Solicitors Regulation Authority

Thematic Review: The use of Non Disclosure Agreements in workplace complaints

14 August 2023

Executive summary

In the vast majority of cases, non-disclosure agreements (NDAs) provide a legitimate legal means for protecting the interests of a business or individual. They can restrict the disclosure of specific sensitive, commercial or confidential information. When used properly, such agreements can operate to the mutual benefit of both parties. While these agreements can be standalone, they are commonly put in place as part of the settlement of employment, commercial or other disputes.

One specific area where there has been significant public concern in recent years is over the use of NDAs between employers and employees where there has been a complaint raised by either party about inappropriate behaviour.

High-profile investigations involving allegations of sexual harassment in the workplace and the #MeToo movement have firmly put the use of NDAs in the spotlight. This scrutiny was triggered in large part by the NDA between Harvey Weinstein and his former employee, Zelda Perkins, which she exposed in 2017.

Evidence [http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/oral/80945.html] provided by Ms Perkins to the Women and Equalities Committee (WEC) raised widespread concerns that NDAs were being used improperly to prevent employees reporting unacceptable conduct, such as allegations of sexual harassment. This in turn raised concerns about the role of solicitors and law firms involved in the drafting of such agreements.

We issued a warning notice to the profession on the use of NDAs in March 2018. As a result of this, we saw a rise in reports about the improper use of NDA clauses in settlement agreements. Reports frequently arose in the context of employment, commercial or consumer disputes and surrounded concerns such as sexual misconduct, discrimination and criminality.

In light of these reports and the introduction of our new Standards and Regulations, we published an update to our warning notice [https://contact.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/] in November 2020.

The term NDA in both this report and our warning notice covers any form of agreement, or terms within an agreement, under which it is agreed information will be kept confidential. The relevant terms include

confidentiality clauses, warranties, indemnities, clawbacks, and other clauses used in a way to prevent disclosures.

We wanted to understand how NDAs are used in an employment context and any measures solicitors have taken to make sure they do not stray into inappropriate areas. This specifically related to what we said to firms in our warning notice.

We also wanted to find out how firms use NDAs when responding to issues raised by employees, as well when advising and representing clients. Answers to these questions will help us better understand whether or not NDAs are being used to conceal serious allegations and prevent employees from speaking up.

Our warning notice

Our warning notice recognises the legitimate place NDAs have in agreements to protect commercial interests, reputation, and confidentiality. However, it highlights our concerns and expectations not only about the terms of agreements, but also the conduct of individuals advising on and negotiating NDAs.

The notice confirms that if your client's instructions are inconsistent with our requirements, you will need to consider whether you can continue to act for them.

We consider that an NDA would be used improperly if it prevents, impedes or deters someone from:

- co-operating with a criminal investigation or prosecution
- reporting an offence to a law enforcement agency
- reporting misconduct, or a serious breach of our regulatory requirements to us, or making an equivalent report to any other body responsible for supervising or regulating the matters in question
- making a protected disclosure under the Public Interest Disclosure Act 1998.

We would also consider an NDA is improper if it is used to:

- influence the substance of such a report, disclosure, or co-operation
- prevent any disclosure required by law
- prevent proper disclosure about the agreement or circumstances surrounding it to professional advisers, including medical professionals and counsellors, who are bound by a duty of confidentiality.

You should also make sure that NDAs do not include unenforceable clauses and that warranties, indemnities and clawback clauses are not used to prevent or inhibit permitted reporting or disclosure.

Our expectations include ethical considerations, such as ensuring you do not take unfair advantage of an opposing party or apply undue pressure such as artificial time limits. Your obligations will be heightened where a party is vulnerable or unrepresented.

What we did

Our review examined how firms negotiated and drafted settlement agreements and managed internal complaints about inappropriate behaviour. We did this by focusing on:

- measures taken to comply with our warning notice and their effectiveness
- whether the drafting and handling of agreements complied with our warning notice
- awareness and compliance with regulatory and reporting obligations
- the use of NDAs following complaints about unacceptable behaviour in the workplace.

To do this we:

- surveyed 150 firms who provide employment services. This included 59 large or very large firms, 42 medium firms and 49 small firms
- based on information from our survey, conducted on-site visits to a representative sample of 25 firms, which involved in-depth interviews and file reviews
- reviewed internal investigations conducted by 13 of the firms we visited
- interviewed the stakeholders the Advisory, Conciliation and Arbitration Service [https://www.acas.org.uk/non-disclosure-agreements] (Acas), the Junior Lawyer Division, and the whistleblowing charity, Protect [https://protect-advice.org.uk/] .

Our visited sample included:

- four very large firms (250 + fee-earners), seven large firms (50 – 249 fee-earners), six medium firms (10 - 50 fee-earners), eight small firms (nine or fewer fee-earners)
- eight employment specialist firms
- eighteen firms providing employment services to both employer and employee clients
- five firms proving services to employer clients only
- two firms providing services only to employee clients.

Key findings

We generally found that most NDAs, whether drafted on behalf of clients or entered into by law firms with their employees, complied with the requirements of our warning notice.

While we found no direct evidence of solicitors drafting NDAs with the deliberate intention of preventing reporting of inappropriate behaviour, we did find a number of common trends or practices which inadvertently might contribute to this happening.

Around two-thirds (64%) of fee-earners we spoke to were aware of our warning notice on the use of NDAs, although knowledge on the issues it covered were fairly low, and we found little evidence of ongoing NDA-specific training within the firms we visited.

Even among those who were aware of the notice, we found low levels of knowledge on the content and issues it raised. For example, we saw inaccurate assumptions that the notice did not apply if:

- all parties to the NDA were legally represented
- the agreement was not a standalone or standard NDA
  the NDAs involved individuals rather than companies.

Among the firms we visited:

- only a quarter (6/25) had ever questioned a client on whether inclusion of an NDA was appropriate when asked to prepare one
- the vast majority (84% 21/25) used templates to draft NDAs
- only 12% (3/25) provided specific training on NDAs.

Drafting NDAs

Overall we found a fundamental imbalance of power in how NDAs are drafted. Employers will generally dictate the terms of any agreement, sometimes before or without an employee engaging legal advice of their own.

Firms also tend to use their own standard templates, which often do not take account of the individual circumstances of a given case.

While we did not see any evidence of clauses intentionally suppressing reports of wrongdoing, in a minority of cases we identified issues that could result in inhibiting or deterring disclosure of information. NDAs should not prevent the reporting of information to bodies such as law enforcement agencies or regulators.

Issues we found included:

- agreements/templates which expressly omit permitted disclosures from draft and final documents
- restrictive non-derogatory clauses
- inappropriate clawback/penalty clauses.

Our evidence suggests that the risks posed by NDAs are routinely underestimated and rarely explored. Firms (and clients) instead focus far

more on the nature and extent of any possible financial settlement, rather than the specific clauses within any agreement.

Advice to an employee when signing an NDA

We found employers set short time limits, typically seven days, for an employee to sign an agreement and that there was a general sense of urgency permeating the negotiation process. This can further restrict the opportunity for the employee to obtain the required support and advice to make informed decisions. We have evidence of one agreement being drafted and finalised in one day.

We saw a significant difference in the legal support available to employer and employees. Contributing factors to this included:

- employees were unable/unwilling to pay for appropriate legal advice
- discretionary levels of financial assistance provided by employers were often minimal
- in most cases documents were rarely amended and/or negotiated from the employee side.

Despite some employers making discretionary cost contributions to help their employees access legal advice, the amount offered (usually £250 to £750) was still only likely to cover limited legal support – most likely just covering signing off of an agreement or considering minimal amendments.

This was reflected in the files we reviewed - there was limited evidence that employee clients had received clear advice verbally or in writing about the NDA. Our warning notice points out that confirming advice in writing is good practice. It provides clarity and certainty and may help to resolve any issues that arise at a later date, including about your role advising on the NDA.

Controls and competence

Generally, we found that while firms provided their fee earners and wider staff with general training on employment law, there was little or no specific training on NDAs, and in particular how such agreements might impact potential reports of misconduct. We would have expected both solicitors and HR professionals whose role involves preparing such agreements to have received appropriate training in this area.

Two-thirds of the fee-earners we spoke to were aware of our warning notice which covers such issues, but this meant a third were not.

Firms frequently display an over-reliance on largely unamended NDA templates. While templates can be useful, firms should take care to make sure terms are up to date, appropriate, reflect the circumstances and protect their client.

With firms so reliant on templated approaches we are concerned that might may leave a knowledge gap in terms of issues not covered within standard forms and guidance and a level of complacency about the risks.

- Employees involved with NDAs can often be in vulnerable positions. But just 28% (7/25) firms in our sample said they provided training for fee-earners on vulnerability.
- Few firms had specific measures such as detailed training, policies, and controls around NDAs to maintain compliance with our warning notice.
- Many firms consider NDAs to be low risk, standard clauses and their approach, policies and controls reflected this.

Reporting concerns

We surveyed our initial sample of 150 employment firms (pre-visit) and asked whether they had ever raised concerns with another firm about an unethical or unenforceable clause in an agreement with an NDA.

Less than 10% (14 firms) reported having done so:

- nine firms raised concerns about a clawback clause
- seven firms raised concerns that clauses deterred reports to a regulatory body
- four firms raised concerns about deterring a report to law enforcement
- two firms raised concerns about undue pressure on clients. However, just three of these firms reported their concerns to us.

Reporting concerns is key to maintaining public trust in the profession. Solicitors and firms should report any serious concerns so that they can be investigated. Of the firms we visited:

- Only 28% (7/25) firms thought that our reporting obligations were relevant regulatory knowledge for fee-earners dealing with NDAs.
- Just one firm reported their concerns about a draft agreement on behalf of a client. However, many firms said they raised issues directly with the firm concerned which resolved the matter.

