



# Non-disclosure agreements - an explainer - The Times

By Jane Croft The Times - 24 October 2017

Many of the women who have spoken about sexual harassment by Harvey Weinstein, the Hollywood film producer, signed non-disclosure agreements. Such agreements have been criticised for being a tool used by the wealthy and powerful to silence victims.

## What is a NDA?

An NDA is a legal agreement signed between two parties to share confidential information or to keep trade secrets private. They are widely used in the business world, such as in mergers and acquisitions, where one company receives sensitive financial information about a business it wants to buy.

"The original legitimate point of non-disclosure agreement is for people to talk about business ideas together and make sure someone does not run off and start their own venture," says Robert Ottinger, founder of the Ottinger Firm, a US employment law practice.

NDAs are also used in employment settlements so that workers cannot speak about events that happened during their employment, such as sexual harassment.

"What is absolutely de rigueur in our business these days is the employer pays you money and you will never say anything about it again," says Kathleen Peratis, head of the sex discrimination and sexual harassment practice group at the New York law firm Outten & Golden.

"They have been used more lately to hide people's dirty secrets. The consequence is the public never knows," Mr Ottinger says. "We sign settlement agreements every week, and you can't tell anyone but your spouse, your accountant and your lawyer."

## How secure are NDA's

NDAs are legally binding. However, once confidential information enters the public domain, there is a question as to how an NDA could be enforced. "If other women who have not signed NDAs suddenly start speaking out then there is a question of whether the information is still confidential or has now entered the public domain. If it is now deemed as public, an employer would be unlikely to succeed in the courts if they sought damages against someone who has breached an NDA."

Ms Peratis says clients have recently asked about the consequences of breaking their confidentiality agreements. "What I say is, you made a deal. If you choose to violate that deal, you are at risk of having this guy demand what the contract allows him to demand. But I also tell them, if you're the first to come out with this your risk is high. If you're the third or fourth, your risk is not so high."

In the UK, lawyers reject the idea that there will be a flood of parties breaching NDAs in light of the Weinstein case. However, there is a possibility that the use of gagging clauses may be curbed, particularly in the UK public sector, which have historically been used to stop workers flagging safety concerns.

## What is the legal position for an employee who breaks an NDA?

In both the UK and US, an ex-employee can be sued for breaching a confidentiality agreement. A company can seek damages from the former staff member and can try to claw back all or part of any financial settlement. In the UK, they can also seek an injunction preventing the former employee from speaking out again.

**Paul Quain**, partner at GQ Employment Law, says UK employment settlements usually have a clause in the agreement that allows ex-employees to speak out about confidential information if they are "required by law, HMRC (HM Revenue & Customs), any regulatory body".

This means that an ex-employee would be able to speak to UK lawmakers at a parliamentary select committee hearing, to UK tax investigators or to the UK financial regulator despite having signed such an NDA.

In the US, NDAs cannot lawfully prevent people from reporting claims to law enforcement and government agencies, such as the Equal Employment Opportunity Commission, or responding to a subpoena.

US federal law does stop "employers from preventing employees from their right to engage in what are called 'concerted activities'," says Maya Raghu, director of workplace equality at the National Women's Law Center in Washington. "That can include restraining or preventing employees from discussing sexual harassment complaints among themselves. That can be unfair labour practice."

## How does an NDA differ from a non-disparagement agreement?

Non-disparagement agreements are more specific than NDAs and mean that both parties (such as an employer and employee) agree not to make derogatory or adverse statements about each other.

## Are the numbers of NDAs increasing?

**Mr Quain** says the number of NDAs has been increasing since the 1970s and 1980s as companies have become more concerned that sensitive information could be leaked. "It may be that companies started to get their fingers burnt and confidential information was made public. They are now pretty standard in employment settlement agreements," he says.

Ms Peratis recalls the first time she saw such an agreement mooted, about 40 years ago. "I said to the lawyer on the other side, 'Ah, you want silence. That's going to cost you a little more.'"

Today, she says, "no conversation like that ever occurs any more because it is absolutely expected that with every single employment settlement agreement there will be a confidentiality agreement. . . Anybody who says these days I am not going to agree to confidentiality is not going to get a deal."

