

## Quick Facts on Non-Disclosure Agreements (NDAs)

September 22, 2022

### Definition

1. **A non-disclosure agreement, or NDA, is a signed legal document that restricts sharing certain information with others. It usually means the person signing cannot share information about a specific event, series of events, misconduct such as sexual harassment or discrimination, the conduct of an employer, and/or the terms of the NDA itself.**
  - a. There are usually no time limits on NDAs, and they are generally intended to silence the parties forever.
  - b. NDAs are sometimes referred to as “confidentiality agreements.”
  - c. NDAs are usually a part of a longer agreement or contract. They often appear as terms in a larger settlement agreement, release, employment contract, severance package when someone is leaving a job, or arbitration or mediation agreement.

### History

2. **NDAs were originally used to protect trade secrets, not to silence victims of sexual harassment and discrimination.**

NDAs appear to have been used as early as the 1940s in maritime law, but it wasn't until the 1980s that they became commonplace in the tech industry to protect trade secrets. NDAs were used to make sure when an employee moved from one company to another, that they didn't share trade secrets with their new employer. Since then, NDAs have gradually crept into a wider variety of contracts and become normalized in settling disputes about sexual misconduct and other forms of discrimination.

### Types of NDAs

3. **There are different types of NDAs:**
  - a. Confidentiality clauses in settlement agreements: Employers may put NDAs in settlement agreements or releases and ask the complainant to sign it. People feel pressured to sign an NDA to settle a dispute. Some may be told that they must sign to get a settlement. Many people who are asked to sign NDAs feel like the other party is “buying” their silence.
  - b. Pre-emptive NDAs: NDAs are sometimes used before misconduct has happened. They can be used pre-emptively in employment contracts or before an event or meeting to make sure that if there is misconduct or something bad happens, the people who signed the NDA cannot talk about it.
    - i. In the U.S. more than one third of worker have signed this type of NDA.<sup>1</sup>

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<sup>1</sup> Kathy Gurchiek, “States Take Action Against Nondisclosure Agreements,” *SHRM* (Aug. 28, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/states-take-action-against-nondisclosure-agreements.aspx> accessed September 8, 2022, cited in Emily Otte, “Toxic Secrecy: Non-Disclosure Agreements and #MeToo”, online (2020) 69:3 *Kansas Law Review* Inc.

- c. Arbitration clauses: Some employment contracts contain mandatory arbitration clauses that say if an employee wants to dissolve a dispute with their employer, they must go to arbitration. Most mandatory arbitration clauses require the arbitration be confidential.
- d. Non-disparagement clauses: These are clauses that can appear in pre-emptive NDAs, such as employment contracts, or in settlement agreements. A non-disparagement clause prevents an employee from saying *anything* negative about the employer that could harm their reputation, even if it's true.

## Impacts

### 4. **Signing an NDA can have a negative impact on physical and mental health.**

Numerous studies have shown that people hiding personal traumatic secrets display more signs of poor health, such as hypertension, influenza, cancer, and other diseases. The reverse is also true: confiding in others can have positive health benefits, such as improved immune function.<sup>2</sup> Disclosure can “reduce rumination and worry, freeing up the mental quagmires that hinder social relationships. Putting experiences into words has a powerful effect on the healing process.”<sup>3</sup>

### 5. **95% of those who report signing an NDA experience a negative impact on their mental health.**<sup>4</sup>

## Prevalence

- 6. **NDAs are secretive.** The secret nature of NDAs makes it difficult to get information about how often they are used. There have not been any significant studies in Canada that have investigated the prevalence of NDAs in Canadian workplace sexual harassment claims.
- 7. **Use has become normalized.** Interviews with US lawyers shows that the practice of using NDAs is widespread, and it's the practice of many large corporate defendants to ask for confidentiality clauses in settlement agreements<sup>5</sup>. Although NDAs have become normalized in the settlement of sexual harassment claims, not all lawyers agree that they are necessary to negotiate a settlement. Settling a claim saves parties time and money that would be spent if they had to go to a hearing or trial.
- 8. **NDAs are broadly used.** Insights from Speak Out Revolution, a non-profit that provides an online platform for targets of workplace harassment and bullying to speak out, shows that NDAs are misused across all company levels in a variety of organizations.

