

BREAKING THE SILENCE

Stakeholder Experiences with New Jersey's Non-Disclosure Agreement Ban

"My experience was horrible. It was horrible. And then they want me to sell my voice for a settlement. No."

– Employee-Survivor (#1)

"The settlement took three years of my life. How can they expect a human being not to talk about the worst three years of their life?"

– Employee-Survivor (#2)

"I found out later this wasn't the first time this person had been a predator. At least now they can't hide it from anyone else. Everyone knows and I'm protected."

– Employee-Survivor (#3)

"I didn't even know about this ban...This is the first I'm hearing about it."

– Business Owner (#1)

"The ban on NDAs has had virtually no effect on my ability to reach a settlement."

– Defense Attorney (#1)



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This expert report is a qualitative study seeking to capture the impacts of New Jersey's landmark law (P.L.2019, c.39) banning the use of non-disclosure agreements (NDAs) to cover up disclosure of workplace misconduct. Enacted in 2019, the law bans NDAs for discrimination, retaliation, and harassment claims.

Methodology:

In order to investigate the effects of S. 121, the author conducted 28 semi-structured qualitative interviews with New Jersey-based employee survivors, employers and employer-side representatives, defense-side lawyers and plaintiff-side lawyers.

Key Findings:

- Plaintiff lawyers were unequivocal in their agreement that the law had no detrimental effects on their ability to settle legal disputes, nor did it affect the monetary amount of settlements for survivors.
- Outside of legal professionals, there was little knowledge of NJ's prohibition of NDAs that silence workers who have experienced or observed workplace misconduct. Employers were unfamiliar with the law, as were employee survivors.
- Despite lack of prior awareness, employee survivors uniformly praised the protections afforded by S. 121, appreciating their right to speak about their experiences both in public and in private and viewing NDAs as an illegitimate tool of suppression.
- Employers acknowledged the law has had little to no detrimental effects (either direct or indirect) on their ability to operate their businesses.

Policy Recommendations:

- Educate employers and employees on existing laws
- Adopt stronger bans on NDAs
- Include the voices of individual stakeholders directly
- Amend existing law to close legal ambiguity
- Require better record keeping

What You Need To Know:

- Nondisclosure agreements, or NDAs, are increasingly common in employment contracts, with half of U.S. workers subject to their constraints.
- Compelling employees to adhere to non-disclosure agreements in cases of sexual harassment, sexual assault, and other workplace discrimination bars them from raising their voices or advocating for accountability in the workplace.
- The research suggests that in silencing survivors, NDAs inflict an additional layer of harm on survivors and curb their freedom to decide where and when to speak about their own experiences, which survivors universally value.

INTRODUCTION

Non-Disclosure Agreements (NDAs) are one of several restrictive covenants commonly used in employment contracts today. NDAs can serve a legitimate purpose in preserving company trade secrets, client lists, and other confidential information from being shared or inappropriately utilized by employees to the detriment of the company. However, NDAs can also be used in ways that harm individual employees and society by suppressing transparency around violations of employee rights and workplace standards. These concerns are particularly acute when NDAs are used in the context of employment discrimination settlements.

A majority of Americans say that they would like to eradicate the use of NDAs for toxic workplace issues

Recent studies estimate that over half of U.S. workers are subject to non-disclosure agreements.¹ The strongest public policy case supporting the use of NDAs is that they protect a company's competitive advantage by preventing employees from disclosing trade secrets, intellectual property, and other sensitive business information. Yet a majority of Americans say they are familiar with non-disclosure agreements (NDAs) and would like to end their use to cover up toxic workplace behavior: Among those who have signed an NDA with their current employer, 64% would like to opt out of it if given the chance, and 54% would like their employer to end the practice of using NDAs altogether.²

Until recently, employers were permitted great latitude to incorporate NDAs into employment contracts and legal settlements to prohibit disclosure of toxic workplace issues, despite public opposition. In March 2019, New Jersey was one of the first states to restrict the use of NDAs for toxic workplace issues, when it effectively banned them in employment and settlement contracts to conceal discrimination, retaliation, and harassment at work.³ California, Maryland, New York, Oregon, Tennessee, Virginia, Vermont, and Washington State have also implemented varying forms of legislation curbing the use of such agreements. At the federal level, President Biden signed the Speak Out Act in December 2022, bipartisan legislation that curtails the use of pre-dispute non-disclosure and non-disparagement clauses related to allegations of sexual assault and/or sexual harassment.

