

ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

**NON-DISCLOSURE AGREEMENTS (NDAs)
SECOND POLICY REPORT
OF THE WORKING GROUP**

Presented by

Jennifer Khor

Supervising Lawyer, Community Legal Assistance Society

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Minutes and the Resolutions on this topic as adopted by the Conference at the Annual meeting.

**Ottawa, Ontario
August 2024**

This document is a publication of
the Uniform Law Conference of Canada.
For more information, please contact
info@ulcc-chlc.ca

Contents

A. Working Group membership and meeting report.....	1
B. Background.....	1
C. Application	5
D. Consultation	5
E. Issue Identification and Analysis	5
F. Options for Consideration.....	6
1. Scope	6
Recommendation 1	7
2. Legislative choice in regulating NDAs.....	7
Recommendation 2	9
Recommendation 3	9
3. Approach to prohibition.....	9
Recommendation 4	10
4. Clarifying NDAs regulated by proposed legislation	10
Recommendation 5	11
5. No restrictions on disclosure of underlying facts	12
Recommendation 6	12
6. Non-applicability and exceptions.....	12
Recommendation 7	13
Recommendation 8	14
7. Requirements or safeguards for NDA to be valid.....	16
Recommendation 9	19
8. NDAs during investigation.....	19
For discussion	20
For discussion	20
9. Retrospectivity	20
Recommendation 10	20
10. Penalties.....	21
Recommendation 11	22
11. Use of public funds	22

	Recommendation 12	23
12.	Measures to support awareness of law.....	23
	Recommendation 13	24
	For discussion	24
13.	Reporting	24
	For discussion	25
14.	Defamation	25
	Recommendation 15	25
F.	Next Steps.....	25
G.	Draft Resolution	25
	Appendix A: NDA Legislation Summary Chart.....	26

Non-Disclosure Agreements (NDAs) - Second Policy Report of Working Group

A. Working Group membership and meeting report

[1] The working group on Non-Disclosure Agreements (NDAs) (the Working Group) commenced meeting in April 2023 to examine the need for uniform legislation to address concerns related to the use of NDAs. Members of the Working Group this year are:

Katie Armitage, Government of British Columbia (Until February 9, 2024)
Natalie Barnes, Government of BC (From February 9, 2024)
Chelsea Evans-Rymes, Government of Alberta
Olivier Gadoua, Government of Canada
Jennifer Khor, Community Legal Assistance Society, BC
Nicolas Le Grand Alary, Barreau du Québec
Peter Lown, K.C., Working Group chair, Uniform Law Conference of Canada (ULCC)
Tyler Nyvall, Government of BC
Clea Parfitt, private lawyer, BC
Christina Croteau, ULCC

[2] Jennifer Khor is a lawyer who works for Community Legal Assistance Society, a non-profit law firm in BC, providing free legal advice. She is the writer of this report.

[3] Since the 2023 Annual Meeting, the Working Group met 10 times to consider policy issues and develop the recommendations in this report for model legislation on NDAs.

B. Background

[4] The #MeToo Movement¹ brought attention to the harms caused by NDAs in certain contexts.² Women broke their NDAs to speak out about how being forced to be silent affected them and to bring attention to the serial predatory nature of perpetrators of sexual harassment and sexual assault. As a result of the public outcry, there were calls for banning or restricting the use of NDAs with many jurisdictions around the world introducing legislation.

[5] As people spoke out more regarding the harms of NDAs, it became clear that people who are silenced by NDAs experience harm in a range of ways, from being restricted from accessing necessary counselling or medical supports to process what happened to them, to being unable to explain a gap or change in their employment, or behaviour that may be triggered due to past trauma at work or in their relationships. They may also experience anxiety or guilt about not being able to warn others who are targeted by the same perpetrator. People who sign an NDA often live with a fear of accidentally breaching it. As NDAs typically have no end date, the perpetrator effectively exerts a level of control over the

¹ Me Too Movement, online: <https://metoomvmt.org/>

² In this paper the term NDAs is used to refer to non-disclosure agreements used in settlement agreements, pre-emptive non-disclosure agreements often included in employment contracts, non-disparagement clauses, and generally confidentiality agreements used to prevent someone from talking about their experience. It does not extend to confidentiality agreements that prevent disclosure of a settlement amount.

complainant forever exacerbating feelings of powerlessness and helplessness. People are often pressured to sign NDAs and may not understand they can refuse to do so or attempt to negotiate something different. A complainant may want to maintain their privacy and may not appreciate that this can be done without agreeing to a blanket NDA. There is no dispute that NDAs can serve to protect perpetrators of wrongdoing, allowing them to continue their wrongful behaviour and further harm others.

[6] Members of marginalized and vulnerable communities are more likely to experience harms, such as sexual harassment and misconduct, racial harassment, and therefore be faced with an NDA. While NDAs are not limited to the workplace, statistics on rates of harassment and violence in the workplace are indicative of the likely impact that legislating NDAs may have. In Canada, 47% of women and 31% of men report experiencing some form of harassment or sexual assault in the workplace.³ Gender-diverse workers report higher rates of harassment and violence in the workplace at 82% as do Indigenous people at 79%, compared to women at 76% or men at 67%.⁴ While it is difficult to ascertain the extent to which NDAs are used, due to their secrecy, in a survey of participants conducted in 2022 at a human rights law conference, 48% of poll respondents indicated that NDAs were involved in 85%-100% of their settlements; this rose to 67% of respondents for NDAs for 70% or more of settlements.⁵

[7] In Canada, Prince Edward Island (PEI) became the first jurisdiction to enact NDA legislation (the PEI Act)⁶ in 2021. Proposed NDA bills were introduced in Nova Scotia (NS)⁷, Manitoba⁸, BC⁹, Ontario,¹⁰ and in the Senate in 2022 and 2023.¹¹ These were all private members' bills. In 2022, NDAs were restricted in Ontario in post-secondary institutions for situations of sexual misconduct through Bill 26.¹² Ontario also amended regulations to specify that contractual agreements cannot prevent reporting to the registrar for

³ Statistics Canada, *Gender Results Framework: A new data table on Workplace Harassment*, Feb 12, 2024. Online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/240212/dq240212a-eng.htm>> retrieved May 14, 2024.

⁴ Centre for Research and Education on Violence Against Women and Children and the Canada Labour Congress, *Research Report: Harassment and Violence in Canadian Workplaces: It's [Not] Part of the Job*, April 2022, Western. Online:

<https://www.learningtoendabuse.ca/research/national_survey_on_harassment_and_violence_at_work_in_canada/pdf/Respect-at-Work-Report-ENGLISH.pdf>

⁵ Poll taken at CLE BC Human Rights Law Conference, November 2022.

⁶ *Non-disclosure Agreements Act*, RSPEI 1988, c N-3.02 ("PEI"). Online https://www.princeedwardisland.ca/sites/default/files/legislation/n-03-02-non-disclosure_agreements_act_2.pdf

⁷ Bill No. 144, *Non-disclosure Agreements Act*, 1st Sess., 64th Leg., Nova Scotia, 2022. Online <https://nslegislature.ca/legc/bills/64th_1st/1st_read/b144.htm>

⁸ Bill 225, *The Non-disclosure Agreements Act*, 4th Sess., 42nd Leg., Manitoba, 2021-22. Online <<https://web2.gov.mb.ca/bills/42-4/b225e.php>>

⁹ Bill M215, *Non-disclosure Agreements Act*, 4th Sess., 42nd Leg., British Columbia, 2023. Online <<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/42nd-parliament/4th-session/bills/first-reading/m215-1>>

¹⁰ Bill 124, *Stopping the Misuse of Non-Disclosure Agreements Act, 2023*, 1st Sess., 43rd Leg., Ontario, 2023. Online <<https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-124>>

¹¹ Bill S-261, *An Act respecting non-disclosure agreements*, 1st Sess., 44th Parl., 2023 ("Canada"). Online <<https://www.parl.ca/DocumentViewer/en/44-1/bill/S-261/first-reading>>

¹² Bill 26, *An Act to amend various Acts in respect of post-secondary education*, S.O. 2022, c. 22. Online <https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2023/2023-11/b026ra_e_corr.pdf>

real estate agents.¹³ The misuse of NDAs was covered by the Canadian media with Hockey Canada's use of NDAs to silence complainants of sexual assault.¹⁴ Organizations such as Can't Buy My Silence¹⁵ led the advocacy campaign for restricting NDAs. In 2023, the Canadian Bar Association passed a resolution to promote the fair and proper use of NDAs; discourage their use to silence victims and whistleblowers reporting experiences of abuse, discrimination and harassment, and advocate for legislation and policies to ensure NDAs are not misused.¹⁶

[8] Considering these developments, the ULCC established a working group to consider whether there was a need for a harmonized approach to addressing concerns related to NDAs. The Working Group commenced meeting in April 2023.

[9] Since the establishment of the Working Group, the Manitoba Law Reform Commission issued a report on *The Use of Non-Disclosure Agreements in the Settlement of Misconduct Claims*¹⁷ expressing concerns that legislation to prohibit NDAs would result in a decrease in settlements and recommended against the enactment of proposed Manitoba NDA legislation. A research report on workplace sexual harassment released in Quebec noted concerns about the use of NDAs and recommended that they be limited.¹⁸ In 2024, Quebec amended the Labour Code to include a clause that parties may relieve each other of the confidentiality of "anything said, written or done during the settlement process" in a settlement involving psychological harassment.¹⁹ Bill 613²⁰ was introduced in Saskatchewan proposing amendments to *The Saskatchewan Employment Act* which included provisions restricting NDAs. Several post-secondary institutions have voluntarily taken the Can't Buy My Silence pledge not to use NDAs to

¹³ *Code of Ethics*, O. Reg. 265/22. ("Ontario Regs.") Online <<https://www.ontario.ca/laws/regulation/r22365>>

¹⁴ Jonathon Gatehouse, Albert Leung, "Documents reveal Hockey Canada received \$14M in federal funds over the past 2 years" (June 20, 2022), online CBC News <<https://www.cbc.ca/news/canada/hockey-canada-federal-funding-1.6493025>> Funding was restored in 2023 subject to conditions: Christian Paas-Lang, "Federal government says it will restore funding to Hockey Canada – with conditions" (April 16, 2023), online CBC News <<https://www.cbc.ca/news/politics/hockey-canada-federal-government-funding-restored-1.6812492>>

¹⁵ Can't Buy My Silence website <<https://www.cantbuymysilence.com/>>

¹⁶ Canadian Bar Association, *Principles to Prevent Misuse of Non-Disclosure Agreements in Cases of Abuse and Harassment*, Resolution 23-05-A. Online: <<https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2023/Principles-to-Prevent-Misuse-of-Non-Disclosure-Agr/23-05-A.pdf>>

¹⁷ Manitoba Law Reform Commission, *Report 145 – The Use of Non-Disclosure Agreement in the Settlement of Misconduct Claims*, June 2023: http://www.manitobalawreform.ca/pubs/pdf/145-full_report.pdf

