Supporting Market Accountability, Workplace Equity, and Fair Competition by Reining in Non-Disclosure Agreements

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January 2022
Summary

Overuse of non-disclosure agreements (NDAs) is a pervasive problem in the United States. Companies apply these silencing tools to prevent their workers from sharing critical information with one another and the public. This in turn threatens economic growth, limits competition, and inhibits workplace equity. Workers need reliable information about corporate practices to assess job quality, ensure personal safety, and obtain pay commensurate with their worth. The public needs information about corporate practices to decide how to use their investment and purchasing power. Yet existing laws give companies enormous latitude to designate information as confidential, allowing them to impose NDAs and other contract clauses and internal policies that prevent workers from sharing information with those who need to know.

It is time for government to rein in corporate secrecy. The #MeToo movement revealed how NDAs enable and perpetuate misconduct at work, prompting public outrage and support for legislative action. New empirical evidence has exposed just how widely NDAs are being used in the corporate world: researchers estimate that between 33% and 57% of U.S. workers are constrained by an NDA or similar mechanism.² At recent hearings and public events, regulators have signaled their concern about the anti-competitive effects of restrictive employment agreements.³ Policymakers should seize this moment of support to pursue a comprehensive legislative and multi-agency agenda limiting inappropriate use of NDAs. A strong action plan should include proactive enforcement of existing laws governing NDAs; new legislation prohibiting the most harmful uses of NDAs; and interagency collaboration to educate the public, collect data, and support research on impacts of corporate secrecy practices. Together, these efforts to limit NDA abuse will promote market accountability, workplace equity, and fair competition.

Challenge and Opportunity

NDAs are contracts in which parties agree not to disclose any information designated confidential by the agreement. In some cases, NDAs may be used appropriately to protect valuable trade secrets or other intellectual property. But employers often draft these agreements broadly to conceal many other types of information, sometimes in ways that overstep existing legal bounds. For instance, the Weinstein Company required employees to sign NDAs that prohibit disclosure of "any confidential, private, and/or non-public information obtained by Employee during Employee's employment with the Company concerning the personal, social, or business activities of the Company, the Co-Chairmen, or the executives, principals, officers, directors, agents, employees of, or contracting parties (including, but not limited to artists) with,

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the Company.” Some companies require employees to sign non-disparagement agreements. These particularly broad NDAs prohibit employees from disclosing any information that might, as a non-disparagement agreement for employees of Task Rabbit reads, “disparage the Company, and the Company’s officers, directors, employees, investors and agents, in any manner likely to be harmful to them or their business, business reputation or personal reputation.” NDAs and non-disparagement agreements often purport to apply indefinitely, preventing workers from sharing information long after they have left employment.

NDAs are imposed on workers at various points during the employment relationship. They are regularly included as part of a bundle of mandatory HR forms that new hires must sign as a condition of employment. They can also be imposed and enforced through confidentiality policies contained in personnel manuals or codes of conduct that prevent employees from sharing information about the company with outsiders and sometimes even with co-workers. They are also routinely included in standardized as well as negotiated severance agreements that workers sign when ending their employment. Lastly, they are also often included in settlement agreements that resolve workplace disputes and in agreements that force employees to arbitrate disputes in secret. By preventing workers from disclosing information on everything from workplace harassment and abuse to compensation practices and safety conditions, NDAs stifle competition, limit the free flow of ideas, and allow toxic workplace conditions to fester.

Prevalence of NDAs

Researchers estimate that between 33% and 57% of U.S. workers are constrained by an NDA or similar mechanism. Yet it is difficult to precisely determine how many employees are silenced by NDAs because NDAs are designed to conceal information. In fact, NDAs often provide that the mere existence of the agreement is itself a secret. Lawyers regularly encourage firms to use broad NDAs as a condition of employment—not only to protect trade secrets, but also to discourage employees from revealing bad employment experiences. NDA prevalence also varies by sectors.