In March 2019, New Jersey was one of the first states to take action against the use of NDAs for toxic workplace issues.

These recent legislative prohibitions bring into sharp relief the need to understand whether and how bans on NDAs for toxic workplace issues have affected key stakeholders. Have they not gone far enough and failed to protect victims and/or allowed toxic behavior to continue? Have they gone too far and created disproportionate burdens on business? Have they engendered unintended consequences, either positive or negative? This project strives to illuminate how employers, survivors, and attorneys have been impacted by and reacted to NJ's ban on NDAs to conceal discrimination, retaliation, and harassment claims. It further distills these voices into several key policy recommendations to ameliorate the destructive impact of toxic workplace behavior and foster fair and accountable workplaces.

¹ Balasubramanian, N., Starr, E. P., & Yamaguchi, S. (2021). Bundling postemployment restrictive covenants: New evidence from firm and worker surveys. In *Academy of Management Proceedings* (Vol. 2021, No. 1, p. 15969). Briarcliff Manor, NY 10510: Academy of Management.)

² Lift Our Voices/Morning Consult <https://liftourvoices.org/poll>

³ New Jersey's P.L. 2019 c.39

PROJECT BACKGROUND

In March 2019, New Jersey passed S. 121 which bans NDAs for discrimination, retaliation, and harassment claims. Specifically, it renders unenforceable:

“A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a “non-disclosure provision”) shall be deemed against public policy and unenforceable against a current or former employee (hereinafter referred to as an “employee”) who is a party to the contract or settlement.”

In order to investigate the effects of S. 121, the author conducted 28 semi-structured qualitative interviews with New Jersey-based employee survivors, employers and employer-side representatives, defense-side lawyers and plaintiff-side lawyers. Semi-structured interviews were designed around the specific topic of NDAs in employment contracts and NJ’s prohibition of NDAs that silence those who experience or observe workplace misconduct. Rather than create a standardized interview questionnaire, this project relied on an interview guide included as (Appendix I). The exact wording and order of the questions varied depending on the background of the subject and what was being said during the general course of the conversation. The key benefit of this approach is to understand insiders’ views of reality. How do the stakeholders themselves view New Jersey’s ban on NDAs? How, in their own words, have they reacted or been affected (if at all) by the ban?

Respondents were identified and selected using a purposive sampling method. Respondents were selected non-probabilistically for their individual experiences with and knowledge of toxic workplace experiences and NJ’s ban on NDAs. This sampling method, and overall qualitative approach, is appropriate given the underdeveloped nature of data related to the study’s central research questions. Little is known about the effects of NDA bans generally or the specific effects on New Jersey stakeholders. Qualitative interviews allow participants themselves to shed light on topics and insights that have particular salience to them.

Of the 28 respondents interviewed:

- 8 were employee survivors⁴
- 8 were employers or employer-side representatives⁵
- 6 were defense-side employment lawyers
- 6 were plaintiff-side employment lawyers

⁴ “Survivors” are workers who have personally experienced sexual harassment, abuse or assault in the workplace and/or experienced discrimination or perceived to have been treated unfairly because of their gender, race, ethnicity, age, religion, sexual orientation, or disability status. Most survivors (6 of 8) in this study formally engaged with the legal process by retaining counsel and filing a formal complaint with their employer, an administrative agency, and/or court. Two of the eight survivors interviewed for this project experienced sexual harassment or discrimination in the workplace but did not lodge a formal complaint. Including survivors who have not filed a formal claim recognizes the academic literature demonstrating that, despite public perception of extreme litigiousness, most incidents of sexual harassment and discrimination in the workplace are left unreported.

