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Feature

Confidentiality Agreements in Harassment Cases: New Global Trends

Are they becoming a thing of the past?

Ruben Goulart
LL.B.
Partner, Bernardi Human Resource Law LLP

Alison Renton
LL.B.
Lawyer, Bernardi Human Resource Law LP

We are all familiar with an employer's practice of wanting an employee to sign a confidentiality or non-disclosure agreement ("NDA"). Sometimes this is when an employee commences employment. It makes an employee aware from the onset of their employment that the employer wants to protect its business, trade and propriety interests.

Sometimes an employee signs a confidentiality agreement because of issues raised by or about an employee during their employment or because their employment has ended. In those situations, and even if no legal action has commenced, an employer wants an employee to enter into written terms of settlement, including a confidentiality agreement, particularly when there is a monetary payment. Generally, an employer wants to safeguard against an employee disclosing to others that a payment was made or the amount of the payment.

Confidentiality agreements, or NDA's, are also used when an employee raises allegations of harassment. As part of the confidentiality agreement, an employer often wants an employee to agree that they will not: disclose the terms of settlement; discuss the harassment allegations; discuss the facts upon which the allegations are based; or even confirm that there is a settlement. Since the majority of harassment cases are resolved without the facts being made public, in essence, an employer buys an employee's silence.

However, in the era of #MeToo, with more people are coming forward to raise allegations of harassment through the courts, administrative tribunals or the media, confidentiality agreements and NDAs are coming under scrutiny. The days of keeping harassment allegations and subsequent terms of settlement confidential may be coming to an end.

Legislatures in the United States and the United Kingdom have introduced or are considering introducing new legislation to limit confidentiality agreements and NDAs in sexual misconduct cases. They are concerned that employers are trying to silence those who come forward with legitimate allegations of harassment, intimidate whistleblowers, or conceal serious harassment and discrimination incidents, particularly those involving senior company executives.

Further, they believe that confidentiality agreements mean that a victim is unable to discuss an issue with other people or organizations, including the police or medical practitioners, including physicians and therapists. This can leave victims afraid to report an incident or speak about their experiences and potentially expose others to similar situations.

To address these concerns, in the last couple of years, sixteen states in the US have introduced bills to limit the use of NDAs in sexual misconduct cases and those bills have been passed into law in eight of them, including: Arizona, Maryland, New York, Tennessee, Vermont, Washington and California.

Effective January 1, 2019, California's *Code of Civil Procedure* was amended to prohibit any provision in a settlement agreement that prevents the disclosure of factual information regarding: acts of sexual assault; sexual harassment under the *Civil Code*; workplace sexual harassment; workplace sex discrimination; failure to prevent acts of workplace sexual harassment or sex discrimination; and retaliation against a person for reporting sexual harassment or sex discrimination. California law expressly states that any

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such provision in a settlement agreement entered after January 2019 will be considered void as a matter of public policy. The law applies to private and public sector employers.

The United Kingdom is also taking steps to prohibit confidentiality agreements and NDA's in harassment situations when on March 4, 2019, it introduced new rules around them. For the first time, it enshrines in law that individuals cannot be prevented from reporting crimes, harassment or discrimination to the police. It also extends the requirement that individuals must receive legal advice about limits on confidentiality agreements before entering into them. The British government warns that employers who do not comply with the new confidentiality clauses will have the entire settlement void, such that the terms of settlement can become public.

But what about in Ontario? Will there be similar restrictions introduced for harassment settlements? It's hard to tell.

In the last decade, as we all know, Ontario has introduced changes in the *Occupational Health and Safety Act* for employers to address workplace violence and harassment, including sexual harassment.

In 2016, the *Limitations Act* was amended to eliminate limitation periods for proceedings based upon sexual assault, or other types of sexual misconduct where the person alleged to have committed the misconduct was in a position of trust or authority in relation to the person with the claim. This includes members of management.

In the 2018 Ontario Superior Court decision of *Watson v. The Governing Council of the Salvation Army of Canada*, the court treated release language in a settlement agreement differently after the employee received the benefit of the settlement and was paid. She then raised allegations of sexual harassment about her former manager, who tried to have her claim dismissed on a summary judgment because of the release language.

The court held that the scope of the release was the employment relationship and that allegations of sexual harassment and intimidation were not included in the release, were not connected to employment. The court held her claim was not barred by the release.

Despite these changes, there is no word in Ontario on whether confidentiality agreements will be prohibited, or their use limited, in harassment situations. But based upon the new laws in other countries, those changes may be fast approaching.

Ruben Goulart is a Partner & HR Advisor with Bernardi Human Resource Law LLP and can be reached via email at rgoulart@hrlawyers.ca.

Alison Renton is a Lawyer and Human Resource Advisor with Bernardi Human Resource Law LLP and can be reached via email at arenton@hrlawyers.ca.