



Make Work Pay: Non-disclosure agreements (NDAs)

The National Union of Journalists' response to the consultation on regulations to prevent the misuse of NDAs in cases of workplace harassment or discrimination



Introduction

1. The National Union of Journalists (NUJ) is the voice for journalism and journalists in the UK and Ireland. It was founded in 1907 and has more than 30,000 members working in broadcasting, newspapers, news agencies, magazines, book publishing, public relations, photography, videography and digital media. The NUJ is not affiliated to any political party.
2. We welcome the Government's consultation and the opportunity to respond to the measures introduced in the Employment Rights Act 2025 to tackle the misuse of non-disclosure agreements (NDAs). We strongly condemn the misuse of Non-Disclosure Agreements (NDAs), often referred to as "gagging clauses," especially when used by media employers and institutions to cover up misconduct, harassment, or discrimination. The union actively campaigns against their use to silence members.
3. NDAs should never be used to prevent whistleblowing, reporting crimes, or disclosing matters that are clearly in the public interest.

Chapter 2: Conditions for an Excepted Agreement

In-line with the Trades Union Congress (TUC) we also believe that measures related to excepted agreement should ensure confidentiality clauses in settlement agreements are only used in an appropriate, clear and ethical manner. They should protect the right of the individual to freely enter into confidentiality obligations. Workers should fully understand the implications of doing so, by receiving appropriate independent advice to inform their choice.

Independent Advice

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

Independent advice should continue in accordance with S.203 (3) of the Employment Rights Act 1996, which means an individual must have received advice on the terms and effect of the agreement from an independent adviser and specifically its impact on their ability to pursue rights at an Employment Tribunal.

Any advice should explicitly set out permissible disclosures under the regulations, clarifying who a worker can disclose information to without breaching their NDA this should include non-derogatory statements clause which are often used alongside confidentiality clauses preventing a worker from speaking out.

They should not include warranties, indemnities and clause back clauses in a way which is designed to improperly prevent or inhibit permitted report or disclosures, i.e. asking a person to warrant that they are not aware of any reason why they would make a permitted disclosure triggering a clawback clause.

Short form COT3 agreements where they include NDAs/confidentiality clauses and non-derogatory statements clauses should require independent advice on permissible disclosures.

We agree with the proposal in the consultation of who should be regarded as an adviser.

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

Answer: Yes

It is standard practice in the NUJ to provide oral advice followed by written advice; this enables members to refer back to what they have been told and understand the implications of the Agreement before signing.

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

Answer: No

Employers should fund independent advice. Currently some employers make a small 'contribution' to legal fees, unions often are left to absorb the additional costs in providing

advice, so that this additional cost does not fall to the member, who is often in a situation where their employment is being terminated and they are in financial difficulties. In some cases, employers refuse to make any financial contribution, whilst others despite being informed of increased legal costs, ignore it. One employer paid £50 per agreement towards legal fees, if the union had not stepped in, the shortfall would have needed to be met by the worker.

We would therefore agree with the TUC and recommend that employers should be required to fund the independent advice. This is in line with equivalent legislation in Ireland where employers are expected to cover the “reasonable legal costs and expenses of the legal practitioner who provides the legal advice”.¹

Further some employers have sought to impose a restriction on who the worker can seek advice from, even if an employer funds a settlement agreement, a worker must have freedom of choice over which adviser to use.

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

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

We agree with the TUC that all independent advisers should be required to meet the criteria set out in S203, paragraphs 3A and 3B.

Conciliators act for both parties to the dispute to seek a resolution. Advice must therefore be independent of the employer.

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

Answer: Yes, in part

Information on where the worker can seek additional support e.g., trade unions or Acas helpline.

This should not become too onerous on the adviser in that it should not be incumbent on the adviser to provide ‘all’ sources of help and support.

¹ <https://www.irishstatutebook.ie/eli/2024/act/37/enacted/en/pdf>

Worker Preference for an Excepted Agreement

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

However, and in-line with the TUC's response, concern would still remain that employers would pressure a worker into expressing their preference for an excepted agreement. But this does provide an additional step to show that the worker has had time to consider the written, independent advice and has made an informed decision to proceed with an excepted agreement.

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

Answer: No

We would advocate for standardised wording, which would remove ambiguity and avoid disagreement later in the process. This could be appended to the Agreement much like an Adviser's Certificate would be.

In agreement with the TUC, the NUJ believes that the template wording should be provided in the statutory code of practice.

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

Answer: No

Whilst we appreciate that the inability to suggest confidentiality clauses could disincentivise employers from entering into Agreements, on balance, agreements are largely drafted by the employer and for the most part for the benefit of the employer, continuing to have the employer make the decision on the inclusion of confidentiality does little to shift the imbalance of power or the regular inclusion of NDAs within Agreements.²

It can be done; we are recognised at a particularly large employer who have for some years removed the requirement for confidentiality clauses within Settlement Agreements and COT3 Agreements.

