

## **NDA's Can Help Harassment Victims**

(published in THE WALL STREET JOURNAL on August 12, 2018)

**Those who speak up can suffer reputational harm.  
They don't want others discussing what happened.**

*By Stanley D. Bernstein and Stephanie M. Beige*

The latest #MeToo exposé, involving CBS head Leslie Moonves, has drawn new attention to the use of nondisclosure agreements in sexual-harassment cases. Mr. Moonves denies the allegations detailed in a New Yorker story, but several former employees of CBS News allege that the network has a history of concealing harassment. They claim Jeff Fager, executive producer of "60 Minutes" and a former CBS News chairman, created a culture that protected harassers and retaliated against victims. Reporters have uncovered numerous out-of-court settlements of sexual-harassment claims against CBS, all with accompanying NDAs—agreements that the settling party will not publicly disclose the allegations or the settlement.

In these instances, NDAs were used to silence victims and protect accused harassers. Thus, some favor eliminating NDAs on the ground that exposing the details of past settlements will prevent employers from protecting serial harassers, warn potential future victims of harassers' past conduct, and empower victims to come forward who may otherwise feel isolated and powerless.

But we must be careful not to ignore the victim who doesn't want the details of her claim made public. NDAs can play an important role in protecting victims, without allowing harassers to continue unchecked.

Victims of sexual harassment fear they have a lot to lose by coming forward. Once a woman reports workplace harassment, her job environment often changes, becoming uncomfortable at best and unbearable at worst. Victims who speak up are often labeled "troublemakers" or "sensitive," and suffer real reputational harm: Be careful what you say around her, that's the one who reported Joe. Not surprisingly, many victims, especially highly paid professionals at large institutions, simply want to move on. They don't want to discuss the harassment again—and, most important, don't want others discussing it.

If the goal is to encourage women to come forward and report harassment, organizational leaders should expand confidentiality to protect victims early in the internal complaint process. By helping ensure that the details of the harassment don't become the subject of water-cooler gossip, NDAs can encourage women to report without fear of backlash. Victims should be able to report sexual harassment internally through the proper channels and, with the aid of a carefully drafted NDA from the outset, not only receive an appropriate remedy, but also be protected from ridicule and retaliation.

How, then, if the conduct remains confidential, can you prevent harassers from continuing their illegal conduct, especially if they move on to another employer?

This newspaper recently reported on a high-powered attorney with a long history of complaints against him who was able to move from one powerful law firm to another without any warning about his history. The current litigation environment discourages employers from being truthful about past misdeeds, lest they find themselves at litigation risk from the harassing former employee. Legislation is critical to immunize past employers from the consequences of giving full and truthful information to potential employers. Absent legislation, potential employers should insist that every job applicant grant access to his entire personnel file, forgoing the possibility of litigation or retribution.

Confidentiality is a critical tool that protects victims as well as the wrongly accused. Instead of banning confidentiality, businesses and corporations must change workplace culture. The powerful men exposed by #MeToo were able to continue their misconduct not because their victims signed NDAs, but because their employers and boards failed to act effectively in the face of repeated allegations of sexual harassment.

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