



Making Work Pay

Misuse of non-disclosure agreements (NDAs)

Introduction

This response is made by Unite the Union. Unite is the UK's strongest trade union, representing over one million members across all sectors of the economy, including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, hospitality, health, local government, and the not-for-profit sector. Unite represents agency workers in a wide range of sectors, across the public and private sectors.

Unite appreciates the opportunity to respond to the DBT consultation regarding the misuse of non-disclosure agreements (NDAs).

Executive Summary

A non-disclosure agreement (NDA) is usually included in an agreement reached between an employer and employee to resolve an employment dispute. This will often be in a Settlement Agreement completed pursuant to the legal obligations in the Employment Rights Act 1996, or in a COT3 (an agreement completed under the auspices of ACAS). The employment disputes which may be resolved using one of these agreements can cover many issues and may arise in relation to an in-work matter, or a dispute following the termination of employment. Settlement Agreements and COT3 agreements can cover disputes resolved before any formal claim has been commenced, or an agreement to settle an ongoing legal case, usually before the Employment Tribunal.

Overview

Unite welcomes the approach being adopted by the Government, which seeks to address the misuse of NDAs by employers who may want to silence workers as regards issues of harassment and discrimination in the workplace, as well as other serious misconduct. The proposed measure is identified as planned to void any provision in an agreement, such as a contract of employment or Settlement Agreement between a worker and their

employer, insofar as it prevents a worker from speaking out about relevant harassment or discrimination. Most Settlement Agreements are drafted initially on behalf of an employer, and they are then sent to the worker and their representative. In complying with section 203(3) of the Employment Rights Act 1996, the individual entering into the agreement must have received advice on the terms and effect of the agreement from an independent adviser, usually a solicitor. In practice, there are many standard clauses in Settlement Agreements, but Unite notes that sometimes contracts of employment include terms which anticipate a requirement of confidentiality on the part of the worker as regards matters arising in the workplace, to apply after employment has ended. Unite is also aware of employers writing to employees at or around the time when their employment terminates, reminding them of express or implied contract terms, obliging secrecy as regards matters arising during employment.

Unite considers that employers use Settlement Agreements to justify a culture of secrecy as regards potential wrongdoing in the workplace. The power of a legal document is used to stop workers speaking out, taking advantage of a power imbalance between the parties. If a worker agrees to be bound by an NDA, they will be prevented from discussing what has happened in the workplace, even with friends and close family and importantly, individuals might be threatened with action if they propose to tell their story in another case, for example before an Employment Tribunal. There are ways of addressing this activity, but the point is that many workers subject to NDA terms feel threatened by the possibility of an alleged breach, meaning that in other cases the NDA has the effect of concealing important evidence.

This consultation is directed in particular towards the circumstances when a worker is signing an agreement after being subject to significant harassment and discrimination, such as on the grounds of sex. There is an important social policy in providing a right for a worker to be able to discuss what may have happened with others, not least to provide emotional and psychological support. It is also important for improper conduct to be subject to review, and if legislation is introduced as proposed, it should assist in reducing discrimination and harassment in the workplace, as such improper behaviour will not be swept under the carpet by writing a big cheque. Control of NDA use is important and adopting a default position preventing NDAs being misused in this way, is welcomed by Unite.

It is also important to understand what happens when many Settlement Agreements or COT3s are completed. The worker can often be very vulnerable, upset, and may have been signed off work for a considerable period. They may be suffering from ill health and could be in a difficult position to adopt a robust stance when engaged in negotiations about their jobs or a legal case. Pressure felt by a worker in such circumstances cannot be understated, and securing protection through the general law will be an important safeguard. It is often the case that Settlement Agreements are produced close to the date

of a Tribunal hearing, when the legal pressures prior to a court trial may be significant and there could be pressure upon a worker as regards legal costs and the usual litigation risks. In many cases, Unite has seen members anxious to secure a reasonable deal rather than to face their harassers in court and to be subject to cross-examination in a public hearing. Helping workers protect their rights in these situations through general legal provisions, is likely to be important, and a great benefit to the workers involved.