⁵ This category can be broken down into 4 Business Owners, 2 Human Resource Officers, and 2 employer-affiliated interest groups.

Employee Survivors:

A total of 8 employee survivors were interviewed for this study, of which 6 formally engaged with the legal process and could be considered plaintiffs while 2 perceived violations of their anti-discrimination employment rights, yet did not pursue their legal claims. An initial finding is that only 1 of the 8 respondent survivors identify S. 121 as influencing their decision to come forward. The remaining 7 survivors say they are not aware of the law at all or were not aware until they retained legal representation. Every respondent who retained representation comments on the educator role their lawyers played – informing them of their rights, including under S. 121, if relevant, and explaining esoteric legal terms and processes; however, this also reveals a distinct need for public education of rights at work even before lawyers come into the picture.

Despite lack of prior awareness, employee survivors uniformly praise the protections afforded by S. 121. A Hispanic female in her 30s is a survivor of sexual harassment and describes her support for S. 121's ban on NDAs by recounting: "I found out later this wasn't the first time this person had been a predator. At least now they can't hide it from anyone else. Everyone knows and I'm protected." When asked about his thoughts regarding the ban on NDAs, a 52-year-old Black male survivor of racial discrimination remarks: "I don't want to keep reliving it. But I want to talk to my therapist or friends or even my husband about what happened without being pulled back into the legal fray." Finally, a white victim of sexual harassment in her mid-20s states: "People need to know what they did to me. I don't want anyone else to be at the center of that abuse. I want to tell the world, 'Don't work there, don't work for him, run.' And I do."

When asked if there are ever appropriate uses of NDAs for toxic workplace issues, survivors are emphatic that NDAs are inappropriate when applied in such contexts. A representative response to a question about whether there are legitimate uses of NDAs is: "Why do they even need me to sign an NDA? I was a barista. They just don't want people to speak out about the harassment." In sum, a resounding theme from employee survivors is the appreciation of their right to speak out about their experiences both in public and in private and views that NDAs are an illegitimate tool of suppression.

All survivors emphasize that toxic workplace disputes exact severe emotional tolls. Respondents describe episodes of depression, self-harm, substance abuse, anxiety, constant flashbacks resulting in sleeplessness, and family problems, among a litany of emotional and physical traumas, as a consequence of their sexual harassment and/or discrimination experiences at work. Two employee survivors who settled disputes prior to the passage of S. 121 comment on the additional emotional toll of being beholden to an NDA. A 42-year-old white mother of three from Central New Jersey reports: "My relationship with my husband was imperfect before the lawsuit, but we would fight about the lawsuit constantly....I didn't even feel like I could talk to him about it...my employer threatened to take everything I had if I talked to anyone." A former retail worker who experienced sexual harassment from a store manager recounts: "I really did think the law could protect me. That just sounds naïve now. They just saw a brown woman that didn't have their degrees and knew they could shut me up." When asked how their lives would be different if they were not subject to NDAs, both assert that they certainly would have spoken out at the time of their lawsuits, but that even in the absence of an NDA, they do not wish to revisit that time in their lives.

Employers:

A total of 8 interviews were conducted with employers (4), human resource officers (2), and employer-aligned interest groups (2). Despite strident opinions enunciated by employer representatives in the media and during interviews, employer-owners and employer human resource professionals are generally unaware of NJ's ban on NDAs. When asked during an interview "When did you first hear of NJ's ban on NDAs?" an owner of a medium-sized franchise business states, "This is the first I'm hearing about it." An owner of a company employing nearly 150 workers in North New Jersey likewise responds: "I didn't even know about this ban until today...." In total, only a small minority of employer-owner or human resource officers (1 of 6) indicate they were familiar with the ban on NDAs prior to our request for an interview. As with employee survivors, there is a clear lack of general knowledge (or concern) about S. 121 among employer owners and human resource officers. In contrast, representatives of two employer-aligned interest groups were aware of S. 121 prior to our inquiry and had been following its development for years.

