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**Response to Legal Services Board Call for Evidence on misuse of non-disclosure agreements**

**July 2023**

**Response of the Employment Law Committee of the Birmingham Law Society to the Legal Services Board call for evidence on misuse of non-disclosure agreements**

This response has been prepared by the Employment Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of the Employment Committee whose members are specialist lawyers practising in all aspects of employment law and are from all branches of the legal profession.

**Questions**

**Section 1: Government Response**

**Are there other legitimate purposes for using NDAs that we have not considered? If so, what is the rationale for the use of these NDAs?**

The Committee is made up of members who are employment law practitioners (solicitors and barristers). As such, the Committee’s experience is principally centred around the use of ‘non-disclosure’ provisions in the context of settlement agreements (an agreement under which the parties agree to settle an employment dispute) and COT3 agreements (settlement agreements which are facilitated by the Advisory, Conciliation and Arbitration Service (‘ACAS’)). In the Committee’s experience, in the UK there is not widespread use of employers requiring employees/workers to sign ‘free-standing’ non-disclosure agreements that attempt to cover future claims, not least because such documents are likely to be ineffective in legal terms.

Non-disclosure provisions (which may more accurately be called confidentiality provisions in this context) are also used in the Committee’s experience in employment contracts (which may contain non-disclosure provisions which protect the employer’s confidential information from disclosure), consultancy agreements (agreements with individuals who are not employees may also contain confidentiality provisions) and ‘free-standing’ confidentiality agreements (may be used by employers to address confidentiality concerns for non-employees such as where there is a temporary worker or student on site).

It is important to emphasise that the above ‘employment’-related contracts would typically contain provisions related to the non-disclosure of confidential information but would not also deal with the settlement of any ongoing dispute (which would therefore fall outside the scope of any such agreement and could form the basis of a potential claim/disclosure). As such, care should be taken to make the distinction between these types of document and settlement agreements/COT3s when discussing the regulation of ‘non-disclosure’ provisions. In other words, the term ‘NDA’ is not specific in employment law terms and does not accurately reflect the documents being described.

**Can you provide examples or case studies about individuals’ entering into NDAs? If you can, please include the following in your response:**

* **The context in which the NDA was signed**
* **The factors that influenced the decision to sign an NDA**
* **Whether the individual had access to legal advice or other support**
* **If signing an NDA had any impact on the individual (e.g., wellbeing, health, future opportunities)**

As described above, the Committee’s experience is that non-disclosure provisions are used in settlement agreements/COT3s and in employment/worker-related contracts.

In the settlement context, the objective for the employer is to settle the relevant dispute (which may or may not have legal merit) and mitigate the litigation risk. This allows the employer to draw a line under the issue (typically a settlement agreement will also provide terms for the ending of the relevant employee’s employment) and protect its business, minimising disruption and legal/litigation costs and avoiding having to involve other employees (such as managers and HR) in potentially lengthy Tribunal proceedings. The employer will typically also require that the terms of the settlement are kept confidential and that the employee agrees not to ‘disparage’ the employer (in the press, for example) in the future given the compromise that has been reached. This, again, is to minimise disruption and to draw a line under the dispute.

In the Committee’s experience, the driver for ‘claimants’ in employment-disputes in signing settlement agreements is also to settle the relevant dispute (which may be an actual claim or a potential claim) and to mitigate the litigation risk. The claimant will typically receive a financial sum but avoid the time, stress and risk of Tribunal proceedings. They will be able to move on with their lives and careers and may also obtain other benefits from the employer such as agreed references and statements, pension contributions or outplacement support. They will be separately advised on the terms of the settlement agreement (a legal requirement, save where the agreement is by way of a COT3 facilitated by ACAS). Further, any ‘non-disparagement’ clauses may be mutual in that the employer will promise not to comment about the employee in the future. The claimant would not be prevented from disclosing their issue to the Police/regulator (for example) or from seeking medical advice as this is not permitted under UK law and, in the Committee’s experience, employers are principally concerned with protecting their business, goodwill, staff and public reputation rather than unduly restricting the future conduct of a claimant. Further, outside of the press, it is unclear where else a claimant may want to disclose their matter in the future if they have settled their potential Tribunal claim.

As emphasised above, the use of non-disclosure provisions in employment/worker-related contracts is distinct and does not involve the settlement of an employment dispute. Here, the employer is protecting confidential information relating to the running of its business. This is relevant during employment (so information is not passed to competitors, for example) and following termination of employment.

**Can you provide any quantitative evidence on the nature and extent of NDA misuse?**

Based on the Committee’s experience (as outlined above), we are not aware of any examples of ‘misuse’ of NDA provisions by employers.

