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Dear Lord Lucas,

Employment Rights Bill - Non-Disclosure Agreement amendment

Thank you for your contributions to the Lords Report Stage debate of the Employment Rights Bill on the 14 July. I am writing to provide responses to your questions in the debate regarding government amendment 46 which seeks to address the misuse of non-disclosure agreements (NDAs) in cases of harassment and discrimination.

Is it right that employers will not be permitted to suggest confidentiality?

The Government acknowledges that NDAs have their legitimate purposes, for example to protect intellectual property or financial information. However, they should never be used to take unfair advantage of workers, who may be in vulnerable or insecure positions, to cover up workplace misconduct. Unfortunately, evidence from a range of high-profile cases in the UK and overseas, as well as several parliamentary inquiries, has shown that some employers have been doing just this. Some employers can exploit the inherent imbalance of power to get NDAs signed, fostering a culture of silence and impunity. NDAs can also have negative impacts on workers, especially when they are prevented from discussing their experiences with others.

The Government will consult on the secondary legislation that will set out the criteria for a valid NDA in the case of relevant harassment and discrimination ('excepted NDA'). The intention is that the regulations will be aimed at shifting the balance of power away from employers who use NDAs to cover up misconduct by ensuring that workers have a greater say in whether they want an NDA and, if they do, a better understanding of what they are agreeing to.

Will there be mandatory independent legal advice?

The Government will consult on the secondary legislation that will set out the criteria for an excepted NDA. Whilst we do not want to pre-empt the outcomes of this consultation, we expect that some stakeholders will respond to indicate a preference for the legislation to require that a worker receive independent advice on the terms and conditions of an agreement before signing it. The Government will consider its response to this issue after reviewing evidence received in the consultation.

Will confidentiality be time limited, or at least have an opt-out?

These are matters that will be considered as part of the consultation on the secondary legislation. The Government will consider its response to this issue after reviewing evidence received in the consultation.

Will the excepted individuals to whom the victim can speak include someone the victim knows, a friend or a relative, not just independent professionals?

NDAs that prevent workers from speaking to anyone about their experiences can impact their health and wellbeing. The Government therefore wants to ensure that where NDAs are validly made in cases of harassment and discrimination that workers can still speak to certain prescribed people, such as a medical professional, to get the support they may need. We will consult on the individuals, to be prescribed in secondary legislation, that a worker with an excepted NDA can still speak to, for which purposes and/or in which circumstances.

Will non-disparagement clauses also be caught by this amendment?

The amendment covers any provision in an agreement between a worker and their employer which prevents a worker from speaking out about relevant harassment or discrimination.

Where an agreement includes a non-disparagement clause, this would be void in so far as it limits a worker's ability to speak out about relevant harassment, discrimination or their employer's response to it.

Once again, I want to thank you for your spoken contributions on the Government's amendment to address the misuse of NDAs in cases of harassment and discrimination. The Government will continue to listen to all views put forward by stakeholders regarding this policy as part of our formal consultation. This Government amendment addresses the misuse of NDAs by employers who want to silence workers about harassment and discrimination in the workplace, giving millions of workers confidence that inappropriate behaviour in the workplace will be dealt with and not hidden. If you have any further questions or would like to engage further on NDAs, please contact us and we can arrange a follow up meeting at your convenience.

I am copying this letter to all Noble Lords who spoke in the debate. I am also depositing a copy of this letter in the Library of the House.

Best wishes,

Maggie Jones.

BARONESS JONES OF WHITCHURCH

Parliamentary Under-Secretary of State (Minister for Legislation)
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