Surprisingly, employer owners and human resource officers generally acknowledge the unfairness of NDAs as they relate to toxic workplace issues, but still report opposition to legislative bans. Indeed, somewhat quixotically, while acknowledging their lack of knowledge regarding the passage of S. 121, several business owners and human resource officers object to the law for reasons that are not particular to S. 121 itself. For example, a business owner of a medium-sized firm of approximately 250 full-time employees in North New Jersey writes: "I would never ask an employee to sign [an NDA] myself, but I don't need another law or regulation telling me what I can or can't do." Likewise, several owners and human resource officers of large companies suggest that the employment law system is already tilted against them, and while they are personally in agreement with the spirit of S. 121, they also see it as potentially disadvantaging them: "A claim of sexual harassment is just that, a claim. Sometimes it doesn't even matter if it happened. If you're a single mother of three and cry in front of a jury, what chance do I stand? That's reality. That's business. And that's why I'm against it."

When asked whether and how the ban on NDAs has affected business interests, owners and human resource professionals report no major changes. However, a clear disconnect emerges between employer and human resource perceptions of S. 121 and those of employer-aligned industry groups. One human resource manager with 15 years of experience in the transportation industry comments: "We didn't even know about this, so what effect could it be having?" Likewise, a business owner who was knowledgeable about S. 121 says, "It has positively had no effect on my business." When pressed whether S. 121 has interfered with their ability to protect confidential data using NDAs, human resource representatives and employers again give very straight-forward responses that, in their experience, S. 121 has had no effect on their willingness or ability to use NDAs for such purposes. In contrast, a representative of a large industry group funded solely by employers states that S. 121 was responsible for increased consumer costs due to "inefficient defensive business practices." When pressed for specific examples, this particular respondent asks to move on to the next question.

Finally, when asked how New Jersey's ban on NDAs can be improved, many business owners and employer-aligned interest groups respond with some version of "By repealing it." I understood this juxtaposition, a desire to repeal S. 121 while simultaneously acknowledging that it has not had any adverse effects on the business, as a principled stand against government regulation and not as a particular flaw or demerit inherent to S. 121.

Plaintiff and Defense Lawyers:

The final population interviewed for this study comprised of (6) plaintiff-side and (6) defense-side lawyers. Unlike their non-lawyer counterparts described above, all 12 lawyer respondents display a deep understanding of S. 121. Many of the lawyer respondents report following the law since it was initially proposed.

Both plaintiff and defense lawyers are fairly subdued in their assessments of S. 121's effect on their client and their own practices. Despite probing for indirect effects of S. 121, a consensus emerges that the results of S. 121's prohibition on NDAs were predictable and direct; there is limited to no acknowledgement of "downstream" effects in terms of client relationships, caseloads, or case management. When pressed on whether the prohibition on NDAs affects caseloads, or the willingness of plaintiffs to come forward, plaintiff attorneys respond simply with a "No" or "No, not at all." Both plaintiff and defense lawyers also acknowledge S. 121 has not affected the frequency or ease of obtaining a settlement.

Management attorneys echo the general lack of effects (positive or negative) on their own practices and interactions with clients. One management attorney describes the effect of S. 121 as: "...de minimus to most of my clients, it's a nothing-burger...my clients have more important things to worry about than [S. 121]." Another management attorney reports, "The effects are obvious and predictable, right? Simple. We don't ask for [NDAs] and we advise our clients they aren't enforceable." Some suggest that they began advising their clients to include a non-disparagement clause rather than a non-disclosure agreement: "even if [a non-disparagement clause] ultimately wouldn't hold up... it is an extraordinary plaintiff who is going to risk a settlement and not voluntarily comply." Increased use of non-disparagement clauses seems to be the only salient secondary effect of S. 121. However, as with the plaintiff attorneys, defense attorneys acknowledge that their caseloads, the number and type of toxic workplace cases, and their ability to settle cases has not been affected by S. 121.

