News

# Employers warned over use of NDAs in sexual harassment cases

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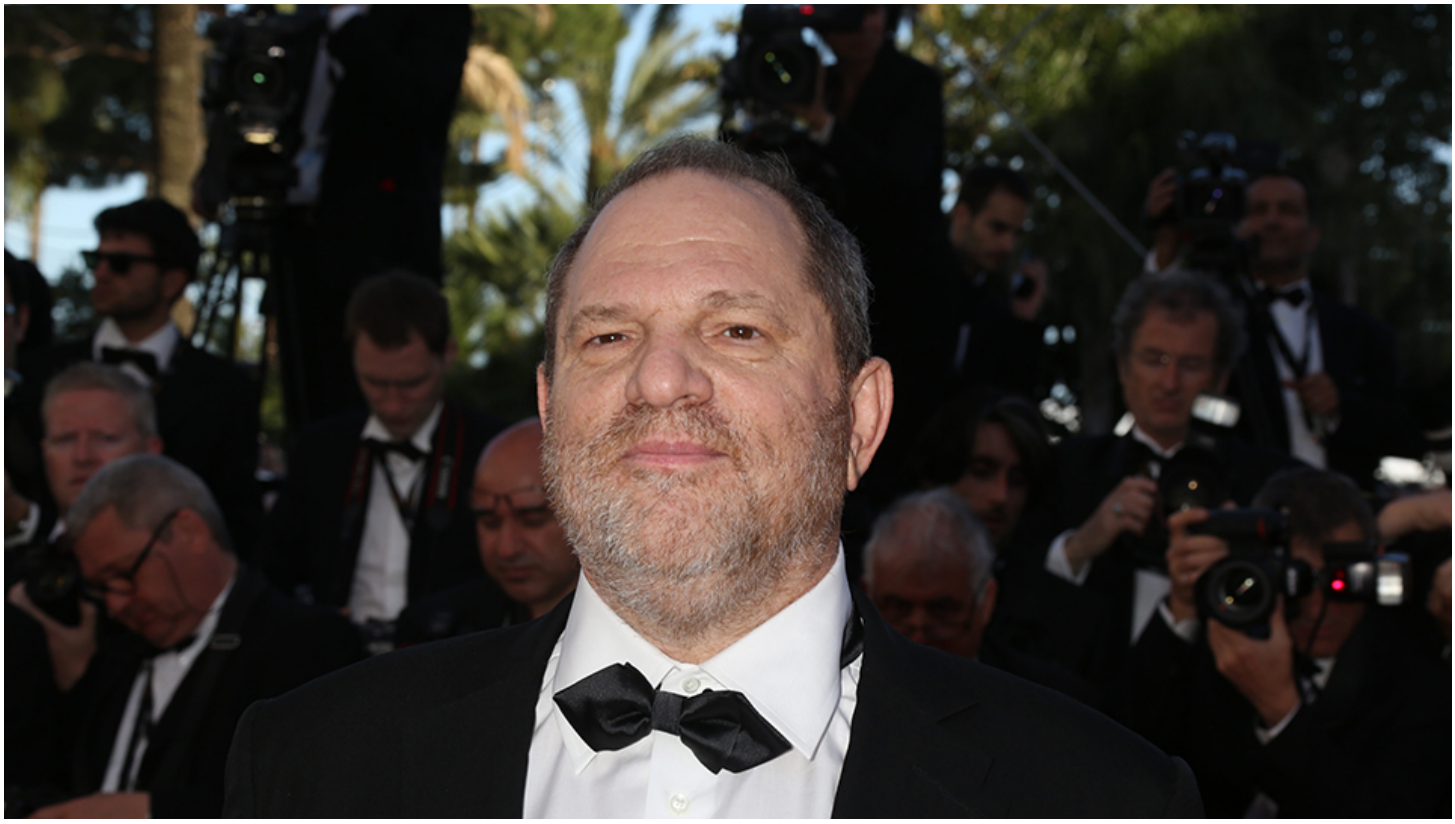
**By Annie Makoff-Clark**

MPs take legal regulator to task for failing to censure solicitors over Harvey Weinstein revelations



Solicitors should not be allowing the use of non-disclosure agreements (NDAs) in sexual harassment cases – and employers should be aware that such arrangements can constitute misconduct, an influential parliamentary committee has been told.