Managing complaints from their own staff

We also reviewed how firms used NDAs to resolve internal employment disputes within their own organisations. We were particularly interested about complaints and NDAs which stemmed from allegations of inappropriate behaviour in the workplace.

Fourteen out of 25 firms in our sample reported receiving one or more such complaint during the last five-year period. All 14 firms had more than 15 employees and included large multinational and international firms.

Some employees had raised multiple complaints and the combined total amounted to 112 complaints.

Of the 112 complaints received by firms:

- 47 resulted in settlement agreements that contained NDAs
- 18 complaints had been fully or in part upheld
- 3 complaints resulted in disciplinary action
- 10 complaints were reported to us after they were upheld by the firm.

During visits, we noted that NDAs we saw were most commonly entered into by employees who had been the subject of a complaint.

Some firms also told us that they would never enter into an NDA with an employee because they felt it would have an impact on their culture.

It is important that as employers, law firms consider what mechanisms they have in place that could prevent matters progressing so far. For example making sure they have a robust complaint and disciplinary process, as this would:

- act as a deterrent to behaviours occurring in the first place that may lead to a complaint
- provide support to both complainants and subjects of a complaint
- help improve the fairness of the process
- help prevent the escalation of issues and the deterioration of relationships, to the point where an NDA may be necessary.

This would encourage a positive workplace culture and might help to reduce incidences of inappropriate behaviour.

Conclusion

NDAs were generally viewed by firms as low risk and fairly straightforward activity. This can lead to some complacency about the scope and relevance of NDAs and the need to tailor templates. This is potentially concerning in the context of bargaining power differences within the workplace. While confidentiality clauses may seem standard, often the individual circumstances are not. It is therefore important that:

- firms consider and review their use of templates regularly, including by considering them against the issues highlighted in our warning notice
- fee-earners are reminded that there is no such thing as a 'standard case' for the individual involved, and remain aware of the need to proactively consider whether an NDA is appropriate and if so, how this may need tailoring to the specific facts of the case or individual involved.

In drawing up NDAs firms are often under pressure to resolve matters quickly, especially from the perspective of the employer – however

solicitors, on both sides, have a responsibility to make sure the process is fair for all parties involved. Commercial imperatives and other pressures can lead to a risk that employees may at best feel pressured to sign an NDA without being as informed as they should be, and at worse may be taken unfair advantage of.

Law firms on both sides of an agreement must help tackle this by:

- taking active steps to support clients and help them make informed decisions
- being aware that the circumstances behind many NDAs can often mean clients and third parties involved are vulnerable, and this means they need to consider their own approaches to working with and supporting people in such circumstances
- considering the training offered to fee-earners to support vulnerable clients and the use of checklists, risk assessments or a red/amber/green system to highlight risks on specific files.

We are also concerned at the number of firms who admit to concerns about the behaviours of another firm in drawing up an NDA but have not gone on to report their concerns – including to us. We would remind firms and solicitors that their obligations in this area are not just to protect the specific client they are dealing with at the time, but also to report to us in order that we are able to action in the wider public interest.

Training on the warning notice, our reporting requirements and wider regulatory obligations could further support solicitors to uphold the trust the public have in the profession.

Next steps

Solicitors must acknowledge the ethical considerations that should be considered when advising clients on NDAs (regardless of which party they represent). This includes when using NDAs within their own practices.

Our Principles, Code and warning notice are clear. However, we will continue to raise awareness among the profession about their obligations, the warning notice and of the need to challenge - and report – unacceptable NDAs or behaviours.

It is not our role to stipulate the level of discretionary costs that employers should contribute for others to seek legal advice. However, what is clear is that solicitors acting for employees need to be explicit with clients about the extent of the advice they can provide where the budget is limited, and be satisfied that they are able to carry out their role to a competent standard in the time provided. This is particularly important as many employees will have limited influence, knowledge, and resources to challenge employers without support.

We plan therefore to undertake a programme of work on the back of our report to review our warning notice and reinforce those areas where we

have identified gaps in knowledge, and deliver webinars and publications to increase the level of knowledge amongst the profession.

We also propose a co-ordinated programme of public education across the legal regulators, using the Legal Choices website alongside other media, to make sure that employee and employer clients are better informed about their rights, the enforceability of key clauses and the obligations of the legal professionals advising them. Harmonised, cross-sector guidance for the professions and consistent enforcement action are also important tools that will allow legal regulators to create an environment where legal professionals can properly balance their professional obligations and behave in a way that upholds public trust and confidence in the legal sector.

Open all [#]

Glossary of terms

Settlement agreements

> In an employment context, settlement agreements are used to settle or resolve disputes between employers and employees (we use these terms rather than respondents and claimants for clarity when referring to our visit data). Agreements are often drafted and negotiated by employers directly with employees. To be legally binding, employees must have received independent advice about the terms and effect of the agreement.
>
> Agreements are also drafted by solicitors on behalf of employers. Typically, the employer offers consideration or compensation in return for the employee waiving employment claims. For example, arising from a complaint or termination of employment.

Acas COT3
: Acas produces a number of codes of practice, supplementary guides, and templates. A COT3 is a type of settlement agreement when negotiations have reached conciliation. They are a legally binding, enforceable agreement, but there is no statutory obligation for the employee to have received legal advice. A conciliator will agree the wording with the parties.

Non-disclosure agreements
: NDAs or confidentiality clauses are a common tool used by parties to protect commercially sensitive information. They are often included by employers in settlement agreements following a dispute with employees to mutually protect confidential information. This usually includes the circumstances that led to the agreement and the amount of compensation.

Exceptions (carve outs)
: There are standard exceptions to these confidentiality clauses, known as carve outs. They identify individuals and bodies the parties are permitted to disclose the information covered by the NDA to. For

example, where disclosures are required to seek professional or medical advice, to comply with a regulator, or by law, such as an order from a court.

Protected disclosures and whistleblowing

Permitted disclosures should also expressly include protected disclosures under the Public Interest Disclosure Act 1998 (PIDA) [https://www.legislation.gov.uk/ukpga/1998/23/contents] . This clarifies that employees cannot be prevented from reporting wrongdoing to certain bodies when it is in the public interest to do so, subject to the conditions set out under section 43A of the Employment Rights Act 1996.

A protected disclosure is engaged by concerns such as the commission of a crime or the breach of a legal obligation, risks to health and safety, illegal or unethical conduct in the workplace, and is in the public interest.

Whistleblowing [https://www.gov.uk/whistleblowing] refers to the disclosure of this wrongdoing by an employee or worker in the public interest. While we are not currently a prescribed person, our guidance also sets out that firms and solicitors have a duty to bring any risks to the public interest to our attention. Any NDA which attempts to prevent someone from making a qualifying disclosure (or whistleblowing report) would be unenforceable.

Drafting NDAs

Our expectations

Improperly using NDAs in settlement agreements may put you in breach of the standards under our Code of Conduct for Solicitors, RELs and RFLs [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] . In particular, you should not attempt to prevent anyone from providing information to us or any other body exercising regulatory, supervisory, investigatory or prosecutory functions in the public interest.

When drafting NDAs, the terms should be clear and relevant, and you should be clear what disclosures can be made and to whom. An NDA would be used improperly if it stipulated, or gave the impression that, it prevents, impedes, or deters, a person from:

- co-operating with a criminal investigation or prosecution
- reporting an offence to a law enforcement agency
- reporting misconduct, or a serious breach of regulatory requirements
- making a protected disclosure.

The general perception among firms was that any risks relating to NDAs inappropriately preventing disclosure were increasingly rare. For example, a firm said: 'There has been so much publicity about this area that the industry has taken steps to improve. The notorious [Harvey Weinstein]

NDA contained provisions that were unique and totally unusual in my 25 years of experience.'

What we found

Overall, we saw a good level of compliance with our warning notice in terms of drafting NDA clauses and proper exclusions to make sure appropriate disclosures could be made.

However, whilst we did not see any evidence of clauses expressly restricting disclosures, in a minority of cases we identified issues that could result in inhibiting or deterring disclosures that were permitted in our warning notice.

These issues are explored in the case studies below. Our concerns were heightened because of a lack of evidence in most cases that clear advice had been provided about what is or is not permitted in an NDA. This is discussed in more detail in our case studies, but in general we identified a degree of complacency around the potential risks of NDAs.

For example, in many interviews, solicitors told us that because NDA clauses are standard features in online precedents they are never actively considered. Many also relied on online precedents to keep up to date with regulatory risks. We also noted from our file reviews that in most cases, firms did not negotiate or tailor NDAs in draft agreements produced by other parties.

Our warning notice states that terms in agreements should be relevant and drafted clearly in plain English. However, we saw little evidence that NDAs are specifically tailored or considered on a case-by-case basis.

Negotiating the inclusion of NDAs

An NDA can be a valuable tool to protect commercial interests and sensitive information. However, firms often told us that NDAs are included as standard without consideration of the purpose for including such a clause. For example, a firm commented they were used even 'when not strictly necessary, where everyone knew the ongoing issue.'

As a matter of good practice, guidance from Acas advises that 'confidentiality clauses should only be used when necessary' and not 'as a matter of course' when drafting agreements. For example, by considering whether information is already public or would be kept confidential anyway.

Firms should discuss with clients whether an NDA is appropriate in all the circumstances. For example, depending on the profile of the parties, reputational consequences and the outcome desired by employers as well as employees.

A fee earner commented that the main challenge when providing advice on settlements is discussing whether the NDA is necessary. They said that ultimately NDAs are generic documents, and their advice focuses on limitations and enforceability.

