

# Are NDAs appropriate in the Workplace?

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**The use of non-disclosure agreements (NDAs) in the workplace has come under scrutiny in recent years. Some employers have been using them to prevent employees from reporting misconduct allegations.**

## What are NDAs?

An NDA is a legal contract to protect and prevent disclosure of confidential information, such as trade secrets, intellectual property or details of a dispute and settlement. NDAs may be a standalone document, but employment contracts and settlement agreements can also contain confidentiality clauses.

There is nothing wrong with the legitimate use of NDAs, but they can be subject to abuse, often to the detriment of an employee and their rights.

## Inappropriate NDAs

One blatant abuse of NDAs is when an employee has raised complaints about unacceptable practices, discrimination, or harassment within the workplace and is paid compensation subject to an NDA. The NDA forbids the employee from disclosing any details of the complaint. You could say that the employee has been 'bought off' and the employer has 'paid for their silence' aka inappropriate use of an NDA. Employers cannot legitimately prevent an employee from being a whistleblower, assisting in a criminal investigation or reporting a crime to the police. Furthermore, NDAs and confidentiality clauses cannot prevent individuals from taking a matter to an employment tribunal.

NDAs should not be used to hide a pattern of behaviour that could endanger others, avoid addressing disputes or issues in the workplace, or mislead someone.

Misused NDAs in the workplace affect the employees' rights and promote an undesirable workplace culture, buying the silence of employees who have suffered wrongdoing.

## Changes as a result of NDA misuse

The Weinstein case shone a light on the misuses of NDAs in the workplace. As a result, there has been a focus on ensuring the proper and legal use of NDAs. For example, in 2018, the Solicitors Regulatory Authority issued a warning notice on the use of NDAs; they must not prevent anyone from whistleblowing, making a report of misconduct or cooperating with law enforcement agencies. In addition, NDAs should not deter individuals from talking to professionals or family members about complaints they've raised in the workplace.

In July 2019, the business minister announced that following a government consultation on confidentiality clauses in the workplace earlier that year, there are plans for new legislation to tackle the abuse of NDAs. The proposed reforms to NDAs and confidentiality clauses are a response to sexual harassment in the workplace. A key challenge for the government in producing new legislation is to balance public policy against individuals' freedom to enter a contract.

## What can employers do to promote the proper use of NDAs?

1. Improve employees' access to legal advice. Employees may not understand the full legal ramifications of signing a confidentiality clause and the imbalance of power it may create.
2. Create and promote inclusive workplaces. Offer specific training. Management should lead by example

in demonstrating appropriate behaviours and calling out inappropriate behaviour.

3. Consider the extent of a confidentiality clause in an employment contract; whether there is a clear need for the clause, the benefit for the employer, and its impact on the employee. Only include a confidentiality clause if it is required rather than as standard practice, and the scope of the clause should only extend to what is necessary.

Contact employment lawyer Karen Cole today to discuss the use of NDAs and confidentiality clauses in the workplace.

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