In their February newsletter, ACAS announced the release of their new Non-Disclosure Agreement (“NDA”) guidance. This guidance is now publicly available online and seeks to answer some of the questions surrounding the use of NDAs.

Those questions on what is or is not appropriate to include in an NDA (or confidentiality agreement or clause) have in the recent past caused huge problems for employers and their advisers. They have led in some cases to employers facing the backlash of adverse publicity, or risk making a sensitive issue far worse. For their advisers, it has also led to disciplinary proceedings being taken against them. All this seems to have come about during a period of recalibration of the norms of behaviour, not necessarily in what constitutes individual bad behaviour, but in how good employers are expected to behave in trying to resolve the situation with those affected.

The general trend of the guidance is to explain what you cannot seek to gag—where imposing a non-disclosure obligation would be wrong.

Most concerns centre around the use of NDAs at work due to a number of workplace sexual harassment and discrimination cases where NDAs have been used to silence whistle-blowers. They should not be used to cover up misconduct and inappropriate behaviour, nor to prevent proper reporting of that behaviour, for example, to the police or a disciplinary body.

Whilst NDAs can be useful (and necessary) in order to protect sensitive commercial information or trade secrets, or the commercial terms of any settlement or the fact of a settlement, there are limits to what should be included. Care needs to be taken in how they are used and how widely they are drafted.

With this guidance, ACAS seeks to educate employers on the appropriate use of NDAs in order to prevent their misuse. The guidance therefore covers what a NDA is, when and whether they should be used, how they should be used and what alternative actions an employer could take.

The full guidance can be found on the ACAS website.

**Michael Archer** is a Partner in Beale & Co’s Corporate Team. His employment practice covers work for both employers and also high-net-worth employees and he is a member of the Employment Lawyers Association.

If you have any questions in relation to the ACAS guidance, please contact Michael on the details below.

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