Unite notes the understanding within the consultation paper of the types of clauses which will be captured by the proposed legislation, and in many workplaces Settlement Agreements have become lengthy and technical documents, which are often difficult to understand as regards the complexity of the contractual terms being drafted. Whilst a standard NDA may impact upon specific disclosures, the wider standard confidentiality clauses will be drafted in the broadest possible terms, linked also to the use of non-derogatory and non-disparaging clauses which frequently incorporate detailed control and obligations upon a worker. Unite notes the definition of relevant harassment or discrimination, and the cross-referencing as regards the relevant provisions derived from the Equality Act 2010.

Unite welcomes the wider NDA reforms, for example, as an NDA may apply to the victim of crime and any strengthening of the law in this area is to be welcomed.

Excepted Agreements

Unite notes the proposal in section 202A which would not void an NDA in certain agreements when particular conditions are met. Unite has experience of members who wish to take account of particular circumstances by agreeing an NDA, which should include mutual obligations between the parties. It is often the case that NDAs and similar clauses are drafted so that they create obligations only for the worker, and this must stop. Currently, if a worker has a good adviser, this will usually be addressed, but the assumption going forward must be that any terms agreed between the parties by way of an “excepted agreement” is a mutually binding arrangement, covered by necessary protections to be included in legislation. As indicated above, many workers are impacted deeply by what they experience in the workplace, and they are prepared to ask for confidentiality to protect their own privacy, and to secure absolute closure as regards the issue under review. Many workers have long term health and psychological problems caused by workplace harassment, and as part of the recovery process, some workers will want relevant terms to be agreed, for example, to protect their identity and as regards benefits they may receive under the terms of an agreement. Legislation should though ensure that the victim is protected, whilst at the same time, serious improper conduct is not concealed causing risk to others and preventing accountability.

Other considerations

Unite believes that control of NDA activity in the context of harassment and discrimination will improve behaviour in the workplace and will ensure that victims are able to tell their story and to report serious misconduct, which will assist them as individuals, and may likely protect others. Those responsible will not be hidden from view, and employers should use this change, in part to improve behaviour in the workplace. Unite and other unions have a strong record of standing up for equality in the workplace, and standards of behaviour have always been better in trade union organised workplaces. Other Government legislation is also seeking to improve workplace behaviour, for example, in addressing all of the reasonable steps required to prevent sexual harassment. Unite also welcomes the additional rights arising in relation to union access to workplaces and through the recognition of workplace equality representatives. Unite's view is that the NDA control will be a positive matter, supported by unions and all of those seeking to eradicate workplace harassment.

Unite considers that steps can also be taken to address particular issues, noting the comments above about the use of highly legalistic Settlement Agreements. The use of plain English terms so that everyone can understand what is being agreed is important, and the significance of only limited excepted agreements will also be important. Whenever obligations are agreed, they must apply mutually between both parties.

Chapter 2: Excepted Agreements and their use

Unite believes that any measure which allows what would otherwise be a void NDA to be used, must engage specific conditions. Such agreements must always be driven by the wishes of the victim, taking into account factors such as those outlined above. Unite accepts that some workers will want to maintain confidentiality, but any applicable conditions or a Code of Practice should be framed to ensure that those responsible are still held to account, and that this does not become a reason why serious misconduct remains secret. For instance, an excepted agreement should not prevent a worker from giving evidence in the future at another worker's Employment Tribunal hearing, should they wish to do so, and should their evidence be relevant. For example, it might be that the same individual has had further complaints raised about them, and the excepted agreement should not operate as a means of avoiding the disclosure of any information about past behaviour.

It is already the case that Unite has in place arrangements for members to receive legal advice from solicitors who specialise in relation to cases involving Settlement Agreements and COT3s. Ensuring the provision of independent advice, particularly for excepted agreements, is crucial going forward. It is important to bear in mind that often agreements are concluded with a tight timescale, and a worker should not be made to feel under pressure and to be faced with a very difficult choice, namely agree the NDA

based excepted agreement or no deal. That would be a stressful and unsatisfactory outcome for the worker, remembering the social policy issues under review, it will assist if all of those involved know that the assumption is that without an acceptable provision between the parties, any NDA will be void as the default position.

