USE OF NON-DISCLOSURE AGREEMENTS

A CHS ALLIANCE GUIDANCE NOTE

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Foreword

The aid sector has had its fair share of controversy over the past few years, many regrettably, aggravated by accusations of "cover-ups". A UK parliamentary report published in 2019 suggested that widespread use of non-disclosure agreements (NDAs) had led to a "hush culture" and that overuse of NDAs could mean that "Victims may be reluctant to report their own experience for fear that their allegations will not be taken seriously or investigated properly and that they will lose their job".

Does it follow that the use of NDAs is intrinsically bad?

Not necessarily.

NDAs are also called and known as confidentiality, gagging or hush clauses and refer, throughout this Guidance Note, to any form of written agreement or contract, or a clause within a wider agreement or contract, that is used to stop parties to agreement from sharing or passing on information.

The CHS Alliance has issued this Guidance Note under its mandate to advise, guide and train organisations to be accountable to affected populations, protect against sexual exploitation, abuse and harassment and better manage people. It aims to improve the understanding around the use of non-disclosure agreements (NDA) and to set out good practice in regard to their use by the organisations and individuals involved in aid response.

In doing so, we seek to assist organisations to apply the Core Humanitarian Standard on Quality and Accountability (CHS), to verify their performance against specific commitments, and to improve their professionalism, compliance and performance over time. As more organisations learn and measure how they meet the CHS, this verification process – either through self-assessment or by a third-party auditor – reveals areas where further guidance might be needed in the interpretation of some CHS indicators.

NDAs are increasingly common in employment contracts and over the past years have grown not only in number but also in breadth. They not only appear in settlements after a victim of sexual harassment has raised their voice but also are now routinely included in standard employment contracts upon hiring. Beyond the sensitive information that organisations rightfully want to protect from leaking, the problem is that NDAs are often written broadly exposing employees to legal risks beyond what current trade secrets' laws otherwise would protect. Despite several important legal exceptions to the enforceability of NDAs, both employers and employees are still largely uninformed about these protections and the enforceable scope of confidentiality agreements.

Foreword continued

In developing this Guidance Note, we have reviewed a broad range of literature including articles, laws and regulations enacted across the world and various guidance notes published on this subject. We consulted CHS Alliance members to seek their views on whether there were circumstances where NDAs were found appropriate for the aid sector, if at all, and if that use was deemed compatible with the CHS. We also shared a public opinion piece to request and garner more views.

This research and some of the feedback received, emphasise the complexity of the subject and confirm the need for a periodic review of this Guidance Note reflecting emerging legislation, practice and evidence.

In the meantime, and given the raising global scrutiny of NDAs in the context of workplace sexual misconduct, as well as minimal legal guidance in most countries, the CHS Alliance advises organisations to review their policies, procedures and practices in order to:

- restrict the scope and use of NDA provisions in employment contracts and settlements agreements by default or as a standard without clear explanation of why the confidentiality clause is proposed and what it intends to achieve;

- prohibit the use of NDAs to cover up inappropriate behaviour and wrongdoing, stop the reporting of discrimination, harassment or prevent whistleblowing, with only exception when employee requests for it;

- set out clear limitations of NDA provisions and the right of disclosure to certain groups including the police, health care professionals, lawyers and immediate family;

- keep a central record of NDAs and regularly report to their leadership on the number and type of NDAs signed and amounts paid-off;

- ensure employees, line managers and HR are aware of these changes and about this Guidance Note through education and communication.

The CHS Alliance proposes a number of safeguards hereafter to guide an organisation in their use of NDAs in alignment with the CHS commitments.

Scope of this Guidance Note

The quantity of documentation found on internet is extensive and can quickly appear daunting. This simple Guidance Note has been produced to give a basic overview of non-disclosure agreements, covering their definition and application in the workplace, set forth options to consider to help meet the requirements of the CHS and outline key recommendations for employers and employees.

It is intended to serve as a reference for HR professionals, line managers and leaders of humanitarian and development organisations when planning, developing, implementing, revising, and maintaining NDAs.