Some firms told us that they do discuss whether an NDA is appropriate. Examples of these discussions gathered during interviews showed a thorough consideration of the issues covered by our warning notice.

Others frequently commented that no particular weight is given to NDAs at all. In fact, just six of the 25 fee earners we interviewed, reported ever questioning the need for a confidentiality clause during negotiations.

Have you ever questioned the inclusion of an NDA?	
Yes	19
No	6

The whistleblowing charity Protect, believes that too many NDAs are treated as a 'business as usual' clause in settlement agreements. They recommend that firms should always think carefully about them and ask whether they really need to be there.

Additionally, as agreements are frequently drafted and negotiated directly between employers and employees, some firms saw them as fait accompli by the time they were instructed. For example, a firm told us that they don't discuss whether an NDA is necessary because the employee has already made up their mind about the agreement, including the NDAs, by the time they are involved.

Another firm told us that challenging the inclusion of NDAs was not relevant because their client base were mainly employees: Some firms stressed that there can be issues with standard NDAs in the templates used by employers; however, they acknowledged negotiating this directly with them on behalf of employees can be challenging. Often this was because of differences in bargaining power and financial resources.

A firm said: 'it can be an issue if HR have long-standing precedents and clauses they normally use. HR departments tend to use the same agreement each time and fees given for the employee's costs are limited. The main issue is that [NDAs] tend to go too far and don't allow the employee to give a reason for termination. [Employees] don't have the costs to address every issue on an agreement. It's less of an issue where a solicitor is acting for the other party.'

Case study: attempting to prevent permitted disclosures

We visited a firm (Firm A) who had been approached by another firm (Firm B) acting on behalf of Firm A's former employee. The former employee alleged that a current employee of Firm A had subjected them to inappropriate behaviour during their employment.

Firm B offered to settle the dispute on behalf of their client and drafted a settlement agreement with an NDA. Firm B's agreement included a standard clause permitting disclosures to a regulator. However, Firm B included an annotation next to this clause implying it could be removed.

Firm A challenged Firm B's draft document. Firm B accepted this but stressed that their client was not seeking any disclosure to the regulator. Despite this, Firm A reported the allegations about their current employee to us.

All solicitors must comply with our Code of Conduct. This means you must tell us if something happens that could be a serious breach. This means self-reporting any matters that could affect your ability to meet your regulatory obligations. We are now investigating both the allegation against Firm A's employee and Firm B's actions.

Managing client instructions

One firm said: 'I was acting for an employee who was given a blanket NDA. I attached the warning notice and said that our client would not agree to it. But the employer would not agree to sign the agreement [without it] and the client said that they still wanted to go ahead. So, I said that I would make a note on the adviser's certificate.'

This raises a number of concerns for vulnerable employees. Clients or third-party employers who propose inappropriate clauses should be robustly challenged. If the client still wants to go ahead and you are worried that this may breach your obligations, you should discuss this with your COLP or contact our Ethics helpline. Recording your ethical considerations will help to explain and justify your decisions and actions.

Another firm told us that a fee earner changed a standard clause to include a warranty that complaints would not be made to the Legal Ombudsman. This was following instructions from an employer client and resulted in a complaint from the employee.

The firm told us that as a result they took active steps to make sure this would not happen again. This included updating drafting guidance, making sure that any template changes are agreed at board level, and providing further training on the warning notice.

Solicitors also need to consider any risks to the proper administration of justice and public trust in the provision of legal services. For example, whether any unenforceable or improper term risks taking unfair advantage of your client or others. Ultimately, if instructions are inconsistent with your obligations, you will need to consider whether you can continue to act for your client.

While an NDA can certainly be a valuable tool to protect sensitive information and help the parties to move on, there are circumstances where the use of NDAs should be considered more carefully.

Case study: Failure to consider all aspects of an employer's draft agreement

An employee had their employment terminated for poor performance. The employer negotiated and drafted a settlement agreement directly with the unrepresented employee.

The brief one-page agreement was attached to a letter which offered money in lieu of notice and a compensation payment. The agreement contained a confidentiality clause and a non- disparagement clause which only bound the employee, rather than both parties.

The agreement also set out permitted disclosure exceptions to their legal adviser, counsel, tax advisor and spouse or domestic partner. However, it said 'while you may discuss this letter with your immediate family and your professional advisors, you may not discuss it with anyone else.'

There was no offer of payment towards legal costs and no mention of any other permitted disclosures. For example, to a regulator or protected disclosures. The letter also advised that the offer 'remains open for seven days for acceptance.'

The employee sought legal advice, and this resulted in an increased financial offer and payment towards their legal costs from the employer. However, the agreement, confidentiality clause and non-derogatory clause remained unchanged. In particular, it failed to refer to the right to make a protected disclosure under PIDA or any other permitted disclosure referred to in our warning notice. For example, disclosures to professionals under a duty of confidentiality such as tax advisers.

When dealing with NDAs we expect you to be clear about what disclosures can be made. There is a risk that omitting this information could have given the impression that the employee was prevented from making a protected disclosure or a report to a regulator.

There was no evidence on file that the firm acting for the employee had discussed the scope or limitations of the clause with the client.

Using NDAs on a case-by-case basis with employees in firms

Seven firms indicated that they would not consider including an NDA in settlement agreements with their own employees. Some of these firms felt particularly strongly about this as a cultural concern.

For example, a firm told us they 'would never use an NDA in a settlement experience and never have over 32 years.' One firm said they thought it would have a negative impact on their culture and did not use them. This was because they were worried it would affect their employees willingness to raise concerns with them. They also believed that information in the settlement would 'be kept confidential anyway - without taking the next step.'

Similarly, another firm told us that 'culturally' NDAs are never considered as they are not 'interested in silencing people.' Other considerations about entering into an NDA with employees included whether an allegation would impact on the firm's credibility and business. For example, a firm said it 'depended on the nature and truth of the allegation.'

Two firms mentioned it was simply standard practice to preserve confidentiality and relied on online templates which include NDAs as standard. Firms tended to use the same templates for their own employees as they did with clients. Just one firm used their own precedent template without an NDA clause for their own employees. Nevertheless, we observed that all the final settlement agreements with their employees contained NDAs.

The whistleblowing charity Protect, believe that too many NDAs are treated as a 'business as usual' clause in settlement agreements. They recommend that firms should always think carefully about them and ask whether they really need to be there.

In most cases, NDAs are mutually acceptable and straightforward, and templates provide useful guidance and a helpful starting point for agreements. But solicitors must be aware of their regulatory obligations and make sure that an NDA is appropriate in the circumstances.

In the agreements we saw, NDAs were typically entered into with employees who had been the subject of complaints about inappropriate behaviour or poor performance. However, not all firms felt comfortable using an NDA following a workplace complaint.

Case study: Tailoring NDAs on a case-by-case basis

One example related to an agreement with an employee following an allegation of discrimination. The employee was briefly employed to carry out manual tasks and the settlement agreement contained a number of terms relating to access to confidential information that were clearly not relevant to the employee's role and circumstances.

Overall, the NDA was broad, and the language complex. The effect of these clauses together with other irrelevant clauses led to an overly complicated document that was difficult to comprehend for lay people.

Furthermore, there was no evidence on file of advice to the employee about the effects or limitations of the NDA. As a result, this could be anticipated to leave them unsure about what they could disclose to a new employer for example.

Managing risks in drafting NDAs

Quite reasonably, clients may prioritise achieving a fair financial outcome. However, solicitors drafting agreements should also make sure NDAs are

appropriate and other terms such as clawbacks are fair. When drafting agreements there are a number of risks that solicitors should consider on behalf of their clients.

Penalty and clawback clauses

Confidentiality clauses are not the only risk area when drafting settlement agreements. Our warning notice highlights that clawback clauses should not be used in a way that has the effect of preventing or inhibiting permitted disclosures. We saw two examples of potentially inappropriate punitive clauses in agreements.

A focus group of conciliators coordinated by Acas observed that NDAs are frequently coupled with a clause that seeks recovery of the settlement sum (or part of it) in the event of breach. The conciliators felt this effectively acts like a penalty clause and often gives rise to discussions around enforceability.

While the enforceability of a clause would be a matter for the courts, such clauses are often financially punitive and can cause significant anxiety. This may amount to an oppressive tactic. Our warning notice points out that including an oppressive or unenforceable clause could breach your obligation not to take unfair advantage of others.

Some firms also mentioned being concerned about the inclusion of clawback clauses that reserve the right to recover compensation payments 'immediately' as a debt in the event of a breach. They said that they advise this wording will be unenforceable and it should be a court matter. In most agreements we saw, such clauses limited repayment to the extent of any loss suffered by the employer.

In one file we reviewed, a clause referred to the whole termination payment being payable as a debt for a possible breach by the employee. It said, in the event the claimant breaches the agreement (which included non-disclosure clauses):

'The Claimant agrees to indemnify and keep indemnified the Respondent and any Associated Parties against all losses, costs, claims, demands, judgments, orders, liabilities, damages, expenses or costs sustained or incurred by the Respondent and any Associated Parties as a result and the Claimant will immediately repay to the Respondent the Notice Payment and the Settlement Payment in full under this Agreement; and/or the Notice Payment and the Settlement Payment will be recoverable by the Respondent from the Claimant as a debt, together with all costs (including legal fees on an indemnity basis) sustained or incurred by the Respondent in recovering such sums'

The fact that this clause does not appear to be limited to reasonable losses suggests that this may be an example of this concern. We were particularly concerned that this is a lengthy and legalistic clause and there

was no evidence of written advice to the employee client about its proportionality, enforceability, or effect.

