

## Help sheet – resisting an NDA

If you find yourself in a position where a settlement agreement makes sense, you may be pressured into accepting the inclusion of non-disclosure or confidentiality clauses, as well as non-disparagement clauses. Indeed, you may be told that settlement is dependent on the inclusion of an NDA.

### Points to consider

- The only essential clause in a settlement agreement is a release clause, which is an enforceable promise not to proceed with a legal claim, usually in exchange for money or another form of compensation.
- NDAs have become a standard inclusion in the vast majority of settlement agreements and are generally accepted as inevitable by lawyers on both sides of a dispute.
- However, they are a relatively new addition to settlements and they have made no difference at all to the percentage of cases that settle before a hearing or trial (contrary to the coercive arguments you are likely to hear from employment lawyers).
- An NDA is not a requirement of a settlement agreement – it is an additional clause the employer highly desires and you do not have to agree to this. You can settle without an NDA.
- A key driver for a church/employer to settle is the protection of their reputation. They want to avoid any negative publicity at all costs – either from legal action or wider awareness of the complaint. Whilst an NDA is the gold standard for them to achieve this, it is not their only option.
- Proceeding to legal action virtually guarantees negative exposure for the church/employer, regardless of the eventual outcome.
- Settling without an NDA therefore offers a ‘third way’ which still offers benefits to both parties. The church/employer avoids the exposure of legal action and the complainant avoids the silencing of an NDA.
- In the vast majority of cases, it will be in the interests of a church/employer to settle without an NDA (where publicity is minimal) than to be exposed through the courts, possibly attracting the attention of the media.
- Therefore, from both logic and a legal point of view, you should in theory be able to negotiate a settlement without an NDA. However, this will depend on a number of factors.

## Resisting an NDA

Your power to negotiate will depend on the church/employer’s perception of your capacity to reject the NDA, either by being prepared to expose your case through legal action and/or media interest, or alternatively to walk away without any settlement in order to preserve your ability to speak out at a later date.

Related, the quality of the evidence that you have to demonstrate your case is a factor. If you have lots of documented evidence and/or witnesses prepared to support your case, you will be in a stronger place to negotiate. And in certain jurisdictions, NDAs cannot be used to silence whistleblowers.

If there are known allies within the governance of your church or organization, you could try to engage them in the moral and theological arguments and not just leave it to the lawyers to argue over legal precedence. Our [discussion document](#) might be helpful here.

Most importantly, your mental health and your support system are crucial. If you are in a good place and have sufficient support, dig deep and keep negotiating! However, if things are on the edge, you may have to accept that now is not the time to hold out. Do not allow an intractable (bullying) church/organization destroy your mental health or jeopardize your important relationships. In certain jurisdictions, NDAs obtained under duress would not hold up in court. Therefore getting documented proof that the church/organization would only settle if an NDA is included and that your request to settle without a confidentiality clause has been rejected could be useful at a later date. If you have to settle with a confidentiality clause included, you should request that it specifies what has to be kept confidential and that it is time bound.

In some jurisdictions, we are starting to see the issuance of guidance notes on the use of NDAs by regulators and industrial relations bodies - and even legislative change to restrict their use. Knowing what’s available can provide vital information and assist you in your interactions with your church/employer as well as your lawyer. For example, in the UK there are guidance notes on NDAs by [ACAS](#) and the [SRA](#).

You may be able to find information relevant to your jurisdiction from whistleblower support organisations - check out the [Whistleblowing International Network](#) for national organisations offering support. If you discover useful external resources we can signpost other people to, please let us know through our [contact page](#).