¹⁸ Comité Chargé d'Analyser les Recours en Matière de Harcèlement Sexuel et d'agressions Sexuelles au Travail, *Rapport final: Mettre Fin au Harcèlement Sexuel dans le Cadre du Travail: se Donner les Moyens pour Agir* (March 2023) Montréal. Online: <https://www.travail.gouv.gc.ca/fileadmin/fichiers/Documents/Harcelement_psy_sexuel/RA_final-recours-harcelement-sexuel-au-travail_MTRAV.pdf>

¹⁹ Bill 42, *An Act to prevent and fight psychological harassment and sexual violence in the workplace*, SQ2024, c. 4, s.25. Online <<https://canlii.ca/t/568pv>>

²⁰ Bill No. 613, *An Act to amend The Saskatchewan Employment Act to provide for a Fairer Workplace and Better Jobs*, 4th Sess, 29th Leg., Saskatchewan, 2023-24. Online <<https://docs.legassembly.sk.ca/legdocs/Bills/29L4S/Bill29-613.pdf>>

settle complaints of “sexual harassment, discrimination, abuse or misconduct, or other forms of harassment and bullying”.²¹

[10] Internationally, an increasing number of jurisdictions continue consider and enact legislation to ban or restrict NDAs.²² The Legal Services Board of England and Wales issued a summary report²³ from their call for evidence on the use of NDAs highlighting the widespread misuse of NDAs and considering regulatory reform. Legal researchers at the University of Sydney published a report²⁴ discussing the overuse and misuse of NDAs in sexual harassment settlements since the Australian Human Rights Commission Respect@Work Report and recommendations for model confidentiality clauses to address the concerns of regarding the use of NDAs. Universities across the United Kingdom have signed the Can’t Buy My Silence pledge.²⁵

[11] The Working Group delivered its first progress report²⁶ to the ULCC Annual Meeting in Charlottetown in August 2023. In it we discussed the need for harmonized legislation, set out the values and principles underpinning policy discussions, considered the scope of conduct that should be subject to the legislation, discussed legislative options, and raised issues for discussion and direction by the Section.

[12] At the Annual Meeting the Civil Section passed the following resolution:

BE IT RESOLVED:

THAT the progress report of the Working Group on Non-Disclosure Agreements (NDAs) be accepted;

THAT the working group continue its work in accordance with the directions of the ULCC; and

THAT the working group report back to the ULCC at the 2024 meeting.

²¹ Acadia University and University of King’s College in Nova Scotia, and Columbia College in British Columbia. See: Caitlin Snow, “Two Nova Scotian Universities pledge to “Can’t Buy My Silence” campaign”, *101.5 The Hawk*, Dec 7, 2023: <https://www.1015thehawk.com/2023/12/07/56064/> and Bethany Lindsay, “Vancouver college becomes the first B.C. school to sign pledge banning NDAs in abuse cases”, *CBC News*, Jan. 13, 2024: <https://www.cbc.ca/news/canada/british-columbia/bc-columbia-college-nda-abuse-pledge-1.7082116>

²² See Appendix A: Table of NDA Legislation.

²³ The Legal Services Board, *The Misuse of Non-Disclosure Agreements: Call for Evidence Themes and Summary of Evidence*, Legal Services Board, February 2024: <https://legalservicesboard.org.uk/wp-content/uploads/2024/02/NDA-call-for-evidence-themes-and-summary-Feb-2024.pdf>

²⁴ Regina Featherstone, Sharmilla Bargon, *Let’s Talk about Confidentiality: NDA use in sexual harassment settlements since the Respect@Work Report*, University of Sydney (March 2024). https://rlc.org.au/sites/default/files/2024-03/Let%27s%20talk%20about%20confidentiality%20final_0.pdf
Appendix: Model confidentiality clauses. <https://rlc.org.au/sites/default/files/2024-03/Model%20confidentiality%20clauses.pdf>

²⁵ Can’t Buy My Silence website UK pledge list: <https://www.cantbuymysilence.com/british-uni1>

²⁶ *Non-Disclosure Agreements (NDAs) Progress Report of the Working Group*, August 2023. <https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2023/Progress-Report-of-the-Working-Group.pdf>

C. Application

[13] This project is to propose a model legislation on NDAs for consideration by all jurisdictions in Canada, both common law and civil law in Quebec, for a harmonized approach.

D. Consultation

[14] The Working Group consulted with Dr. Julie Macfarlane, professor emeritus of University of Windsor and founder of Can't Buy My Silence. Dr. Macfarlane shared with the Working Group her analysis indicating that settlement rates²⁷ have not dropped in jurisdictions which have passed legislation restricting NDAs. In fact, the data shows an increase in rates of settlements.

[15] The Working Group also consulted with Joanna Birenbaum, a lawyer recognized for her work in the areas of sexualized violence and civil sexual assault. She is also Director of Capacity Building for Watershed Legal Projects²⁸, formerly the Canadian Centre for Legal Innovation in Sexual Assault Response (CCLISAR), dedicated to transforming legal systems' responses to sexualized violence. As CCLISAR, Watershed held an expert workshop on NDAs in November 2021 and issued a position statement²⁹ supporting:

a nuanced approach to legislation prohibiting NDAs that will provide clear guidance to all parties as to the circumstances in which, at the request and direction of the survivor, and in the public interest, confidentiality as to the identity of the individual respondent may be a term of any agreement between a survivor and an individual or institutional respondent. It will be a rare circumstance where confidentiality terms to protect institutional respondents would ever be in the public interest.

E. Issue Identification and Analysis

[16] There has been a proliferation in the use of NDAs to hide wrongful conduct and silence complainants or whistleblowers. Complainants who signed NDAs, which typically never expire, are often unable to seek the support they need to move on from the trauma of the sexual harassment or assault and live in fear of breaching the NDA accidentally. Also, they may experience guilt if they learn that the perpetrator has moved on to harm others. NDAs effectively give the perpetrator continued control over

²⁷ Between 2017 and 2021, at least 9 states legislated to restrict NDAs for sexual harassment cases - California, Vermont, New Mexico, Arizona, Hawaii, New Jersey, New York, Washington State, and Maine. These 9 states constitute 27% of the total US population and approximately 18% of the nationwide EEOC sexual harassment claims in 2022. In 2017 there were a total of 6,996 sexual harassment claims to EEOC. These numbers began to rise significantly from 2018 onwards, then declined to 6,201 in 2022. In 2017, before there was NDA legislation, the overall settlement rate at the EEOC was **81%**. After these 9 states passed NDA legislation, in 2022, **there was an overall settlement rate of 92.1%**. Data source: Equal Employment Opportunity Commission settlement data, 2022. Analysis by Dr. Julie Macfarlane, Can't Buy My Silence provided February 12, 2024

²⁸ Watershed Legal Projects website: <<https://www.watershedlegalprojects.ca/>>

²⁹ Canadian Centre for Legal Innovation in Sexual Assault Response, *Position Statement Legislation Prohibiting Non-Disclosure Agreements (NDAs)*. Online: <https://www.watershedlegalprojects.ca/files/ugd/4b52bd_c138560207e8460caabbf1c68dc2a005.pdf>

complainants and serve as a constant reminder of a traumatic period in their lives. Perpetrators may not be held accountable for the wrongs they are responsible for and therefore have the freedom to continue their wrongful conduct.

[17] Complainants are in a power imbalance with the institutional respondents (e.g. employers, organizations) and with the individual perpetrator who may be a person in a position of power or authority. The societal vulnerability of persons from marginalized and vulnerable groups further exacerbates their unequal bargaining position. Complainants may not have access to legal counsel or may be under financial pressure to settle.

[18] By allowing the use of NDAs to protect the reputation of the employer or organization and the individual found or alleged to have committed the wrongdoing, this signals that as a society we are placing greater value on protecting the reputation of someone who has committed a wrong or the reputation of an institution that had responsibility to prevent wrongdoing, over the psychological health and freedom of expression of the person who was harmed.

[19] NDAs are frequently used in inappropriate ways and well beyond their original purpose being to protect trade secrets, intellectual property, and other similar confidential business information. NDAs are being used to silence people and avoid accountability for wrongdoing. Their use has expanded to become viewed as almost a “standard” practice; this risks creating a lack of confidence in the administration of justice and government’s ability to hold people to account. Moreover, use of NDAs for these improper purposes undermines the fundamental foundations of our democratic society including freedom of expression by limiting people’s ability to discuss important matters of public policy. Real measures are needed to change this culture of silence. Addressing these improper uses which cause harm and attempting to correct power imbalances are justifiable reasons to restrict the use of NDAs.

F. Options for Consideration

[20] The considerations and recommendations of the Working Group on the content for the proposed legislation on NDAs are outlined below.

1. Scope

[21] In the Progress Report of the Working Group a Continuum of Conduct was outlined summarizing the types of wrongful conduct being concealed through the use of NDAs. The Working Group is cognizant of emerging stories and evidence demonstrating the wide-spread use of NDAs to conceal wrongdoing. These reports are concerning.³⁰

[22] At the Conference’s Annual Meeting in 2023, consideration was given to the scope of the proposed legislation. The Civil Section gave direction to narrow this legislation to addressing what has been the focus of the concerns regarding misuse of NDAs, namely egregious behaviour that is directed at a person based

³⁰ Legal Services Board, *supra*, note 23.

on someone’s personal characteristics and that threatens their personal security. It is hoped that this pragmatic approach will facilitate the adoption of the proposed legislation.

[23] Therefore, the proposed legislation would address NDAs used in the context of human rights discrimination, inappropriate sexual conduct and sexual assault, harassment, and bullying. These are areas we see addressed under existing NDA legislation.

[24] In considering the conduct captured by harassment and bullying, it should be broadly defined. Reference can be made to health and safety legislation. For example, the Canada Labour Code gives this definition of “harassment and violence”:

harassment and violence means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment;³¹

[25] The Working Group agrees that one instance, or an act, if sufficiently serious, will be captured by the model legislation. A series of incidents is not necessary. Recognizing that inappropriate behaviour may occur in different contexts, this legislation would not be limited to workplaces as are many current examples of NDA legislation. To ensure clarity on this issue, we suggest that a description in the commentary be included to confirm that the applicability of the legislation is not limited to workplaces and clearly refer to examples of other situations where it would apply such as service relationships, sporting organizations, and situations of trust or mentorship between individuals in any relationship or interaction.

[26] The Working Group members are also all in agreement that acts of reprisal should be included as behaviour that is caught by the legislation. Reprisals are effectively an extension of the original wrongful conduct.

[27] **Recommendation 1:** The legislation should address human rights discrimination, inappropriate sexual conduct and sexual assault, harassment, bullying, and reprisals, with a single instance being sufficient to be captured by the legislation. It should not be limited to a specific context.

