

Opinion **Employment**

## The NDA boom is bad for both employers and workers

Silencing agreements can stop important information on fraud or mistreatment from reaching the public

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Academic research suggests that roughly 57 per cent of US workers are covered by non-disclosure agreements © Esch Collection/Getty

**Sarah O'Connor** AUGUST 10 2021

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When the [#MeToo](#) movement triggered a cascade of sexual misconduct allegations against powerful men a few years ago, it drew attention to how [non-disclosure agreements](#) can silence people and let wrongdoing continue. Now legislators in Ireland and California are [drafting laws](#) that would prevent NDAs from being used to cover up harassment and discrimination. A number of technology companies have promised to stop using them. Uber, for example, [said](#) that in future “survivors will be in control of whether to share their stories”.

But a growing body of research suggests the problems with NDAs extend far beyond their use in sexual harassment cases. These agreements, originally used to protect trade secrets, have become commonplace in the US, where they frequently occur in settlement agreements, severance packages, and as boilerplate language in employment contracts. A [paper](#) published recently by Natarajan Balasubramanian, Evan Starr and Shotaro Yamaguchi suggests that roughly 57 per cent of US workers are covered by NDAs, ranging from 44 per cent in accommodation and food services to 69 per cent in professional services. Tech companies often make visitors sign them at the [front desk](#).

Orly Lobel, a law professor at the University of San Diego, says NDAs are increasingly bundled with non-disparagement clauses which forbid employees from saying anything negative about their employer. She [gives](#) an example from a major US company's employment contract, which states: "You shall not at any time, directly or indirectly, disparage the Company, including making or publishing any statement, written, oral, electronic or digital, truthful or otherwise, which may adversely affect the business, public image, reputation or goodwill of the company, including its operations, employees, directors and its past, present or future products or services."

The result, says Lobel, is a "much broader chilling effect on speech, and silencing on a broad range of topics". While academic research has focused on the US so far, Jonathan Chamberlain, an employment lawyer at Gowling WLG in London, says similar clauses are used in the UK and elsewhere.

Why worry? One could argue that employers and employees should be free to enter into contracts which benefit them both. In the case of a settlement agreement, for example, the employee trades their right to speak freely for money. But the case is harder to make when there is a clear power imbalance, especially when the clauses are a condition of being employed at all.

Some silencing clauses are so broad they are not actually enforceable. In the US and the UK, NDAs cannot stop employees from reporting anything illegal, for example. Chamberlain says very broad non-disparagement clauses "are not meant to be enforced, I've never seen them being enforced, they will always be difficult to enforce because the free speech issues are really tricky. They're meant to threaten."

But threats can work. They can stop important information from reaching the public domain, from the mistreatment of staff to the defrauding of customers. A number of ex-employees at Theranos, the fraudulent blood-testing company, did not speak up for fear of [legal consequences](#). They are not helpful for regulators, potential investors, prospective employees, or for good employers who want to distinguish themselves from bad ones.

Aaron Sojourner, an associate economics professor at the University of Minnesota, argues that stifling information makes labour markets less efficient. “It imposes this switching cost: the devil you know is better than the devil you don’t know.”

A new [working paper](#) by Sojourner, Jason Sockin and Evan Starr uses data from Glassdoor, the website which allows people to write anonymous reviews of their employers. It shows that after three US states narrowed the kinds of information NDAs could suppress, the flow of negative information in Glassdoor reviews increased. A [previous study](#) showed that this is particularly useful to jobseekers: they classify reviews as more helpful when they contain more negative information.

No employer wants disgruntled former employees to bad-mouth them unfairly. But to use these agreements to weave a web of silence is overkill, especially when employers already have the right to sue for defamation.

Policymakers and some companies have rightly recognised that silencing clauses are problematic with regards to sexual harassment and discrimination. But it would be a missed opportunity to carve out that issue for special attention and leave the workforce gagged about everything else.

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