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

No, whilst it may not remove pressure by the employer entirely, where the employer is aware the worker must express their preference in writing to enter into an excepted agreement and had the benefit of written advice from an independent adviser, in making an informed decision to enter into the agreement as an additional protection for a worker.

² <https://committees.parliament.uk/writtenevidence/88330/pdf/>

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

No, as above question 11 – but note early comments on ACAS conciliators as independent advisers.

Cooling Off Period

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

Answer: Yes

Employer's often set arbitrary deadlines to sign Agreements. A window for the worker to reflect should be introduced.

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

Answer: Yes

We agree with the TUC - this appears reasonable and in accordance with similar international legislation and consumer protections. Save in circumstances that would be an exception to the cooling off period for example an impending hearing date which is due to take place within less than a 14-day timeframe.

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

This would add a layer of complexity and an opportunity for dispute. It would also be difficult to operate in practice.

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

Answer: No

Save for circumstances as set out in 14, a waiver should not apply to a cooling off period this would protect the worker from pressure from the employer waive the protection to reflect before signing.

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

Answer: No

Again, we would expect a cooling off period save certain for exceptions as outlined at question 14 connected to claims. We agree with the TUC that in such circumstances, delaying implementation of the agreement could create unnecessary costs and uncertainty for both parties. It would be unclear to both parties whether the tribunal needed to proceed or not.

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

Same as above.

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

Answer: No

We agree with TUC there should be a statutory review period, to enable the worker a period to consider the terms before signing an excepted agreement. The TUC believes there should be a statutory review period. This would prevent employers rushing workers into signing an NDA.

As well a consultation with unions before determining the appropriate length for the statutory review period.

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

Answer: Yes.

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

Workers have reported that they have not been permitted to retain a copy of the Agreement they have signed, employers later producing a copy as evidence of a breach in an NDA. All parties to the Agreement should be provided with a copy of the fully executed document.

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

Disability is a significant factor in many workplace harassment cases. The TUC polling found that seven out of 10 (68 per cent) disabled women had experienced sexual harassment in the workplace, higher than women in general³

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

Answer: Yes

³ <https://www.tuc.org.uk/research-analysis/reports/sexual-harassment-disabled-women-workplace/>
<https://www.nuj.org.uk/resource/tuc-report-finds-seven-in-10-disabled-women-say-they-have-been-sexually-harassed-at-work.html/>

Yes, plain language is vital, this will ensure that workers understand what they are agreeing to and standard use of plain language should be encouraged. However, we do not believe this should form part of the regulatory requirements. See response to question 25 below.

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

Answer: No

Regulatory requirements could result in unintended consequences requiring the Tribunal or other court to interpret, leading to an increase in cases.

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

Answer: Yes

We agree with the TUC that Acas should update its statutory code of practice to provide guidance for all parties about best practice NDAs/excepted agreements. This should include guidance on how to ensure agreements are written in plain language and providing examples.

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

Agreements and in particular confidentiality clauses often include the words 'or in the future' in reference to potential claims, NDAs should only relate to the incident of harassment or discrimination that has taken place. This would enable further acts of discrimination with impunity and requires the worker to predict future acts of harassment or discrimination.

We would agree that pre-event NDAs for example should be banned.

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, the worker should choose if they can be time limited

NDAs should not be in perpetuity.

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

Answer: No

It should be open to a worker to choose a time limit.

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?

In agreement with the TUC, we would also agree:

- code of practice and guidance (produced by the Equality and Human Rights Commission and/or ACAS).
- Enforcement measures to include uplifts to tribunal awards where an employer has failed to follow the statutory code of practice and/or has failed to include a clarifying statement on the front of the agreement, with additional penalties for repeat infringements.
- A requirement for the reciprocity of confidentiality obligations in NDAs. Where an individual accepts confidentiality restrictions, reciprocal obligations on the employer

Chapter 3: Permitted Disclosures

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

Answer: Yes

We Agree with the TUC

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

- Mental health and trauma specialists not covered by ‘regulated professions’.
- Community or religious leaders where these form part of a worker’s established support network.

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

Answer: Yes

Whilst many workers may choose not to disclose to a prospective employer they should be given the choice.

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

We would define a wider group as ‘wider family members, friend circle, partner or other trusted person(s) as identified by 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

Section 202A should also apply to the self-employed, those who work under tripartite employment relationships, such as agency workers, and unpaid workers such as interns, volunteers, work experience.

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

Answer: Yes

Agree with the TUC - Agency workers and workers on secondment should also be covered by the Regulations.

In addition, platform workers, workers employed by umbrella companies and other labour market intermediaries should also be covered by the Regulations.

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

Answer: Yes

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

Interns, people on work trials, work experience, training placements and volunteers.

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

Answer: Yes

Protections should cover all self-employed workers.