Individuals who are asked to sign or have signed an NDA, should read this document and seek additional legal advice for further clarification, if needed.

This Guidance Note is also intended to assist those undertaking an organisational verification of the CHS. CHS auditors should assess whether organisations use NDAs lawfully and in compliance with recommendations stated in this document.

Those who seek more information will find a list of useful reference literature on pages 12 and 13 of this Guidance Note.

What is a non-disclosure agreement?

Non-disclosure agreements, restricting what a person or organisation can say, or to whom they can say it, most often come in two basic types: a mutual (bilateral or multilateral) agreement or a one-sided (unilateral) agreement. In the workplace, an NDA can form a legitimate part of an employment contract to keep employees from disclosing any confidential or sensitive information or included as part of a settlement agreement to end the employment relations.

Such confidential information applied to the aid sector might include, for example, intellectual property or certain things an employee learns, sees or experiences in the course of their work, sensitive/personal records about affected communities and population, or information belonging to other third parties with which the worker will come into contact.

Whatever their type, NDAs are always legally binding contracts used to protect the secrecy of confidential information given to another party. For this reason, NDAs are critically important for any conflict that might arise in the future. Any party violating the agreement would be legally liable to compensate for damages.

When might non-disclosure agreements be appropriate and compliant with CHS?

There are numerous instances where NDAs are appropriate and used lawfully by employers to protect confidential information and this aligns to the following CHS commitments. For example, confidentiality is required for protective reasons under:

Commitment 3, indicator 3.8: All personal information collected from communities should be treated as confidential. This is particularly the case with regard to handling complaints about sexual exploitation and abuse (see Commitment 5) where assurances of confidentiality are essential to prevent further harm from occurring. More generally, some organisations working in volatile situations or on sensitive topics, a contractual guarantee of confidentiality is critical to safe working practices, ensuring that staff can deliver vital services and maintain access to people in need. Indeed, under some circumstances, a guarantee of confidentiality may be desirable or even essential in order for organisations to carry out their functions and deliver services to those who need them the most.

Commitment 4, indicator 4.6: Not all information can or should be shared with all stakeholders. Decisions about what information to share should be based on an assessment of risk. For example, in some insecure areas, publicising information about cash distributions might put people at risk of being attacked. Such considerations may apply not just to staff but to regional and local contractors as well, giving the sector a legal standing should confidence be breached, and projects compromised as a result. Organisations holding confidential personal or medical data may also feel compelled to bind staff to non-disclosure during and even after their terms of employment.

Commitment 5, indicator 5.3: Care must be taken in deciding who needs to know what information within the organisation. Given the social stigma associated with sexual abuse and the very real danger that women and children reporting such abuse could face from perpetrators and their own families, it is essential to ensure that their complaint will be treated confidentially and reassure them that they will face no danger of retaliation. A whistle-blowing policy should offer assurance of protection to staff who highlight concerns about programmes or the behaviour of colleagues.

When should non-disclosure agreements be avoided and noncompliant with CHS?

In the wake of #MeToo Movement, recent high-profile scandals have shone a spotlight on public concerns that NDAs can be used unjustly and unethically to silence employees that may suffer harassment and discrimination of various forms from their employers and to cover up the wrongdoing to protect employer's reputation. As the tide is beginning to turn against improper use of NDAs, we have analysed the circumstances when NDAs should be avoided andnoncompliant with the CHS requirements under:

Commitment 3, Indicator 3.6: All staff share a responsibility to maintain an environment that is free of exploitation and abuse. Staff members have a responsibility to report any abuse they suspect or witness, whether within their own organisation or outside. No workplace should operate a culture or system where individuals are too scared to report wrongdoing, regardless of whether an NDA has been signed or not. An NDA should not be used to prevent whistleblowing, reporting of discrimination or harassment or to cover up inappropriate behaviour or misconduct, particularly if there is a risk of repetition of such behaviour. The only exception should be the express request of an NDA by the employee.