Unite understands that using alternative dispute resolution to resolve employment disputes has a value, noting that there are very significant delays in dealing with the Employment Tribunal. Unite officers and our appointed solicitors understand that the many cases achieving the right deal is an effective way of resolving a dispute. What is apparent from the consultation is that this process should not ignore the need for transparency as regards serious misconduct which may have led to the dispute arising. It is of note that although completing a COT3 engages the services of ACAS, there is no comparable provision for a COT3 to the position with a Settlement Agreement, which already requires the provision of independent legal advice. Ensuring that COT3s adhere to the new rules will be important in practice, understanding the need to maintain levels of protection if a COT3 includes any provision which seeks to except the agreement from the new default position. Unite recognises and agrees with the proposals in relation to independent advice, and it will be a matter for ACAS to determine if an ACAS conciliator is to take on a comparable role to comply with the equivalent of the duties under section 203 of the Employment Rights Act 1996. It is correct to record that in the majority of cases, the cost of providing legal advice under a Settlement Agreement is met to a certain level by employers.

Questions

Question 1. Do you agree it should be a condition that the worker has received independent advice on the terms and effect, and the legal limitations of a proposed excepted agreement, before entering into the agreement?

Answer: Yes

Section 203(3) confirms the obligation for independent legal advice when a Settlement Agreement has completed. This should already address matters such as an NDA, and as explained above, provision would need to be addressed when a COT3 is being completed, and an individual worker does not have a lawyer already acting on their behalf.

Question 2. Do you agree that independent advice must be given in writing?

Answer: Yes

As explained above, Settlement Agreements tend to be lengthy and complex legal documents, and rights and obligations arising between the parties are best addressed in writing, and this does not prevent a discussion between the worker and an adviser for a greater understanding of the agreement terms.

Question 3. Do you agree that employers should not have to cover the cost of independent advice?

Answer: No

If this was confirmed as an obligation, it would formalise what already happens in practice in the vast majority of cases. There are though occasions when an individual does not receive assistance, and this can apply pressure on the worker. Unite has come across cases when an employer prescribes the identity of the adviser they will fund, and freedom of choice in this regard is important as a matter of credibility and independence. Agreement of a reasonable fee already happens in practice without significant dispute.

Question 4. For private settlement agreements, do you have any concerns about requiring the worker to receive independent written advice on the terms and effect, and legal limitations of the NDA?

Answer: No

See above as regards the importance of this matter.

Question 5. For ACAS facilitated COT3 agreements, do you have any concerns about requiring the worker to have received independent advice in writing on the terms and effect, and legal limitations of the NDA?

Answer: No

Question 6. Should ACAS conciliators be included as relevant independent advisers?

Answer: No

At present, an ACAS conciliator is not identified as acting on behalf of one of the parties, instead they liaise between the parties and explain what is being proposed. If an adviser was required, such as in section 203 (see above), it would be difficult for an ACAS conciliator to fulfil this role, as they might be seen to have moved from being independent to both parties, to a role focusing upon the worker only. Whilst ACAS will have their own views upon this, Unite considers that a truly independent adviser would be the preferred option for this system to have credibility.

Question 7. Should an independent adviser be required to provide other advice in writing, in addition to those proposed?

Answer: Yes

It is likely that the worker will have other issues to address linked to the terms of a Settlement Agreement, and providing a full understanding of the terms is reasonable and fair. An NDA is always likely to include some technical text which needs to be explained clearly.

Worker Preference in writing for an Excepted Agreement, following the receipt of independent advice.

Question 8. Do you agree that it should be a condition in the regulations that the worker has expressed their preference for an excepted agreement in writing following the receipt of independent advice?

Answer: Yes

Whilst the whole process around excepted agreements involves some risk, at least by having a statement in writing will be a formal way of recording the independent advice received.

Question 9. Do you agree that the regulations should not prescribe the form and style of the worker's preference?

Answer: No

As the statement of preference is going to be important, it will be easier to prescribe text rather than inevitably allow for this to be drafted on behalf of the employer alongside the draft Settlement Agreement. It will then be a matter for the individual to take advice on the issue and on the completion of the expression of preference document.

Question 10. Should an employer be able to suggest confidentiality to their workers?

