

## MEMORANDUM

TO: Senate Committee on Economic Development, Housing and General Affairs

FROM: Lisa Senecal

SUBJECT: H.707

DATE: April 25, 2018

Last week, the Committee received testimony related to non-disclosure agreements in sexual harassment settlements. The proposed amendment would codify existing labor law and legal precedent that already allows employees to disclose information to fellow employees in an effort to protect them. Although at first blush, this might appear to offer a solution to the NDA issue, the provision in practice would not only fall far short of the goal but could result in further harm to victims. Following are my primary concerns with this approach:

1. This provision would only apply to employees informing fellow employees of the risk a perpetrator poses. However, most people who sign settlement agreements no longer work at the company, so they have no employee to employee relationships or protections.
2. The requirement that an employee could only reveal their experience to fellow employees would also preclude a victim from speaking with a victim at the perpetrator's new place of employment, even if the victim continued to work for the original employer.
3. One of the goals of H.707 is to expand sexual harassment protection to contract workers, unpaid interns, volunteers, etc. This proposed provision would not provide any protection to victims in those classes. It would also not extend protection to people who were victimized in the hiring process, as I was. In my case, it was my coming forward about the assault that ended my prospects for becoming an employee.
4. An unintended negative consequence of codifying this provision in the law and requiring it be included in settlement agreements could very well lead to employers being further motivated to have the victim leave their employ. If a victim were no longer an employee, she would not have the status to share her experience with other victims.

Below is an alternative concept that incorporates some conversations that Rep. Copeland-Hanzas and I have had with Julio Thompson. The goal is to address the specific risk posed by serial predators and the practice of multiple NDAs allowing for ongoing abuse:

1. All settlements that include non-disclosure provisions must be filed within 14 days of signing with the AG's office;
2. All complaints brought to the AG's office will be checked against settlements with non-disclosure agreement and agreements reached with the Vermont Human Rights Commission;
3. If the AG's office determines that the new claim is actionable and a settlement with an NDA exists from a previous incident, the AG's office will nullify all previous NDAs related to that perpetrator's offenses. Previous complainants will be notified that they are no longer bound by an NDA. No future settlement agreements containing NDAs would be allowed to cover sexual harassment claims against that perpetrator in Vermont;
4. If the AG's office determines that the new claim is actionable, it will contact the Vermont Human Right Commission and determine if a previous sexual harassment complaint has been settled with the same perpetrator. If so, the AG's office will nullify all previous NDAs related to that perpetrator's offenses. Previous complainants will be notified that they are no longer bound by an NDA. No future settlement agreements containing NDAs would be allowed to cover sexual harassment claims against that perpetrator in Vermont.

It is important to remember that the absence of evidence is not evidence of absence. Merely because reports of serial harassment have been uncommon, does not mean that they have not been occurring, merely that they are underreported. This is true of all sexual harassment. The whole point of the NDA voiding language is to encourage disclosure at the outset, and more importantly, is about stopping serial predators. If there is a second and different victim, that a) provides further evidence that the original complaint had merit and b) heightens the importance of stopping the behavior (and encouraging disclosure of it) as a public policy matter.

The goal of this bill should be to a) disincentivize the behavior generally and b) bring more acute protection for victims of serial offenders and less protection for employers who employ them.

NDAs were not created and should not be used to silence victims to protect serial offenders or allow toxic cultures to go unaddressed.

In addition to better employee and employer education, shifts in the perception of the source of "the problem" from the victim to the perpetrator and in the value of silencing survivors will truly be what changes the culture. We revictimize survivors by legally requiring their silence after they learn of additional abuses by their perpetrator. This is especially true if the company failed to institute promised changes to protect employees. Silence in those situations should be considered against public policy.