2. Legislative choice in regulating NDAs

[28] In the first Progress Report, three options were proposed to address the harms caused by NDAs: banning, restricting or defining the scope of their proper use or “permissive” use. There are legitimate purposes for NDAs, for example, protecting intellectual property, trade secrets, and similar confidential business information. However, it would be difficult to ensure that “permissive” or “positive” legislation, setting out when NDAs could be properly used, would provide for all legitimate purposes for NDAs. If the permissive approach was chosen, care in drafting would be required to ensure there were no gaps or

³¹ *Canada Labour Code*, R.S.C., 1985, c. L-2, s. 122. < <https://laws-lois.justice.gc.ca/eng/acts/L-2/page-14.html#h-341198> >

“backdoors” that may permit an improper NDA from being legitimized. It was also noted that the common approach in legislative drafting was to outline restrictions rather than permissive conduct. In fact, there were no examples of existing NDA legislation in which a positive approach was used. Accordingly, use of a positive approach to drafting legislation may be more challenging for Canadian jurisdictions to accept.

[29] Considering banning or restricting NDAs, the Working Group recognizes that prohibiting NDAs outright sends a clear message, and it is straightforward to legislate (see Washington, Hawaii, Maryland)³². Banning NDAs would signal a clear public policy position that using NDAs to hide wrongdoing is not acceptable. However, the Working Group considered various factors and concluded that legislation restricting NDAs may be a more acceptable option. It was noted that banning NDAs may not be what all complainants wish for, even recognizing that there could be a confidentiality clause to prevent others from speaking about the complainant.

[30] Additionally, concerns were expressed that a ban may disincentivize parties from settling matters. However, this appears to be a less compelling reason to restrict NDAs, as arguments continue to exist for the use of settlement in the absence of NDAs (e.g. reduced and predictable costs, control of the situation, keeping a matter less public, resolving a matter sooner). Furthermore, it must be noted that cases were regularly settled before the proliferation of NDAs. Can’t Buy My Silence shared data analysis on the rates of settlements for sexual harassment claims since the introduction of NDA legislation in several jurisdictions in the USA. This analysis shows that NDA legislation has not negatively affected parties from settling, rather rates of settlement remain steady or have increased.³³

[31] The Working Group considered arguments that banning NDAs would limit the freedom to contract. There is a strong argument that there is an overriding public policy interest in preventing concealment of wrongdoing that outweighs the possibility that a complainant may receive a more substantial settlement for also agreeing to stay silent. The Working Group concluded that as NDAs are being used beyond their intended purpose of protecting trade secrets to hide wrongdoing by keeping a complainant silent, this must be addressed.

[32] The Working Group considered whether banning NDAs would address the unequal bargaining power of the parties exacerbated by systemic inequalities (e.g. gender, ethnicity, race, Indigeneity, ability). It is acknowledged that complainants may still be under pressure to accept settlements for various reasons, including financial hardship. Although the Working Group continues to have significant concerns given the likely reality in the unequal bargaining power that exists between the parties, the Working Group is wary of completely banning the use of NDAs as there may be situations where a complainant may expressly wish for an NDA.

³² Bill 1795, *Engrossed Substitute House Bill*, 67th Leg., Washington, 2022 (passed by the House Feb 9, 2022, passed by the Senate Mar 3, 2022), H.B. No. HD1 SD1 2495, *A Bill for an Act relating to Employment Practices*, Act 288, 31st Leg., Hawaii, 2022 (signed into law July 12, 2022), H.B. 1596, *Disclosing Sexual Harassment in the Workplace Act of 2018*, Ch. 738, Maryland, 2018 (passed May 15, 2018).

³³ Julie Macfarlane, *supra* note 27.

[33] **Recommendation 2:** The Working Group recommends the legislation strictly regulate and limit the use of NDAs.

[34] Due to the concerns of the Working Group regarding the proliferation and misuse of NDAs, as well as the need for culture change, it is important for the objective of the legislation to be clear. While there has been a movement away from the use of purpose clauses in legislation, the Working Group submits that it is essential to include a purpose clause in addition to commentary to make clear the serious concerns regarding the misuse of NDAs that are being addressed by the legislation.

[35] **Recommendation 3:** The Working Group recommends that the model legislation have both a purpose clause and commentary to provide context regarding the objectives of the legislation and clearly articulate the concerns regarding the improper, deleterious, and coercive use of NDAs that are intended to be addressed by the legislation.

3. Approach to prohibition

[36] The Working Group considered whether the model legislation would send a stronger message if written to say that a person cannot be required to sign agreements with NDAs. This is a feature of the state of Maine's NDA legislation.³⁴

3. Certain settlement, separation and severance agreements prohibited. An employer may not require an employee, intern or applicant for employment to enter into a settlement, separation or severance agreement that includes a provision that:

- A. Limits an individual's right to report, testify or provide evidence to a federal or state agency that enforces employment or discrimination laws;
- B. Prevents an individual from testifying or providing evidence in federal and state court proceedings in response to legal process; or
- C. Prohibits an individual from reporting conduct to a law enforcement agency.

[37] The group also considered framing the agreements as valid only if they meet certain conditions and ensure specific protections for the complainants, otherwise the agreement will be void. This has been done in the New York legislation.³⁵

§ 5-336. Nondisclosure agreements. 1. (a) Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves discrimination, harassment, or retaliation, in violation of laws prohibiting discrimination, including discriminatory harassment or retaliation, including but not limited to, article fifteen of the executive law, any term or condition that would prevent the **disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference.**

³⁴ 26 MRSA §599-C, sec. 1. ("Maine"). Online: <<https://legislature.maine.gov/statutes/26/title26sec599-C.html>>

³⁵ NYS General Obligations § 5-336, Nondisclosure Agreements ("NYS"). Online: <<https://www.nysenate.gov/legislation/laws/GOB/5-336>>

...

(c) Any such term or condition shall be void to the extent that it prohibits or otherwise restricts the complainant from: (i) **initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency;** or (ii) **filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits** to which the complainant is entitled

...

2. Notwithstanding any provision of law to the contrary, any provision in a contract or other agreement between an employer or an agent of an employer and any employee, potential employee, or independent contractor of that employer entered into on or after January first, two thousand twenty, that prevents the disclosure of factual information related to any future claim of discrimination is void and unenforceable unless such provision notifies the employee, potential employee, or independent contractor that it **does not prohibit the complainant from speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, the attorney general, a local commission on human rights, or an attorney retained by the employee or potential employee.** (Emphasis added)

[38] In view of the broad use of NDAs, associated harms and the need for a substantial cultural shift, the model legislation must signal that NDAs are exceptional measures. There should be careful consideration by parties proposing to impose an NDA regarding the necessity and value of an NDA. The legislation must make clear that an NDA will only be valid if it meets the requirements in the legislation. To signal that NDAs are exceptional measures, the Working Group proposes that stating an NDA will be void is stronger than the language above.

[39] **Recommendation 4:** The Working Group recommends that NDAs shall be void if they do not meet the required conditions or they attempt to restrict the complainant in any of the non-applicability/public interest areas. The legislation must be clear on this point.

4. Clarifying NDAs regulated by proposed legislation

[40] The Working Group discussions focused predominantly on harmful NDAs that are frequently seen in settlement situations. These settlements may arise out of various situations involving harassment and discrimination. They may also be included in a termination of employment agreement, regardless of whether the worker is aware of any misconduct. There are additional forms of confidentiality clauses that should be captured by the legislation. Additionally, clarity may be helpful regarding specific types of clauses which are not caught by the legislation.

[41] **Preemptive NDAs:** Preemptive NDAs are most often seen at the beginning of employment context or other service relationship where an NDA is included in the contract and requires the employee or contractor not to disclose anything that they may learn in the workplace. Such NDAs are problematic because of the significant power imbalance present at the beginning of employment and service contracts. In some cases, these preemptive NDAs may include prohibitions against sharing information about actions

that may be considered harassment or discrimination for events which have not yet occurred. For these reasons, the Working Group agreed that the legislation should make clear that broad preemptive NDAs that are not limited to the legitimate purposes of protecting trade secrets, intellectual property, and other similar confidential business information, are not permissible.

[42] **Non-disparagement agreements:** Non-disparagement agreements are agreements in which parties agree not to say anything negative or critical about the other party even if true. Non-disparagement agreements have the same effect and purpose as NDAs in concealing details which may relate to allegations or incidents of harassment or discrimination. The legislation should clearly define and recognize non-disparagement agreements as a form of NDA, such as in the PEI Act.³⁶

s.4(9) In this section, all references to a non-disclosure agreement shall be taken to also refer to a non-disparagement agreement where the non-disparagement agreement has the effect or purpose of concealing details relating to an allegation or incident of harassment or discrimination.

[43] **Proper use of NDAs:** The Working Group is also aware that the introduction of the legislation may give rise to concerns that NDAs used for legitimate purposes, such as protecting trade secrets, intellectual property, and similar confidential business information such as pricing models or customer lists, agreements to preserving Cabinet confidence, may be at risk. To address concerns the legislation should include a clause explicitly stating that it does not apply to NDAs used for these proper purposes, similar to the Washington legislation.³⁷

(6) This section does not prohibit an employer and an employee from protecting trade secrets, proprietary information, or confidential information that does not involve illegal acts.

[44] **Confidentiality of settlement amounts:** To encourage settlement parties may still agree to keep settlement amounts confidential without engaging the requirements of this legislation. The purpose of having legislation regulate the use of NDAs is to ensure that they are not used to conceal wrongdoing and/or the underlying facts giving rise to the claims. The legislation should specify this similar to what was done in the PEI Act and Washington legislation:³⁸

(2) This section does not prohibit the enforcement of a provision in any agreement that prohibits the disclosure of the amount paid in settlement of a claim.

[45] **Recommendation 5:** The legislation should include clauses to ban preemptive NDAs that go beyond the legitimate use of NDAs in protecting trade secrets and proprietary information, non-

³⁶ PEI, *supra*, note 6.

³⁷ RCW 49.44.211 (“Washington”). Online < <https://app.leg.wa.gov/rcw/default.aspx?cite=49.44.211> >

³⁸ PEI, *supra* note 6, s.4(10), *ibid*, RCW 49.44.211(2)

disparagement clauses, proper use of an NDA, and confidentiality of settlement amounts as discussed above.

5. No restrictions on disclosure of underlying facts

[46] Several jurisdictions such as New York³⁹ (see above in para. 36) and Illinois⁴⁰ include wording indicating that complainants cannot be limited from disclosing underlying facts and circumstances:

820 ILCS 96, Sec. 1-25. Conditions of employment or continued employment. (a) Any agreement, clause, covenant, or waiver that is a unilateral condition of employment or continued employment and has the purpose or effect of **preventing an employee or prospective employee from making truthful statements or disclosures about alleged unlawful employment practices is against public policy, void to the extent** it prevents such statements or disclosures, **and severable** from an otherwise valid and enforceable contract under this Act. **(emphasis added)**

[47] Allowing a person to talk about the “facts” enables the person to be able to process what happened to them, permits them to own their story and, to a limited extent, it gives them back their autonomy which the wrongdoing has taken away. Preventing someone from talking about their own experience with an NDA perpetuates the harm and the loss of power that occurred with harassment or discrimination.