Commitment 8, Indicator 8.1: Staff work according to the mandate and values of the organisation and to agreed objectives and performance standards. The use of NDA's that cover up unlawful discrimination and harassment allow management behaviour and organisational culture to go unchallenged and unchanged, which comes as a serious disconnect between the statements made in most aid organisations' mandate and values. Organisations should work on reducing this gap and work towards shaping a culture that reflects their values and standards.

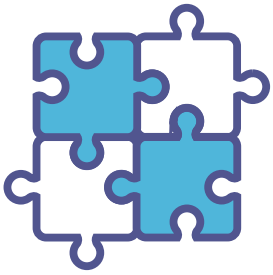
Commitment 8, Indicator 8.2: Staff adhere to the policies that are relevant to them and understand the consequences of not adhering to them. Employers should clearly define and outline what information is considered confidential and what employees are asked to agree to. Caution must be taken with excessive NDAs that ask employees to be silent about everything regarding the organisation or provisions that are used identically for all employees in the organisation despite the difference in roles and responsibilities, with some roles not requiring confidentiality clauses.

When should non-disclosure agreements be avoided and noncompliant with CHS? - continued

Commitment 8, Indicator 8.5: Staff policies and procedures are fair, transparent, non-discriminatory and compliant with local employment law. Employers should follow and remain up to date with latest developments on NDAs. They must fill certain conditions to be compliant with national regulatory obligations and this Guidance Note as a minimum. As a result, NDAs must not try to avoid a legal requirement to make a referral to a regulatory and/or government body or to the police. The policies, procedures and practices should reflect organisations' commitment to promoting fair, transparent and safe working environment.

Commitment 8, Indicator 8.7: A code of conduct is in place that establishes, at a minimum, the obligation of staff not to exploit, abuse or otherwise discriminate against people. Indeed, by covering up inappropriate behaviour or wrongdoing or by forcing employees to sign, NDAs cause serious moral or ethical issues. The workplace culture nurtured by the use of NDAs is often in stark contrast with values and desirable behaviours mentioned in most codes of ethics or conduct in the sector.

Commitment 8, Indicator 8.9: Policies are in place for the security and the wellbeing of staff. Organisations should weigh up the benefit to the employer of using the confidentiality agreement against the consequence such agreements can have on the employee (wellbeing) and organisational culture. Employers should also contemplate the benefits of not using NDAs. Research by Pregnant Then Screwed, for example, found that more than 90 % of women who had signed an NDA after encountering pregnancy or maternity discrimination felt this was their only option, and 70% said that signing had negatively affected their mental health. Having an open-door policy where employees can approach their line managers and know they will be taken seriously will help employees to feel secure about raising workplace issues.



Commitment 9: Communities and people affected by crisis can expect that the organisations assisting them are managing resources effectively, efficiently and ethically. NDAs, in settlement agreements, typically involve a payment to an employee on the condition that they do not disclose specific information about the organisation to anyone else. It's arguable if this use of donated financial resources is reasonable. Moreover, using NDAs in this way prevents organisations from resolving underlying and systemic issues and implementing the measures needed to tackle them. Employers should keep track of their use of NDAs, summarising and reporting to their leadership the total amount paid off and the number and type of NDAs made.

When should non-disclosure agreements be avoided and noncompliant with CHS? - continued

The commitments and examples above recognise that NDAs are essential in protecting confidential information which if exposed might jeopardise the best interest of an affected person. At the same time, they can prevent employees from speaking up and, as a result, promote organisational cultures that cover up inappropriate behaviour and wrongdoing, leading to a poor and un-safe working environment where ethical breaches are not reported or investigated.

Given these concerns, it is likely there will be continuous calls for further NDA regulation across the world (as seen already in the UK and many states in the USA). There may also be extended scrutiny over lawyers' professional duties when negotiating such agreements, especially in sexual harassment disputes.

NDAs cause serious moral or ethical issues, when they are deployed to cover up inappropriate behaviour or wrongdoing, unless the employee requests it.

There should be appropriate and diverse reporting policies and mechanisms in place to allow the employees to report their grievances and require managers to escalate concerns about the workplace culture, systemic discrimination and serious or repeated acts of discrimination by one individual.

Employers must attempt to resolve these issues promptly, seriously and discreetly and take all reasonable actions to prevent such situations occurring again in the future.