Answer: No

If this is allowed, it is inevitable that draft agreements will be prepared to include the NDA in most circumstances, and this will apply pressure to the individual, possibly continuing with the secrecy around workplace discrimination and harassment, as employees may feel compelled to agree to the NDA, as having the term in the agreement might be seen as normal. If there is any view that it should be allowed, it would be preferable for this to be outside of the agreement and perhaps could only be suggested if the proposal was communicated through a workplace union representative who would understand the interests of the worker and be able to assist in the provision of the advice, as well as explaining how the matter should be reviewed with the independent adviser.

Question 11. For private settlement agreements, do you have any concerns about requiring a worker to express their preference in writing to enter into the agreement?

Answer: No

It will be a matter for a worker to discuss with the independent adviser and to comply with the process.

Question 12. For ACAS facilitated COT3 agreements, do you have any concerns about requiring a worker to express their preference in writing to enter into the agreement?

Answer: No

As above, it should be part of the process, providing that completion of COT3 agreements is brought in line with Settlement Agreements.

Cooling-Off Period for Excepted Agreements

Question 13. Do you agree that an excepted agreement should be required to include a cooling-off period?

Answer: Yes

As referred to above, often Settlement Agreements are associated with urgency, and it is not uncommon for workers to be seeking independent advice on the very same day that they are expected to sign off a Settlement Agreement which might include complex terms. The social policy behind the new legislation is to take away secrecy from these workplace situations, and allowing a worker to have time to think about what is being agreed is important. Cooling off periods are commonly used in other types of contract when an individual is committing to a formal legal obligation, including in non-workplace situations, e.g. when considering consumer rights.

Question 14. Do you agree that 14 days is a sufficient length of time for a cooling-off period?

Answer: Yes

This does seem to be a reasonable period of time, allowing a person to withdraw from an agreement or particular terms in the agreement, without a penalty.

Question 15. If no to Q14, what length of cooling-off period would you consider appropriate?

N/A

Question 16. Should any required cooling-off period only apply to the confidentiality clauses within an excepted agreement?

Answer: No

As indicated above, Settlement Agreements are usually detailed and comprehensive documents covering possibly more than one dispute, and providing for payment of existing contractual benefits, and possibly compensation. It would be difficult to manage both decision-making and the provision of independent advice if a cooling-off period covered only one aspect of the negotiations.

Question 17. Should workers be allowed flexibility to waive the cooling-off period?

Answer: No

Workers would inevitably be subject to pressure to get a case finished and to either reduce or waive the cooling-off period entirely. The whole point of a cooling-off period is to allow proper time for reflection. Unite envisages that in practice, this may become difficult if there are time constraints, for example, pre-hearing negotiations if a case is to be settled before an Employment Tribunal hearing takes place. The fact of having the cooling-off period should encourage parties to seek to resolve matters in good time, providing for cooling-off periods to satisfy the legislation, noting that this would only be applicable for completion of excepted agreements.

Question 18. Do you have any concerns about requiring a cooling-off period for private settlement agreements?

Answer: Yes

As indicated above, there may be issues depending upon the timing of the negotiations and other processes such as relating to an Employment Tribunal. Both parties may seek the benefit of a conclusion which will provide certainty and will reduce costs. There may also be cases when terms are being agreed shortly before the expiry of a limitation period, but the starting point should be that parties understand why there is a cooling-off period and the duration of the period. It is about protecting the interests of the worker being required to sign an agreement which is departing from the new default provision.

Question 19. Do you have any concerns about requiring a cooling-off period in an ACAS facilitated COT3 agreement?

Answer: Yes

See above, Unite is aware of cases involving members who are at the Tribunal when an agreement is concluded and communicated to ACAS for completion. The starting point though is to rely upon the default position, rather than compromising on principle to assist with an excepted agreement which allows an otherwise void NDA to be included. The fact of urgency should not undermine the protections provided.

Question 20. Do you agree that there should not be a mandatory statutory review period before an excepted agreement is entered into?

Answer: No

As indicated above, the default position should be to void agreements which include NDAs in relation to relevant harassment or discrimination. Workers should be given a chance to understand what they are being asked to sign, and the Code of Practice dealing with private conversations already makes provision for time to be available. Unite would welcome the inclusion of a period of review, in addition to a cooling-off period after an initial decision has been made. Frequently, Settlement Agreements involve life-changing

and important decisions about employment and careers and providing an opportunity for reflection should not be seen as a burden.

