



National Alliance to
End Sexual Violence

Position Statement: Non-disclosure Agreements & Workplace Harassment

August, 2018

The National Alliance to End Sexual Violence (NAESV) seeks to provide guidance regarding issues that arise with the use of non-disclosure agreements (NDAs) in employment contracts related to sexual harassment and other forms of workplace discrimination. As the #MeToo Movement has, through online participation, reached the communities that systems have historically failed to support, the surge in reports and public disclosures of sexual harassment that have captured national headlines have been both horrific and illuminating. Naturally, leaders at the local, state, and federal levels feel compelled to establish legislative remedies and are now grappling with how to appropriately respond to workplace harassment. As a starting point for thinking about legislation in this issue area, NAESV has prepared the following statement to explore how the use of non-disclosure agreements affects survivors/victims.

In our culture, one rooted in sexism and institutionalized inequality, no workplace can claim exception from gender-based discrimination or sexual harassment. This truth is exacerbated in workplaces with stark power imbalances between workers and employers and in industries with a high proportion of low-wage jobs such as food service, retail, hospitality, janitorial, and agriculture. Women, and particularly women of color and immigrant women, are overrepresented in low-wage jobs. Workers in these industries often experience a net of compounding factors, a net that when cast hinders employees from accessing legal protections, higher wages, fair and predictable schedules, health insurance, paid time off, and other critical supports that aid in the process of reporting abuses. As a result, workers in low-wage jobs are left more vulnerable to exploitation and sexual harassment without recourse or remedy. In FY16, nearly 30,000 harassment charges were filed with The U.S. Equal Employment Opportunity Commission (EEOC);¹ one-quarter of those alleging sexual harassment.² Of these, 83.4 percent of all sexual harassment charges were brought forward by women. This number does not begin to fully illustrate the scope of the problem as a recent survey revealed 81% of women and 43% of men experience some form of sexual harassment during their lifetime,³ the majority of whom do not

¹ U.S. Equal Employment Opportunity Commission, "All Charges Alleging Harassment (Charges filed with EEOC) FY 2010 – FY 2017" accessed August 7, 2018. https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm

² U.S. Equal Employment Opportunity Commission, "All Charges Alleging Harassment (Charges filed with EEOC) FY 2010 – FY 2017"

³ Stop Street Harassment, *The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Assault*, (Reston, VA: 2018), 7.

report.⁴ Furthermore, more than 1 in 3 women who filed charges alleging sexual harassment also alleged retaliation.⁵

Within this context, it is important to note one-third of all workplaces in the United States employ non-disclosure agreements.⁶ Many of these agreements are vague, potentially unenforceable, and have historically limited the rights of workers especially in sexual harassment cases. Conversely, some survivors find the option of an NDA an important protection for them, limiting the disclosure of information and protecting them in future employment prospects. **Policy-makers considering legislation related to NDAs will find their work in balancing the competing interests of increasing public safety and accountability while also authoring a pathway to preserving victim autonomy. Of primary importance, the needs of survivors must be centered in any approach aimed at addressing a hostile work environment.** With this in mind, this paper suggests some potential benefits, a number of pitfalls, and a path forward with regard to NDAs.

Potential benefits of NDAs for survivors:

- The use of non-disclosure agreements can work to ensure a victims' confidentiality and privacy around details of the harassment.
- NDAs can protect victims from experiencing retaliation as a result of reporting, including retaliation that would damage their professional reputations and future job prospects.
- Supporting the survivor's choice in opting into an NDA provides for self-determination and represents a trauma-informed approach.
- Survivors can use NDAs as useful leverage against their employer in settlement negotiations. Banning NDAs entirely could make employers less likely to settle claims of harassment, forcing victims to take up the difficult, expensive, and often time consuming task of pursuing legal claims in court in order to obtain any restitution.

Potential pitfalls of NDAs for survivors:

- Mandatory NDAs eliminate survivor choice, specifically taking away the option for those who may want to go public with their story.
- In many workplaces, it is common practice for workers to sign an NDA as a contingency of their employment. In this way, NDAs have the ability as a condition of hiring, promotion, compensation, benefits, and/or changes in employment status or contractual relationship, to preemptively quash a survivor's right to discuss any sexual harassment they may experience while working for the company.
- In recent years, NDAs have increased in breadth and scope. Even though employers are prohibited from preventing workers from discussing sexual harassment complaints as enumerated by the National Labor Relations Act (NLRA), these types of provisions still persist within the majority of employment contracts. Vague and broadly interpreted, many NDAs

⁴ U.S. Equal Employment Opportunity Commission, "Select Task Force on the Study of Harassment in the Work Place" (2016), accessed August 13, 2018. https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf

⁵ Amanda Rossie et al. *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, (Washington, DC: 2018), 5 <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.