HR professionals play a key role in developing cultures where discrimination and harassment are known to be unacceptable and where individuals are confident enough to bring complaints without fear of ridicule or reprisal.

Top recommendations for employers

1 Assess the need, restrict the use and scope

Employers should carefully consider whether confidentiality provisions are required in the first place and restrict the use and scope of NDAs. There are many situations when there is no real need for one. Often, the information employer seeks to protect is already protected under national laws and data privacy regulations.

2 Adopt a case-by-case approach

If an employer uses a template employment contract or settlement agreement, NDAs should not be included as standard (by default) but added to it only as required for the situation they encounter. Organisations should adopt a case-by-case approach and sign off each and every NDA by a director (or equivalent) or by an appropriate delegated senior manager to prevent their misuse or overuse. The employer's board of directors (or equivalent) should have oversight of the central record of NDAs and regularly analyse their use, scope, number and cost.

3 Tend to unambiguous content, set clear boundaries and share with staff concerned

NDAs must be clear in their wording, meaning, effect and limits (use plain English, avoid jargon) outlining a definition of what is considered to be confidential information at the outset of the employment. This should be included in the induction processes and policies and a copy of the signed NDA must always be given to the employee to keep for their records. If in any doubt as to whether the NDA's wording is appropriate, the employer should seek advice.

4 Ensure compliance with existing law and this Guidance Note

NDAs must be compliant with national regulatory obligation, this Guidance Note and any other applicable legislation issued on the subject of NDAs in the workplace. Employers should prohibit NDAs that seek to prevent lawful whistleblowing, reporting criminal activity or making disclosures required by law and stop employees from speaking with their supervisor, HR or relevant colleagues, their immediate family, legal advisor and medical professional at a minimum.

5 Provide assistance to your staff member as needed and appropriate

Employees should not be put under pressure to sign an NDA and a reasonable amount of time (normally no less than 10 working days) should be given to the employee to seek independent advice of their choice in order to consider the terms of the confidentiality agreement. The employer should also consider paying for the costs of the legal advice (based on costs locally practiced), even if the employee decides not to sign the NDA at the end.

Top recommendations for employees

1 Consider if the NDA content is clear and its use is justified

When entering into an NDA, employees should carefully consider whether confidentiality clauses are justified and clearly outline what information in the organisation is considered confidential and sensitive. It should not include the information that cannot be protected, namely anything that is a matter of public record or common knowledge.

2 Understand what happens in case of NDA's breach and confirm the obligations are mutual

NDAs specify cash amounts to be paid in case of agreement's breach. This obligation should apply to both parties, not the employee only. High numbers are terrifying and very effective in silencing employees, but often rejected by courts where the damage/penalty for the breach is found to be much greater than the harm actually caused by an alleged breach.

3 Check the NDA is limited in time

NDAs should be limited in time and should raise a red flag if established for the employee's entire life duration.

4 Watch out for Forced arbitration clause

If an NDA comprises a forced arbitration clause it will require private and confidential arbitration rather than in a public court of law.

5 Clarify the circumstances in which the NDA can or can not be enforced

An NDA should not seek to prevent employee from bringing a discrimination or (sexual) harassment claim/complaint or using their whistleblowing rights with the proper authority.

6 Confirm your right for legal disclosure

An NDA cannot prohibit an employee from making disclosures required by law and permit disclosure to legal, financial and medical advisers and close family members.

Even if you think you are sure about the NDA terms, perhaps its good practice to always seek advice from a qualified independent legal advisor. Indeed, while many clauses might be legal, it is important to be aware of what they meanand reduce the likelihood of feeling that your rights are suppressed.

Conclusion

As discussed throughout this Guidance Note, NDAs can provide value and protection to each party and satisfy CHS requirements, if used correctly. We have also covered many circumstances where their use is inappropriate, unlawful and noncompliant with the CHS and as such should be avoided.

The CHS Alliance recommends to avoid using an NDA unless there is a strong case to include one. Indeed, in employment, many contracts, settlements and other legal agreements do not need confidentiality clauses. In many cases, adding an unnecessary confidentiality clause can have unintended negative consequences, particularly on workplace culture and people practices.