Another firm commented that such clauses commonly arise as some employers use blanket terms in agreements. They said: 'most firms/companies just roll out standard settlement agreements and you see penalty clauses every so often in every other agreement. I will raise it with the other side unless the employee client says they don't care. But mostly employers say they want it to remain and if so, I have raised it as potentially unenforceable and will have a paper trail just in case.'

None of the 25 firms we visited had ever taken enforcement action in relation to breach of an NDA. However, such clauses have the potential to cause considerable concern to employees as well as inhibit reporting. Particularly if they include payment by the defaulting employee of all and any potential costs incurred by employers.

If you have concerns about terms, you should challenge other firms or employers by referring to our warning notice. You may also need to consider whether the matter should be reported to us as a potential breach of Standards and Regulations [https://contact.sra.org.uk/solicitors/standards-regulations/] .

Non-derogatory clauses

Many firms mentioned that claimants are often more concerned about non derogatory clauses than NDAs. We noted that in some cases these clauses were so broad they could have the effect of preventing proper disclosures.

One agreement we saw stated that: 'You are not to make any statement, written or oral, including social media, about any of the Released Parties or any of their products, services, employees, representatives, partners, directors, officers, shareholders, customers, or affiliates that disparages, that adversely affects or otherwise maligns the business or reputation of any of the Released Parties.'

The reference to an adverse effect is also arguably so wide and subjective it could cause confusion about what can be disclosed about an employer. Ultimately, this could have a deterrent effect, even where carve outs for disclosures are present in the NDA.

One firm challenged the use of a non-derogatory clause which included statements made prior to the NDA. The firm argued that this was too broad and advised their client that this was likely to be unenforceable. They advised the client not to challenge the clause because it might then be replaced with an enforceable alternative. Another firm successfully challenged the scope of a non-derogatory clause. Their client's new role required legitimate scrutiny and criticism of their previous employer. The firm successfully secured an exemption to allow appropriate criticism of the employer's business.

Protecting an organisations' reputation is a key driver for employers when settling workplace complaints. However, you must consider whether any non-derogatory clause may have the unintended consequence of prohibiting proper disclosures. You should also consider whether the inclusion of a clause is fair and consistent with obligations to maintain trust in the profession and act independently.

Controls and procedures: Templates

Most agreements settling an employment dispute are drafted by employers, or law firms on behalf of employers, using a template. Many firms used templates published by the same online legal subscription service and relied on the service to keep up with regulatory and legal updates.

Most agreements contained similar carve outs listing clear exceptions to the confidentiality provisions. Some firms suggested that this standardisation was due to a cultural shift over the last ten years and carve outs for permitted disclosures are now accepted practice.

The wide use of templates with NDAs also provided assurance that firms were complying with obligations and using standard clauses. For example, a large firm said: 'No [not including an NDA] never happens. All lawyers rely on the templates as it has guidance notes and this is a helpful standard, as a barometer of good practice.'

While templates can save time and are a good starting point, you must make sure that NDA clauses are appropriate in each case and tailored to the individual circumstances of each client.

We saw three templates, all at the same firm, which failed to include carve outs for protected disclosures, and disclosures to a regulator, or a law enforcement agency. They appeared to have been drafted between 2018 and 2019 and the firm explained that they were old templates.

The firm explained that most of their clients were employees. However, they did offer services to employers and confirmed they were not familiar with either our 2018 or 2020 warning notice.

We also reviewed a draft agreement for the firm's client dated March 2018, and the same omissions appeared.

They were aware of the principle to 'exclude reporting wrongdoing' and had updated their templates when they identified changes in agreements drafted by other firms. The firm also supplied a newer template dated '2019' which had an improved disclosure carve out.

However, as they were unaware of the full requirements of our warning notice, we could not be satisfied they understood their legal, ethical, and regulatory obligations in relation to NDAs.

Our concern was exacerbated by the firm's lack of controls to make sure templates were regularly reviewed and updated. We explained to the firm that they must make sure they keep up to date with regulatory changes and recommended they diarised reviews and recorded updates.

Many firms did not have systematic controls around managing and updating templates. Twenty-one firms supplied us with their templates for clients or that they used for their employees for us to review. Most were undated and did not record changes and updates.

When was the template updated?	
In the last 6 months	4
In the last 12 months	2
In the last 5 years	1
No version date	11
Do not use templates	4

In some cases, firms told us that this was because online templates are automatically generated and updated each time. For example, a large firm said: 'We use [an online legal service] and use their standard template and just take it on trust that [fee earners] always use the online version.'

Nevertheless, without proper review procedures and guidance, there is a risk that templates could be reused inappropriately as demonstrated in our next case study.

Case study: Failure to update templates and check agreements

A large firm had generally good systems and procedures around managing templates. They maintained a precedent bank and their templates had guidance drafting notes which included a note reminding fee earners to tailor each agreement. They also used templates from an online subscription service.

We reviewed a file in which the fee earner was asked by a partner to draft a settlement agreement for a client. The agreement related to allegations that client's employee had been involved in a serious criminal offence.

The NDA drafted by the fee-earner, prevented the employee from disclosing the agreement or its terms unless expressly authorised by the employer to do so. Exceptions included seeking legal advice, disclosure to authorities 'as required by law' and to a 'spouse/civil partner provided that [it] imposes…a like condition of confidentiality'.

However, there were no explicit provisions for disclosures to law enforcement agencies or regulatory bodies. This was particularly concerning given the nature of the allegation against the employee.

The fee earner explained that they had inadvertently used a historical template on an old file rather than an up-to-date template from the firm's

precedent bank. It was also noted that the agreement had been drafted and signed during the course of just one day. However, the agreement had been completed without identifying this issue.

It was also clear from our interview that the fee-earner did not know about the background to the allegations, whether law enforcement agencies were involved or had been informed.

Given the nature of the allegations, the agreement should have been clear that the NDA would not prevent disclosure to any law enforcement agency. This would avoid any confusion and potentially could assist with the prosecution of any crime and the prevention of further harm.

We were also concerned that the fee earner told us they did not have regular supervision meetings.

There was no evidence of advice to the client about the appropriate scope of the NDA or wider agreement. The firm told us that there was no advice on file because the whole agreement was drafted and signed in just one day. We discussed our concerns with the firm and will be following up with them to understand the steps they have taken to address the issues.

Managing risks when using precedent templates

Solicitors should manage risks that incorrect or untailored versions of templates are used with effective supervision and robust controls When drafting an agreement, you should always make sure that you understand the relevant background facts to provide a competent service.

The matter in this case was supervised by a partner but it was not clear how much involvement they had in reviewing the document.

Good practice in using precedent templates

Larger firms usually provided their own tailored template guidance for fee earners. Overall, larger firms were also more likely to be able to demonstrate they supported good practice in relation to NDAs.

For example, one large firm said: 'We check our precedent template against the warning notice and update it all the time. We have a weekly team meeting to discuss any updates.' Another firm kept clear records and rationale for updates using a table on the front of the template to record the date, clause, author, and reasons for any amendment or update.

One large firm produced a useful practice note on the use of NDAs with comprehensive regulatory information and resources. The firm provided useful drafting guidance and clarified that support was available from supervising partners and managers if a client insists on an inappropriate confidentiality clause. Other examples of good practice included clear

instructions to tailor documents to the individual circumstances of each client and warnings that NDAs are not suitable for use in all cases.

Next steps/recommendations

Improving general and client awareness of NDAs and issues surrounding them, could help firms to manage risks when discussing NDAs directly with employers. To achieve this they may consider:

- Highlighting best practice guidance on draft templates and when reviewing draft templates supplied by employers.
- Providing advice and information about our warning notice on NDAs on your website.

Templates can support compliance. However, they must not be used automatically or without careful tailoring. Firms should consider reviewing not just client generated content, but also their own templates and procedures to make sure they are meeting their professional obligations when dealing with NDAs.

For example by:

- reviewing templates regularly and compare them to our warning notice to spot any issues, record any updates and the reason on the template

- checking whether a clause could amount to a breach because it gives the impression that reports to the police or a disclosure in the public interest cannot be made
- making sure terms are clear and relevant to the issues and claims likely to arise.
- encouraging employers to act fairly by signposting examples of good practice or guidance in draft agreements to promote high ethical standards across the industry.
- reminding fee earners to always tailor agreements to the circumstances
- adapting templates with their own drafting guidance, highlighting firm policies and appropriate resources from a range of sources to make sure fee earners are aware of our warning notice and best practice from the EHRC or Acas Code of Practice

Advice: Principles and public trust

Our expectations

We expect you to act with independence and integrity when advising on NDAs or negotiating the terms of an agreement with your employee, client or another third party. The warning notice highlights that ethical obligations under the SRA Principles not only attach to the terms of the agreement but also to the conduct of the parties during negotiations.

You must make sure that you do not take advantage of others who are party to a settlement agreement or NDA, whether they are represented or not. For example, by preventing them from taking independent legal advice, using oppressive behaviours or applying unnecessary pressure such as artificial time limits. If your client's instructions are inconsistent with our requirements, you will need to consider whether you can continue to act for them.

What we found

Providing advice on NDAs

Employees need to weigh up the risks of pursuing a claim, including the time, costs, and uncertainty of outcome, when deciding whether to settle and accept an offer. Obtaining independent legal advice provides a valuable opportunity to consider whether the terms of an agreement are appropriate and fair.

Advising on the terms of the whole settlement is important because many agreements are drafted and negotiated by employers with employees before they are represented. Firms should also provide clear advice to clients about the purpose and scope of NDAs to make sure that there is no confusion about what is permitted. For example, by discussing whistleblowing rights.

This includes advising on the potential risks and consequences of using NDAs to prevent or limit proper reporting of unethical or illegal behaviour. Solicitors may also need to advise employer clients of their regulatory obligations if an NDA is misused.