Question 21. Should both a review and cooling-off period be conditions of an excepted agreement?

Answer: Yes

See above answers which provide important protections.

Written Copy and Plain Language

Question 22. Do you agree that a written copy of the excepted agreement should be provided to all parties to the agreement?

Answer: Yes

Many Settlement Agreements are now dealt with through email correspondence, and that is often more efficient. For legal certainty however, the parties should exchange a copy of a document which is signed on behalf of both parties and records what they have agreed, reflecting the formal legal nature of a Settlement Agreement.

Question 23. Do you agree it should be a requirement that an excepted agreement is made available to the parties in any accessible format they may need?

Answer: Yes

Disabled workers are entitled to be able to review and understand what they are being asked to agree in any appropriate format. Complying with this obligation would also satisfy more general obligations derived from the Equality Act, such as making reasonable adjustments.

Question 24. Should an excepted agreement be written in plain language?

Answer: Yes

As indicated above, Settlement Agreements are often difficult to understand, and as they contain formal obligations, they should be written to be understood by both the worker and their adviser.

Question 25. Should regulations require an excepted agreement to be in plain language?

Answer: Yes

Unite's view is that agreements should be drafted on a basis that they can be understood by workers. Whilst workers will receive advice about the terms, it would be the individual taking the agreement away and applying the text, for example, of an NDA or non-disparaging clause. Unite recognises that formal text will be required to prescribe what is being agreed in this regard, as all involved will value certainty. An agreement should not

be a basis for debate about what has been agreed, and achieving the balance between clarity and understanding is a necessary position for the Government to adopt. If in this regard there may be an ACAS Code of Practice, this could include guidance about how particular clauses can be prepared, particularly when looking at excepted agreements.

Question 26. Should guidance, rather than regulations, set out that an excepted agreement should be written in plain language?

Answer: Yes

See above as regards the importance of legal certainty and clarity and understanding.

Pre-Existing Incidents Only

Question 27. Do you agree it should be a condition that an excepted agreement can only be entered into where it would prevent a worker speaking out about an incident of relevant harassment or discrimination which has already taken place?

Answer: Yes

Settlement Agreements are often drafted to cover everything that has happened, and also anything that may happen in the future. It would be improper, bearing in mind the policy of the proposed legislation, to allow restriction about what might be disclosed about something that may happen in the future. This would almost anticipate further wrongdoing which could not be commented upon.

It is correct that some contracts of employment already make provision for an enduring obligation not to make any statement because of pre-event confidentiality clauses. Unite does not consider that such clauses are consistent with the new proposed policy, and they should be void and unenforceable.

Time Limits

Question 28. Should the confidentiality obligations relating to relevant harassment and discrimination in an excepted agreement be required to be time-limited?

Answer: Yes

Unite is concerned that an NDA without time limit would mean almost permanent secrecy as regards serious misconduct. Those responsible may be able to hide behind the secrecy if an accepted agreement is completed. This may impact upon other workers in a negative way and would be contrary to the policy behind this provision. The consultation paper provides examples of how this works in other jurisdictions, and if the focus is upon the worker, it should be a matter for the individual to decide if they would prefer there to be permanent confidentiality, or if they consider that their interests would be met by time limiting the particular clause or clauses.

Question 29. If a time-limit is required, should government stipulate a maximum time-limit?

Answer: No

See above, this should be a matter for the worker and in practice, it may end up being a matter for mutual negotiation.

Question 30. If yes, what should the maximum time-limit be?

N/A

Question 31. Are there any other conditions or safeguards that should be required for excepted agreements?

Answer: Yes

Unite has answered yes to this question, but it is a matter which would require consideration to reflect best practice. Unite encounters Settlement Agreements for members in usually unionised workplaces, when employment disputes have involved workplace representatives such as shop stewards. It means that for Unite, the union will already have a record of Settlement Agreements being completed, and it should not be necessary to require the parties to undertake substantial additional work associated with recording details of a Settlement Agreement, including an excepted agreement. Unite supports the safeguards outlined above, which include ensuring that there is independent advice and a cooling-off period for a worker to make such an important decision.