[48] **Recommendation 6:** The Working Group recommends that the legislation should include a section making it clear that an NDA cannot prevent disclosure of underlying facts by a complainant unless it is the complainant’s preference. It is also recognized that there may be necessary disclosure to provide sufficient context in situations where NDAs do not apply or are exempted from restrictions by the NDA as discussed below (e.g. disclosures to counsellors, employers). This freedom to disclose underlying facts does not limit the information which may be disclosed as permitted in the situations outlined below in the non-applicability and exceptions section.

6. Non-applicability and exceptions

[49] The Working Group agreed that there are situations where an NDA cannot prevent disclosure. In the Progress Report, the Working Group recommended at paragraph 43 that:

There should be no situation where an NDA could prevent someone from going to law enforcement, or a regulator from making a disclosure or complaint that is provided for in law or is against public policy.

[50] Therefore, there are two categories of non-applicability:

- disclosure or complaint to law enforcement, regulator, or other authority with investigative powers about a criminal act, statutory offence, or violation of code of

³⁹ NYS, *supra* note 35.

⁴⁰ 820 ILCS 96/1-35 (“Illinois”).

conduct (for example, a workplace safety regulatory body, a professional governance body, an ombuds office), and

- where maintaining confidentiality would be against public policy.

[51] It was agreed that parties cannot contract out of statutory obligations therefore an NDA could not prevent someone from reporting under health and safety legislation, the Criminal Code, statutory regulatory authorities such as an ombuds office, professional regulatory authority, or under order. Such statements have been found to be privileged and therefore protected in law.⁴¹ There is a lack of certainty with respect to the extent of statements which are protected. Some legislation specifies that a contractual agreement cannot prevent disclosure under their statutory authority (e.g. BC *Public Interest Disclosure Act*, s.45,⁴² and Ontario Real Estate regulations⁴³). More problematic, the general public may not be aware of existing statutory protections, or the fact that statements may be privileged and consequently protected. Additionally, they may not understand the meaning of a privileged statement. A person who signs an NDA often believes that they are prevented from saying anything to anyone, including in circumstances which are privileged. A complainant may fear potential ramifications of being accused of breaching their NDA even when they are informed that the NDA does not prevent them from reporting as provided by law. Therefore, the legislation must make the situations where NDAs cannot prevent a complainant from disclosing or reporting clear by including a broad list of exceptions that may be referred to.

[52] To prevent the associated harms of NDAs, existing NDA legislation also provides for disclosures that may be necessary for a complainant to consult for advice, support, or care, (e.g. medical personnel, elder, family and friends), process the harm done to them, or otherwise need to disclose to where non-disclosure would be detrimental to the interests of the complainant (e.g. future employer) as exceptions. Some of these may also fall within the public interest or non-applicability categories.

[53] **Recommendation 7:** The Working Group reviewed the non-application ss. 4(6) and (7) of the PEI Act⁴⁴ and agree to adopt the list provided in the legislation. The Working Group also recommends commentary to make it clear that a Complainant cannot be prohibited from talking about allegations.

Non-application

(6) An agreement made in accordance with subsection (2) shall not apply to
(a) any disclosure of information protected or required under the *Employment Standards Act*, R.S.P.E.I. 1988, Cap.E-6.2, the *Human Rights Act*, the *Occupational Health*

⁴¹ *Ontario Human Rights Commission et al. v. Borough of Etobicoke*, 132 D.L.R. (3d) 14 [1982 CanLII 15 \(SCC\)](https://www.canlii.org/en/ca/scc/doc/1982/1982canlii15/1982canlii15.html) <<https://www.canlii.org/en/ca/scc/doc/1982/1982canlii15/1982canlii15.html>>; *Malaspina University-College Records, Re*, 2000 CanLII 14412 (BC IPC)

<<https://www.canlii.org/en/bc/bcipc/doc/2000/2000canlii14412/2000canlii14412.html>>

⁴² *Public Interest Disclosure Act* SBC 2018 C.22, s.45 Online

<<https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/18022#section45>>

⁴³ Ontario Regs., *supra*, note 13.

⁴⁴ *PEI*, *supra*, note 6.

- and Safety Act* R.S.P.E.I. 1988, Cap. O-1.01, or any disclosure protected or required under another enactment or Act of the Parliament of Canada;
- (b) artistic expression by the relevant person that does not identify
 - (i) the party responsible or the person who committed or is alleged to have committed the harassment or discrimination, or
 - (ii) the terms of the non-disclosure agreement;
 - (c) any communication relating to the harassment or discrimination between the relevant person and
 - (i) a person whose duties include the enforcement of an enactment or Act of the Parliament of Canada, with respect to a matter within the person's power to investigate,
 - (ii) a person authorized to practise law in the province pursuant to section 20 of the *Legal Profession Act* R.S.P.E.I. 1988, Cap. L-6.1,
 - (iii) a medical practitioner as defined in the *Interpretation Act* R.S.P.E.I. 1988, Cap. I-8.1,
 - (iv) a psychologist or psychological associate as defined in the *Psychologists Act* R.S.P.E.I. 1988, Cap. P-27.2,
 - (v) a registered nurse or nurse practitioner as defined in the Registered Nurses Regulations (EC350/18) under the *Regulated Health Professions Act* R.S.P.E.I. 1988, Cap. R-10.1,
 - (vi) a social worker as defined in the *Social Work Act* R.S.P.E.I. 1988, Cap. S-5;
 - (vii) a person who provides victim services pursuant to the *Victims of Crime Act* R.S.P.E.I. 1988, Cap. V-3.1,
 - (viii) a community elder, spiritual counsellor or counsellor who is providing culturally specific services to the relevant person,
 - (ix) the Office of the Ombudsperson within the meaning of the *Ombudsperson Act* R.S.P.E.I. 1988, Cap. O-5.01,
 - (x) a friend, a family member or personal supporter as specified or approved in the non-disclosure agreement, or
 - (xi) a person or class of persons prescribed in the regulations.

Non-application, hiring

- (7) An agreement made in accordance with subsection (2) that relates to a previous employment relationship does not apply to a relevant person's communication with a prospective employer for the purpose of obtaining employment and providing information about the relevant person's employment history, including
- (a) disclosure of the fact that a settlement agreement was reached with the party responsible or the person who committed or is alleged to have committed the harassment or discrimination; and
 - (b) that the settlement agreement includes a non-disclosure agreement if the communication does not state the particulars of the harassment or discrimination that occurred or is alleged to have occurred.

[54] [Recommendation 8](#): The Working Group discussed other suggested additions to this list such as:

- future employer, or investigator, where necessary if a complainant is triggered in the workplace and may need to disclose information to the extent necessary to explain their behaviour;
- support groups;
- public interest disclosures or “whistleblowing”;
- initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, provincial, or federal agency or authority⁴⁵; and
- “or otherwise in the public interest.”

[55] In discussing the above, it was noted that public interest disclosure legislation in some jurisdictions may already provide for the non-applicability of NDAs, while others may not make this clear. Reference to the relevant public interest disclosure legislation may be helpful.

[56] The Working Group discussed the challenge of ensuring the non-applicability/exception list was all encompassing, and that there may be situations in which disclosure would be in the public interest which have not been identified, therefore proposes inclusion of the catchall clause “in the public interest.”

[57] The Working Group concluded that while it was not possible to define “public interest,” the list of exceptions would be illustrative of situations where NDAs could not prevent disclosures, and it was important to signal that this list was not exhaustive. The legislation should contain a general statement confirming NDAs cannot bar disclosures provided by law or in the interest of public policy, and then provide a list of non-applicability and exclusions. Reference to “unlawful activities” may be made as a measure of conduct that an NDA would not be able to conceal on the grounds of public policy (see Illinois example above).

[58] It is the Working Group’s view that as NDA’s have expanded from their original purpose they have focused on the interest of the employer, organization or individuals alleged to have committed wrongdoing by concealing the wrongdoing to protect their reputation. For this reason, the Working Group believes that the ULCC’s legislation should focus on the public’s right to know over the entity or individual’s interest in these circumstances.

[59] Regarding support for the complainant, the Working Group discussed the challenges that a complainant may have in considering what supports may be needed to negotiate their inclusion in the NDA, and often may not know yet what may work for them in processing their trauma. It was acknowledged that it is not possible to anticipate future circumstances and needs arguing against having restrictive NDAs. This issue is further addressed by considering time limits for NDAs.

⁴⁵ NYS, *supra* note 35, s.1(c)

7. Requirements or safeguards for NDA to be valid

[60] In permitting parties to enter into settlements which have NDAs for situations of harassment and discrimination, the Working Group considered a number of requirements or safeguards necessary to address the inequities that may exist between the parties.

[61] The Working Group reviewed the requirements outlined in sections 4(2) and (3) of the PEI Act⁴⁶ and considered each in turn. Section 4(3) states:

Where a non-disclosure agreement is made under subsection (2), the agreement shall only be enforceable where

(a) the relevant person has had a reasonable opportunity to receive independent legal advice;

(b) there have been no undue attempts to influence the relevant person in respect of the decision to include a requirement not to disclose any material information;

(c) the agreement does not adversely affect
(i) the health or safety of a third party, or
(ii) the public interest;

(d) the agreement includes an opportunity for the relevant person to decide to waive their own confidentiality in the future and the process for doing so; and

(e) the agreement is of a set and limited duration.

[62] **Express wish and preference:** Section 4(2) of the PEI Act requires that an NDA must be “the expressed wish and preference of the relevant person concerned.”⁴⁷ Several other jurisdictions have similar wording (e.g. New York, California, New Mexico⁴⁸). The Working Group agrees with this requirement.

[63] **Independent legal advice:** The Working Group discussed this requirement in detail and agreed in principle. Several other jurisdictions also include references to independent legal advice (e.g. California, Illinois⁴⁹). Concerns were raised that legal advice may not be easily accessed due to a variety of factors such as availability, costs, timing, conflicts, and the lawyer’s expertise.

[64] The Working Group noted that not all independent legal advice may be of the same quality or consistency as not all legal counsel may be aware of the intricacies and issues related to NDAs. Addressing this issue is not within the jurisdiction of the ULCC, however, commentary to the legislation could highlight

⁴⁶ PEI, *supra* note 6.

⁴⁷ PEI, *supra* note 6.

⁴⁸ NYS, *supra* note 35, (b), CA Civ Pro Code §1001 (2023), s.(b)(c). This section does not apply when a government agency or public official is party to the settlement. Online: <<https://law.justia.com/codes/california/code-ccp/part-2/title-14/chapter-3-5/section-1001/>>, NM Stat §50-4-36 (2023), s. C which makes a distinction from “disclosure of facts that could lead to the identification of the employee” in B(2). Online < <https://law.justia.com/codes/new-mexico/chapter-50/article-4/section-50-4-36/>>

⁴⁹ CA Stat. Gov Code §12964.5 (b)(4) Online:

<https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV§ionNum=12964.5>; Illinois, *supra* note 40, (a)(2)

the importance of ensuring need for availability of competent legal advice, including suggestions for jurisdictions to work closely with continuing legal education providers to provide courses on the new legislation and important legal concepts if they may be involved in advising on NDAs.

