

31 January 2019

Maria Miller MP
Chair of the Women and Equalities Select Committee
House of Commons
London
SW1A 0AA

Dear Maria Miller,

The CBI welcomes the opportunity to contribute to the Women and Equalities Select Committee inquiry into the use of non-disclosure agreements (NDAs) in discrimination cases. Businesses believe that NDAs are valuable tools for employees and employers. But evidence has emerged of NDAs being misused in some workplaces. A statutory code of practice should make some good practices compulsory, improve awareness of a NDA's limitations and improve enforcement where they are misused.

The CBI is the UK's leading business organisation, speaking on behalf of 190,000 businesses that together employ around a third of the UK's private sector workforce. Its mission is to help businesses create a more prosperous society.

NDAs can support better outcomes for both businesses and employees

Non-disclosure agreements are usually not standalone documents in an employment context but are part of settlement agreements to resolve workplace disputes. Businesses believe that confidentiality in settlement agreements can be valuable to both employers and employees. Most workplace disputes are resolved in the workplace. And this is usually the preferred approach for both employers and employees. Well managed dispute resolution in the workplace is quicker and less stressful for the parties involved than litigation. It can lead to higher compensation than employees would be awarded by a tribunal, and preventing a drawn-out and confrontational legal dispute can also increase the chance of repairing an employment relationship.

Employment tribunals will become less effective if restricting confidentiality clauses leads to more disputes requiring a formal hearing. The employment tribunal system is already failing to meet the needs of its users as CBI members report claims routinely rescheduled at short notice or delayed by over a year. Where it has not been possible to resolve a dispute in the workplace, employment tribunals are an essential safety net to ensure that employees' rights are upheld. But they are a distant second-best option for cases that could have been resolved by agreement.

It is also bad for business if not being able to resolve a case with confidentiality means that the employee doesn't raise their concern at all. Sometimes employees don't want people involved in the dispute to disclose information to other employees or the public. Building trust in employment relationships requires these concerns to be heard, investigated and resolved whenever possible.

The CBI is also concerned by the idea of limiting the use of confidentiality clauses to occasions when the employee requests it. Employees should always be properly advised before signing a settlement agreement. But the flaw in requiring that it is the employee who starts the conversation about confidentiality is that most employees are not aware of all options available to them, particularly when not advised by a trade union or a lawyer. This would lead to situations where a confidentiality agreement could be in the interests of both parties and the employer knows it but can't start the conversation.

A code of practice on the use of NDAs is needed to prevent their misuse

Non-disclosure agreements have important functions. They are used to protect intellectual property and other commercially sensitive information, and as part of a mutually acceptable settlement of a workplace dispute. But revelations of the President's Club dinner case have shown, there is evidence of their misuse. And there seem to be misunderstandings about their limitations. For example, it is already the law that an NDA cannot prevent a person from discussing or initiating enforcement proceedings in relation to future breaches of their employment rights. Neither can it prevent a person from making a public interest disclosure as a whistleblower. But employees are not fully aware of these limitations. This can prevent them from challenging misuse. A statutory code of practice will ensure that employees make an informed choice and do so in full knowledge of the NDA's limitations.

ACAS' experience of confidentiality clauses in COT3 agreements mean that it would be best placed to develop such a statutory code of practice. Most settlement agreements dealing with employment disputes of any type contain confidentiality clauses¹, so the CBI supports a code that applies equally to all settlement agreements. A statutory code limited to cases of harassment and discrimination would be a missed opportunity to have a wider positive impact on workplace dispute resolution.

The settlement agreement legislation already requires that before signing an NDA, an employee must first receive independent legal advice. As well as reinforcing understanding of the law, the CBI believes that the code of practice should require that signatories can keep a copy of the agreement for future reference. CBI members have said that this almost always happens already, but examples that have come to light about the misuse of NDAs have often included one or both of these requirements being breached.

What is standard practice has been evolving rapidly since the potential for the misuse of confidentiality clauses was revealed. CBI member law firms have reported, for example, that they have re-written templates for confidentiality clauses to explicitly state that any confidentiality clause does not interfere with a person's right to protection as a whistleblower, and to position this information and other limitations much more prominently. They have cited interventions by both the Solicitors Regulatory Authority and the Employment Lawyers Association as catalysts for change. A code of practice is an opportunity to more widely promote these sort of emerging good practices.

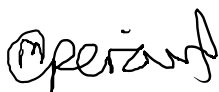
¹ Employment Lawyers Association evidence on NDAs to the Women and Equalities Select Committee (2018).

Recommendations:

- Confidentiality clauses in settlement agreements can benefit both employers and employees and should be retained.
- A statutory code of practice should be introduced to prevent the misuse of confidentiality clauses in settlement agreements.
- ACAS should develop the statutory code of practice and it should apply to all employment disputes.
- The statutory code of practice should:
 - Restate that employees must receive legal advice before signing a NDA.
 - Establish that employees must receive a copy of the agreement for future reference
 - Establish that confidentiality clauses explicitly state their limitations.
 - Promote existing good practices like how to most effectively communicate a confidentiality clause's limitations.

The CBI looks forward to collaborating with the Women and Equalities Select Committee, the Government and other stakeholders to ensure that confidentiality clauses can continue to be used positively, but with greater confidence that they are not misused.

Yours sincerely



Matthew Percival
Head of Employment