

Non-Disclosure Agreement (NDA) Fact sheet for Workers

What are NDAs?

A non-disclosure agreement, or NDA, is a legal document designed to stop you from sharing information. NDAs can be standalone agreements or form part of a larger agreement. NDAs are also called confidentiality or non-disparagement clauses.

Historically, companies used NDAs to protect trade secrets from competitors. In recent years, NDA use has grown. Some employers are using NDAs as part of their response to sexual harassment complaints, often in the settlement process.

Impacts of NDAs

By requiring silence, NDAs can negatively impact your physical and mental health. This is because NDAs prevent you from sharing what happened, which can harm your ability to process the experience and cause you more trauma. An NDA can also put you at a disadvantage if you can't explain to future employers why you left your last job or why you don't have a reference.

In sexual harassment and assault situations, NDAs are used to protect the reputation of the harasser and the employer, not to protect the complainant. This can promote a culture of silence and fear and increase the risk of harassment.

Many governments around the world are limiting or banning NDAs in sexual harassment cases. British Columbia has not limited or banned NDAs at this time, but that may change. While NDAs are legal at present, this does not mean you have to sign one.

How to identify an NDA

An NDA can come in several different forms:

- It can be a *confidentiality clause* within a bigger agreement (like an agreement to leave your job for severance or a settlement). The scope may vary: some state that you cannot share the amount of compensation, others state that you cannot share the details of the sexual harassment at all. Sometimes confidentiality clauses are found in

arbitration clauses, in which parties agree to go to private dispute resolution rather than a court or tribunal.

- It can be a *non-disparagement clause*, which means that you agree not to say anything negative about your employer, even if true.
- It can be a *pre-emptive agreement* that you sign at the beginning of your employment, saying that you cannot talk about negative things that happen at work.
- NDAs often have a “*clawback*” clause, which means that if you speak about something you agreed not to speak about, your employer can sue you to get the compensation back.

What to do if I am asked to sign an NDA?

If an employer wants you to sign an NDA, make sure you are fully informed of your options. You should seek legal advice before meeting with the employer or signing anything.

If the employer wants you to sign something right away, let them know that you need time to consider it. You do not need to rush or settle on the employer’s timeframe. Also, you can settle without an NDA, it is not mandatory. The NDA is a benefit for the employer, and you should consider carefully whether you want to sign an NDA or settle without an NDA.

You can settle anytime up to the date of hearing or trial. Make sure you have enough time to consider your options and get legal advice, especially if you are considering agreeing to a clause that will silence you. You can access up to 5 hours of free legal advice from the [SHARP Workplaces Legal Clinic](#).

If the employer asks you to sign an NDA, these are some of the options you might consider.

● Require the silencing clauses of the NDA to be removed before settling

- Remove the portions of the settlement agreement that prevent you from speaking about what happened. Consider instead offering to agree not to disclose the compensation amount or other terms that do not silence you about what happened.

- If the employer refuses to settle without the silencing clauses and you have started a formal court or tribunal process, you can continue with that process. This will eventually lead to formal mediation and a public hearing, but parties can settle at any time, and most cases do settle before hearing.
- Litigation can be time-consuming, expensive, and emotionally draining, but keep in mind that you can withdraw at any point in the process. If you withdraw, you give up your rights to compensation and other remedies. Withdrawing will also remove your opportunity to get a negotiated settlement from the employer, because it will remove your bargaining power. Seek legal advice before withdrawing a court or tribunal case.
- If the employer refuses to settle without the silencing clauses and you have not already started a formal court or tribunal process, get legal advice right away to understand the timelines for starting a case.
- You have no obligation to take legal action. If you choose to, you can also simply refuse to sign the NDA and move on without starting a legal case. This would mean giving up your rights to compensation and other remedies.
- **Reject the silencing clauses, but consider offering agreements not to name the employer or respondent**
 - Remove the portions of the settlement agreement that prevent you from speaking about what happened, but agree not to name the specific employer or the respondent. You may wish to have the agreement specifically state that you are free to discuss what you experienced.
- **Keep the silencing clauses, but make them as narrow as possible**
 - If you have received legal advice and still wish to sign a silencing clause, consider making it as narrow as possible.
 - Identify what is most important to the employer (for example, sharing on social media), and limit the silencing clauses to those items.

● **Keep the silencing clauses, but include exceptions**

- If you have received legal advice and still wish to sign a silencing clause, consider building in exceptions about whom you can speak to, such as: the freedom to speak to counsellors, lawyers, family, or police.
- Consider your priorities and what you will need over the long term. Think about the specific situations in which you may want to be able to speak openly, and how you would feel if you were not allowed to speak openly. For example, you may wish to be able to speak to individual counsellors, in group therapy, to Elders, religious leaders, or in other community groups such as recovery groups. It may be important for you to speak to your family and friends. You can ask to include as many exceptions as you need.
- Consider adding a clause that allows you to speak in legally protected or required circumstances. For example, this could arise where you have:
 - a legal duty to report harm or criminal conduct
 - a professional or ethical obligation to report misconduct (for example, to a regulatory body),
 - a duty to report workplace risks
 - a duty to make a report in the public interest

Note any agreement can never prevent you from going to the police to report a crime.

You may also wish to specify that all privileged communications with a lawyer would be exempt from the silencing clause.

● **Keep the silencing clauses, but add a time limit**

- You could also include a time limit for the silencing clause (like one year) so that you could speak freely after that time.

● **Keep the silencing clauses, but try to mitigate their impact**

- For example, require a positive reference letter and an explanation for leaving your job. This will help you find another job without breaching your NDA.

- If you do this, you may wish to include specifics like who will give a reference, and what specifically you will say if asked about your employment history.

- **Keep the silencing clauses, but require them to go both ways**

- Try to negotiate mutual terms of confidentiality or non-disparagement if you do not want your employer or harasser to speak about you or the harassment.
- Keep in mind that the negative impact of these clauses is much more significant for you than for your employer.

- **Keep the silencing clauses (with your preferred modifications) and add a cooling-off period**

- Include a period of time (for example, a few days or a week) in which you can change your mind and retract your agreement to the settlement.

- **Agree to the terms and be bound by the silencing clauses**

- Only you can decide if this makes sense in your situation. Seek legal advice, and be aware that your mental and physical health may be negatively impacted if you sign an NDA.
- If your NDA requires you to stay silent, you are not allowed to share information about the sexual harassment. If you share this information after signing an NDA, the employer could sue you if they found out.

INVOLVING THE MEDIA

- **Alongside their legal and settlement options, some workers may want to go to the media to bring public attention to the harassment.**
- **Keep in mind that it is the media outlet that will ultimately decide how to tell the story, and not you.**
- **Your employer may sue you for defamation. A defense to defamation is that you told the truth, but being sued can be stressful, expensive and time-consuming even if you have a solid defense. Get legal advice before speaking to the media.**
- **If you are currently in litigation, going to the media can harm settlement prospects and may hurt your case.**

Conclusion

NDA's are a legal tool that can silence you. They can harm your physical and mental health. They are still used in BC. If you are asked to sign one, seek legal advice and understand your options.

To learn more about NDAs and the campaign against the misuse of NDAs in BC visit: <https://clasbc.net/FightMisuseofNDAs>

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