[65] **Time to consider:** Settlements are negotiated within a set time frame as in a mediation, or with arbitrary deadlines set for agreement to terms. This practice adds pressure on parties to agree in haste, which may lead parties to regret the decision. The Working Group considered what a reasonable length of time for parties to consider whether they wish to agree to an NDA. This period of time would also allow reasonable opportunity to be able to obtain legal advice if they did not already have counsel. The Working Group recommends that the legislation specifies no less than **30 days**. This period of time is not, in the opinion of the Working Group, unreasonably long considering that the complainant may need time to reflect, consult, and may be triggered by negotiation discussions. As a comparison, Illinois and New York specify 21 days before signing to consider the agreement and 7 days after to revoke it.⁵⁰

[66] **No undue influence:** The Working Group agrees that for an NDA to be valid there must not be any undue influence on the complainant to agree not to disclose information sought to be hidden by the NDA or the decision of the complainant to agree to an NDA. Research has revealed that there are very few agreements that are challenged for undue influence or unconscionability, and the test to be met in common law is high. The Working Group recommends that the legislation provide for a reverse burden of proof where undue influence is alleged similar to British Columbia's *Wills, Estates and Succession Act*, s.52⁵¹. Therefore, if a complainant alleges that they entered into a settlement agreement with an NDA as a result of undue influence, the party that benefits from the NDA must prove that there was no undue influence.

[67] **Not adversely affect the health or safety of a third party and the public interest:** The Working Group agreed with both these requirements.

[68] **Mutuality:** Recognizing that parties may wish to have information remain confidential, the Working Group recommends that the confidentiality requirement be mutual, and binding on all parties. Complainants are misled to believe that they must sign an NDA to receive a settlement. It is often misunderstood by the person who experienced harm that to have privacy and maintain confidentiality of their identity that must agree to an NDA. Complainants are also led to believe that if they agree to an NDA then the party offering the settlement will also be bound by the NDA. However, frequently employers or organizations with greater bargaining power will require the NDA from the person who experienced harm as a condition of settlement but the organization itself will not be bound by the NDA. Legislation should "level the playing field" by ensuring that if an NDA is part of a settlement agreement, then all parties are bound. For examples, see New York, Maine, Illinois legislation.⁵²

⁵⁰ Illinois, *supra* note 40, (a) (5) and (6), and New York, *supra* note 34, s.1 (b).

⁵¹ *Wills, Estates and Succession Act* [SBC 2009] Ch. 13, s. 52. Online <
https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/09013_01>

⁵² NYS, *supra* note 35, Maine, *supra* note 34, Illinois, *supra* note 40.

[69] **Waiving confidentiality by person who experienced harm:** The Working Group recognizes that trauma and the need to process the trauma may only become apparent to a person some time, possibly years, after the NDA is agreed to. Concern was expressed regarding binding someone who, while given opportunity to consider what is being agreed to, may not be able to fully appreciate the impact of the NDA. Additionally, with the passing of time, circumstances will change, and the complainant may need to address those changes. Therefore, the Working Group recommends that the complainant may choose to unilateral waive confidentiality in the future.

[70] While the person who was harmed may waive confidentiality, the Working Group agreed that the respondent(s), often an employer or organization, and the person(s) who caused the harm will continue to be bound by the NDA unless sufficient information is publicly disclosed to identify the respondent(s). This effectively creates the possibility of a one-way disclosure as has been done in New Jersey.⁵³

[71] **Set time and duration:** The Working Group agreed that NDAs in these circumstances should not continue to bind parties in perpetuity and recommends the legislation specify **10 years** as the longest period that NDAs remain valid. However, it is important that parties can agree to a shorter period.

[72] **No liquidated damages:** The Working Group is aware that clauses to pay liquidated damages or return the consideration paid for settlement of the claim for harassment or discrimination are included in some NDAs. While the extent of this practice is not known, the objective of further intimidating the complainant is clear. The legislation should ensure this practice does not continue and proposes taking an approach similar to New York:

3. Notwithstanding any other law to the contrary, no release of any claim, the factual foundation for which involves unlawful discrimination, including discriminatory harassment, or retaliation, shall be enforceable, if as part of the agreement resolving such claim:

- (a) the complainant is **required to pay liquidated damages** for violation of a nondisclosure clause or nondisparagement clause;
- (b) the complainant is **required to forfeit all or part of the consideration** for the agreement, for violation of a nondisclosure clause or nondisparagement clause; or
- (c) it **contains or requires any affirmative statement, assertion, or disclaimer by the complainant that the complainant was not in fact subject to unlawful** discrimination, including discriminatory harassment, or retaliation.⁵⁴ **(added for emphasis)**

[73] **Non-compliant NDA is void:** All jurisdictions that have legislation regulating the use of NDAs have a clear statement that an NDA that does not meet all the requirements is void. The legislation should clearly state this.

⁵³ N.J. Stat. §10:5-12.8 a. Online <<https://casetext.com/statute/new-jersey-statutes/title-10-civil-rights/chapter-105/section-105-128-certain-provisions-in-employment-contract-settlement-agreement-deemed-against-public-policy-and-unenforceable?>>

⁵⁴ NYS, *supra* note 35, s.3.

[74] **Recommendation 9:** The Working Group recommends the legislation requires that the above-listed conditions be met for an NDA to be valid.

8. NDAs during investigation

[75] The Working Group focused in large part on NDAs used during settlement. However, NDAs have arisen in other contexts that may also conceal wrongful conduct and cause harm. A complainant may experience harm as a result of an NDA required during investigation or through a process such as mediation. The Human Rights Tribunal of British Columbia has recognized the potential for further injury to be caused by an NDA during investigation to be discriminatory (see *Ms. C v. City and others*⁵⁵). In that case the complainant spoke of harm she experienced as a result of not being able to warn others who may be targeted by her harasser.

[76] Members of the Working Group also considered the importance of the ability for the employer or organization to be able to conduct the investigation and the challenge during an investigation, to ensure a fair process for the person(s) alleged to have perpetrated the wrongful conduct, if the complainant was talking to others in a workplace or organization. The Working Group also recognized that often when a complaint is made in a workplace or organization, others may be engaged in discussion about the allegations who may not be restricted by an investigation NDA. While in the federal context there is some guidance regarding requirements during investigations⁵⁶, management of an investigation process is largely left to the employer or organization to develop policies. In the criminal context, the complainant(s) may be cautioned noting concerns regarding tainting evidence, but there are no specific restrictions during the process.⁵⁷

[77] The Working Group discussed whether the legislation should specifically address these situations. We struggled to balance the harm that may be caused by preventing someone from discussing events during an investigation process, fairness in the process or the right to due process, and the interest in confidentiality to carry-out the investigation.

[78] The Working Group acknowledges that confidentiality during investigations may facilitate the investigation, however, investigations should not be delayed as the complainant, and respondent, may experience negative mental health impacts. Additionally, the complainant may be targeted by reprisals as inevitably people become aware that a complaint was made and by whom. There may be added pressure for an employer or organization to ensure an investigation is carried out without delay if there is no confidentiality requirement on the complainant. The Working Group also recognizes that not all confidentiality requirements are NDAs and care by an employer or organization in developing a well-considered policy dealing with complaints may address the concerns.

⁵⁵ *Ms. C v. City and others*, 2023 BCHRT 203 (CanLII), <<https://canlii.ca/t/k15c8>>, retrieved on 2024-05-13

⁵⁶ *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130. Online < <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2020-130/page-1.html>>

⁵⁷ In some cases where the complainant may be speaking publicly, the complainant may be warned or charged with criminal harassment.

[79] **For discussion:** Should parties be permitted to talk about the underlying facts during an investigation if confidentiality of the investigation process (and discussions in the investigation) is maintained? Should this be addressed in the legislation?

[80] With respect to mediation, there have been situations where parties alleged to have committed wrongdoing use the mediation process to intimidate the complainant and further commit acts of harassment or discrimination.

[81] **For discussion:** Should the legislation ensure that confidentiality agreements used during a legal process such as in a mediation do not contain NDAs that conceal wrongful conduct or retaliation during the process?

9. Retrospectivity

[82] Most existing legislation regulating NDAs does not apply retroactively, although many acts invalidate limitations in past NDAs that are contrary to legislation (e.g. PEI s.5, add other jurisdictions). Retrospectivity would address issues where people have already entered into NDA agreements that would be invalid under the legislation. If NDAs are harmful to complainants on an ongoing basis and are against public policy in concealing bad behavior, then the legislation should address previous agreements and indicate that they will no longer be valid. This would be consistent with the purpose of the legislation. An example of a retrospectivity clause is found in Massachusetts proposed legislation, which provides that disclosure by a claimant of information subject to an NDA that would be void under the Act may not invalidate the claimant's rights to consideration or require return of consideration provided.⁵⁸

[83] The Massachusetts approach in protecting a claimant's right to the consideration already provided under the terms of the settlement agreement recognizes that compensation is (or should have been) provided for the wrongdoing itself and should not have been provided to "buy" a complainant's silence. However, it was also noted that the Massachusetts clause would not prevent an employer, organization or individual from seeking damages for breach of the NDA, only preventing repayment of the initial consideration. Therefore, a complainant may still be fearful of breaching an NDA although legally not prohibited. This is discussed further in the below section on penalties.

[84] **Recommendation 10:** To achieve the objectives of the legislation, the Working Group recommends that to the extent that past agreements are in conflict with the legislation, past NDA agreements are unenforceable.

[85] Recognizing that agreements may address other issues and not be standalone NDAs, the remaining clauses of the agreements would remain valid while severing of the NDA. For clarity, it is the

⁵⁸ Bill H. 1778, *Concerning nondisclosure agreements relative to sexual harassment and discrimination*, 193rd General Court (Feb 2023), Massachusetts, s.1 amending 151B, s. 11 (e) ("Massachusetts". Online <<https://www.billtrack50.com/billdetail/1605123>>

view of the Working Group that the legislation would also invalidate preemptive NDA clauses in contracts, so that pre-employment NDAs contrary to the legislation would not be enforceable.

[86] The Working Group recognizes that specific language is required to make the retrospectivity of the legislation clear.

10. Penalties

[87] Different jurisdictions have taken different approaches to ensuring NDAs are not used contrary to the legislation. Many jurisdictions make it an offence to enter into an NDA or seek to enforce an NDA contrary to the legislation.⁵⁹

[88] Several jurisdictions in the USA include provisions to award costs and attorney fees in addition to fines. Maine additionally requires payment of liquidated damages equal to three times the amount equal to the fines in some circumstances and in situations where an employee or prospective employee refuses to sign a pre-emptive NDA limiting claims related to discrimination or retaliation the person may elect to be reinstated in the employment with back wages.⁶⁰ In Massachusetts the legislation recognizes that an attorney who demands an NDA be included contrary to the legislation or advises a client to sign such an agreement maybe grounds for professional discipline.⁶¹

[89] The Working Group recommends the legislation include offence provisions for the respondents entering into an NDA or anyone who enforces or attempts to enforce an NDA contrary to the legislation. The offence and fine must be sufficiently significant to be a deterrent to address the potential of an employer, organization or individual seeking damages for breach of an NDA that was previously valid, or enforcing an NDA entered after the legislation was passed in situations captured by this legislation. In this regard, fines may accumulate for each instance of contravention or continuing contravention (see Maine section s.6.A. \$1,000 for each violation⁶²) and may specify higher fines for organizations (see draft British Columbia bill⁶³). The Working Group proposes that a party who seeks to enforce an NDA that would be void for public policy reasons would be liable for costs.

