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Bill 124

**An Act to regulate the use of non-disclosure agreements
relating to discrimination, harassment, sexual harassment and sexual assault**

Co-sponsors:

MPP K. Wong-Tam

Ms B. Karpoche

Ms C. Pasma

Ms P. Sattler

Private Members' Bill

1st Reading June 6, 2023

2nd Reading

3rd Reading

Royal Assent



EXPLANATORY NOTE

The Bill enacts the *Stopping the Misuse of Non-Disclosure Agreements Act, 2023*. The Act prohibits any party responsible, defined in the Act as the person who has an obligation in the law to take reasonable steps to prevent discrimination, harassment, sexual harassment or sexual assault in the place where one or more of these happened or is alleged to have happened, from entering into a non-disclosure agreement with a relevant person, defined in the Act as the person who has experienced or made an allegation of one of the underlying acts, if the non-disclosure agreement has the purpose or effect of concealing the details of the incident.

The Act includes an exception for situations in which the relevant person expressly wishes to enter into the agreement. The Act sets out requirements for such an agreement to be enforceable as well as limits on such an agreement.

Section 3 of the Act prohibits non-disclosure agreements between the party responsible and the person who committed or is alleged to have committed the underlying act if the purpose of that non-disclosure agreement is preventing a lawful investigation into a complaint of harassment or discrimination.

**An Act to regulate the use of non-disclosure agreements
relating to discrimination, harassment, sexual harassment and sexual assault**

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Definitions

1 In this Act,

“party responsible” means a person who has an obligation in law to take reasonable steps to prevent discrimination, harassment, sexual harassment or sexual assault in the place where the discrimination, harassment, sexual harassment or sexual assault occurred or is alleged to have occurred; (“partie responsable”)

“relevant person” means a person who has experienced or made allegations of discrimination, harassment, sexual harassment or sexual assault. (“personne concernée”)

Limits on non-disclosure agreements

2 (1) No party responsible or person who committed or who is alleged to have committed discrimination, harassment, sexual harassment or sexual assault shall enter into a non-disclosure agreement with a relevant person if the non-disclosure agreement has the purpose or effect of concealing the details relating to a complaint of discrimination, harassment, sexual harassment or sexual assault.

Exception

(2) Despite subsection (1), a party responsible or person who committed or who is alleged to have committed discrimination, harassment, sexual harassment or sexual assault may enter into a non-disclosure agreement with a relevant person if the agreement is the expressed wish and preference of the relevant person concerned.

Enforceability

(3) A non-disclosure agreement made under subsection (2) is not enforceable unless the following requirements are satisfied with respect to the agreement:

1. The relevant person has had a reasonable opportunity to receive independent legal advice.
2. There have been no undue attempts to influence the relevant person in respect of the decision to include a requirement not to disclose any material information.
3. The agreement does not adversely affect,
 - i. the health or safety of a third party, or
 - ii. the public interest.
4. The agreement includes an opportunity for the relevant person to decide to waive their own confidentiality in the future and the process for doing so.
5. The agreement is of a set and limited duration.

Limits re agreement

(4) An agreement made in accordance with subsection (2) shall not apply to,

- (a) any disclosure of information protected or required under,
 - (i) the *Employment Standards Act, 2000*,
 - (ii) the *Human Rights Code*,
 - (iii) the *Occupational Health and Safety Act*,
 - (iv) any other Act of the Legislative Assembly of Ontario, or
 - (v) an Act of the Parliament of Canada;
- (b) artistic expression by the relevant person that does not identify,

- (i) the party responsible or the person who committed or is alleged to have committed the discrimination, harassment, sexual harassment or sexual assault, or
 - (ii) the terms of the non-disclosure agreement; or
- (c) any communication relating to the discrimination, harassment, sexual harassment or sexual assault between the relevant person and,
- (i) a person whose duties include the enforcement of an enactment or Act of the Parliament of Canada, with respect to a matter within the person's power to investigate,
 - (ii) a person authorized to practise law in Ontario,
 - (iii) a legally qualified medical practitioner,
 - (iv) a psychologist or psychological associate, within the meaning of the *Psychology Act, 1991*,
 - (v) a registered nurse or nurse practitioner,
 - (vi) a social worker,
 - (vii) a person who provides victim services,
 - (viii) a community elder, spiritual counsellor or counsellor who is providing culturally specific services to the relevant person,
 - (ix) the Office of the Ombudsman,
 - (x) a friend, family member or other personal supporter, or
 - (xi) a prescribed person or class of persons.

Non-application, hiring

(5) An agreement made in accordance with subsection (2) that relates to a previous employment relationship does not apply to a relevant person's communication with a prospective employer for the purposes of obtaining employment and providing information about the relevant person's employment history if the communication does not state the particulars of the discrimination, harassment, sexual harassment or sexual assault that occurred or is alleged to have occurred.

Plain language

(6) An agreement made under subsection (2) shall, insofar as is possible, be written in plain language.

Separate agreement prohibited

3 A party responsible shall not enter into a separate non-disclosure agreement with the person who committed or is alleged to have committed the discrimination, harassment, sexual harassment or sexual assault for the purpose of preventing a lawful investigation into a complaint of harassment or discrimination.

Effect of non-compliance

4 A non-disclosure agreement respecting an allegation or incident of discrimination, harassment, sexual harassment or sexual assault that does not comply with section 2 or 3 is of no legal effect.

Non-disparagement agreement

5 In this Act, all references to a non-disclosure agreement shall be taken to also refer to a non-disparagement agreement if the non-disparagement agreement has the effect or purpose of concealing details relating to an allegation or incident of discrimination, harassment, sexual harassment or sexual assault.

Non-disclosure of amount paid

6 For greater certainty, nothing in this Act prohibits the inclusion or enforcement of a provision in a settlement agreement that precludes the disclosure of the amount paid in the settlement of a claim.

Existing agreements

7 A non-disclosure agreement that was entered into before the day this section came into force is subject to subsections 2 (4) and (5), with any necessary modifications.

Offence

8 A party responsible or person who committed or is alleged to have committed discrimination, harassment, sexual harassment or sexual assault who, after the coming into force of this Act, enters into a non-disclosure agreement that is not made in accordance with section 2 or 3, is guilty of an offence and is liable on summary conviction to a fine in accordance with the following:

1. If the party responsible or person is an individual, \$10,000.

2. If the party responsible or person is a corporation, not less than \$10,000 and not more than \$50,000.

Regulations

9 The Lieutenant Governor in Council may make regulations,

- (a) defining terms used but not defined in this Act;
- (b) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out the intent and purpose of this Act;
- (c) prescribing persons or classes of persons for the purposes of subclause 2 (4) (c) (xi).

Commencement

10 This Act comes into force on the day it receives Royal Assent.

Short title

11 The short title of this Act is the *Stopping the Misuse of Non-Disclosure Agreements Act, 2023*.