**Section 2: The role of legal professionals**

**At what point is a legal advisor made available (if at all) to an individual who is being asked to sign an NDA?**

In the Committee’s experience, the extent of the use of a legal advisor by a ‘claimant’ in employment dispute situations will differ from case to case. For example, if the claimant is a senior and highly renumerated individual they may have a legal advisor throughout the matter and the negotiation of the settlement agreement may be a lengthy and detailed process. Claimants may also be advised throughout if they are trade union members (and the trade union is able to procure legal representation) or if they are able to find a legal advisor who is able to support them on a ‘conditional’ fee basis. They may also have support from pro bono advice or from ACAS (such as the pre-claim conciliation service).

Alternatively, other claimants (who may be more junior in some cases), may not be represented throughout the dispute. In such cases, as part of the negotiations, the employer will typically provide a financial contribution towards the cost of legal advice for the individual. This advice will then generally cover the review, negotiation and signing of the settlement agreement. Part of this advice would involve emphasising the effect of the provisions of the agreement (including any confidentiality/non-disparagement provisions) and making sure the claimant is aware of their legal rights. In this sense, it is worth noting that the claimant would be free to withdraw from the negotiations and continue with their claim/dispute should they wish to do so.

In respect of employment-related agreements, there is no requirement to receive independent legal advice. Therefore, unless the individual is senior/highly-renumerated, they are unlikely to be independently advised on their ‘employment’ agreement. However, as previously noted, this situation would not involve the settlement of any employment dispute and so is distinct.

**What are individuals’ experiences of having access to legal advice? Please consider in your response**

* **the extent to which an individual felt well informed, supported and that their interests were being protected during the process. For example, were the terms and effect of the NDA fully explained?**
* **the justification provided for keeping the information that was subject to the NDA confidential**
* **whether an individual experienced any behaviours or conduct by legal professionals (either acting on an individual’s behalf or an opponent’s behalf) that were considered to be unethical or fall short of their professional obligations. If so, please provide an explanation.**

The Committee is unable to provide such evidence of individual experiences of legal advice (although the experience of Committee members who advise claimants is they are not aware of any examples of claimants who were subsequently became unhappy with their settlement agreement after signing it).

**Where relevant, we would also like to hear from parties who have used guidance and/or other published documents that are designed to warn against the misuse of NDAs.**

**We would like to know:**

* **How effective are the guidance and/or other published documents that are designed to warn against the misuse of NDAs. Please consider if they:**
* **provide clarity on when NDAs should not be used, the rationale behind this (e.g., where use is unlawful, a breach of code of conduct or unethical) and the consequences for legal professionals or employers of doing so**
* **reflect your knowledge of the use of NDAs in practice**
* **sufficiently explain what individuals who are asked to sign NDAs should do and where to go for support**

In the Committee’s view, the guidance given by the SRA and the actions it has taken so far have made its stance clear. Equivalent guidance from the BSB/CILEX may be helpful in this respect.

**Regulatory**

**a) Where you have reported the misuse of NDAs to any relevant body, what is your experience of this?**

**In your response, please reflect on:**

* **the processes for reporting**
* **the outcomes of reporting**
* **if you would report misuse again in future**

The members of the Committee do not have any experience of reporting to a relevant body in respect of non-disclosure provisions.

**b) Have regulators responded to the misuse of NDAs in any other ways beyond the activity summarised above?**

The Committee is not aware of any further regulatory guidance on this issue.

**c) How can regulators best address the role of legal professionals in the misuse of NDAs?**

As set out above, the view of the Committee is that the SRA has given a clear statement on this issue. It should continue to review this guidance and to respond to complaints/reports it receives.

Further, the wider-profession may benefit from a greater clarity as to what is meant by ‘misuse’ in the context of non-disclosure provisions. This would be beneficial as some of the commentary on the matter can be taken to imply that the underlying use of compensation and financial-based settlement agreements in discrimination or harassment matters is unethical. However, the Government has accepted that there are legitimate business and legal reasons for the use of settlement agreements (including confidentiality provisions) and in employment contracts. Additionally, the relevant employment law framework already provides protection for claimants (or potential claimants) through the requirement to receive independent legal advice, the role of ACAS/the Tribunal and the rules around settlement of claims (including pre-termination conversations). Therefore, it is important that any guidance makes clear what the specific concerns are about the role of the legal profession in this area and uses clear terminology which distinguishes between the different types of use of non-disclosure provisions.

**d) Is there is anything else you would like to tell us or suggest about regulators’ role and the misuse of NDAs?**

The Committee’s view is that further consultation should be done directly with claimants who have entered into settlement agreements/COT3s. Evidence quoted in the consultation suggests that claimants subsequently feel unhappy with the agreements they have signed. However, it is unclear from this evidence to what extent this can be attributed to the role of the relevant legal professionals involved (if at all) or whether it is a broader issue related to the legal and regulatory status of harassment and discrimination claims.