Despite the consensus that S. 121 is not particularly burdensome, defense and plaintiff attorneys have diametrically opposed visions of improvements to the law. Defense attorneys, like business owners and employer-aligned interest groups, wryly observe that New Jersey's ban on NDAs could be improved by "being repealed," or "being thrown out." However, many also propose that exceptions for voluntary, post-dispute NDAs would prove better policy than the status quo. Plaintiff-side employment attorneys express general satisfaction with the law. And while some plaintiff attorneys suggest that non-disparagement clauses be expressly forbidden, others comment that such an amendment would be redundant. In sum, plaintiff-side and defense-side attorneys have drastically different visions of what would constitute an improvement to S. 121.

- **Educate Employers and Employees on Existing Laws**

- Interviews reveal a general lack of awareness of S. 121 among the very stakeholders most directly affected. Employee survivors display a general lack of knowledge or confidence in their understanding of S. 121. Somewhat surprisingly, employer owners themselves display a similar lack of awareness. Taken as a whole, it is apparent that employees and owners stand to benefit from knowledge of the laws regulating their workplaces.

- **Adopt Stronger (as Opposed to Weaker) Bans on NDAs**

- New Jersey's S. 121 goes further than the federal Speak Out Act and other state legislation, such as Tennessee's Code Annotated S 50-1-108, which prohibit the enforcement of pre-dispute NDAs for sexual misconduct and non-disparagement clauses or NDAs promulgated as a condition of employment, respectively. Given the positive sentiments towards NJ's stricter ban expressed by employee survivors and the absence of strong objections directly from the business community, policy makers should consider adopting broader legislative bans on the use of NDAs similar to New Jersey or the Silenced No More Act in Washington State.

- **Include the Voices of Individual Stakeholders Directly**

- This research finds a divergence between stakeholders themselves and their representatives. Specifically, business owners and human resource officers report general ignorance of the law and a general lack of concern about it. However, interviews of employer-aligned interest groups shows that they are stridently opposed to the legislation. Policy makers are encouraged to listen to the parties directly and not exclusively to organizations purporting to represent the interests of various constituent groups.

- **Amend Existing Law to Close Legal Ambiguity**

- Employee survivors and plaintiff-side attorneys believe S. 121 would be improved were it to contain an explicit prohibition on non-disparagement clauses. While some attorneys think non-disparagement clauses are already covered by S. 121, others believe that is not the case. Regardless, there is support, particularly among plaintiff-side lawyers, to remove ambiguity in terms of the legality of non-disparagement clauses as they relate to toxic workplace suits.

- **Require Better Record Keeping**

- Definitive answers as to the effects of the NDA bans are of vital public importance; however, researchers are currently unable to produce robust data sets due to the private nature of legal settlements and complaints lodged pursuant to employers' internal dispute resolution policies. Policy makers should consider collecting data through a state administrative agency or public reporting requirements to accurately measure the impact(s) of future legislation banning NDAs for toxic workplace issues.

Compelling employees to adhere to non-disclosure agreements in cases of sexual harassment, sexual assault, and other workplace discrimination bars them from raising their voices or advocating for accountability in the workplace.

This research underscores the urgency to understand the effects of NDAs and related bans in the context of toxic workplace issues. Compelling employees to adhere to non-disclosure agreements in cases of sexual harassment, sexual assault, and other workplace discrimination bars them from raising their voices or advocating for accountability in the workplace. But employers and defense lawyers assert that NDAs play an appropriate role in protecting trade secrets and, relative to toxic workplace issues, in maintaining a firm's reputation and as a vital strategic tool to induce settlements despite admitting New Jersey's ban on NDAs has not affected the frequency of settlements.

