

Non-disclosure agreements (NDAs) in workplace harassment and discrimination situations

Confidentiality clauses, or NDAs, have become a topic of significant interest because of how they can be used to prevent employees from reporting allegations of sexual harassment or other similar misconduct.

There are a number of current legal requirements for NDAs, and restraints on their use. In addition to the current legal requirements, the Equality and Human Rights Commission recently published best practice [guidance](#). The Government has also announced the introduction of new restrictions (detailed in its July 2019 [response to a consultation](#)) but these future requirements are not yet in force.

In designing the future requirements, the Government took account of various calls from reform, especially from the Women & Equalities Select Committee, which has been advocating for specific reforms in this area for some time. The Government plans to take forward some of the Select Committee's recommendations, but has ruled out others, for reasons explained in its [Select Committee response](#). Some of the rejected proposals, however, have found their way into the EHRC's best practice guidance.

Solicitors have additional regulatory requirements to consider. In November 2019, the Solicitors Regulatory Authority updated its [Warning Notice](#) to solicitors on the use of NDAs. This applies to all practitioners, including in-house counsel.

Our table brings together the various sources of law and guidance to identify the current legal and regulatory requirements (highlighted in red) and distinguish them from best practice and future proposals.

We start by looking at the position for settlement agreements, and then consider the position for employment contracts.

NDAs in settlement agreements	Current or future requirement or best practice?	Source
Employers to consider on a case-by-case basis whether an NDA is actually needed - not to be included in templates as standard	Best practice	Page 19 EHRC guidance
Employers to weigh up reason for NDA, benefit to employer, impact on worker, impact on organisational culture of organisation and benefit of not using NDA – in every case	Best practice	Page 19 EHRC guidance
Employers not to delegate all responsibility for drafting & negotiating NDAs to lawyers	Best practice	Page 23 EHRC guidance
NDA to be limited to what is necessary and appropriate in the case (e.g. settlement sum only)	Best practice	Page 20 EHRC guidance
NDA to be signed off by director or senior manager, and not someone involved in the discrimination or hearing grievance	Best practice	Page 25 EHRC guidance
Employer to tell individual why it has the view an NDA should be used	Best practice	Page 21 EHRC guidance

NDAs in settlement agreements	Current or future requirement or best practice?	Source
Police disclosures - NDA to not stop individual discussing criminal activity with police	Current Requirement - NDAs can't currently stop individuals from reporting offences or co-operating in criminal investigations. Solicitors are under a regulatory requirement not to use an NDA which makes an individual feel unable to go the police.	Sections 4 and 5 Criminal Law Act 1967 SRA warning notice
Police disclosures - wording of NDA to make clear that individual can disclose to police	Considered best practice by EHRC and SRA, and the government proposes new legislation to make this a legal requirement	Page 21 EHRC guidance, SRA warning notice, Government consultation response
Protected disclosures - NDA not to stop individual from making a protected disclosure (including reporting to any relevant regulator)	Current requirement - An NDA is currently void to the extent that it prevents a protected disclosure Solicitors must not use an NDA which makes an individual feel unable to make reports to regulators or protected disclosures Employers regulated by FCA/PRA must include a term making it clear that any NDA does not prevent a protected disclosure	Section 43(j) Employment Right Act 1996 SRA Warning notice FCA handbook SYSC 18.5.1
Protected disclosures - wording of NDA to make clear that individual can make a protected disclosure (including reporting to any relevant regulator)	Considered best practice by EHRC and SRA, and the government proposes new legislation to make this a legal requirement	Page 21 EHRC guidance, SRA warning notice, Government consultation response
NDA not to stop individuals disclosing information reasonably required by HMRC (e.g. settlement sum)	Current requirement	Finance Act 2008 (para 1, schedule 36)
Wording of the NDA to also allow the individual to have discussions with: <ul style="list-style-type: none"> • tax advisors (who are bound by obligation of confidentiality) • spouse, partner, or other immediate family members (provided they are also asked to keep the matter confidential) • the individual's trade union • a potential employer where and to the extent necessary to discuss the circumstances in which their previous employment ended 	Best practice (However, note that the government explicitly rejected calls to legislate to allow disclosures to family, friends and new employers, saying that allowing disclosure to family & friends could undermine the purpose of the NDA)	Page 21 EHRC guidance
NDAs to not normally impose obligations on individuals that are not mutual (e.g. if an NDA stops the individual discussing a certain issue, the employer should require its other workers not to discuss the same issue)	Best practice	Page 21 EHRC guidance

NDAs in settlement agreements	Current or future requirement or best practice?	Source
NDAs to “clearly set out their limitations” (guidance to be provided on what this involves – employers may have to explain the concept of a protected disclosure)	Future requirement (proposed new legislation)	Government consultation response page 10
NDAs not to include unenforceable penalty clauses or other unenforceable clauses	Best practice & SRA requirement Note also that solicitors are under a regulatory requirement not to use improper threats of litigation (including unsustainable threats of defamation proceedings)	Page 34 EHRC guidance, SRA warning notice
Individual to have independent legal advice on terms and effect of any settlement agreement	Current requirement – agreement not binding otherwise	S147 Equality Act 2010 (and equivalent in other legislation)
Independent legal advice on settlement agreement to extend to the nature and limitations of any NDA	Future requirement (proposed new legislation)	Government consultation response page 13
Employer to make sure individual has adviser, TU rep or colleague during the negotiation phase – not just when they go for advice on terms	Best practice	Page 22 EHRC guidance
Employer to pay individual’s reasonable legal costs (even if they don’t sign the agreement)	Best practice However, note that the government explicitly rejected a call to legislate for this	Page 22 EHRC guidance Response to Select Committee, page 17
Individual to have reasonable time to seek advice and to consider terms (normally at least 10 days)	Best practice	Page 23 EHRC guidance
Employer to always provide basic factual reference confirming dates of employment.	Possible future requirement Government has said it will consult on a new statutory obligation to provide a basic reference	Response to Select Committee page 5
Individual to get copy of signed NDA	Best practice and SRA requirement (although wording of EHRC guidance suggests it’s a legal requirement)	Page 15 EHRC guidance, SRA warning notice
NDA to be void in its entirety if does not meet legislative requirements	Future requirement (proposed new legislation)	Press release to Government Consultation response 21 July 2019
Employers to monitor their usage of NDAs	Best practice But note the Government has rejected calls to require employers to publish reports on NDA usage)	Page 24 EHRC guidance Response to Select Committee page 21

NDA in employment contracts	Current or future requirement or best practice?	Source
Cannot be used to stop individuals complaining about discrimination/harassment which has not yet taken place	Current requirement	S144 Equality Act 2010
Individuals not to be put under 'duress' to sign up	Current requirement – but note that duress is high threshold (common law definition requires illegitimate physical or economic threats)	Page 14 ERHC guidance – derives from common law of duress
Confidentiality clause not to stop individual from making a protected disclosure	Current requirement - a confidentiality clause is currently void to the extent that it prevents a protected disclosure	Section 43(j) Employment Right Act 1996
Confidentiality clauses to "clearly set out their limitations" (guidance to be provided on what this involves – employers may have to explain the concept of a protected disclosure)	Future requirement (proposed new legislation)	Government Consultation response
Confidentiality clauses to be clear that they do not stop the individual from speaking about discrimination	Best practice	Page 15 EHRC guidance

For more information



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