

LFC Requester:

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AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: 2/10/2025

Check all that apply:

Bill Number: SB 324

Original Correction
Amendment Substitute

Sponsor: Sen. Katy M. Duhigg

Agency Name and Code Number: 305 – New Mexico Department of Justice

Person Writing

Short Title: Prohibit Certain Employment Agreements

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
 Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis:

Section 1: This section amends NMSA, 1978 § 50-4-36 (2020), which prohibits certain types of clauses in employment contracts, pertaining to actions regarding sexual harassment. The section expands on the type of clauses that are prohibited, and clarifies that they are also rendered unenforceable.

Section 1A: This amends Subsection A of the original statute, which prohibits a private employer from requiring an employee to agree, as a term of employment, to a non-disclosure provision of a settlement agreement regarding sexual harassment, discrimination, or retaliation, and also generally bars a private employer from preventing the disclosure of such a claim. The new material expands the prohibition to include non-disparagement provisions, which typically go beyond the terms of the settlement itself and bar discussion of the underlying conduct. In addition, the material expands the purview from “employees,” and prevents an employer from requiring prospective or former employees, as well as independent contractors, to agree to these provisions. Finally, the new material includes claims of sexual assault.

Section 1B: This amends Subsection B of the original statute, which allows certain exceptions for confidentiality provisions that “relate to the monetary value of a settlement,” or, at the request of the employee in question, facts that could lead to the identification of the employee. The new material makes the same expansions to encompass former and prospective employees, as well as sexual assault claims. In addition, the new subsection also takes material from the current Subsection C, allowing an employee (or independent contractor, etc.) to request confidentiality of the facts of the underlying claim.

Section 1C: This amends Subsection C of the original statute, which allows for the employee to request a confidentiality provision for the underlying facts of the claim, and also states that disclosure is allowed if required under a court order or subpoena. The proposed change to the statute moves the first part to Subsection B, as described above.

Section 1D: This amends Subsection D of the original statute, which states that a confidentiality provision in a settlement agreement subject to this section is void and unenforceable, except as provided by Subsections B and C. The proposed change eliminates the exception for Subsection B.

Section 1E: This adds a new Subsection E to the statute, allowing in a civil action regarding sexual harassment or assault, evidence to be introduced that the employer entered into prior non-disclosure or non-disparagement agreements involving the conduct of the same individuals alleged to have been involved in the prior acts, and such evidence may be used to support punitive damages.

Section 1F: This adds a new Subsection F to the statute, stating that, with respect to claims of sexual assault or sexual harassment, any nondisclosure or non-disparagement agreement agreed to before the dispute arises will not be judicially enforced where violations of state, federal, or tribal law are alleged.

Section 1G: This adds a new Subsection G to the statute, invalidating any predispute arbitration agreement or joint-action waiver, with respect to a case filed under federal, tribal, or state law relating to claims of sexual harassment or sexual assault.

Section 1H: This adds a new Subsection H to the statute, stating that the statute is to be interpreted broadly, in keeping with its remedial purpose.

Section 2: This simply states that the changes to the statute will be effective for all agreements entered into on or after June 20, 2025

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

N/A

SIGNIFICANT ISSUES

Section 1G adds new material that invalidates arbitration clauses under certain circumstances. This may be preempted by the relevant portion of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, which prevents the singling out of arbitration provisions for unenforceability. Arbitration provisions need to be enforced to the same extent as the rest of the contract. If a contract is unconscionable, for instance, the arbitration provision may be thrown out, but these provisions generally need to be given effect

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None apparent

TECHNICAL ISSUES

Subsection D, as amended by Section 1D, states that confidentiality provisions are void, “except as provided in Subsection C.” However, there are no confidentiality provisions listed in the amended Subsection C, and this would appear to contradict and negate the confidentiality provisions of Subsection B, as amended. Perhaps the drafter meant to write “except as provided by Subsection B.”

The bill states that a private employer shall not require a former employee to sign a nondisclosure or non-disparagement provision of a settlement agreement as a term of employment, but it is unclear why or how an employer require a former employee to sign anything as a term of employment?

OTHER SUBSTANTIVE ISSUES

While the statute generally applies only prospectively, it is implied that Subsection E, which allows for the use of previous NDAs in civil actions, would result in the divulgement of settlement agreements from before the effective date of the bill. This would potentially result in the bill impairing the NDA portion of the settlement agreements, in violation of Section 1, Article 10 of the U.S. Constitution. However, this may not be such a serious concern given that the bill likely serves a legitimate public purpose and may be deemed “reasonable and necessary” for that purpose. *See, e.g., Conn. State Police Union v. Rovella*, 36 F.4th 54 (2d Cir. 2022).

The bill describes, in a number of places, claims made under “federal, tribal, or state law.” However, the bill would only be applicable to contracts that are interpreted under New Mexico state law and disputes heard in New Mexico courts. If a dispute concerns a violation of tribal law, heard by a tribal court, then it is very likely that circumstances of the contract itself would require it to be interpreted according to the law of the relevant tribe. Under those circumstances, the bill would not be applicable.

ALTERNATIVES

None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

None yet.