

Insights

THE END OF THE NDA?

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It has been announced that, next week, the government will table an amendment to the Employment Rights Bill proposing to prohibit Non-Disclosure Agreements (NDAs) relating to employees who are subject to harassment or discrimination. It is possible that the amendment will cover harassment, victimisation and discrimination under the Equality Act 2010 (EqA) and will cover witnesses to such actions.

If the prohibition is carried through into law, it will mean substantial changes to settlement agreements, as virtually all contain clauses which have the effect of an NDA. If an employee's employment terminates and the circumstances involve matters that relate to harassment or discrimination, then it is proposed that an NDA will be void. This will leave the ex-employee free to talk openly about the termination of their employment and the circumstances leading to it.

The provision will need to go through discussion and consultation but, as a government amendment, it seems likely that it will be included in the Employment Rights Bill when it becomes law. The implementation date, based on the government's "implementation roadmap" will be 2027 at the latest.

ANALYSIS

Ever since the #metoo movement began in 2017, and the use of NDAs was brought more into the public gaze, there has been pressure on successive governments to ban NDAs in cases of harassment and bullying. Organisations such as "Can't Buy My Silence UK", founded by Zelda Perkins, who was made subject to an NDA in a settlement agreement in the late 1990s, have put continuous pressure on UK governments to ban NDAs.

Some states in the US have already banned NDAs in these circumstances, and both the SRA and FCA/PRA have urged caution regarding NDAs from a regulatory perspective.

However, although a ban on NDAs in cases of discrimination, bullying and harassment may make sense from a public policy perspective, there may be unforeseen consequences. For example:

- employers may be less willing to settle employment disputes without the security of an NDA. This could force disputes to a full and expensive hearing even where an employee wishes to settle; and
- not all bullying and harassment is based on a protected characteristic under the EqA, so it is possible, subject to the final wording, that a settlement relating to bullying and behaviour that falls outside the scope of the EqA will not be covered.

These are only headline observations. However, by 2027 at the very latest, settlement agreement templates may have to change substantially, and employers' attitudes to settling employment disputes may change with them.

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MEET THE TEAM



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