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5 Ibid.
11 Starr, E.P.; et al. (2020).
12 Balasubramnian, N.; et al. (2021).
For instance, 73% of workers in “computer or mathematical jobs” report having an NDA with their employer.\textsuperscript{15,16}

How NDAs Hurt Workers, the Public, and the Economy

The overuse of broad NDAs can have harmful economic and social effects. Depending on how they are drafted and enforced, NDAs may undermine law enforcement and regulatory compliance, distort labor and investment markets, constrain fair competition, allow toxic workplace conditions such as harassment and discrimination to persist, and undercut efforts to make workplaces more diverse and equitable.

*Interference with Law Enforcement and Regulatory Compliance*

Social, psychological, and economic disincentives already discourage employees from blowing the whistle on harmful and illegal corporate behavior.\textsuperscript{17} NDAs add another barrier preventing this critical information from reaching regulators and the public. NDAs have been used by companies to cover up illegal behavior. They have been used to silence whistleblowers who disclose information about products that threaten public health and safety.\textsuperscript{18} They have even been used to prevent employees from disclosing illegal conduct to government regulators despite countervailing law. A complaint filed by the California Department of Fair Employment and Housing (DFEH) against gaming company Activision Blizzard alleges that, contrary to law, the company pressured employees to sign contracts waiving their right to speak to investigators and requiring them to notify the company before disclosing information to DFEH.\textsuperscript{19} Some companies have required employees to agree to secrecy about corporate pay practices and diversity statistics, thereby depriving regulators of vital information about companies’ compliance with pay equity and anti-discrimination laws.\textsuperscript{20} The dangers of overly aggressive NDAs have become especially clear during the COVID-19 pandemic, when it is vital for the public to know if companies are disregarding essential health and safety guidelines designed to reduce virus spread.

*Market Distortion*

NDAs deprive individuals of information they need to assess competing job offers and make informed decisions about where to work. They also degrade the reliability of employer reviews that workers post to online job platforms. This is because workers

\textsuperscript{15} Balasubramnian, N.; et al. (2021).
\textsuperscript{16} Balasubramnian, N.; et al. (2021).
subject to broad NDAs are more likely to censor themselves and withhold negative information. New research shows that on Glassdoor, workers in states with more stringent limits on NDAs are 16% more likely to give a one-star review, write 8% more about the “cons” of working at the firm, and discuss harassment at work 22% more often.\footnote{Sockin, J.; et al. (2021)} That same research also shows that states with more stringent limits on NDAs increase reporting of sexual harassment and safety violations to federal agencies. NDAs hence remove an important check on corporate behavior, since companies have been shown to improve their practices in response to negative job reviews and investigations into their practices.\footnote{Dube, S.; Zu, C. (2021). The Disciplinary Effect of Social Media: Evidence from Firms’ Responses to Glassdoor Reviews. \textit{Journal of Accounting Research}, 59(5): 1783–1825. See also Johnson, Matthew S. “Regulation by shaming: Deterrence effects of publicizing violations of workplace safety and health laws.” \textit{American economic review} 110, no. 6 (2020): 1866-1904.} NDAs thus enable bad employers to hide their flaws and make it difficult for good employers to distinguish themselves in the market.

Accurate information about workplace conditions is also valuable to investors, who have increasingly come to recognize that the ways companies treat their workers impact corporate financial performance.\footnote{Mahoney, C. (2021). \textit{Companies that Have the Most Workers Earning a Living Wage Have Higher Return on Assets. Just Capital}, February 21.} A nonprofit investment group recently called on the Securities and Exchange Commission to develop a standardized set of workplace-practice metrics as part of a comprehensive framework for evaluating socially responsible corporate governance.\footnote{Whittaker, M. (2021). CEO JUST Capital, Letter filed in response to SEC request for comments on ESG disclosures. Available at \url{https://www.sec.gov/comments/climate-disclosure/cll12-8922517-245118.pdf}, June 14.} NDAs can hide information about workplace conditions that investors value.

