

The Dangers of Weaponizing NDAs

Insights

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UK employers entering into non-disclosure agreements (NDAs) as part of their sexual harassment or discrimination settlements will begin to find the scope of their NDAs significantly limited. This article focuses on the latest development in the UK, but an increasing number of other jurisdictions are also beginning to adopt similar requirements.

The UK Solicitors Disciplinary Tribunal is currently investigating a lawyer from Allen & Overy, one of the world's largest law firms, on an NDA that he drafted to silence a former assistant of Harvey Weinstein. Zelda Perkins was an employee of Mr. Weinstein's company Miramax. After Ms. Perkins alleged that she was sexually harassed by Mr. Weinstein at work, Miramax negotiated an NDA with her which limits her right to initiate any criminal actions against Mr. Weinstein or Miramax. The agreement even bans her from talking to a doctor, therapist, or psychoanalyst about her experience.

Ms. Perkins's decision to finally break her silence two decades later has led to the UK government's move toward implementing measures to prevent the misuse of NDAs^[1] and the Solicitors Regulation Authority (SRA)'s^[2] issuance of new rules to the same effect.

Reputational Damages and Criminal Risks

When exposed, employers who use overly restrictive NDAs in sexual harassment and discrimination settlements receive overwhelming condemnations from the media and the general public. This is illustrated by an increasing number of entities and individuals who have been exposed for using NDAs to quiet allegations, such as UK's global fashion brand Topshop, a handful of UK universities, and the soccer superstar Cristiano Ronaldo. Employers engaging in such conduct will be viewed as perpetuating a culture of sexual harassment and/or discrimination.

Worse still, as overly restrictive NDAs may be considered an obstruction of justice, employers and their executives can be subject to criminal prosecutions in certain jurisdictions for concealing illegal activities through NDAs.

What cannot be included in an NDA?

The following NDA clauses are either already prohibited by SRA rules or will likely become prohibited by the UK government's impending new measures:

- Clauses which curtails a worker's rights to discuss a matter with the police or report a crime without fear of reprisal;

- Clauses which improperly threaten litigation or other adverse consequences, or otherwise exert inappropriate influence over a worker not to make disclosures which are protected by statute, or reportable to regulators or law enforcement agencies;
- Clauses which impede a worker from making protected disclosures to protect public interest (i.e. whistleblowing);
- Clauses which deter a person from cooperating with a criminal investigation or prosecution; and
- Clauses which seek to improperly influence the substance of such a report, disclosure, or cooperation.

What should the new NDAs look like?

In order to comply with the above requirements, NDAs in sexual harassment and discrimination settlements in the UK should:

- make it clear to workers that they still maintain some disclosure rights even when they sign an NDA;
- clearly spell out the NDA's limitations and the types of disclosures that are not prohibited by the NDA; and
- ensure that workers receive independent legal advice specifically on any confidentiality provisions and their limitations;

Any NDAs that do not meet these proposed new wording requirements will likely be deemed void in its entirety.

Employers should incorporate in their NDAs, in an easy-to-read font and clear English, a provision stating that nothing in the NDA prevents the signatory from notifying law enforcement agencies and regulators of conduct which might otherwise be reportable.

Common Trend across Jurisdictions

In addition to the UK, six U.S. states have already passed laws to impose limits on private companies using NDAs in sexual harassment cases. At least ten other states are considering similar legislation. New Zealand has also implemented similar measures. Although there are concerns that efforts to restrict the use of NDAs may have the effect of discouraging quick settlements as the accused may feel more pressure to defend through trial, global employers must become increasingly mindful about their NDA practices.

[1] The UK Department for Business, Energy & Industrial Strategy is currently conducting consultation on measures to prevent misuse of confidentiality clauses in situations of workplace harassment or discrimination.

[2] The SRA is the body overseeing attorney conduct in England and Wales.

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