

**Effective 1/1/2023**

**34A-5-114 Limitations on enforceability of nondisclosure and non-disparagement clauses -- Retaliation prohibited.**

- (1) As used in this section:
  - (a) "Confidentiality clause" means a nondisclosure clause or a non-disparagement clause.
  - (b) "Employee" means a current or a former employee.
  - (c) "Nondisclosure clause" means an agreement between an employee and employer that:
    - (i) prevents, or has the effect of preventing, an employee from disclosing or discussing:
      - (A) sexual assault;
      - (B) allegations of sexual assault;
      - (C) sexual harassment; or
      - (D) allegations of sexual harassment.
  - (d) "Non-disparagement clause" means an agreement between an employee and employer that prohibits, or has the effect of prohibiting, an employee from making a negative statement that is:
    - (i) about the employer; and
    - (ii) related to:
      - (A) a claim of sexual assault or sexual harassment;
      - (B) a sexual assault dispute; or
      - (C) a sexual harassment dispute.
  - (e) "Post-employment restrictive covenant" means the same as that term is defined in Section 34-51-102.
  - (f) "Proprietary information" means an employer's business plan or customer information.
  - (g) "Retaliate" means taking an adverse action against an employee because the employee made an allegation of sexual harassment or assault, including:
    - (i) discharge;
    - (ii) suspension;
    - (iii) demotion; or
    - (iv) discrimination in the terms, conditions, or privileges of employment.
  - (h) "Sexual assault" means:
    - (i) conduct that would constitute a violation of 18 U.S.C. Secs. 2241 through 2244; or
    - (ii) criminal conduct described in Title 76, Chapter 5, Part 4, Sexual Offenses.
  - (i) "Sexual assault dispute" means a dispute between an employer and the employer's employee relating to alleged sexual assault.
  - (j) "Sexual harassment" means conduct that is a violation of:
    - (i) Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq.; or
    - (ii) Subsection 34A-5-106(1)(a)(i) prohibiting harassment on the basis of sex, sexual orientation, or gender.
  - (k) "Sexual harassment dispute" means a dispute between an employer and the employer's employee relating to alleged sexual harassment.
- (2)
  - (a) A confidentiality clause regarding sexual misconduct, as a condition of employment, is against public policy and is void and unenforceable.
  - (b) After an employee makes an allegation of sexual harassment or sexual assault, an employer of any sized business, regardless of Subsection 34-5-102(1)(i)(D):
    - (i) may not retaliate against the employee because the employee made an allegation of sexual harassment or assault; or

- (ii) may not retaliate based on an employee's refusal to enter into a confidentiality clause or an employment contract that, as a condition of employment, contains a confidentiality clause.
- (c) An employee may, within three business days after the day on which the employee agrees to a settlement agreement that includes a confidentiality clause regarding sexual misconduct, withdraw from the settlement agreement.
- (3) An employer who attempts to enforce a confidentiality clause in violation of this section:
  - (a) is liable for all costs, including reasonable attorney fees, resulting from legal action to enforce the confidentiality clause; and
  - (b) is not entitled to monetary damages resulting from a breach of a confidentiality clause.
- (4) This section does not:
  - (a) prohibit an agreement between an employee who alleges sexual assault or sexual harassment and an employer from containing a nondisclosure clause, a non-disparagement clause, or any other clause prohibiting disclosure of:
    - (i) the amount of a monetary settlement; or
    - (ii) at the request of the employee, facts that could reasonably lead to the identification of the employee;
  - (b) prohibit an employer from requiring an employee to:
    - (i) sign a post-employment restrictive covenant; or
    - (ii) agree not to disclose an employer's non-public trade secrets, proprietary information, or confidential information that does not involve illegal acts;
  - (c) authorize an employee to:
    - (i) disclose data otherwise protected by law or legal privilege; or
    - (ii) knowingly make statements or disclosures that are false or made with reckless disregard of the truth;
  - (d) prohibit an employee from discussing sexual misconduct or allegations of sexual misconduct in a civil or criminal case when subpoenaed if the sexual misconduct or allegations of sexual misconduct are against the individual whom the employee alleged engaged in sexual misconduct;
  - (e) permit a disclosure that would violate state or federal law; or
  - (f) limit other grounds that may exist at law or in equity for the unenforceability of a confidentiality clause.