\textit{Constraints on Fair Competition}

Broad NDAs can impede fair competition. Research has demonstrated that non-compete agreements—which prohibit departing workers from joining competitors—impede worker mobility, economic growth, and new firm entry. Broad NDAs pose some of the same competitive risks as non-competes because they limit workers’ ability to share and apply knowledge gained through on-the-job experience. This in turn diminishes workers’ human capital and makes them less competitive in the labor market.\footnote{See TLS Management & Marketing Services v. Rodriguez-Toledo, 966 F.3d 46 (1st Cir. 2020). The Court of Appeals found that “overly broad nondisclosure agreements, while not specifically prohibiting an employee from entering into competition with the former employer, raise the same policy concerns about restraining competition as noncompete clauses where...they have the effect of preventing the defendant from competing with the plaintiff.”} Indeed, employers in states that ban non-competes have illegally attempted to use broad NDAs as an alternative mechanism to impede employee mobility.\footnote{Brown v. TGS Management Co., LLC, 57 Cal.App.5th 303 (2020).}

\textit{Harassment and Discrimination}

NDAs conceal harassment, discrimination, and abuse in the workplace. As the #MeToo movement showed, perpetrators of harassment and discrimination are often
repeat offenders.\textsuperscript{27,28} NDAs may prevent victims of harassment and discrimination from warning co-workers and prospective employees about a company's toxic workplace environment, leaving others at risk. NDAs may also prohibit or inhibit employees from disclosing information to government agencies, shielding offenders from outside investigation. By limiting what employees can share, NDAs allow harmful and abusive behavior to persist.

\textit{Diversity, Equity, and Inclusion}

Restrictions on employee disclosure of harassment and discrimination undermine the goal of achieving diverse and equitable workplaces. Workers of color, women, and LGBTQ+ workers are disproportionately likely to suffer harassment and discrimination in the workplace. Such adverse experiences can have significant psychological and professional consequences, including driving workers out of certain jobs and even out of certain industries.\textsuperscript{29,30} NDAs exacerbate these harms by suppressing information about systemic workplace inequities and by denying workers a forum to expose and discuss harassment and discrimination.

Corporate-secrecy practices shrouding employee compensation similarly undermine efforts of diverse employees to achieve pay equity. Contrary to law, some NDAs and confidentiality policies prohibit employees from discussing their compensation, which makes it challenging for those employees to negotiate fair salary terms commensurate with their value.\textsuperscript{31} Studies have found that states that adopted anti-secrecy pay laws increased gender wage equality relative to states that did not.\textsuperscript{32,33}

\textbf{National Leadership Is Needed}

As described above, overly broad NDAs and the organizational secrecy practices they support pose serious risks to our economy and our society. Yet absent government intervention, these challenges will persist. Individual firms have incentives to maintain their reputations using corporate-secrecy tactics despite the social costs of such behavior. Many of those who value the information concealed by NDAs lack the capacity and power to pressure companies to change. Policymakers have an imperative to use the levers of government to curb NDA abuse.

A minority of states, including California, Illinois, New Jersey, New York and Washington, passed legislation in the wake of #MeToo regulating some uses of NDAs. But these laws comprise an inconsistent and incomplete regulatory patchwork. State

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laws differ in scope of coverage and impose different compliance standards, making it difficult for employees and companies to determine what employee disclosures are legally protected where. Moreover, the harms caused by NDAs do not stop at state lines. In fact, uneven regulation of NDAs further distorts markets by making it easier for companies to conceal information and restrict competition in some states than in others. Multi-state firms can use choice of law and choice of forum provisions to exploit inter-state legislative discrepancies, i.e., to apply the most lenient state-level secrecy laws to the entirety of a multi-state workforce.

The upshot is clear. National leadership is the only way to support market accountability, workplace equity, and fair competition by reining in non-disclosure agreements.

**Plan of Action**

Multiple policy interventions could curtail NDA misuse. Select options are presented below.

