Government to ban NDAs gagging workers from speaking out about discrimination or harassment

In the final stages of its passage through Parliament, the Government has tabled a number of significant amendments to the Employment Rights Bill. Of considerable interest is a new clause tabled by Labour Peer Baroness Jones addressing contractual duties of confidentiality relating to harassment and discrimination – commonly known as "non-disclosure agreements" or NDAs.

What are the proposals?

On 7 July 2025, an Amendment Paper listing proposed amendments to the Employment Rights Bill (the **Bill**) was published. The paper includes a number of Government-backed amendments, including a new provision addressing contractual duties of confidentiality relating to harassment and discrimination.

New Clause 22A of the Bill would render any provision in an agreement between an employer and a worker void in so far as it purports to prevent the worker from making an "allegation" or a "disclosure of information" relating to:

- relevant harassment or discrimination; or

- the employer's response to either the relevant harassment or discrimination itself or the making of an allegation or disclosure of relevant harassment or discrimination.

Could the employer's "response" potentially encompass the fact of the exit discussions and existence of the settlement agreement? Arguably, these steps form part of the employer's response to the allegation or disclosure and, if so, should also be excluded from any NDA.

What is an "allegation"?

"Allegation" is not defined in Clause 22A or elsewhere in the Bill. The dictionary definition of "allegation" is *"a statement that someone has done something wrong or illegal, made without proof that this is true".* On its face, therefore, this could even extend to false or bad faith allegations – certainly these types of allegations have not been excluded in the initial drafting.

However, the victimisation provisions in clause 27 of the Equality Act 2010 may be instructive here. Workers are protected from detrimental treatment where they have raised an allegation of discrimination. However, that protection is not engaged where the allegation is false or made in bad faith.

It will be interesting to see whether similar drafting makes its way into the final version of Clause 22A. Without this

caveat, as a matter of contract law, it appears that employers will be unable to prevent a worker from repeating false or bad faith allegations even where a claim has been settled – they would still be "allegations" after all. An individual against whom false or bad faith allegations have been made would have to look to the law of defamation for recourse.

What is a "disclosure of information"?

"Disclosure of information" is also not defined in Clause 22A. In the context of whistleblowing law, the term "disclosure of information" is understood to mean a disclosure which has sufficient factual content or specificity. This is more than a mere allegation, although a disclosure containing a mix of facts and allegations would be enough.

It is not clear whether the meaning of the term in Clause 22A will mirror the way it is understood in the whistleblowing context, but, in the absence of any other guidance, it seems reasonable to assume that it will.

What is "relevant harassment and discrimination"?

For these purposes, "harassment" covers all forms of discriminatory harassment, sexual harassment and less favourable treatment for having not submitted to sexual harassment (in each case as defined in the Equality Act 2010). It does not cover harassment arising under other legislation, such as the Protection from Harassment Act 1997, nor bullying more generally.

"Discrimination" covers direct and indirect discrimination and discrimination arising from disability (in each case as defined in the Equality Act 2010). Notably, allegations and disclosures relating to failures to make reasonable adjustments or to victimisation are not covered. It is not clear why these forms of discrimination have been excluded.

Such harassment and discrimination will be regarded as "relevant" for these purposes if it consists of (or is alleged to consist of) conduct committed by either the employer or a co-worker.

It will also be "relevant" where the victim of the harassment or discrimination is the worker or a co-worker. Although not expressly stated, this suggests that allegations or disclosures of harassment committed by third parties will also be covered once the new legal protection against third party harassment comes into effect (according to the Government's roadmap for implementing the Bill, protection from third party harassment will be implemented in October 2026).

Which agreements are covered?

The prohibition will cover relevant NDAs contained in both employment contracts and settlement agreements, but it will not extend to agreements that satisfy *"such conditions as the Secretary of State may specify in regulations"* – these are to be known as "excepted agreements".

There are no further clues as to what types of agreement might constitute an excepted agreement. However, it is stated that regulations may provide that even in excepted agreements a

relevant NDA may be subject to limits, including that it must not preclude allegations or disclosures to certain people, for certain purposes or in certain circumstances. In other words, it is unlikely that even excepted agreements may contain a blanket NDA.

Who is covered?

Agreements covering allegations made by employees and workers (i.e. those working under a contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract who is not a client or customer of any profession or business undertaking carried on by the individual) are covered.