Confirming this advice in writing provides clarity and certainty, particularly if any concerns arise at a later date. However, we saw little evidence of written or verbal advice to employees or employers about the extent or limitations of NDAs on client files.

We asked firms whether they take any particular steps to advise clients about the scope and limitations of NDAs. Firms said:

- 'Most settlement agreements have some confidentiality clauses in them. This is why we don't treat NDA's any differently to anything else.'
- 'No, we don't view them as risky. I'm not aware of any risks associated with them.'

Some firms commented that NDAs are not generally a key concern for employee clients or law firms. For example, both may focus more on the level of the financial settlement.

A small firm said that in a fixed fee matter: 'I don't necessarily draw [the client's] attention to everything as I only have two and half hours. I highlight the key things to change. The waiver is the main issue really as

they are waiving their statutory employment rights. Confidentiality is not a concern, so I don't provide specific advice on this and the carve outs. Everyone uses [the same] templates and individuals don't really ask. They are more interested in knowing if they can talk to their family or spouse and even if unfairly treated, they don't want to make it public, they want to move on.'

One firm explained that advice 'wouldn't always be in writing usually because the speed of matters means we share the draft and discuss it over the telephone.' However, several files did not even have a telephone attendance note recording any advice provided to clients. It was difficult therefore to be satisfied that the client had received appropriate advice.

Managing risks

Overall, it is concerning that NDAs are viewed as a standard provision when considered in the context of workplace complaints and bargaining power differences. While confidentiality may seem standard, the client's individual circumstances are not.

Initial meetings with clients should include a discussion about the scope and necessity of NDAs. Our warning notice also points out that confirming advice in writing is good practice. It may also help to resolve any issues that arise later, including about your role advising on the NDA.

Imbalance of power during negotiations

When complaints relate to serious allegations about unacceptable behaviour in the workplace, you must always take the time to consider whether there has been an attempt to silence serious, reportable concerns.

The circumstances in which agreements are negotiated and finalised can inevitably be pressurised for employees. Solicitors should make sure they do not take unfair advantage of parties with limited access to advice.

Many firms pointed out that employers generally have more leverage in negotiations:

- 'You are often dealing with stressed clients and need to deal with things quickly. The employer is the gatekeeper as to whether an agreement is done or not and this often boils down to a commercial decision for them, while the employee generally has to go through the hoops.'
- 'Negotiations usually take around three to five days - but most employees will take the money and go and do what the employer asks as it's a balance of power issue. Employers can basically pressure the employee as they are in a weaker position in discrimination claims - and most employees don't know where to start.'

The imperative for a swift conclusion to negotiations was often based on the financial resources available to the employee and the need to secure an offer made by an employer. However, as many firms pointed out during interviews, employers are in the driving seat when it comes to both.

Artificial time limits

Settling quickly can also be a commercial decision for both employers and employees. However, creating unnecessary pressure or a sense of urgency can be used as a negotiating tactic and lead to unfair outcomes, particularly for vulnerable parties.

Employees often do not have an opportunity to fully consider their options, rights, and the implications of the agreement until a very late stage. Usually by the time the agreement has been drafted and an offer has already been made. Without adequate advice, employees may sign NDAs they do not understand or are not in their best interests.

At that point, there is usually a short time frame provided by the employer to accept the offer. For example, a firm commented: 'Employers often try to pressure clients and want to give them just two days [to sign] but we always advise that the Acas guidance is 10 days, but the standard is usually five to seven days.'

Feeling pressurised to settle quickly may also have an impact on an employee's ability to take in and reflect on the advice provided by their solicitor.

This was highlighted by a small firm who said: 'I have seen a pattern of women leaving under settlement agreements within an organisation - which means that an issue is not being addressed by that employer. But no one is interested in standing up against the employer - and …proving it is a different matter. Most people don't have the appetite for a fight particularly in terms of risks and reward. As soon as you mitigate the loss that caps your damages, and most people want closure.'

Securing good commercial outcomes for clients is an integral part of any negotiation. However, there may be circumstances in which solicitors also need to consider whether any pressure conflicts with wider regulatory responsibilities. In particular, that your duty to act in the best interests of your client does not override the principles that safeguard the wider public interest.

Overall, a combination of the employer's standard agreements with 'blanket' NDAs, minimal contributions to costs and employee referrals to preferred firms all risk strategically favouring the interests of employers over employees. It also poses ethical risks for firms if commercial interests mean employees are not afforded the time needed for tailored agreements and advice as a result.

Legal costs contributions

Employers usually pay a contribution towards an employee's legal fees because legal advice is a statutory condition for a completed settlement agreement. However, if matters are not swiftly concluded, employees are likely to have to fund any extended legal advice or representation themselves.

In the files we reviewed, contributions from employers typically ranged between £250 and £750. Although some very senior employees were offered significantly higher contributions. The effect of more nominal contributions was that employees are more motivated to finalise agreements quickly and access to advice was more limited.

A firm acting for both employers and employees commented: 'Employers aren't willing to provide additional costs. At the end of the day, you're paying someone to go against them.'

Many firms discussed the challenges the level of fees typically available to employees poses when providing advice.

A sole practitioner told us: 'There is an issue with the amounts offered - £250 is not enough to adequately advise someone. I'm not sure how anyone could do this? A Director charges £300 per hour. People also often expect to have the first hour free, but this isn't possible - particularly in this area.'

A small firm also commented: 'Most advice is standard and for most that is fine as everyone uses [the same template] so everything looks the same - but I won't accept a lower fee because I want to offer clients a decent level of service. I just don't think you can do it for less than 2.5 hours and I have to work efficiently to even do that. I have to sign an adviser's certificate and have an obligation to understand what's in the agreement.'

Some firms also told us that they had concerns about the quality of advice provided by firms who provide services for clients who can only afford the typical minimum contribution of £250 towards legal costs. In relation to disputes with their own employees a large firm commented: 'We want to make sure people are properly advised…we offer £750 as a minimum and if contentious significantly more.'

Some firms indicated that they work more hours than the fixed fee allows. For example, in one case, a fee earner provided a significant amount of clear and thorough written advice to an employee about a 30-page settlement agreement for a fixed fee of £250. It was clear that the time taken to do this would involve a financial loss to the firm.

However, another firm told us that if clients can't pay the costs shortfall they won't act. They told us that they often advise employees to ask their employer for more money and have even offered to speak to HR on their behalf.

Sign off services

Some firms meet these demands with 'sign-off services' to check and sign settlement agreements for a fixed fee. Typically sign off services or matters where a low fixed fee has been agreed, will involve minimal advice or amendments.

The firm will have an initial discussion with the employee over the telephone or online and then negotiate the terms of the agreement directly with the employer. In some cases, minimal revisions and negotiations are made depending on the client's instructions. The legal adviser's certificate is then signed, and the agreement is completed.

These services generally offer a quick turnaround for reviewing and signing agreements, typically from around £250 upwards. Fixed fees provide certainty for employee clients who may have limited budgets and are relying on employer contributions. However, firms should make sure that dealing with a matter quickly does not have a detrimental impact on the quality of advice provided.

Some firms pointed out that employees are happy with the agreement they have reached with employers and need only to fulfil the statutory requirements to make the agreement final. A small firm told us: 'Some individuals will come to the firm and say they are happy with the terms, and I just need someone to sign it off.'

While these services can be very cost effective in straightforward cases, we saw examples of files where there was little, or no evidence of advice to employees in dispute with employers. This risks some employees entering into agreements that they don't understand, and which waive their statutory and contractual rights.

While legal services have to be commercially proportionate, firms should always consider whether any terms drafted before the employee was represented should be negotiated or challenged. This is particularly important as employees often have limited influence, knowledge, and resources to challenge employers without support.

A number of firms also thought this type of service could lead to unfair outcomes for employees.

For example, a firm said: 'An obvious risk is that an employee is being offered a very poor deal. These are vulnerable clients who need the advice of a solicitor to make sure they get the best they can. But it can be hard to encourage individuals to enforce their rights when considering litigation risks, delay, paying court fees and [other legal] costs. It is a commercial decision. But it can lead to people taking less than they are legally entitled to finish it early'.

Some firms also mentioned that nominal costs contributions from employers impact on the financial outcome of negotiations with the same

employers.

They said: 'I used to work somewhere…eight years ago where documents were just signed off. They only deal with settlement agreements there, but they had a policy of no negotiation. Otherwise, they pass it on to someone else if necessary. Ethically, I do wonder if you can go through this without advising on the agreement - and this was for about £250 VAT, which poses a massive risk. Most clients are not being offered anything above their statutory rights by employers. They won't know there must be a sweetener to waive your rights, not just a payment in lieu of notice.'

Interestingly, two large firms also separately commented that on occasion they have been surprised that their opening offer has been accepted without negotiation by firms acting for employees.

Some employees may be unwilling to negotiate the terms of an NDA or seek further advice about onerous terms because it may result in additional work and costs. Therefore, in effect, even when employees are represented, modest contributions towards their legal costs resulted in limited access to legal advice. This may impact on their ability to make informed choices about a fair settlement.

Equality and Human Rights Commission guidance recommends that costs contributions should be sufficient to take advice from an independent adviser and to seek changes to agreements if necessary.

Case study: impact of time limits and minimal costs contributions

A firm acting for an employer in a potential maternity discrimination claim wrote to an unrepresented employee confirming their client's offer of £1,500. They enclosed a draft settlement agreement 'to speed up the process'.

The firm explained that it was a legal requirement to obtain advice before signing the agreement and offered a contribution of £250 + VAT towards costs. They asked the employee to do this 'at the earliest opportunity' and return 'the signed settlement agreement…as soon as possible and no later than… [within seven days - including date of receipt].'