**Better Enforce Existing Laws**

Existing laws restrict some of the harmful uses of NDAs. But laws must be enforced to be effective. Research shows that some employers include unlawful non-compete clauses in their employment contracts, capitalizing on workers’ ignorance of the law and fears of being sued. Employers may similarly use NDAs in ways that violate existing law.34,35 Ensuring that employers are following laws that protect certain disclosures and forms of communication is a common-sense place to start when it comes to curbing NDA abuse.36

The Federal Trade Commission (FTC) has an important role to play in enforcement. The FTC has broad authority to punish companies engaging in unfair or deceptive practices that harm consumers or competitors, as NDA misuse often does.37 Unfair practices include practices that offend public policy as established by state statutes and common law,38 which already restrict use of overly broad NDAs as well as NDA misuse to silence disclosures of employer wrongdoing. Stronger enforcement by the FTC would give these laws some needed teeth and would help establish norms governing responsible NDA use. The FTC could also work with companies to develop standards and best practices around NDA use and to encourage companies to engage in robust self-regulation and police one another.39

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37 Section 5 of the Federal Trade Commission Act.
Stronger enforcement of existing laws could also come from the various federal agencies that help oversee labor and employment in the United States. For example, the National Labor Relations Act protects workers who make common cause in seeking to discuss the terms and conditions of their employment. Regional offices of the National Labor Relations Board (NLRB) have the authority to investigate employers’ use of policies that discourage this type of communication, and to file unfair labor practice charges against employers acting unlawfully. The NLRB can and should exercise this authority more forcefully. Similarly, the Occupational Safety and Health Administration (OSHA) could better use its power to enforce whistleblower laws protecting employees who report unlawful behavior. The Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL) also receive complaints about unlawful employment practices, including retaliation against employees who report or object to discriminatory behavior, wage theft, and other violations. The EEOC and DOL should actively seek information about NDAs and related practices in the course of their investigations and should make pursuit of retaliation claims a top priority.

In addition to redoubling enforcement efforts in their respective spheres of jurisdiction, the aforementioned agencies should collaboratively develop and implement strategies for amplifying the collective impact of their oversight.

Prohibit the Most Pernicious Uses of NDAs

New federal laws should be enacted to ban employer-imposed secrecy regarding key categories of essential information, including firm diversity, harassment and discrimination, compensation practices, and workplace health and safety. The recently proposed Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act (EMPOWER Act) would make it illegal for an employer to require or enforce an NDA or nondisparagement clause related to workplace harassment based on a range of protected characteristics, including sex, race, national origin, disability, age, or religion. The proposed law, which enjoys bipartisan support, would also establish a confidential tip line for reporting systematic workplace harassment.

The EMPOWER Act is a step in the right direction, but federal legislation should go even further. New laws are needed to protect a wider range of disclosures and to ensure that employees know their rights. A section of California’s Silenced No More Act provides one example. It prohibits companies from using NDAs to silence employees not only about harassment, but also about discrimination and other illegal conduct. To ensure that employees know their rights, the act requires employers who use NDAs for lawful purposes to include in these contracts language clarifying that “[n]othing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”
The federal Defend Trade Secrets Act (DTSA) provides another example of a provision that could be incorporated into new legislation aimed at reining in NDAs.\(^{40}\) Signed into law by President Obama in 2016, the DTSA requires employers to include language in all employment contracts notifying employees that they are immune from liability when blowing the whistle on unlawful employer behavior, even if doing so involves revealing trade secrets. This notice requirement could be expanded to cover any discussions about workplace conditions. It could also clarify that the NDAs may cover only technical information that is truly secret and not general skills, know-how, and job-related experience. This would give workers more freedom to leverage their knowledge in competing for quality jobs and market-based terms of employment.

Enacting a reform agenda that impacts the widest possible swath of employers requires Congressional action. However, President Biden could act immediately to limit NDA use by federal contractors. The president has the power to issue an executive order restricting or prohibiting the federal government from entering into contracts with companies that fail to adhere to certain rules. President Biden could issue an executive order requiring that federal contractors adhere to new rules prohibiting use of NDAs to conceal essential information, including information on firm diversity, harassment and discrimination, compensation practices, workplace health and safety, and other areas of regulatory compliance. In addition to the benefits discussed above, such rules could help prevent concealment of fraud by government contractors.