Chapter 3: Permitted Disclosures

It is common in a Settlement Agreement to make provision for disclosure of information to prescribed bodies, e.g. associated with protected disclosures and whistleblowing. There is usually some provision for disclosure of information to immediate family, but even this can on occasion cause disputes between the parties. Many employers insist upon a term which might make the worker responsible should one of those family members decide to breach confidentiality. It is also the case that advisers and medical staff may need to know about the agreement, e.g. GP, solicitor, and workplace union representative. When dealing with in-work disputes, sometimes terms will include changes to working arrangements which would need to be discussed with representatives and possibly managers who may need to impact the agreed terms.

Question 32. Do you agree a worker should be able to make disclosures to the individuals and bodies included in the proposal?

Answer: Yes

Unite agrees that disclosures to persons who have law enforcement functions should be permitted, noting as above, that protected disclosures need to be excluded, as is usually the case with a Settlement Agreement already. It may also be the case that some of the conduct under review involves criminal activity, and part of the policy is to ensure responsibility for actions, not to maintain secrecy.

There may also be the need for other reporting, e.g. to the Fair Work Agency and the EHRC. Workers should not be afraid to make disclosures, noting the wider social policy interests. As indicated above, it is important for a worker to be able to consult their union representative to assist in implementing an agreement and assisting in understanding what is agreed. Many workers will not know their independent advisers in advance, but they are likely to have known their shop stewards for many years.

Question 33. Are there any individuals or organisations not included in the proposal that you think a worker should be able to make a disclosure to?

Answer: Yes

As indicated above, there will be cases when workers need to consult medical advisers, including counsellors, as well as other recognised categories of person who will be offering support. This could include community leaders and particularly members of religious orders.

Question 34. Should individuals with excepted agreements be able to disclose to prospective employers?

Answer: Yes

This is sometimes difficult in practice, because workers may not want to tell prospective employers that they have left employment under a Settlement Agreement. It may though be important when explaining why they are on the job market, and a worker may want to explain what has happened, as it may be relevant to their proposed work role and the arrangements in work, including hours, shifts, and the like. They may be asking a prospective employer for additional assistance, with the final decision upon this matter being for the worker.

Question 35. Should individuals with excepted agreements be able to disclose to close family, as defined above?

Answer: Yes

Question 36. Should individuals with excepted agreements be able to disclose to any other individuals, for example wider family members, friends or anyone else?

Answer: Yes

Question 37. If yes to Q36, how would you define the wider group of individuals?

Answer: Yes

Currently, the prevalent use of NDAs is usually in a format which restricts disclosure, rather than providing additional support for a worker. The parties may need to agree how this would work in practice, for example, by naming those who will be offering support in the community, and it could include an entirely separate third party, such as a neighbour. It is difficult to generalise about what all workers would need, but this should be drafted from the perspective of the worker.

Chapter 4: Application to Other Individuals

Question 38. Should section 202A apply to individuals who work for someone other than their employer?

Answer: Yes

As time passes, working relationships become ever more complex, involving agency relationships, and engagement through separate personal service companies. When considering the protections arising under legislation, social policy dictates that it should be inclusive of workers in different relationships, rather than seeking to limit protection, which has been the case in the past, for example, on ordinary employment rights. There are also those who undertake activity in a work environment without a formal relationship who are deserving of protection, e.g. volunteers and interns. This policy is about improving workers' rights, not restricting them.

Question 39. If yes, what additional individuals should be covered?

Answer: Yes

See above, noting the vulnerability of some categories of worker, such as agency workers, and those with more technical work relationships such as those employed by umbrella companies.

Question 40. Should section 202A apply to individuals not covered by the usual definition of 'worker' in Section 230(3)?

Answer: Yes

Unite has noted the information provided in the consultation paper, pages 39 – 40, and Unite agrees with the list of categories of NHS workers, noting the reference to those engaged in work experience placement, nurses and midwives in training, and those described as NHS workers.

Question 41. If yes, what additional individuals should be covered?

See 38 above.

Question 42. Are there any specific groups of self-employed individuals that should be covered by section 202A?

Answer: Yes

As far as self-employment engages with workplaces and interaction with others, Unite considers that self-employed workers should have the benefit of the proposed new legislation.