⁶ Randall S Thomas et al. "An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants," *Vanderbilt Law Review* 68, no. 1, (2015): https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2401781

actually violate existing federal labor laws. However, most workers are either unaware of their legal protections under the NLRA or simply comply with the provisions of their employment contract for fear of facing legal repercussions as a result of breaking their NDA.

- NDAs can restrict victims from talking to coworkers about their experience, coworkers who may have experienced similar harassment from the same perpetrator. Limiting the opportunities for victims to seek support not only serves to isolate them but also works to shield serial predators from accountability and effectively eliminates victims' ability to pursue a class certification against their employer.
- NDAs shield hostile company culture and allow harassment to persist in the work environment by preventing victims from sharing their experience of the administrative complaint process and/or relevant case outcome information that could potentially inform future process improvements.
- Cases of workplace sexual harassment are often settled through private arbitration. With NDAs in place, workers whose experience of the arbitration process is less than satisfying are left with no recourse, unable to file an official complaint with the EEOC as a result of having signed the NDA.

In an effort to mitigate the damage of the 'pitfalls' listed above, NAESV proposes that any policy for governing the use of non-disclosure agreements:

1. Restore power to survivors by prohibiting employers from requiring employees to sign:
 - a. NDAs as a condition of employment, compensation, benefits or change in employment status or contractual relationship.
 - b. NDAs as a prerequisite to reporting and/or investigating workplace harassment or discrimination,
 - c. NDAs that are a mandatory condition of settlement.
2. Require documentation and/or a finding when a survivor signs a NDA that they are doing so voluntarily with meaningful access to legal advice, not under duress or coercion.
3. Require employers to ensure confidentiality throughout the reporting and investigation process rather than compel employees to sign an NDA as a prerequisite to reporting and/or investigating.
4. Require that NDAs signed during separation or settlement agreements shall not restrict the individual who made the claim from:
 - a. Lodging a complaint of sexual harassment committed by any person with any local, state or federal agency;
 - b. Testifying or participating in any manner with an investigation related to a claim of sexual harassment conducted by any local, state or federal agency;
 - c. Complying with a valid request for discovery or testimony related to litigation alleging sexual harassment;
 - d. Exercising any right the individual may have pursuant to state or federal labor relations laws to engage in activities for the purposes of collective bargaining or mutual aid and protection;
 - e. Waiving any rights or claims that may arise after the date the settlement agreement is executed.
5. Address the enforceable scope of NDAs with unambiguous language regarding the consequences for employers who attempt to enact provisions of NDAs that are inconsistent with federal or state law and/or regulations.

6. Address a broader context for protection from unfair NDAs by using “workplace harassment and discrimination, which includes sexual harassment,” instead of “sexual harassment.”

Survivors need protections in the workplace beyond NDAs, and while these issues deserve their own discussion, it is essential to point out the importance of:

- Extending labor rights for contractors, subcontractors, and gig workers who are not fully protected under current federal laws and regulations.
- Ensuring that workers are aware of their right under Title VII and the National Labor Relations Act (NLRA) to share information related to workplace discrimination and sexual harassment and to file a complaint with the EEOC.
- Reducing the employer size threshold for harassment laws and other antidiscrimination laws to ensure that employees working for small businesses have a legal remedy if they experience harassment. Alaska, Colorado, District of Columbia, Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, and Wisconsin have laws like these already in place.⁷
- Addressing other abusive provisions within employment contracts that often accompany NDAs like non-disparagement clauses, non-compete clauses, and forced arbitration clauses.

In conclusion, policies addressing sexual violence in the workplace, especially non-disclosure agreements, must keep survivors’ needs at the center of the discussion. While it does not make sense to ban NDAs all together, it is important to limit their use to both protect survivors and the public. Survivors’ needs and choices matter.

The National Alliance to End Sexual Violence is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. For more information, please contact Ebony Tucker, Advocacy Director, at ebony@endsexualviolence.org.

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⁷ Maya Raghu et al. *#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability*, (Washington, DC: 2017), 2 <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf>.