Collect Data and Require Disclosure

Research tells us that NDAs are common in American workplaces. Recent events have shown that some employers use NDAs to cover up unlawful behavior. Yet information on the prevalence and content of NDAs is still relatively scarce. Employers are not currently required to disclose their NDAs to any outside party or government regulator. Employers are also free to prohibit employees who sign NDAs from even revealing that the agreement exists. Without adequate information on the scope and nature of the NDA problem, it is difficult for lawmakers to craft well-tailored policy solutions that account for a variety of stakeholder concerns. Any law limiting NDAs must balance the damage that concealing information from the public imposes against the value of NDAs for employers when used appropriately. Legislation must also consider the personal interests of victims of misconduct who may prefer to keep their experiences secret.

Policymakers should therefore require organizations to disclose their NDAs and related clauses in employment agreements. The FTC should use its investigative authority under Section 6(b) of the FTC Act\(^{41}\) to gather and study these documents. The SEC should also consider requiring disclosure of companies’ use of NDAs as part


\(^{41}\) 15 U.S.C. § 46(b).
of its broader response to investor demand for credible information about human-capital management and environmental, social, and governance performance.\(^{42,43}\)

In addition, the various agencies that investigate violations of employment laws should collaborate to conduct more research on the scope and effects of NDAs (as well as other corporate-secrecy practices) across states and industries. For instance, the EEOC already receives annual reports from employers about worker demographics, salary breakdowns by gender and race, and other employment information. A coordinated agency effort could provide insight into how NDAs affect diversity and equity in employment. Developing this type of data will help lawmakers assess the anti-competitive effects of corporate secrecy, balance competing policy interests, and draft effective legislation.

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\(^{43}\) Just Capital. (2021). *As the SEC Finally Takes on Climate Disclosure Standards, It Must Also Consider ESG Standards Affecting Workers*.

About the Authors

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Political activist and advocate Julie Roginsky has long been an outspoken champion of women's rights and issues. She co-founded the non-profit Lift Our Voices to end the silencing of harassment victims through forced arbitration and non-disclosure agreements. Julie, is a nationally recognized political consultant, began her career working at a prominent organization dedicated to electing more women to political office. Throughout her career, she has focused her efforts on mentoring and empowering women who seek to become engaged in the political process. Roginsky is a former contributor at CNBC and the Fox News Channel, where she was a frequent co-host of "Outnumbered" and "The Five". In 2017, she became one of the first women to file a sexual harassment and retaliation lawsuit against the Fox News Channel and its chairman. Since then, she has fought relentlessly against non-disclosure agreements and other tools that organizations use to silence women from publicly disclosing their experiences with toxic work environments. She serves as an advisor to major corporations, start-ups, non-profits, labor unions, and dozens of elected officials, including governors, senators, members of the House of Representatives, and state legislators.
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About the Day One Project

The Federation of American Scientists’ Day One Project is dedicated to democratizing the policymaking process by working with new and expert voices across the science and technology community, helping to develop actionable policies that can improve the lives of all Americans. For more about the Day One Project, visit dayoneproject.org.

About Lift Our Voices

Lift Our Voices is a nonprofit initiative dedicated to creating positive, systemic change in the American workplace through the eradication of nondisclosure agreements for toxic work issues and mandatory arbitration clauses. We protect American workers by eradicating the laws and business practices that prevent employees from publicly discussing and disclosing toxic workplace conditions. We give voice to those silenced by NDAs and arbitration clauses, raising public awareness through advocacy and education. Our approach is based upon the simplicity of our solution. We work with legislators, corporations, educators, and the public to illuminate the negative impact of NDAs and mandatory arbitration clauses, influence corporate leaders to discontinue the practice and educate the public about state and local laws regulating their use.

The Day One Project offers a platform for ideas that represent a broad range of perspectives across S&T disciplines. The views and opinions expressed in this proposal are those of the author(s) and do not reflect the views and opinions of the Day One Project or its S&T Leadership Council.