The employee instructed the firm the following day. The employee made it clear they could only afford to pay them for the initial consultation with their employer's costs contribution.

A telephone attendance note made on the same day, recorded that the client was advised during a consultation call that she could achieve more at tribunal. However, the client was happy to accept the offer because of the cost of further litigation and to avoid any stress during her pregnancy.

No further advice was provided about the strength of the employer's opening offer, timescales, or the scope of the NDA. Minimal revisions were made to the agreement and there was no attempt to negotiate terms. The

agreement was signed by the employee and sent to the employer within five days.

Given the client's financial circumstances this service was proportionate in a commercial sense. The firm acting for the employer had also made a commercial offer and encouraged early resolution in their client's best interests.

However, the client was unrepresented when the initial offer was made and may have been anxious about losing the opportunity to agree to the settlement. This was exacerbated by the imposition of a short, unjustified time limit.

Maintaining independence

Some firms receive regular referrals of settlement agreement work for employees from employers. For example, we met small firms who were reliant on regular redundancy work from two or three large employers.

One large firm told us that they provide a list of five recommended firms for employees to use during employment disputes. A manager clarified that they always explain to employees that it is their choice who to instruct.

The manager said that they prefer working with these firms because they 'understand the way (they) work' and were 'responsive'. However, these characteristics may not necessarily match the needs and interests of their employees who are in dispute with them. In some cases, a reliance on referrals, combined with other factors identified in this section, may compound the imbalance in power between employers and employees.

A similar concern was raised separately by another firm who mentioned that some employers use their purchasing power to make sure employees in disputes only instruct certain firms.

The firm said: 'there is an increasing tendency for blue chip financial companies to only send their settlement agreements to four or five law firms in central London. If you go somewhere else, they won't pay the bill. This is a real risk for regulators. It is not a typical panel because the company won't pay anyone else.'

Next steps/recommendations

While panels can be helpful for companies who refer significant volumes of work, such as redundancies, such arrangements might put the independence of firms at risk. Solicitors should take steps to reflect on their approach to any commercial arrangements to identify and manage potential ethical risks.

This could include firms reflecting on whether:

- the same standard fees are paid to all firms
- employees are clear that they are free to select a representative of their choice, and this will not affect the outcome of any final settlement
- the arrangement could compromise their independence.

Controls and competence

Our expectations

Maintaining competence when dealing with NDAs is an integral part of the requirements of service and competence set out in the Code of Conduct. The Statement of Solicitor [https://contact.sra.org.uk/solicitors/resources-archived/continuing-competence/cpd/competence-statement/] Competence [https://contact.sra.org.uk/solicitors/resources-archived/continuing-competence/cpd/competence-statement/] sets out what solicitors need to be able to do to perform their role effectively.

Firms are required [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/] to have effective governance structures, arrangements, systems and controls in place that make sure compliance with our regulatory arrangements. Having suitable controls, policies and training will support staff to act appropriately when dealing with NDAs.

What we found

Measures to maintain compliance and awareness

NDAs are the subject of significant public and political concern because there have been instances of them being misused to silence victims of sexual assault and other unacceptable behaviour.

The circumstances in which NDAs are used may be complex. Employees may be vulnerable, and parties often have competing goals when trying to reach a suitable settlement. Solicitors and other relevant staff should be fully aware of their obligations and any regulatory risks.

It is important that when dealing with NDAs they have support to maintain awareness of the key issues and their professional obligations. However, we saw concerningly low levels of knowledge about our warning notice and the key risks in drafting and negotiating NDAs.

Just one firm provided their own internal guidance specifically on the risks of misusing NDAs to cover up inappropriate behaviour. However, NDAs were included in all the settlement agreements we saw between firms and their employees. Acas recommend as a matter of good practice that managers should be trained on the acceptable use of NDAs. Having internal policies and guidance helps to manage risks in a complex area for both employees at firms and fee earners drafting NDAs.

We were concerned that five firms we visited indicated they were wholly unaware of the warning notice, despite dealing with high volumes of settlement agreements. Two firms also told us that they didn't know of any regulatory requirements relating to NDAs. This suggests that these firms are not maintaining their competence. On each occasion, we reminded firms of their professional obligations**.**

Firms are responsible and accountable for the services provided by their employees, and they should make sure compliance with our warning notice and other relevant legal and regulatory obligations. Two key aspects of managing risks to consumers are maintaining continuing competence through learning and development and providing effective supervision.

Learning and development

Most fee earners said they were carrying out some degree of employment law training even if not specifically on NDAs. However, a significant number were unable to demonstrate this with a record of learning and development. For example:

- four fee earners said their records were unavailable for inspection because they were kept by HR in appraisals
- seven fee earners said they did not keep a training record at all.

It was not clear how these individuals meaningfully assessed and reflected on their competence. Those that did provide records, even at large firms, were not always able to show that they had reflected on their learning needs.

In one instance, a fee earner without a learning and development record told us they had not undertaken any training since the Covid-19 pandemic. There did not appear to be a reasonable explanation for this, and we were concerned that neither the firm's manager nor the fee earner were aware of our warning notice. We advised the firm that this is not acceptable. They need to be able demonstrate they are maintaining an up-to-date understanding of relevant law and practice.

Some firms said that regulatory training might be useful in the future. One firm explained: 'we don't train specifically on risks and challenges on NDAs. We focus on the technical aspects rather than clauses - but yes think it would be helpful to look at challenges as agreements can be long and usually only gets done at the end of negotiations.'

Training not only supports technical knowledge but also raises awareness of wider ethical risks and best practice when handling NDAs. Just two of the firms we visited could objectively demonstrate fee earners were aware of most of the issues in the warning notice. For example, because they had produced guidance on templates and or provided regulatory updates to staff.

A small number of firms felt confident that they had responded at an early stage to concerns in the warning notice by amending templates and did not need to bring in any formal measures as a result.

However, without training and formal policies staff may not have a full understanding about their obligations. For example, any ethical considerations or relevant Principles that may be engaged. Firms should regularly reflect on any established practices to identify whether there are any gaps in training or policies.

Demonstrating your approach to compliance with the warning notice is also reassuring for clients.

One firm commented: 'Clients see the warning notice as an indication of what is appropriate. To not follow the warning notice would be a red flag for clients and the firm. If there is an allegation about sexual misconduct for instance, then we will have a discussion to consider whether an NDA is necessary and about potential reputation issues.'

Reliance on templates to maintain awareness

However, as firms tend to treat settlement agreements as a standard transaction, many did not provide any specific training or support for fee earners on NDAs. This presents a risk that their professional knowledge and skills are not up to date.

Some firms relied on templates to make sure good practice. For example, two firms claimed they were aware of our requirements because of the standard clauses and carve outs in template agreements provided by employer clients. Another firm said that they use an online template to make sure staff remain compliant because they are regularly updated.

For example, a firm said: 'We don't do anything specific in-house, but we know about the areas referred to in the warning notice through advising clients as the precedent clauses specifically refer to them. If we don't see the same in settlement agreements from the other side, we will mention this to them.'

Firms that rely on templates for technical knowledge and updates may not have considered the wider ethical issues emphasised by the warning notice. Nor are they likely to have considered their regulatory obligations under the Standards and Regulations and Principles.

In terms of training and support on the use of NDAs, we asked firms to outline the topics they make fee earners aware of.

What issues and support do you make fee earners aware in terms of NDAs?	Yes - we make individuals aware	No - we do not make individuals aware
NDA Warning notice	10	15

Reporting requirements	7	18
SRA Principles	7	18
Unfair advantage	6	19
Preventing reporting	5	20
Independent advice	5	20
Preventing reports to the police	4	21
Preventing reports to a regulator	4	21
Reporting improper terms	1	24
Unenforceable terms	1	24
Improper threats of litigation	0	25

Failing to train staff and support them to maintain competence is a significant regulatory risk for firms. Competence and training also have an impact on the service provided to clients and whether they achieve fair outcomes in settlements.

Awareness of vulnerability

Our warning notice stresses that some claimants or employees can be vulnerable when dealing with NDAs. Vulnerability encompasses a very wide spectrum of clients. As well as factors that make consumers particularly vulnerable such as disability, poor health, and low income, 'market-specific' vulnerability can affect any consumer.

Research [https://legalservicesboard.org.uk/wp-content/uploads/2022/06/Vulnerability-in-legal-services-research-FINAL-REPORT.pdf] from the LSB underlined that market vulnerability can mean consumers feel disempowered at the point of service. As a result, they might be reluctant to use legal services because of a lack of confidence and concerns about cost.

Employees may feel at a disadvantage in the bargaining relationship when negotiating agreements relating to complaints about inappropriate behaviour. Therefore, it is important for firms to be able to identify and respond to vulnerability appropriately when dealing with NDAs.

However, few firms had controls in place to respond to vulnerability or to identify vulnerable clients. Just seven firms in our sample said they provided training for fee earners on vulnerability. Even less had considered training on whether an NDA is necessary or appropriate. The table below shows that only 3 of 25 firms provided training to support their staff in considering whether NDAs where appropriate, and only seven provided training on ethical decision making or working with vulnerable clients.

Technical NDA Training: Do you provide training in the following areas?	**Yes**	**No**
How to decide whether an NDA is appropriate / risks…	3	22
Drafting confidentiality agreements	4	21

Vulnerable clients	7	18
Ethics/Ethical decision making	7	18

There also appeared to be a lack of awareness of who vulnerable clients might be. For example, a firm told us that they do not have vulnerable clients. However, when we came to review one of their files, we noted their client had alcoholism and mental health issues.