Organisations are reminded to consider the importance of fostering a working environment where employees and managers feel safe and enabled to address misunderstandings as early and informally as possible, for example by keeping channels of communication open and training managers to spot and tackle early signs of conflict or disagreement. A robust HR management function is central as an enabler to foster a healthy working environment all the while ensuring clear procedures and channels exist for tackling challenges that may arise.

Having clear workplace policies that are genuinely acted upon and refreshed is essential. Whistleblowing and harassment should be treated with the same significance as allegations of bribery and corruption and amending the ways in which NDAs are used will go some way towards ensuring matters can't be hidden or covered up. Leaders should encourage employees of any level to come forward with information and should be celebrated, not castigated. Maintaining a central record of NDAs, signing them off by a senior manager (or equivalent) and reporting back to leadership on their use and cost should help secure the support from the top in implementing the recommendations and safeguards put forward in this Guidance Note.

In light of newly enacted laws across the world and numerous guidance documents, the CHS Alliance encourages organisations to consider how and why they use NDAs and whether such use is 1. Required, 2. Appropriate as per this Guidance Note and 3. Lawful.

Further sources of advice, support and information

Equality and Human Rights Commission (EHRC) UK (2019) The use of confidentiality agreements in discrimination cases (online, assessed 12 May 2020)

Solicitors Regulation Authority, UK (2019) Confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination (online, assessed 12 May 2020)

Solicitors Regulation Authority, UK (2018) Use of non-disclosure agreements (NDAs) (online, assessed 12 May 2020)

Swiss Civil Code, Part Five: The Code of Obligations (online, assessed 12 May 2020)

ACAS guidance on non-disclosure agreements (2020) (online, assessed 12 May 20200)

ACEVO (2019) In plain sight, Workplace bullying in charities and the implications for leadership (online, assessed 12 May 2020)

CIPD (2019) Would a ban on NDAS help prevent harassment? (online, assessed 12 May 2020)

CIPD (2018) The use of Non-Disclosure Agreements in Discrimination cases. Submission to the Women & Equalities Select Committee (online, assessed 12 May 2020)

SHRM (2018) When Should Employers Use Nondisclosure Agreements? (online, assessed 12 May 2020)

People Management (2020) Are NDAs a reflection of workplace culture? (online, assessed 12 May 2020)

People Management (2019) Are NDAs really that bad? (online, assessed 12 May 2020)

People Management (2018) Rely on culture change, not NDAs, to end harassment, say experts (online, assessed 12 May 2020

Further sources of advice, support and information - continued

Hayley Gullen: The Sceptical Fundraiser (2020) How many charities are covering up bad behaviour with NDAs? Let's make them tell us (online, assessed 12 May 2020)

The Guardian (2019) Pregnant then screwed: how gagging contracts are used to silence sacked mothers (online, assessed 12 May 2020)

New Law Journal (2019) NDAs: Good intentions & their consequences (online, assessed 12 May 2020)Personnel Today (2019) Putting a stop to the misuse of NDAs (online, assessed 12 May 2020)

Workplace Fairness, Non-Disclosure Agreements (NDAs) (online, assessed 12 May 2020)

The Law Society, UK: Non-disclosure agreements and confidentiality clauses in an employment law context (online, assessed 12 May 2020)

HR Magazine (2019) Why proposed NDA reform helps employers (online, assessed 12 May 2020)

HRM Australia (2019) Should NDAs be restricted in sexual harassment cases? (online, assessed 12 May 2020)

Independent (2017) How NDAs maintain a culture of silence around workplace sexual harassment (online, assesed 12 May 2020)

Harvard Business Review (2018) NDAs Are Out of Control. Here's What Needs to Change (online, assessed 12 May 2020)

Farrer & Co (2020) New ACAS Guidance: Non-Disclosure Agreements (online, assessed 12 May 2020)

Farrer & Co (2019) Non-Disclosure Agreements, so last season? The use of "gagging clauses" in the post #MeToo world (online, assessed 12 May 2020)