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The DNA of an **NDA** – when it can be used (and when it can't)

By Andrew Macaulay

The first rule of a non-disclosure agreement (NDA) is to not talk about the non-disclosure agreement.

However, that is likely to change if the proposed amendments to the Employment Rights Bill remain.

If the revisions come into force, it will mean that confidentiality clauses in NDAs (including settlement agreements) that aim to prevent a worker speaking about allegations of harassment or discrimination will be rendered void. This means victims of workplace discrimination can speak openly without fear of repercussions and the employer can publicly support them.

This follows on from a warning notice from 2018 issued by the Solicitors Regulation Authority reminding law firms that NDAs are not to be abused and misused as a way of covering up sexual misconduct in the workplace. This particular notice was circulated in the context of the #MeToo movement, especially given that some of Harvey Weinstein's victims broke their NDAs in order to speak about their abuse at the hands of the producer, including his former personal assistant Zelda Perkins. Consequently, Perkins founded the not-for-profit initiative Can't Buy My Silence, and has worked extensively with the UK government, campaigning for legislative and regulatory reform, which has therefore led to the Employment Rights Bill amendments.

Whilst the above developments are promising, this does not mean that NDAs should stop being used altogether, as they are a useful tool for businesses. Their most common usage is for keeping trade secrets or financial information private and confidential, meaning that such information can be shared without concerns about it being misused. A typical use of an NDA is as part of a settlement agreement entered into on an agreed termination of a contract of employment, meaning neither employer nor employee can speak about anything that occurred during the employment or the reasons for the termination. It is standard for these NDAs to contain mutual non-disparagement clauses so both parties agree not to make derogatory or adverse statements about the other.

If you need advice on NDAs, settlement agreements or have concerns about a document you are being asked to enter into, the employment law team at Hethertons will be able to help.



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