Other firms suggested that only clients with mental health conditions or litigants in person were vulnerable. For example, one small firm's COLP felt that taking steps to advise the client about permitted disclosures in an NDA would only apply to clients with mental health conditions.

Providing advice on the terms, limitations, or enforceability of confidentiality clauses should not be considered as an exceptional step. Most employees are likely to need advice about permitted disclosures and the implications of such agreements.

Even if clients do not consider themselves vulnerable, most will be feeling under emotional pressure and will be facing a significant personal and financial change in circumstances. They may also be unfamiliar with legal terms and agreements.

Two firms had a positive approach to identifying and supporting vulnerability with a dedicated vulnerable client policy. This included information about how to recognise vulnerable clients and the process to inform a partner if they felt the client was vulnerable.

Under one firm's policy they run file risk assessments and file workshops. They explained that it is an opportunity to share knowledge, discuss issues around vulnerability and check they are doing 'the right thing'.

Support and supervision

As well as clients being very vulnerable, sometimes clients can also be very demanding in disputes. Both can be challenging for fee earners. For example, a large firm said that fee earners may need support when dealing with clients from the United States because regulations on NDAs are slightly different and they are used more widely. They said that managers provide 'gentle support on the call' or will otherwise be available for support if needed.

It is essential that solicitors are adequately supervised, trained, and supported to manage any risks that may arise. This includes recognising when to push back if instructions or terms are inappropriate or unethical. However, not all firms provided the support needed to do this.

Supervision helps to manage regulatory and legal risks and firms are accountable for the actions of their employees. Our guidance on effective supervision [https://contact.sra.org.uk/solicitors/guidance/effective-supervision-guidance/]

provides information about our regulatory requirements and how to meet them.

Case studies: Examples of concerns

Mid-size firm

A solicitor heading up the employment department had more than a decade of post qualifying experience. However, they were unable to produce any training records. They indicated this was because they did not have any learning and development needs. They said: 'I advise others on [NDAs] – and so don't need training myself.'

It was clear that the solicitor had not attended any training at all for a considerable period. We were concerned that they had not maintained an up-to-date understanding of relevant law, policy, and practice. The solicitor responded that they could ask a manager for support but in any event did not feel this was needed.

When we reviewed the solicitor's files our concern was increased for the following reasons:

- there was no evidence of any advice to the client either verbally or in writing about the terms of the agreement on one file.
- a settlement agreement did not include carve outs to allow disclosures to regulators and the police.
- poor file management and loose papers meant that it was difficult for the fee earner to locate specific documents on request easily.

We have referred our concerns for further investigation. Maintaining competence is not only about achieving technical expertise in your area of practice. Our statement of solicitor competence includes ethical considerations, considering developments in the law, providing information in a way clients understand and managing work activities.

A large firm

A fee earner at a large firm highlighted good examples of sign off procedures and opportunities to discuss files. However, they explained that as they are a small team, they do not have file reviews, 121s or formal regular catch ups with supervisors.

They thought that this was managed because 'there are a lot of emails and phone calls and team meetings to talk though difficult issues and case law changes.' They also said; 'The first draft of an agreement is always reviewed before going out and signed off and partners are copied into emails.'

However, the settlement agreement we reviewed for an international client did not contain all relevant permitted disclosures in the carve out to

the confidentiality provisions. The matter was being supervised by a partner but there was no evidence on the file that the agreement had been reviewed. Effective supervision is a regulatory requirement and vital for delivering good outcomes for clients, staff and third parties. Firms should consider whether their existing procedures adequately support fee earners.

A small firm

The sole director of a small firm provided access to a subscription based online learning programme for staff to use. However, this was not monitored and there was no proactive direction about training to fee earners about NDAs.

They said: 'I subscribe to [online training] and if things come up, I direct them to the SRA website. But as I have senior employees, I expect them to know this.'

However, when we met a fee earner at the same firm, they were unable to demonstrate that that they had undertaken any relevant training in the last two years. In terms of oversight, they did not have regular supervision meetings but felt that oversight of their work was implicit because emails to clients are also 'cc'd' to the director.

We were concerned that they were not adequately supported to maintain their obligations. The fee earner told us: '[my manager] can be difficult to get hold of as [they are] always busy, and this can cause issues.... I had a [long] career break and so in reality I only have [limited] PQE. It can also be quite daunting to approach [my manager] working from home.'

The fee earner did not have adequate support and training when dealing with very vulnerable clients in a complex area of law. Our concern was increased when we reviewed their files and observed issues in an agreement. Including the omission of the right to make a protected disclosure or to disclose information to regulators and the police.

Overall, our findings indicate that solicitors should take steps to reflect on their approach to NDAs and assess whether it complies with the warning notice. Systematic training on ethics and regulatory obligations could support firms and in-house teams to mitigate any potential threats to independence and trust in the profession.

Good practice

Our four very large firms in particular, were able to demonstrate they offered fee earners training and updates on regulatory obligations, our warning notice, and any wider guidance on NDAs. However, in half of those firms fee earners were not able to provide training records to demonstrate this had taken place.

Some examples of good practice included:

- a large firm produced a number of blogs to help raise awareness and also to inform other firms of their obligations acting on the other side. They said that the blog helps to manage issues and push back where "this isn't SRA compliant".
- a large firm had a full day of compliance training for all staff. They use this to discuss whistleblowing and other reporting options for trainees. They also provide mandatory ethics training on an annual basis to discuss ethical scenarios and SRA compliance issues.
- a large firm used team meetings to discuss issues around our regulations. They said that if there is a sexual harassment client matter, they may discuss it as a team because they recognised they have their own biases. They also share information and guidance about NDAs with clients on their dedicated share point intranet site.
- a medium sized firm had staff briefings that includes regulatory issues every quarter. They said it helps to trigger useful discussions and raises the profile of risk, ethics, and the role of the COLP. HR also provides mentoring training which includes a session on ethical resilience.

Next steps

We expect all clients, including employees, to receive clear advice about the terms of an NDA. Supplying advice in writing provides an opportunity for the client to review the terms of the NDA in their own time and ask further questions if needed.

While some clients may seek a quicker service due to budget constraints, you still must do all you can to make sure they are taking informed decisions. Consider preparing standard written information in advance for clients to read, for example with your client care letter or on your website. Signpost useful resources such as guidance from Acas or our warning notice.

Our warning notice also points out that where an opposing party is vulnerable or unrepresented, your obligations to make sure there is no abuse of position, or unfair advantage taken, will be heightened. If solicitors suspect or are aware that an employee is unrepresented or vulnerable, they need to take active steps to make sure negotiations are fair.

All clients are at risk of becoming vulnerable. Support fee earners to identify vulnerable clients and third parties with training and resources. For example, this could include training on how to support vulnerable employees, using checklists, risk assessments or a RAG system to highlight risks on files.

Solicitors are responsible for their personal learning and development. This includes demonstrating you have reflected on learning needs to evaluate

strengths and limitations and keeping up to date with developments in legal services.

It is important for all solicitors to identify and address any learning needs. If you are finding it difficult to access suitable training, formal training records highlighting any gaps could help you to discuss options for support with a supervisor. It will also help you to demonstrate your competence requirements are being met.

Additionally, firms are responsible for ensuring their employees are competent and adequately supervised. This includes considering how much oversight you have of matters and how readily available you are in practice to support fee earners

Reporting and managing complaints

Our expectations

Solicitors have an important role in reporting matters that may amount to a serious breach of our rules. This includes reporting concerns about the misuse of NDAs and allegations about serious inappropriate behaviour in firms.

We expect you to report promptly any facts or matters that you reasonably believe are capable of amounting to a serious breach of our regulatory arrangements. Reporting is fundamental to promoting trust in the integrity of the profession, and to our ability to regulate in the public interest.

What we found - Reporting misuse of NDAs

Only a small proportion of reports we receive are self-reported or reported by firms representing parties to an agreement. Most commonly reports relate to clauses restricting reporting or preventing proactive disclosure to a regulator, the police, other government body or law enforcement.

Therefore, we wanted to understand how frequently firms see misuse of NDAs in the sector and the issues they report to us.

We surveyed our initial sample of 150 employment firms (pre-visit) and asked whether they had ever raised concerns with a firm about an unethical or unenforceable clause in an agreement with an NDA.

Fourteen firms highlighted the following concerns in agreements:

- nine firms raised concerns about a clawback clause
- seven firms raised concerns that clauses deterred reports to a regulatory body
- four firms raised concerns about deterring a report to law enforcement
- two firms raised concerns about undue pressure on clients.

However, just three of these firms reported their concerns to the SRA. Two firms told us that they had received a complaint from a client about an NDA clause.

We also asked our visit sample of 25 employment firms whether they had come across any misuse in the sector and how they responded.

Have you ever had concerns about the misuse of NDAs?	
Yes	7
No	18

Seven firms reported that they had come across concerns about terms in agreements with NDAs. They included issues with standard templates that were not tailored or included penalty clauses. Three firms discussed more general issues of concern rather than misuse of NDAs.

Only one firm went on to report their concerns to us. Most firms said they managed any issues with the firms concerned direct. However, it was not clear in all cases that the inclusion of inappropriate terms had been inadvertent or that firms were aware of when issues with other firms should be reported.

Was this reported to the SRA?	
Yes	1
No	6
Not applicable	18

For example, one firm said that their client had been subjected to inappropriate behaviour at work. One of their fee earners spotted that a clause in the proposed settlement agreement purported to prevent their client from voluntarily discussing the matter in court. The firm described it to us as 'inappropriate and borderline bribery'.

