Institute of Directors Ireland

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Briefing: New restrictions on the use of NDAs in employment equality claims comes into law

Employers should be aware that, following the enactment of the Maternity Protection, Employment Equality and Preservation of Certain Records Act 2024 (the "**Act**"), there are, with effect from 20 November 2024, now very significant restrictions on employers with regard to non-disclosure provisions within agreements with employees ("**NDAs**"). This briefing considers the scope of and impetus for that restriction, the exceptions to the general principle, and the significant change in practice that it likely heralds. Employers will need to be cautious about including such clauses, and should take advice in circumstances where an NDA is considered desirable or necessary.

NDAs – what is the controversy?

NDAs typically involve contractual commitments which preclude a person from disclosing specified information. Such provisions came under intense scrutiny during the #MeToo movement, prompted by a concern that such NDAs were being deployed unethically, including in an effort to 'gag ' or suppress disclosure of harmful behaviour. A party who breaches an NDA may be sued for damages arising from their breach of contract. A report commissioned by the government in 2022 on the prevalence and use of NDAs in discrimination and sexual harassment disputes found them to be '*widely used by businesses in a range of contexts*'. It also noted the frequent power imbalances inherent in NDAs, and their potential negative effects on complainants and their careers, as well as society more generally.

The new principle

The effect of the Act is to place new restrictions on entering into NDAs where any such NDA relates to information concerning an "*allegation*" or any "*action taken*" by an employee relating to discrimination, harassment, sexual harassment or victimisation. The effect is that such an NDA is void, whether applicable to current, former or prospective future employees. However, this is subject to two exceptions.

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Exceptions

Where an NDA is included as a term of a settlement following a WRC mediation the prohibition will not apply. This is a straightforward exception but limited to instances of mediation before the WRC's mediation service, rather than other forms of third-party mediation. Given that there are no designated criteria applicable to any such NDAs (as is the case in respect of the other exception discussed below), it may be that WRC mediations increase in their popularity amongst employers as a form of dispute resolution.

The second exception is more intricate. While it permits an employer to agree an NDA in writing with an employee, a long list of demanding, and arguably uncertain criteria, must be met to ensure that the employee has provided informed consent. These are as follows:

- the employee requests the NDA;
- the employee takes independent legal advice in writing from a legal practitioner (for which the employer discharges the reasonable cost) before entering the NDA;
- the provision is in clear and easily understood language and in a format that is easily accessible;
- the NDA is of unlimited duration (unless where an employee elects otherwise) ;
- a provision is included stating that the NDA does not prohibit the employee making a relevant disclosure to certain individuals (including, for instance, the Gardaí).

Any parties seeking to rely on this exception must ensure that the terms of the NDA itself are also documented in any settlement agreement entered into by the party. Crucially, under this exception, the employee has a '*cooling-off period*' of fourteen days within which to withdraw from any concluded NDA. Where an agreement is entered into in circumstances where this second exception is relied upon, there is an onus on the employer to provide a copy of the executed compromise agreement to the employee.

Concluding remarks

While the restrictions in the Act are limited to specific allegations and claims in the context of employment, this represents a significant change to the current practice whereby, in many cases of termination of employment, such clauses are standard or 'boilerplate'. This includes where there is a backdrop of equality-related allegations or claims and often reflects employers' desire for finality and closure regarding such allegations or disputes. Employers should now give more careful consideration as to whether an NDA is necessary or desirable at all. Employers will need to revise any compromise or termination agreements commonly deployed and where such agreements purport to include an NDA, this should be considered carefully in the specific context and appropriate legal advice should be sought.

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