[90] The Working Group considered that specifying reasonable lawyer's fees and costs and recognizing potential ethical issues for lawyers in the legislation are not common subjects that are included in legislation in Canada, although they may be in the USA. While specifying coverage of reasonable lawyer's fees and costs would assist in ensuring the complainant required to defend against the enforcement of an invalid NDA for pragmatic considerations of the legislation being acceptable to jurisdictions, and less likely to be challenged, these measures are not included.

⁵⁹ PEI, *supra* note 6, s. 6, Illinois, *supra* note 40, Washington, *supra* note 37, s. (7)

⁶⁰ Maine, *supra* note 34, s. 6(B)

⁶¹ Massachusetts, *supra* note 58, s.11(i)

⁶² Maine, *supra* note 34, s.6.A

⁶³ Bill M217, *Non-Disclosure Agreements Act*, 5th Session, 42nd Parliament (2024), s. 8

[91] Any rights and remedies provided in this legislation would be in addition to any other rights and remedies provided by law.

[92] **Recommendation 11:** The Working Group recommends that the legislation include offence provisions for the respondents entering into an NDA or who enforces, or attempts to enforce, an NDA contrary to the legislation. The quantity of the fines should reflect whether the respondent is an individual or an organization, and fines should accumulate for each instance of contravention or continuing contravention. The Working Group also proposes that a party who seeks to enforce an NDA that would be void for public policy reasons would be liable for solicitor-client costs.

11. Use of public funds

[93] With the Hockey Canada sexual assault scandal in which an NDA in settlement prevented the complainant from speaking publicly⁶⁴ and reporting of other sexual assault cases in sports, there were concerns regarding the possible use of public monies to settle these types of complaints and in silencing complainants. Recognizing public interest in ensuring wrongdoing is not concealed and concern regarding the misuse of public funds, the legislation should specify that public funds cannot be used to settle claims for behaviour covered by this legislation with an NDA, and that public funds cannot be used to litigate enforcement of an NDA.

[94] An example of such a provision is found in the Arizona legislation⁶⁵:

D. Public monies may not be used as consideration in exchange for a nondisclosure agreement that is related to an allegation of or attempted sexual assault or sexual harassment.

[95] As well, the proposed Federal bill, suggested amendments to the *Finance Administration Act*⁶⁶:

25.1 (1) Any statutory authority that allows for the making of a grant or a contribution of public money to an entity whose financial information is not included in the Public Accounts prepared under this Act must be exercised in a way that prevents public money from being used to

- (a) pay for settlements in relation to harassment and violence or discrimination based on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act* if the settlement is to include a non-disclosure agreement; or
- (b) litigate non-disclosure agreements against complainants.

[96] An additional restriction is proposed to prevent the use of public money by the federal government or Crown corporations to litigate a non-disclosure agreement against a complainant.⁶⁷

⁶⁴ Ashley Burke, "Hockey Canada scandal shows the need to ban non-disclosure agreements, advocates say", (August 10, 2022) online CBC News <<https://www.cbc.ca/news/politics/growing-calls-outlaw-non-disclosure-agreements-canada-1.6546531>>.

⁶⁵ A.R.S. § 12-720. Online: <<https://www.azleg.gov/ars/12/00720.htm>>

⁶⁶ Canada, *supra* note 11, s.5

⁶⁷ Canada, *supra* note 11, s.6 amending the *Financial Administration Act*, s. 40.01(3)

[97] Consideration was given to whether the prohibition against using public funds for settlements involving NDAs should be in the NDA legislation or would more appropriately be covered elsewhere, such as the *Finance Administration Act* or in legislation governing the provision of grants. However, if the provision is only in the *Finance Administration Act* or legislation governing the provision of grants, then this may not restrict the use of NDAs. It is recommended that legislation provide for the prohibition against the use of public funds and jurisdictions give consideration to also including a provision in their applicable *Finance Administration Act* or legislation governing the provisions of grants.

[98] **Recommendation 12:** The legislation include a restriction that public monies cannot be used as consideration for an NDA related to harassment and discrimination, or to litigate enforcement of an NDA. This prohibition extends to grants of public funds. Corresponding amendments to relevant *Finance Administration Acts* or legislation governing the provision of grants should also be made.

12. Measures to support awareness of law

[99] The Working Group recognized that even with legislation a significant challenge will continue to be the lack of understanding about the limits of an NDA and the belief by complainants that they cannot disclose. Therefore, the Working Group considered a number of measures to ensure parties contemplating agreeing to an NDA were aware of what their rights were and understood what an NDA could and could not restrict and recommends that the legislation:

- require that NDAs entered into after the NDA legislation comes into force have appended to them the protective provisions and non-application/exception list contained in legislation. This will draw attention to these sections; and
- the NDA be written in plain language as required by many existing examples NDA legislation, including the PEI Act.⁶⁸

[100] The Working Group discussed whether NDAs should be required to have a clause where the person entering into the NDA acknowledges that independent legal advice was received. However, the Working Group debated how much assistance this would be. The issue is that the use of NDAs has become so normalized that some lawyers may advise clients that they sign the NDA because those lawyers perceive NDAs as a “standard” requirement and may not be aware of the complexities of NDAs. Complainants may also not be able to access legal advice because of costs or other issues. These concerns could be mitigated if the legislation required the compensating party to also reimburse the complainant’s reasonable costs of obtaining independent legal advice. However, this would not address the issue of lawyers providing inadequate advice because they are not aware of the legislation restricting the use of NDAs or the other complexities associated with their use.

[101] It was suggested that a jurisdiction’s law society or continuing legal education provider develop a checklist for use when obtaining independent legal advice. The checklist would require review of the various protective provisions and non-application/exceptions.

⁶⁸ PEI, *supra* note 6, s. 4(8).

[102] **Recommendation 13:** The Working Group recommends that the protective provisions and non-application/exception list contained in legislation be required to be appended to any NDA, and that NDA be written in plain language.

[103] **For discussion:** Should the legislation provide for reasonable funding of independent legal advice by the respondent party for the complainant? Complainants may be more likely to access legal advice if they are provided funds in advance for those costs. For example, providing something similar to the voucher system for independent legal advice for sexual assault in Ontario.

13. Reporting

[104] In some jurisdictions with NDA legislation, there are reporting requirements to collect data on the number of settlements made, and those made with NDAs. For example, reporting may be to the state commission for civil rights as in Maryland⁶⁹ or employers must retain records available for inspection by the Attorney-General's office or Human Rights Commission⁷⁰, or Department of Labour⁷¹ depending on the state. It is also noted that reporting of complaints and settlements for discrimination in employment for federal employers are made to the US Equal Opportunity Commission.⁷² The Canadian federal bill proposes reporting to Parliament and the Treasury Board.⁷³

[105] The Working Group discussed that it would be helpful to have reporting to track if the legislation was effective but recognized that in Canada there wasn't a clear body to report to particularly as the proposed scope for the model legislation is wider than in some other jurisdictions where the NDA legislation may be limited only to employment. Possible options suggested included designating reporting to human rights commissions, workers' compensation boards, or registering agreements with the court as "Notices of Dispute" are registered in the court registry.

[106] An additional advantage to filing in court would permit the registry to check the NDA register to determine if they can allow an action where a party is suing on an NDA to proceed, similar to how registry staff check the Notice of Dispute registry before processing an application for probate in British Columbia.

[107] A question was raised as to whether there were other means to measure the effectiveness of the legislation.

⁶⁹ See Maryland, §3-715 Online <<https://mgaleg.maryland.gov/mgawebwebsite/laws/StatuteText?article=gle§ion=3-715&enactments=False&archived=False>>

⁷⁰ 21 V.S.A. § 495h, s.(i)(1)(a)(i). Online <<https://legislature.vermont.gov/statutes/section/21/005/00495h>>

⁷¹ Maine, *supra* note 34, s.5.

⁷² US Equal Employment Opportunity Commission website: <https://www.eeoc.gov/overview>

⁷³ Canada, *supra* note 11, ss. 3 and 4.

[108] **For discussion:** Should the legislation include required reporting to assess the effectiveness of the legislation? If so, does the Section have any direction on the options or suggestions for this?

14. Defamation

[109] The use of defamation to silence complainants has been on the rise since the #MeToo Movement. Defamation has effectively become a new form of NDA to silencing anyone, not just complainants (see *Rooney v. Galloway*⁷⁴). In some ways, defamation is more harmful than an NDA. This is because, in Canada, the person who has made the statement has to prove the truth of the statement and incur the cost of litigation. The Working Group recommends the ULCC consider restarting its defamation project.

[110] **Recommendation 15:** The Working Group also proposes that the NDA legislation include a provision reversing the onus in defamation where a settlement agreement has been entered into. Essentially, where a settlement agreement has been entered into then, whether or not the agreement has an NDA component, the onus would be on the party alleging defamation to prove that the statement was not truthful.

F. Next Steps

[111] With direction from the ULCC August 2024 annual meeting on the recommendations on the proposed legislation contained in this paper and the questions posed, the Working Group will hold discussions to address any issues that are raised by the ULCC and draft the model legislation for the ULCC August 2025 annual meeting.

[112] The Working Group looks forward to the advice and direction from the Section.

G. Draft Resolution

[113] The Working Group proposes the following resolution for consideration by the Section:

BE IT RESOLVED:

THAT the second policy report of the Working Group on Non-Disclosure Agreements (NDAs) be accepted;

THAT the Working Group continue its work in accordance with the directions of the ULCC;

THAT a draft model legislation on NDAs be prepared based on the recommendations of the second policy report and further directions provided by the Working Group;

and

THAT the Working Group report back to the ULCC at the 2025 meeting.

⁷⁴ *Rooney v. Galloway*, 2024 BCCA 8 (CanLII), <<https://canlii.ca/t/k253m>>, retrieved on 2024-05-12.

