Stricter controls on the way for non-disclosure agreements in the employment context

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Employment Law News

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Stricter controls on the way for non-disclosure agreements in the employment context

It's hard to believe that the #MeToo movement took off little more than two years ago. Not only has the movement empowered

victims to speak up against harassment and encouraged employers to reflect on their approach to dealing with such allegations, it has driven the Government to focus on what it can do about the practice of using non-disclosure agreements (NDAs) to hush up complaints. In this briefing we consider the status of the various legislative proposals on the table, the latest guidance and the next steps for employers.

Government consultation on use of NDAs – proposed new legislation

Earlier this year, the Government consulted on proposals to improve the regulation of NDAs in cases of workplace harassment or discrimination. That consultation received 582 responses, the majority of which supported the protection of vulnerable workers from the improper use of NDAs by employers. In July 2019, the Government responded to the consultation confirming that it would introduce new laws to provide that:

- NDAs cannot be used to prevent disclosures to the police, regulated health and care professionals and/or legal professionals;
- the limitations of NDAs are clearly set out in both employment contracts and settlement agreements;
- individuals signing up to NDAs in settlement agreements must receive independent legal advice on the nature and limitations of the clause; and
- NDAs that do not meet the legal requirements would be subject to enforcement measures.An offending clause in an employment contract would give rise to a claim for compensation and an offending clause in a settlement agreement would be void.

The fly in the ointment is that the Government committed to introducing these reforms "when Parliamentary time allows". Unsurprisingly, given the preoccupation with Brexit, these new laws have not yet seen the light of day. It remains to be seen which parties will commit to introduce any or all of

these reforms in their manifestos for the forthcoming General Election (and when they would be introduced).

Women and Equalities Select Committee report on use of NDAs – further proposals for reform

Despite this uncertainty, the Government has recently gone on to make further commitments for reform in this area. In June 2019, the Women and Equalities Select Committee (WESC) published a report on the use of NDAs in harassment and discrimination cases. Gareth Brahams of this firm gave evidence to the WESC as part of its inquiry into this issue – you can read his evidence here.

The WESC report made 45 recommendations to Government concerning the regulation of NDAs and other related matters. In October 2019, the Government published its response to the WESC report. Notably, the response sets out further commitments to:

- consult on whether to require employers to provide a basic factual reference about a worker (on the basis that a failure to provide a reference can be problematic for victims of harassment or discrimination);
- consider whether to require employers to investigate all harassment and discrimination complaints, even where a settlement is reached;*
- consider whether to require employers to appoint a director or equivalent to oversee the anti-discrimination and harassment policies and the use of NDAs in relevant cases;*
- consider the adverse effects on individuals of publishing employment tribunal judgments online (e.g. blacklisting) and what, if any, safeguards could be adopted; and
- consider extending the time limit for bringing claims in the employment tribunal from 3 months to 6 months in cases involving sexual harassment or pregnancy or

maternity discrimination.*

**Note that these proposals are already under consideration as part of a separate consultation on sexual harassment, pregnancy and maternity discrimination which closed in October 2019.*

New guidance for employers on the use of NDAs

Another key commitment emerging from the Government's responses to both the consultation and the WESC report was the publication of new guidance for employers and their advisers on the drafting and use of NDAs. The Government identified various stakeholders who would be responsible for discharging this commitment, including the Equality and Human Rights Commission (EHRC), ACAS and the Solicitors Regulation Authority (SRA).

The EHRC has now published its guidance on the use of confidentiality agreements in discrimination cases. The guidance is non-statutory – this means that an Employment Tribunal or Court is not obliged to take it into account but it may be used as evidence in legal proceedings where relevant. The guidance usefully clarifies the law on the use of NDAs (as it currently stands) and offers wide-ranging recommendations of best practice in this area. Employers should note the following key best practice points on the use and drafting of NDAs:

- avoid using NDAs as a matter of course – weigh up whether they are really needed on a case by case basis;
- where it is felt that an NDA is needed, stick to what is necessary and appropriate to the particular circumstances of the case – if in doubt seek legal advice on the wording;
- apply carve outs to the NDA to permit the worker to have discussions with various parties such as: regulators, the police, immediate family members and a potential

employer;

- avoid using warranties which require the employee to promise that they are not aware of anything that would be a protected disclosure or a criminal offence as this could silence the employee from speaking out (and it is unlawful to prevent a worker from making protected disclosures or reporting criminal offences);
- where an NDA is used, there should be a mutual obligation on the employer to keep matters secret;
- ensure that the use of the NDA is signed off by a director (or equivalent) or other senior manager and not by someone implicated in the complaint itself or involved in the hearing of the complaint; and
- ensure workers are given time to read and reflect on any NDA and discuss it with their adviser if appropriate.

More generally, employers are advised to monitor discrimination complaints and the use of NDAs to help identify any systemic issues. For large employers this means holding a central record of NDAs which is overseen by the board of directors (or equivalent). Further, employers are advised to investigate **all** allegations of discrimination and harassment – even where there is a settlement – and take any reasonable steps to prevent the discrimination occurring again in future. The EHRC notes that a failure to do this may make it harder for employers to defend future discrimination complaints.

Separately, ACAS has announced that it will publish its own guidance on the use of NDAs, although it is not known when. The SRA has indicated that it will update its warning notice to solicitors (published in March 2018) to align with the forthcoming legislative reforms. The Law Society has also committed to update its practice notice on the subject. Once the legislative reforms are in place, the Government has said that it will run an awareness raising campaign for employers to highlight the changes and the new sources of guidance.

What action should employers take now?

As well as continuing to monitor developments in this area, employers should:

- ensure they have read and acted upon any guidance from a relevant regulator (for example, in-house lawyers will be expected to comply with the guidance issued by the SRA);
- update template employment contracts and settlement agreements with a view to being able to comply with the new legislative requirements in due course; and
- read the EHRC's guidance and benchmark internal practices and procedures against it.

BDBF can help your business navigate these changes. If you would like to discuss how we can help, please contact Amanda Steadman or your usual BDBF contact.

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