$50 000.
- (3) If a corporation commits an offence under this Act, an officer, director, shareholder, employee or agent of the corporation who directs, authorizes, permits or participates or acquiesces in the commission of the offence commits the same offence, whether or not the corporation has been prosecuted of the offence.

Regulations

- 9 The Lieutenant Governor in Council may make regulations as follows:
- (a) prescribing persons or classes of persons for the purposes of section 4 (1) (b) (xiii) *[void provisions of non-disclosure agreement]*;
 - (b) defining terms used but not defined in this Act.

Commencement

- 10 This Act comes into force on the date of Royal Assent.