However, the protection may be extended further. It is provided that regulations may extend the protection to cover those who fall outside the legal definition of "worker", including to those undertaking work experience or training. It may also cover those who enter into or work under a relevant contract of a specified description. Such regulations may also state who is to be regarded as the employer of such individuals.

Clearly, the scope of the coverage needs to be thrashed out in separate regulations, but the intention is that the protection will be wide.

How does this proposal differ from existing prohibitions on NDAs concerning harassment and discrimination?

Section 43J of the Employment Rights Act 1996

Section 43J of the Employment Rights Act 1996 already provides that any provision in an agreement between an employer and worker is void in so far as it purports to preclude the worker from making a "protected disclosure". A protected disclosure covers disclosures of information that a worker reasonably believes tends to show one or more types of wrongdoing or relevant failure. The worker must also have a reasonable belief that the disclosure is in the public interest, and it must also be made to certain specified persons (with more rigorous rules applying to wider disclosures). Accordingly, this may capture some disclosures about harassment and discrimination.

The new proposal goes further in that it covers "allegations" as well as "disclosures of information". Nor is there a requirement for such allegations or disclosures to jump the other hurdles involved in making a protected disclosure. Rather, the worker is able to disclose the allegation or information to anyone and be confident that they are not barred from doing so.

Section 17 of the Victims and Prisoners Act 2024

From 1 October 2025, section 17 of the Victims and Prisoners Act 2024 provides that NDAs will be unenforceable against victims of crime (or people who reasonably believe that they are a victim of a crime) in relation to disclosures of information about the crime to certain specified persons, including the police, qualified lawyers or healthcare professionals. Disclosures made for the primary purpose of releasing information into the public domain (or for any

purpose not specified in the legislation) are not covered. Accordingly, disclosures about harassment and discrimination may be covered in some circumstances. However, there will be instances of misconduct (including of sexual harassment) which would not amount to a crime and so be out of scope.

Again, the new proposal goes further in that it covers "allegations" as well as "disclosures of information", no criminal act needs to have occurred or be suspected, and there are no restrictions on the purposes or recipients of the allegation or disclosure.

What are the implications for workers and employers?

The amendment has been welcomed by those who campaigned for it. Their aim is to prevent discrimination and harassment in the workplace being swept under the carpet, particularly in the context of serial perpetrators of sexual misconduct. Whether it is effective in doing so remains to be seen. However, for individual employees bringing claims of harassment or discrimination who would prefer to settle, and would be willing or actively want to do so on a confidential basis, the concern is that it will take away a route to resolution that they may welcome.

Employers will be wary of this change. Although employers are now in the habit of carving out exceptions to NDAs, for example, in respect of protected disclosures and disclosures to the police or a regulator, this takes things even further. Workers can make relevant allegations or disclosures to anyone, without the need to jump any other hurdles. This weakens both straightforward confidentiality clauses and non-disparagement clauses. In some cases, this may mean

settlement is a less attractive option for an employer.

This raises the question of whether a worker could volunteer to sign up to a more restrictive NDA in order to incentivise settlement. As it stands, it seems that any such clause would still be void and employers would be ill-advised to rely upon it. Further, if the worker went on to breach the NDA and, in turn, the employer sought to withhold or clawback a settlement payment as a result, that act could potentially amount to an act of post-employment victimisation.

Will the proposal make its way into law?

Clause 22A has been proposed by a Labour Peer and so is highly likely to pass into law, albeit there may be amendments to the drafting.

However, Louise Haigh MP confirmed on Radio 5 Live on 8 July 2025 that the ban will not be retrospective, meaning that workers will not be able to unpick existing NDA provisions, provided that they are otherwise lawful. This gives rise to concerns about a two-tier system whereby those who entered NDAs before a certain date are prevented from speaking about discrimination and harassment, whereas those who did so after a certain date are not. Could this proposed change to the law force a change in culture whereby employers do not feel able to enforce any NDAs which apply in those circumstances?

It is not clear whether the ban will come into force when the Bill passes later this year, or whether it will be phased in at a later date. The Government has recently published its roadmap for implementing the Bill, but it makes no mention of

the NDA ban (having been published before the amendment was tabled).

Employment lawyers should expect the SRA's Warning Notice on the use of NDAs to be updated in due course to reflect the change in the law.

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.