The policy arguments for and against New Jersey's ban on NDAs in employment contracts reflect the complex realities of balancing employee and employer interests, as well as that of the general public. While NDAs can act to defend against exploiting proprietary knowledge and trade secrets, it is clear they can also harm survivors and restrict public knowledge of employer wrongdoing. Indeed, this research suggests that in silencing survivors, NDAs inflict an additional layer of harm on survivors and curb their freedom to decide where and when to speak about their own experiences, which survivors universally value. Further, banning NDAs for toxic workplace issues is unanimously endorsed by survivors and plaintiff attorneys and by many owners themselves. This can be understood in the context that employer stakeholders report that New Jersey's ban on NDAs has been relatively non-intrusive; while there are pockets of resistance mainly from employer-aligned interest groups, employers and lawyers themselves almost unanimously report that New Jersey's ban on NDAs has had a small or negligible effect on them or their business. Indeed, only a single business owner interviewed was even aware of the law prior to the interview.

Employer stakeholders report that NJ's ban on NDAs has been relatively non-intrusive

An additional theme conveyed by survivors, employers, and defense and plaintiff lawyers is a shared sense that the employment litigation system is unfair. However, respondents reached this conclusion in a biased way, only acknowledging aspects of the employment litigation process or system that puts them (or their clients) at a perceived disadvantage. Survivors and plaintiff-side lawyers stress the emotional and structural barriers (such as NDAs, formerly), whereas employers and defense attorneys emphasize defense costs and using the law for non-legal but emotionally-charged disputes. This seems to color stakeholders' desired improvements to NJ's legislation. Whereas employees and plaintiff lawyers suggest strengthening damages and expanding the scope of S 121, employers and defense lawyers tend to advocate for the status quo or a complete rescission of the law.

Given these findings, policy makers are invited to consider educating employers and employees regarding the contents of legislation restricting the use of NDAs, adopting stronger (as opposed to weaker) restrictions on the use of NDAs, listening to survivors and employers individually (as opposed to industry-aligned groups), and working to collect complete records on the effects of laws restricting NDAs to better understand their effects. Doing so will balance employers' legitimate interests in protecting trade secrets with the public's interest in accountability for toxic experiences at work while allowing survivors to retain ownership over their stories, experiences, and voice.

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APPENDIX A: INTERVIEW GUIDE

1. Background Questions

- a. What is your gender identity?
- b. What is your ethnicity?

2. Introductory Questions

- a. What is your professional background?
- b. Are you familiar with NJ's ban on NDAs?
- c. When did you first hear of NJ's ban on NDAs?
- d. What were your original thoughts/reactions regarding the ban?
- e. What do you think are the pros and cons of banning NDAs in cases of employment discrimination, harassment, and retaliation?

3. Questions for Defense-Side Lawyers/Plaintiff-Side Lawyers/Business

- a. How has New Jersey's ban on NDAs affected you/your clients?
- b. How have you/your organization reacted to New Jersey's ban on NDAs?
- c. How do you think the ban on NDAs has affected victims of discrimination/harassment/retaliation?
- d. How do you think the ban on NDAs has affected business interests?
- e. How do you think the ban on NDAs has affected the role of lawyers?
- f. Are there any situations where you believe NDAs should still be allowed in cases of employment discrimination, retaliation, or sexual harassment?
- g. How could NJ's ban on NDAs be improved?

4. Questions for Survivors

- a. How did the ban on NDAs affect your decision to come forward?
- b. How has the ban on NDAs affected your ability to tell your story and seek support from others who may have had similar experiences?
- c. In your opinion, what kind of support system and resources are necessary to help victims of workplace harassment to heal and move forward?
- d. How do you think the ban on NDAs has affected business interests?
- e. How do you think the ban on NDAs affected your relationship with your lawyers?
- f. Are there any situations where you believe NDAs should still be allowed in cases of employment discrimination, retaliation, or sexual harassment?
- g. How could NJ's ban on NDAs be improved?

5. Concluding Questions

- a. What kind of legal reforms do you think would be necessary to effectively address the issue of workplace harassment/retaliation/discrimination in the absence of NDAs?
- b. Is there anything else you'd like me to take note of that I didn't capture in this interview?