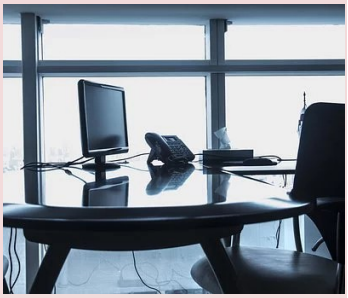
Employment

Employment Contracts: Confidentiality Provisions and Non-Disclosure Agreements in Discrimination Cases



Following the highly publicised #MeToo campaign, "gagging clauses" in the form of confidentiality provisions and non-disclosure agreements ("NDAs") have come under increasing scrutiny. Two years on from that campaign, in October, the Equality and Human Rights Commission (EHRC) published new guidance on the use of NDAs in discrimination cases.

The guidance offers both employers and employees clarity on the law around NDAs and when and how they can be used. The guidance aims to promote cultural change to enable workers to feel able to speak up and expose sexual harassment (as well as other forms of discrimination).

Of course, sometimes NDAs are a necessary and legitimate tool to be used to protect confidential information or where the individual wishes to maintain confidentiality surrounding the discrimination that they have suffered. However, the EHRC also recognises, as highlighted by the #MeToo movement, that NDAs have been used to cover up serious cases of discrimination and therefore form part of the problem itself.

Some particularly good practice recommendations included in the guidance are follows:

· Don't ever ask a worker to sign a confidentiality agreement as part of their employment contract which would prevent them from making a discrimination claim against the employer in the future.

· During the induction process, make clear how to report discrimination and that complaints will be taken seriously.

· When drafting settlement agreements, consider whether confidentiality provisions are required on a case by case basis. Consideration should include the reason for and benefit of a confidentiality agreement as well as its impact on the individual and the culture of the organisation. Current practice is to include confidentiality provisions as standard, so this guidance does require a change of approach for employers.

· If it is decided to include confidentiality provisions, explain why to the individual so that they can discuss this with their adviser and consider whether their inclusion is reasonable.

· Don't use an NDA to prevent a worker from discussing a discriminatory incident that took place in their workplace unless, for example, the victim has requested confidentiality around their discriminatory experience.

· Employers should make sure the confidentiality agreement spells out the details of exactly what information is confidential.

· Don't try to use NDAs to prevent workers from whistleblowing. The guidance also clarifies that NDAs cannot be used to seek to prevent a worker from speaking to the police - as this could constitute a criminal offence.

· Employers should meet the reasonable costs of the worker taking legal advice on a proposed settlement, even (unlike now) if an agreement is not reached.

· Workers should be given a reasonable period of time – which should be no less than 10 days other than in exceptional circumstances – to consider a proposed NDA and they should be given a copy.

· NDAs should be signed off by a director or appropriate senior manager who was not involved in the relevant issue or the consideration of any grievance relating to it.

· If possible and reasonable in the circumstances, the employer should investigate and address any discrimination, including taking reasonable steps to prevent it occurring in the future - even where a claim settles. Failure could prejudice an employer if a similar incident occurs subsequently and they attempt to avoid liability on the basis of the "statutory defence" that the employer took all reasonable steps to prevent discrimination.

· Employers should monitor their use of NDAs. Subject to data protection compliance, larger employers should maintain a central record, including details of type of claim, who allegations of discrimination were made against, what type of confidentiality was agreed and why confidentiality was applied.

· Managers should be required to escalate concerns about workplace culture, systemic discrimination or repeated or "highly serious" acts of discrimination by one individual.

As mentioned above, this EHRC guidance is not legally-binding, but employers should consider their internal practices and whether to adopt the EHRC recommendations to avoid potential reputational damage or legal challenges in the future.

If you have any queries, please contact the 3HR Employment team.

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