

What You Need to Know Before You Sign an NDA¹

What is an NDA?

An “NDA” is a non-disclosure agreement. It is a legally binding contract between two parties. In the context of sexual harassment allegations, the parties to the contract are the survivor and, usually, the employer, or the harasser himself, or both.

Employers generally use NDAs when they want to keep certain matters secret. For example, employers include NDAs in settlement agreements, either before you file a case in court or after. Some employers ask employees to sign NDAs at the time of hire, which is a highly problematic practice that some states have outlawed.

What are the typical terms of an NDA?

The purpose of an NDA is to allow the employer to keep certain matters secret. Employers typically use two different types of clauses in NDAs: confidentiality and non-disparagement.

Confidentiality clauses are just that. They require that the people (or organization) signing the agreement keep matters specified in the contract confidential. A standard confidentiality clause in a sexual harassment settlement agreement requires that the parties keep the fact of the settlement, as well as the amount of the settlement confidential.

More onerous confidentiality clauses require that the parties keep all the facts that led to the complaint secret. Those kinds of requirements are problematic because they allow harassers to continue operating as if complaints hadn't happened.

Another clause that employers are using more and more often are known as “non-disparagement” clauses. Employers insist on these in order to protect the company's reputation. Non-disparagement clauses require that the survivor not make any negative statements about the employer, or its business in public (or, sometimes, even private). These types of clauses are also problematic because they silence survivors, preventing them from warning other women about harassment or other problems in the workplace.²

Do I have to sign an NDA no matter what?

¹ This is not legal advice, but an overview of an issue important to survivors. If you need legal advice about a particular contract or other situation, please contact a lawyer.

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<https://www.nytimes.com/2017/07/21/technology/silicon-valley-sexual-harassment-non-disparagement-agreements.html>

No one can force you to sign an NDA. Thirteen states have made it unlawful for an employer to require that you sign an NDA as a condition of employment or as part of a settlement agreement: Arizona, California, Illinois, Louisiana, Maryland, Nevada, New Jersey, Oregon, Tennessee, Vermont, Virginia and Washington. That doesn't mean that in those states you can't sign such an agreement, only that it has to be voluntary.

Is there anything else I should know?

Yes, this is a complicated area of law. If you are negotiating an NDA, you may want to consult a lawyer. As a member of Survivors Know, you have the ability to talk to survivors with experience in dealing with NDAs.

Defamation: What is it? Can I be sued if I expose the person who harassed me?

One of the tools that harassers use to try to silence survivors is the threat of a defamation lawsuit. We at Survivors Know have seen plenty of lawyers send aggressive letters to survivors, threatening to sue them unless they withdraw claims of harassment. Those letters can be very scary, especially for someone without the resources to hire a lawyer.

Here's what you should know about defamation:

Generally, defamation is a **false** public statement about another that causes damage to that person's reputation.³ Someone suing you for defamation must prove: (1) that you made a public statement; (2) the statement was false; and (3) he suffered damage. Truth is an absolute defense to defamation.

If the facts that you reveal are true, the harasser is very unlikely to win. In fact, more often than not, harassers don't go through with threats of lawsuits. There are rare cases when a harasser has lots of money, and the survivor doesn't, and the harasser uses a lawsuit as an intimidation tactic.

As a member of Survivors Know you will have access to other survivors who have faced threats of defamation lawsuits, and work with them to craft strategies to respond.

³ State laws differ on the actual definition of defamation. Also, public figures are subject to a higher standard--in other words, to prove defamation, a public figure must show that the person who makes a false statement acts with malice.

I want to sue my employer and/or my harasser. What do I need to know?⁴

First, you need to know that the process for holding a harasser (and an employer) accountable through the legal system is long, expensive, and all too often, emotionally, intellectually and physically draining.

The first step is to file a claim (called “a charge”) with the U.S. Equal Employment Opportunity Commission (EEOC), or a state or local agency that handles claims of harassment. You will have to provide evidence that you are covered by the law (in other words, that you are in a “protected class”), that someone did something in the workplace (or in the context of work) to cause you harm because of your sex (in this case “sex” is a legal term that encompasses gender, and includes women, as well as homosexual and trans people). Sexual assault is presumed to be “because of sex.”

The EEOC (or state or local agency) will assign an investigator to your case. The employer will be given a chance to respond. The EEOC allows complainants to see what the employer has submitted, but not to make copies.

Sometimes, the agency will try to mediate the case--that is, get the parties in a room and try to reach a settlement. If either party objects to a mediation, the agency can't force it.

If the agency finds merit in the case, it could decide to bring the case to court itself, although that is very, very rare--and usually reserved for cases where the agency finds systemic, long-term harassment.

The agency process usually takes at least 6 months. In some cases, it takes much longer. If the agency hasn't resolved the case in 6 months, the survivor can ask for a “right-to-sue” letter, which allows the survivor to file a lawsuit in federal or state court.

The next step is to file a lawsuit, which has to happen within 90 days of the agency's letter. Sometimes, employers will agree to private mediation before you file your lawsuit, in order to avoid the publicity. By the time you get to this point, you will have probably spent between \$20,000-\$30,000 in legal fees.

Survivors Know members have access to more detailed information about the lawsuit process, and to other survivors who have gone through the process.

⁴ This is not legal advice. If you are considering filing a claim of sexual harassment, please contact a lawyer.