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<sup>2</sup> K.J. Petrie, R.J. Booth, J.W. Pennebaker, K.P. Davison & M.G. Thomas, “Disclosure of trauma and immune response to a hepatitis B vaccination program” (1995) 63:5 *Journal of Consulting and Clinical Psychology*, 787–792; J.W. Pennebaker and R.C. O’Heeron, (1984) “Confiding in others and illness rate among spouses of suicide and accidental-death victims.” *Online* (1984) 94:4 *Journal of Abnormal Psychology*, 473- 476; J.W. Pennebaker, “Emotion, disclosure, and healthy: An Overview. In J.W. Pennebaker (Ed.), *Emotion, disclosure, & health*, 1995, 3-10.

<sup>3</sup> Bernadette Baum, “Workplace Sexual Harassment in the “Me Too” Era: The Unforeseen Consequences of Confidential Settlement Agreements”, *online* (2019) 31:1 *Journal of Business and Behavioural Sciences* 4.

<sup>4</sup> Olivia Leahy, “The Channel 4 News Women are Just the Tip of the Iceberg – Have Women of Colour Been Disproportionately Silenced via NDAs for Years?” *Speak Out Revolution*, <https://www.speakoutrevolution.co.uk/the-speak-out-blogs/vsllc12tng5vff83uqilxgn7uyrxaj> accessed September 8, 2022.

<sup>5</sup> Blanca Fromm, “Bringing Settlement Out of the Shadows,” *online* (2001) 48 *UCLA L. Rev.* 663.

According to a study by Team Blind Inc., 15% of surveyed tech industry workers have been prevented from speaking out about important issues by NDAs.<sup>6</sup>

## Power & Inequality

9. **Women are more likely to be silenced via an NDA.** 28% of women who formally report their unfair treatment at work reporting they have signed one (12% stating they cannot answer for legal reasons).<sup>7</sup>
10. **Women are more likely than men to have signed an NDA (Speak Out Revolution).** 29% of women versus 18% of men.
11. A systematic study of the use of secret settlements was done by the Federal Justice Center (FJC) in 2004. **The FJC found that 40% of the secret settlements involved cases involving “special public interest,” such as sexual abuse, professional malpractice, or environmental concerns.**
12. **Racialized women are disproportionately affected by being silenced with an NDA after formally reporting unfair treatment in their workplaces.** Speak Out Revolution’s data shows that 75% of Black African women reported having signed an NDA versus 28% of their White British/Irish counterparts.
13. **Complainants who sign NDAs are often in vulnerable positions, lacking the power and resources of the employer or harasser.**

People who have been sexually harassed may be in unstable financial positions after being forced to leave a job or the harassment has impacted their ability to earn a living. On the other hand, the respondent employer is often a larger company with a lot of money, resources, and power to affect the complainant’s career. Someone being asked to sign an NDA may also be experiencing mild to severe impacts of trauma, making an ongoing legal battle painful and difficult to endure. Many complainants do not have the ability to hire legal counsel, or they have not had time to get legal advice before being asked to sign an NDA. Respondents (employers and/or harassers) often ask complainants to sign NDAs on short notice, allowing only a few days to decide.

## Legislative Changes Limiting NDAs

14. **Since 2018, there has been a global wave of legislative changes banning or limiting how NDAs can be used in sexual harassment cases.**
  - a. In Canada, Prince Edward Island was the first to pass legislation limiting the use of NDAs in discrimination and workplace sexual harassment claims. Manitoba and Nova Scotia have since introduced similar legislation that has not yet passed.
  - b. 15 US states have restricted NDAs, and the US has introduced a federal bill making many NDAs unenforceable.
  - c. Ireland and Victoria, Australia are also considering NDA-limiting legislation.

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<sup>6</sup> Matt Drange, “‘A gag order for life’: how tech giants use secretive legal contracts for their employees to create a culture of silence in Silicon Valley.” July 27, 2021 *Business Insider* .<https://www.businessinsider.com/silicon-valley-tech-workers-nda-culture-silence-2021-7> accessed September 8, 2021.

<sup>7</sup> *Supra*. note 4.