Appendix A: NDA Legislation Summary Chart (Updated June 4, 2024)¹

CANADA: PASSED

Jurisdiction	Date	Prohibits NDA pre-claim	Prohibits NDA in settlement	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retro-actively	Other
Ontario Amendments to Acts in respect of postsecondary education	Royal Assent: December 8, 2022 Most substantive sections in force: July 1, 2023	Yes	Renders void any agreement terms that stop the institution or “related people” from disclosing allegation or complaint.	Yes, with certain conditions (legal advice, no undue influence, future chance to waive confidentiality, and set and	No additional categories.	Applies to publicly-funded universities and colleges Applies to private career colleges For both types, applies to sexual misconduct in relation to students	No	Also does the following: -provides authority for discharge or discipline, -prohibits re-employment, -disentitles harasser from termination pay, and

¹ An earlier version of this table was included in Jennifer Khor, et al., “Challenging Non-Disclosure Agreements (NDAs) and the Harm they Cause: Paving the Way for more Trauma-Informed Approaches,” (October 27, 2022) prepared for *The Continuing Legal Education Society of British Columbia*, Human Rights Law Conference 2022, and subsequently in the ULCC, *Non-Disclosure Agreements (NDAs) Progress Report of the Working Group*, August 2023.

Uniform Law Conference of Canada

				limited duration)				-prohibits substitute penalties (e.g. from a labour arb)
Ontario Regulation 365/22 made under the Real Estate and Business Brokers Act	Passed and comes into force by specific proclamation of coming into force of s. 31(1) Bill 145 (Canlii)	Yes	Prohibits registrants from obstructing or inducing a person to withdraw a complaint to the registrar or make agreements that include requirement to withdraw or refrain from complaint	No.	No additional categories	-Applies to registrants under the <i>Real Estate and Business Brokers Act</i> . -Applies to all potential complaints to the registrar (not limited to harassment/discrimination)	No	-part of a general update of the regulations and standards of conduct.
PEI Non-Disclosure	In force May 17, 2022	Yes	Yes, unless “expressed	Yes, subject to certain conditions	NDA’s are void to the extent that they restrict:	-All allegations of harassment or discrimination	No	

Uniform Law Conference of Canada

Agreements Act			wish and preference”	(legal advice, no undue influence, future chance to waive confidentiality, and set and limited duration)	-Disclosure protected/require under legislation -artistic expression -Communication w certain classes of persons (e.g., lawyer, physician, elder, etc.).	-All contexts		
--------------------------------	--	--	----------------------	--	--	---------------	--	--

CANADA: NOT YET PASSED

Jurisdiction	Date	Prohibits NDA pre-claim	Prohibits NDA in settlement	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retro-actively	Other
British Columbia	(Bill 225) First reading March 9, 2023 (Private Member's bill) (died), Bill M 217 - First reading May 6, 2024 (Private Member's bill) Not yet law as	Yes	Yes, unless "expressed wish and preference"	Yes, subject to certain conditions (independent legal advice, no adverse effect on third party or public interest, etc.)	NDAs are void to the extent that they restrict: -Disclosure protected/require under legislation -artistic expression -Communication w certain classes of persons (e.g., lawyer, physician, elder, etc.)	-All allegations of harassment or discrimination -In all contexts	No	Requirement for NDAs to be drafted in 'clear and understandable' language.

Uniform Law Conference of Canada

	of June 4 2024.							
Manitoba Bill 225 – the Non Disclosure Agreements Act Bill 215 the Non-Disclosure Agreements Act	(Bill 225) Introduced April 26, 2022 (Private Member’s Bill) (Bill 215) Introduced Nov 29, 2022 (died)	Yes	Yes, prohibits non-compliant NDAs.	Yes, subject to certain conditions (independent legal advice, no adverse effect on third party or public interest, etc.)	NDAs are unenforceable to the extent that they restrict: -Disclosure protected/require under legislation -Artistic expression -Communication w certain classes of persons (e.g., lawyer, physician, elder, social worker, victim services, etc.)	-All allegations of harassment or discrimination -In all contexts	No	Text substantially borrowed from PEI legislation
Nova Scotia Bill No 144 Non Disclosure	First reading April 7, 2022 (Private Member’s Bill)	Yes	Yes, unless “expressed wish and preferen	Yes, subject to certain conditions (same as above)	Same exclusions as listed above	-All allegations of harassment or discrimination -All contexts	No	Text substantially borrowed from PEI legislation

Uniform Law Conference of Canada

Agreements Act	Second Reading Debates March 20, 2024. Not yet law as of June 4 2024.		ce” of victim					
Nova Scotia Bill 278 Non-disclosure Agreement Prohibition Act	First Reading March 28, 2023 (Private Member’s Bill)	Yes	Yes	No	None	Sexual assault or harassment, or alleged sexual assault or harassment by a member of a political party	No	No respondent or responsible party may enter into a NDA with a complainant
Saskatchewan Bill 613: The Saskatchewan Employment (Fairer	First Reading November 8 2023 Not yet law as of May	Yes	Yes, unless “expressed wish and preference”	Yes, subject to certain conditions (independent legal advice, no adverse effect on third party or public interest, etc.)	NDAs are unenforceable to the extent that they restrict: -Disclosure protected/require under legislation	All allegations of harassment or discrimination In all contexts	No	Text re NDAs substantially borrowed from PEI legislation, Act addresses other

Uniform Law Conference of Canada

Workplace, Better Jobs) Amendment Act, 2023	13, 2024				-Artistic expression -Communication w certain classes of persons (e.g., lawyer, physician, elder, social worker, victim services, etc.)			amendments
Bill 124, Stopping the Misuse of Non-disclosure Agreements Act	Carried at first reading June 6, 2023 (Private Member's Bill) Not yet law as of May 10, 2024	Yes	Yes, unless "expressed wish and preference"	Yes, subject to certain conditions (same as above)	Same exclusions as listed above.	-All allegations of harassment or discrimination -In all contexts	Yes, partially: applies listed situations where NDA prohibited to *existing * agreements (legislation, artistic expression, certain classes)	Text substantially similar to PEI legislation.

Uniform Law Conference of Canada

							and general communications with prospective employer)	
Federal (Canada) Bill S-261 An Act respecting non-disclosure agreements (Can't Buy Silence Act)	Second Reading in progress (Senate Bill) Not yet law as of May 10, 2024	Yes	Yes, unless "specific and voluntary written request" " after opportunity to obtain legal advice	Yes, but only if opportunity to obtain independent legal advice includes advice on alternatives to NDA for protecting confidentiality	Same as above.	-All allegations of harassment or discrimination -Applies to federal government departments, departmental corporations, and Crown corporations -Applies to House of Commons, Senate, Library of Parliament, Parliamentary	No	This bill also includes: -restrictions on spending – grantees cannot use public money for NDA settlements or to litigate NDAs against complainants - reporting requirements on how many NDAs

Uniform Law Conference of Canada

						Protective Service		and dollar amounts of NDAs without divulging identity of complainants
--	--	--	--	--	--	--------------------	--	---

UNITED STATES: PASSED

Jurisdiction	Date	Prohibits NDA pre-claim	Prohibits NDA in settlement	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retroactively	Other
Arizona House Bill 2020 Title 12 Ch 6 Art 12 S 12-720	Passed April 2018	No	No	Yes	-Responding to a peace officer or prosecutor -Making a statement not initiated by the party in a criminal proceeding	Only in cases of sexual assault or sexual harassment (criminal context)	No	Public monies cannot be used as consideration for a sexual assault related NDA

Uniform Law Conference of Canada

California SB-820	Passed Nov 8, 2018	No	Yes	Yes, unless a gov't agency is a party to the agreement	Not specified	-Only in cases of sexual assault or sexual harassment -Only in employment context	Yes	
California SB-331 Code of Civil Procedure s 1001	Passed October 7, 2021	Yes	Yes	Yes, unless a gov't agency is a party to the agreement	Not specified	-In all instances of harassment/discr imination -In employment context	Yes	
Colorado SB – 23053 Colorado Revised Statutes ss. 22-1-135.5 , 24-50.5- 105.5	Governor signed June 2, 2023 Date effective – August 7, 2023.	Yes	Yes	Yes	-NDA allowed if: - required to prevent disclosure of employee's (complainant) identity and this is the wish of the complainant	Applies to: - School boards, districts, and boards of cooperative services (public bodies)	Not specified	-includes provisions for costs against employers to seek to enforce prohibited NDAs

Uniform Law Conference of Canada

					<p>-legislative data privacy requirements or privilege</p> <p>-trade secrets, security arrangements</p>	<p>-State departments, agencies etc.</p> <p>-Local government</p>		
<p>Hawaii</p> <p>H.B. No 2495</p> <p>HI Rev Stat 378-2.2 (2023)</p>	<p>Effective July 12, 2022</p>	<p>Yes</p>	<p>Yes</p>	<p>No</p>	<p>Does not apply to human resources employees or employees who are expected or requested to maintain the confidentiality of an ongoing human resources investigation, and to proceedings and records of peer review committees and quality assurance committees (624-25.5)</p>	<p>- Only in cases of sexual assault or harassment</p> <p>-Only in employment context</p>	<p>No</p>	<p>Prohibits employer from retaliating against an employee for disclosing or discussion sexual harassment or sexual assault</p>

Uniform Law Conference of Canada

<p>Illinois</p> <p>820 ILCS 96 Workplace Transparency Act</p>	<p>Effective Jan 1, 2020</p>	<p>Yes</p>	<p>Yes</p>	<p>Yes, subject to conditions (right to legal advice, 21 days to consider, 7-day period to change their mind)</p>	<p>Right to testify in administrative, legislative, judicial proceeding re criminal conduct or alleged unlawful employment practices</p>	<p>-Unlawful discrimination and harassment</p> <p>-Only in employment context</p>	<p>Yes</p>	<p>Employees are entitled to “reasonable attorney’s fees and costs incurred”</p>
<p>Maine</p> <p>H.P. 711 An Act Concerning Nondisclosure Agreements in Employment</p> <p>Title 26 Ch 7 SC 1 §599-C</p>	<p>Passed May 12, 2022</p>	<p>Yes</p>	<p>Yes, in certain circumstances</p>	<p>Yes</p>	<p>Individual must retain right to report to federal/state agencies and testify in court proceedings</p>	<p>-All employment discrimination</p> <p>-Only in employment context</p>	<p>No</p>	
<p>Maryland</p> <p>House Bill 1596 Disclosing</p>	<p>Passed May 15, 2018; effective</p>	<p>Yes</p>	<p>Yes</p>	<p>No</p>	<p>Not specified</p>	<p>-Sexual harassment and retaliation</p>	<p>Yes</p>	<p>- Specifically prohibits retaliatory</p>

Uniform Law Conference of Canada

Sexual Harassment in the Workplace Act of 2018 Md. Code Lab and Empl. 3-715	Oct 1, 2018					-Only employment context		action by employer -Sets out that certain employers are liable for attorney's fees - requires reporting of settlements to Commission on Civil Rights
Nevada NV Rev Stat S. 10.195 (2019)	Effective July 1, 2019	No	Yes	Yes, unless a gov't agency is a party to the settlement	Not specified.	-Only sexual harassment/discrimination on the basis of sex -Employment and landlord/tenant context	No	
Nevada	Approved by the	No	No	No	NDA provision not allowed if it	Applies where the proceeding	No	