The firm said they raised it with the other side and they 'immediately dropped it'. However, they felt this was 'accidental' because the firm was small. This may have been a reasonable decision in the circumstances as it was resolved immediately. If you make a decision not to report, you should keep a record of your decision and the factors that influenced it.

In another example, a firm told us they were concerned about a clause that purported to prevent their client from reporting a matter to the Information Commissioner's Office (ICO). The firm said they challenged this because the client had an ongoing complaint to the ICO and wanted to progress it. The clause was removed.

However, when we asked whether it was reported, the firm said that in their view this 'wasn't an attempt to gag' their client. They described it as a standard provision. It is not clear why such a clause would be considered 'standard'. An NDA or term would be used improperly if it has the effect of

deterring a report to a body responsible for supervising or regulating the matter in question.

What we found - Awareness of reporting obligations

Sixteen (64%) of fee earners said they were aware of our guidance on reporting and notification obligations. Concerningly, just seven firms thought that our reporting obligations were relevant regulatory knowledge for fee earners dealing with NDAs.

Our warning notice makes it clear that we are concerned that NDAs are not used to prevent reporting to us. We asked fee earners and managers what factors they consider when deciding whether to report a concern about NDAs or inappropriate workplace behaviour to us:

- just under half of our sample, (12) referred to their specific regulatory obligations such as evaluating the seriousness of the breach and/or their reporting obligations
- just three firms mentioned or referred to our guidance being a factor
- two firms referred only to reporting anti-money laundering or data protection concerns as a relevant factor. This suggests they did not view NDAs or inappropriate behaviour as a reportable issue.

Additionally, just under half of our sample (12 out of 25) had a whistleblowing policy. While this is not a requirement, such policies set out a clear process so that workers can understand the circumstances certain issues can be disclosed in the public interest.

We were also concerned that four firms said that the interests of clients would be factored into their considerations. For example, a firm was aware of their reporting obligations, but their primary focus was to deal with any issue such as an unenforceable clause directly. Whilst this may be the most sensible approach to resolving the matter in the client's interests, firms still should consider whether a matter should be reported.

Another firm said that reports to us would depend 'on the context and the integrity of the person reporting it' to them. We do not expect you to simply pass on any complaint without question or investigation. However, you should be prepared to evidence this decision.

Case study: Failing to report misuse of NDAs

A firm recalled a time when they acted for an employee several years ago in relation to a settlement agreement with their employer. The employee raised allegations about witnessing sexual abuse at the organisation in which they worked. The agreement drafted by the employer purported to prevent the employee from disclosing this information.

The firm said that they flagged the NDA with the client as an area of concern - but the client 'just rolled over'. The firm did not report the matter

to us. An imbalance in bargaining power may lead employees to feel they have a little choice but to settle a complaint. However, should be able to rely on adequate and robust advice from their solicitor.

This is potentially an example of an employer attempting to silence wrongdoing by covering up complaints. NDAs cannot override the rights of employees to make protected disclosures about a potential criminal offence in the public interest. It would also be an unenforceable, as well as an unethical term to try and prevent the disclosure of a criminal offence.

We asked the firm whether in hindsight they felt this should have been reported to us. The firm said that it has been 'on [their] mind' ever since. But they also commented that the agreement looked standard at the time.

We were concerned that this matter was not reported to us, even if this occurred before the publication of our warning notice. Reporting obligations do not end because the 'events are aged or historic in nature'. If at any point you become aware that the issue should have been reported, then it remains a requirement to report this to us as soon as possible.

This matter has been referred for further consideration.

What we found - managing complaints

We asked firms about the number of complaints received from employees about inappropriate behaviour in the workplace.

Fourteen out of 25 firms in our sample reported receiving one or more such complaints during the last five-year period. All 14 firms had more than fifteen employees and included large multinational and international firms. Some employees had raised multiple complaints and the combined total amounted to 112 complaints across the 14 firms.

Complaints about inappropriate workplace behaviour most frequently (11 firms) related to discrimination. Other investigations included:

- complaints about bullying at nine firms
- complaints about sexual harassment at four firms
- complaints about unfair treatment at four firms.

Our sexual misconduct guidance [https://contact.sra.org.uk/solicitors/guidance/sexual-misconduct/] explains that allegations of sexual harassment may need to be reported immediately. Two out of 14 firms reported a matter to us once they had received a complaint from an employee about inappropriate behaviour. We were satisfied that relevant issues had been reported and the remaining matters did not warrant a referral to us.

Use of NDAs

Of the 112 complaints received by 14 firms,

- 47 resulted in settlement agreements that contained NDAs
- 18 complaints fully or in part upheld (across 7 firms)
- 3 complaints resulted in disciplinary action (at 3 different firms)
- 10 complaints were reported to us.

Next steps

The EHRC's report 'Turning the tables: ending sexual harassment at work' [https://www.equalityhumanrights.com/turning-tables-ending-sexual-harassment-work] highlights that one of the reasons employees may feel unable to speak up about discrimination at work is 'fear that the alleged perpetrator will be protected and a lack of appropriate reporting procedures.'

Having a range of formal and informal mechanisms and policies that support and encourage employees to raise concerns with employers or report out to others can make sure firms deal with workplace concerns promptly. Firms should also make sure employees know what types of behaviour are reportable.

This in turn will enable you or your firm to report any serious regulatory breaches to us. Your reporting obligations form part of the Standards & Regulations. Reports enable us to understand, act upon and investigate issues if necessary. You should consider our reporting guidance so that you understand your obligations and are prepared to justify any decisions not to report.

Conclusion

NDAs were generally viewed by firms as low risk and fairly straightforward. This can lead to some complacency about the scope and relevance of NDAs and the need to tailor templates. This is potentially concerning in the context of bargaining power differences within the workplace. While confidentiality clauses may seem standard, often the individual circumstances are not. It is therefore important that:

- Firms consider and review their use of templates regularly, including by considering them against the issues highlighted in our warning notice.
- Fee earners are reminded that there is no such thing a 'standard case' for the individual involved, and remain aware of the need to proactively consider whether an NDA is appropriate and if so how this may need tailoring to the specific facts of the case or individual involved.

In drawing up NDAs firms are often under pressure to resolve matters quickly, especially from the perspective of the employer – however solicitors, on both sides, have a responsibility to make sure the process is fair for all parties involved. Commercial imperatives and other pressures can lead to a risk that employees may at best feel pressured to sign an

NDA without being as informed as they should be, and at worse may be taken unfair advantage of.

Law firms on both sides of an agreement must help tackle this by:

- taking active steps to support clients and help them make informed decisions
- being aware that the circumstances behind many NDAs can often mean clients and third parties involved are vulnerable, and this mean they need consider their own approaches to working with and supporting people in such circumstances
- considering the training offered to fee-earners to support vulnerable clients and the use of checklists, risk assessments or a RAG system to highlight risks on specific files.

We are also concerned at the number of firms who admit to concerns about the behaviours of another firm in drawing up an NDA, but have not gone on to report their concerns – including to us. We would remind firms and solicitors that their obligations in this area are not just to protect the specific client they are dealing with at the time, but also to report to us in order that we are able to action in the wider public interest.

Training on the warning notice, our reporting requirements and wider regulatory obligations could further support solicitors to uphold the trust the public have in the profession.

Our next steps

Solicitors must acknowledge the ethical considerations that should be considered when advising clients on NDAs (regardless of which party they represent). This includes when using NDAs within their own practices.

Our Principles, Code and warning notice are clear. However, we will continue to raise awareness among the profession about their obligations, the warning notice and of the need to challenge - and report – unacceptable NDAs or behaviours.

It is not the role of the SRA to stipulate the level of discretionary costs that employers contribute. However, what is clear is that solicitors acting for employees need to be explicit with clients about the extent of the advice they can provide where the budget is limited, and be satisfied that they are able to carry out their role to a competent standard in the time provided. This is particularly important as many employees will have limited influence, knowledge, and resources to challenge employers without support.

We plan to undertake a programme of work on the back of our report to update our warning notice to clarify the areas of misunderstanding, and deliver webinars and publications to increase the level of knowledge amongst the profession.

We also propose a coordinated programme of public education across the legal regulators, using the Legal Choices website alongside other media, to make sure that employee and employer clients are better informed about their rights, the enforceability of key clauses and the obligations of the legal professionals advising them. Harmonised, cross sector guidance for the professions and consistent enforcement action are also important tools that will allow legal regulators to create an environment where legal professionals can properly balance their professional obligations and behave in a way that upholds public trust and confidence in the legal sector.

Annex: Resources for practitioners

SRA Guidance

- Conduct in disputes [https://contact.sra.org.uk/solicitors/guidance/conduct-disputes/]
- Sexual Misconduct [https://contact.sra.org.uk/solicitors/guidance/sexual-misconduct/]
- Reporting and notification obligations [https://contact.sra.org.uk/solicitors/guidance/reporting-notification-obligations/]
- Whistleblowing to the SRA [https://contact.sra.org.uk/consumers/problems/report-solicitor/whistleblowing-to-sra/]
- Effective supervision [https://contact.sra.org.uk/solicitors/guidance/effective-supervision-guidance/]

Other support

Acas

- Non-disclosure agreements [https://www.acas.org.uk/non-disclosure-agreements] ,
- Investigations for discipline and grievance: step by step [https://www.acas.org.uk/investigations-for-discipline-and-grievance-step-by-step/step-2-preparing-for-an-investigation]

Equality and Human Rights Commission

- The use of confidentiality agreements in discrimination cases [https://www.equalityhumanrights.com/guidance/business/use-confidentiality-agreements-discrimination-cases-0]

Protect (whistleblowing charity)

- Section 43J of the Employment Rights Act - Protection against NDAs [https://protect-advice.org.uk/43j-a-protection-against-ndas/] .