Uniform Law Conference of Canada

<p>Nev. Rev. Stat. Ann. § 50.069.</p>	<p>Governor May 21, 2021</p>				<p>restricts a party to a contract or settlement from testifying at a judicial or administrative proceeding when required to testify pursuant to a court order, lawful subpoena, or written request by an administrative agency</p>	<p>concerns another party to the proceeding and his or her commission of a criminal offence, an act of sexual harassment, discrimination by employer or landlord, an act of retaliation for reporting discrimination</p>		
<p>New Jersey</p> <p>NJ Stat. S 10:5 -12.8</p>	<p>Effective March 18, 2019</p>	<p>Yes</p>	<p>Yes</p>	<p>Not specified.</p>	<p>-NDA allowed for non-compete and proprietary information</p>	<p>-All claims of discrimination, retaliation, or harassment</p> <p>-Only employment context</p>	<p>Yes</p>	<p>Note: NDAs are unenforceable against employee, but still enforceable against employer unless employee reveals identity of employer.</p>

Uniform Law Conference of Canada

New Mexico HB0021 NM Stat. 50-3-36	; effective May 20, 2020	Yes	Yes, under certain circumstances	Yes	-NDA can't prevent disclosure of information in a "judicial, administrative, or other governmental proceeding"	-Sexual harassment, discrimination, and retaliation claims -Only employment context	Yes	
New York General Obligations Ch 24-A, Art 5, Tit 3, S. 5-336	Effective October 12, 2018 (and further amended)	Yes	Yes	Yes, subject to conditions (plain language, 21 days to consider, 7-day period to change their mind) Yes, only if "the condition of confidentiality is the complainant's preference"	NDA void to the extent that it prevents participation in gov't investigation or disclosing any facts necessary to receive unemployment insurance, Medicaid, etc. -Adds non enforceability of NDAs that restrict ability to speak to attorney general	-All types of discrimination -Only in employment context -Adds independent contractors -Adds "harassment or retaliation" to existing law that includes all	No	Specifically prohibits: - the use of liquidated damages clauses for breach of an NDA -forfeiture of compensation for breach of NDA

Uniform Law Conference of Canada

						forms of discrimination		-any clause or requirement requiring the complainant to state that there was no discrimination
Oregon Senate Bill 1586	Effective Jan 1, 2023	Yes	Yes	Yes	Not specified	-All types of discrimination -Only in employment context	Yes	
Rhode Island SB 342 Amendment to ss. 28-5-6 and 28-5-7 General Laws ("Fair Employment	Signed by Governor June 22, 2023	Yes	Yes	No	None specified	-All types of discrimination/ "violations of civil rights" -Only in employment context	Yes	Embedded in general human rights code

Uniform Law Conference of Canada

nt Practices”)								
Tennessee Tennessee Code Title 50 Ch 1 50-1-108	Passed in 2018.	Yes	Not specified.	No	Not specified	-Only sexual harassment -Only in employment context (restricts employers from making NDAs a condition of employment)	No	
Tennessee TN Code § 49-2-131 (2021)	-	No	Yes	Not with Local Education Agency (LEA) Prohibits a LEA from entering into a non-disclosure agreement during a settlement for any act of sexual misconduct	Not specified	Sexual misconduct including but not limited to sexual harassment or sexual assault	Not specified	Prohibits a LEA employee from assisting a person known or believed to have engaged in sexual misconduct with student/minor obtain

Uniform Law Conference of Canada

								another job except as provided
Utah HB 55 34A-5-114 (Utah Labor Code)	Signed by Governor 13 March 2024	No	Yes	confidentiality clause regarding sexual misconduct, as a condition of employment, is against public policy and is void and unenforceable;	Agreement prohibiting disclosure of amount of monetary settlement or facts that could lead to identification of employee; restrictive covenants; trade secrets; discussion of sexual misconduct in civil or criminal proceeding when subpoenaed	Sexual harassment and sexual assault; retaliation Only in employment context)	Yes, retrospective operation to January 1, 2023	An employer who attempts to enforce NDA which violates this section is liable for all costs, including attorney fees and not entitled to monetary damages Employee may withdraw from

Uniform Law Conference of Canada

								settlement agreement within three days if it contains a confidentiality clause
Vermont 21 V.S.A. § 495h H707 An Act Relating to the Prevention of Sexual Harassment	Passed May 28, 2018	Yes	Yes	Yes	An NDA must expressly state that it does not prohibit lodging a sexual harassment complaint w/ a government agency, testifying in court, or exercising any collective bargaining rights	-Only sexual harassment -Only in employment context	Yes	
Virginia Title 40.1 Ch 3 Art 1 S 40.1-28.01	Effective July 1, 2019	Yes	Yes	Yes(?)	Not specified	-Only sexual assault	Yes	

Uniform Law Conference of Canada

						-Only employment context		
Virginia – update to existing law HB 1895 Title Ch 3 Art 1 S 40.1-28.01	Approved by Governor March 24 , 2023	Yes	Yes	Yes	Not specified	-Amended to add sexual harassment to the above law -Amended to specifically include nondisparagement agreements	Yes, as above.	
Washington (House Bill 1795) Title 49 C 49.44 S 49.44.211	Effective June 9, 2022	Yes	Yes	No	Not specified	-All forms of discrimination, harassment, retaliation, and sexual assault -Only employment context	Yes	
US (Federal) Speak Out Act	Approved, Dec 7, 2022	Yes	Yes	No	Not specified	-Only sexual assault/harassment (which violates the law)	Yes	

Uniform Law Conference of Canada

						-All contexts		
--	--	--	--	--	--	---------------	--	--

UNITED STATES: NOT YET PASSED

Jurisdiction	Date	Prohibits NDA pre-claim?	Prohibits NDA in settlement?	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retro-actively	Other
Arizona HB 2369 Amends Title 23, Ch. 2, Article 1 (Arizona Revised Statutes) HB 2526 (Note: deals with employment contexts – additional law already	HB 2369 - Second reading in the House, January 26, 2023 HB 2526 - Second reading in House on January 22, 2024	Yes	No - specifically allows NDA in settlement and specifically allows confidentiality provisions	No (although note that settlement NDAs are specifically allowed)	None specified	-Employment contexts only -Applies to work-related sexual harassment and sexual assault -Appears to only apply to nondisclosure agreements as a condition of employment	No.	More limited than most of the other legislation as it does not restrict NDAs used in settlement, but only prohibits making NDA a condition of employment.

Uniform Law Conference of Canada

passed above re: criminal assault and harassment)								
Connecticut SB697	Introduced Jan 2019 On Senate calendar as of April 2019 Died	Yes	Yes	No	Not specified	-Only sexual harassment/assault -Only employment context	No	
Kansas HB2324	Died May 21, 2020 Entry on trackbill.com	No	Yes	No	Not specified	-Only sexual harassment/abuse -Only employment context	Yes	
Massachusetts HD 1377 is now H1778	H1778 - Senate concurred, Feb 16, 2023 H1778 - Hearing	Yes	Yes	Yes -- allows provisions that protect the claimant's identity,		-Covers sexual offenses, sexual harassment, discrimination based on sex or SOGI, retaliation,	Partial – prior agreements that would run afoul of	-Parties who attempt to enforce prohibited NDAs will

Uniform Law Conference of Canada

<p>Amending Chapter 151B of the General Laws to add S. 11</p>	<p>scheduled for December 5, 2023 Not yet published online as of May 14, 2024</p>			<p>and related facts, only on “written, informed” request of the claimant, but cannot be construed to limit the right of the claimant to disclose.</p>		<p>-Only employment context</p>	<p>this law cannot be used to invalidate compensation claims or force claimant to return compensation</p>	<p>be liable for costs. -Public funds cannot be used to settle claims against public employees -A lawyer who insists on prohibited clauses may be subject to professional discipline</p>
<p>New Jersey</p>	<p>Introduced in Senate and</p>	<p>Yes</p>	<p>Yes</p>	<p>No</p>	<p>None specified</p>	<p>-Applies to state officers and employers,</p>	<p>No</p>	<p>No campaign contributio</p>

Uniform Law Conference of Canada

<p>S1380 Amending PL 1993 c. 65 and supplementing Title 52 of the Revised Statutes</p>	<p>referred to Committee Feb 10, 2022 (not yet included in online version of Title 52 as of May 21, 2024</p>					<p>Legislature and candidates -Applies to sexual assault and harassment claims, and definition includes nonsexual conduct if it is based on the sex of an individual</p>		<p>ns can be used for settlement of sexual assault or harassment claims</p>
<p>Pennsylvania HB 938</p>	<p>Referred to House committee March 17, 2021; moved to Senate committee May 5 2021; referred to Labor and Industry May 6, 2021</p>	<p>Yes</p>	<p>No, if voluntary</p>	<p>Yes</p>	<p>Not specified</p>	<p>-Only sexual harassment -Only employment context</p>	<p>No</p>	

Uniform Law Conference of Canada

	Entry on trackbill.com Cursory search shows this as not published as of May 21, 2023							
<p>Texas HB 4309 Amending the Labor Code, adding Chapter 25</p>	Died in Committee	Yes, prohibits clauses that stop complainants from reporting to police or discussing facts of the claim	No – Does not apply to “negotiated settlement agreements”	No	Not specified	-Applies to sexual assault and harassment, including “conduct” that unreasonably interferes with work/creates poisoned environment -Applies in employment contexts only	Yes	
US Federal	Read the second	-	-	-	-	-	-	Requires an Executive

Uniform Law Conference of Canada

HR 300	time. Placed on Senate Legislative Calendar January 26, 2023							agency to submit information regarding settlement agreements to a public database
------------------------	---	--	--	--	--	--	--	---

OTHER JURISDICTIONS

Jurisdiction	Date	Prohibits NDA pre-claim	Prohibits NDA in settlement	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retro-actively	Other
Ireland Bill 2001 Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2001	Seanad fifth stage as of October 25, 2023	No	Yes, unless “expressed wish and preference” of employee	Yes, subject to certain conditions (independent legal advice, no adverse effect on third party or public interest, etc.)	NDA will not apply to disclosure of information under Protected Disclosures Act, or to certain protected classes of person (lawyer, doctor, family member, etc.)	-Sexual harassment and other forms of discrimination -Only employment context	Yes	NB: agreements made before this legislation that do not conform to it are void; an employer that makes an NDA that does not conform after it

Uniform Law Conference of Canada

								passes is guilty of an offence
Victoria, Australia Victorian Government Response to the Ministerial Taskforce on Workplace Sexual Harassment	Reforms proposed and accepted, but no set timeline	?	?	?	?	-Only sexual harassment -Only employment context	?	Task force recommended legislative amendments to restrict the use of NDAs in re workplace sexual harassment. The government accepted the recommendation in principle. Legislation to be developed.
England Bill 131 2022-23 Non-Disclosure Agreements Bill	First reading 29, June 2022. Schedule d for second reading November 24, 2023	Yes	Yes, unless “expressed wish and preference” of employee	Yes, subject to certain conditions (independent legal advice, no adverse effect on third party or public interest, etc.)	None specified	-Bullying, harassment, and discrimination. -No limits on context, although employment is specifically mentioned.	No	-Requires plain language in any agreement -Applies to England, Wales and Scotland.