The Solicitors Regulation Authority (SRA) faced a grilling by MPs for failing to act after law firm **Allen & Overy used an NDA to silence Zelda Perkins**, the former personal assistant to movie mogul Harvey Weinstein.

Giving evidence at the second session on Wednesday (25 April) of the women and equalities committee's inquiry into sexual harassment in the workplace, Paul Philip, CEO of the SRA, told MPs that an NDA that prevented an individual from going to the police would be "professional misconduct".

He asked Philip: "How on earth can you sit there before us today when you've got the clearest example of things that breach your warning notice, that you've said yourself in front of the committee is 'professional misconduct', and yet outside of this room you see a big law firm and you decide not to take any action?"

The SRA's relationship with large legal firms was "like a cosy old boys' network", Davies added. Philip insisted that the Allen & Overy investigation was still open.

The SRA's decision comes just days after Professor Richard Moorhead, chair of law and professional ethics at University College London, **submitted written evidence to the committee** urging the industry regulator to take a tougher approach to NDAs.

"Basic understandings of the code of conduct are not well embedded within practising ranks. This needs to be addressed by stronger enforcement, better education and improved training and management in law firms and in-house legal teams," Moorhead said.

In February, experts gave evidence before the government inquiry into sexual harassment of women and girls in public places. They **urged the government to bolster current law on sexual harassment** to better protect women in the workplace.

Sarah Evans, partner at JMW Solicitors, told *People Management* that while it was encouraging that the issue was being taken so seriously to the point where the parliamentary committee was investigating the appropriateness of gagging orders, the broader context of sexual harassment in the workplace "affects all industries".

She said: "The SRA has given clear guidelines and it would be remiss of any employer to ignore that advice."

At this week's session, Diana Holland, assistant general secretary for transport, equalities, food and agriculture at Unite, said the duty on employers to provide a workplace that is free from discrimination and harassment should "be the context" in which NDAs are reached.

Peninsula's head of advisory, Kate Palmer, told *People Management* that NDAs were traditionally used to prevent damage to an organisation's commercial interests and ensure confidentiality.

But she said recent cases – such as the use of NDAs for waiting staff at the infamous Presidents Club dinner and Perkins' case against Weinstein – have "worryingly revealed that NDAs are commonly being used to prevent women from reporting sexual harassment in the workplace to appropriate bodies, including the police in Perkins' case.

"NDAs cannot prevent an employee from making protected disclosures and they cannot be used to sign away legal rights to protection, including protection against sexual harassment."

But she added: "Many agreements are likely to be worded in a way that seeks to prevent this – and those who sign the agreements are often unaware of their right to speak out or report criminal offences."

She said a worrying trend was that those who signed the disclosure agreements were not provided with a copy: "Perkins held a belief that she would be jailed if she breached the terms of the agreement, and was unable to subsequently seek advice or speak to professionals regarding the harassment."

Not having sight of a legal document, and not being able to refer to the exact wording at a later date, can leave the individual feeling vulnerable and uncertain about what they can and cannot do. There may also be a reluctance to request a copy, especially where they feel intimidated or pressured.

Key proposals discussed at the session included the recommendation to follow criminal law's lead in how sexual harassment cases are managed.

Andrew Taggart, partner for employment, pensions and incentives at Herbert Smith Freehills, called for the employment tribunal system to make “new provisions” for protections and protocols for sexual harassment cases, similar to those already enshrined in criminal law, such as the use of television screens for giving evidence and identity protection.

Provisions should not just be made for sexual harassment or misconduct cases, he insisted, but racial harassment and sexual orientation harassment cases, too.

“The issue ought to be looked at from a general dignity perspective so all sorts of protected characteristics ought to be given similar protection if someone doesn’t want to go through the trauma of giving evidence. It is right that the court should look at how individuals can pursue claims through methods that don’t expose them to more trauma,” he added.

Francesca West, chief executive of Public Concern at Work, as well as Taggart and Philip, welcomed recommendations made by HMRC to introduce a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace.

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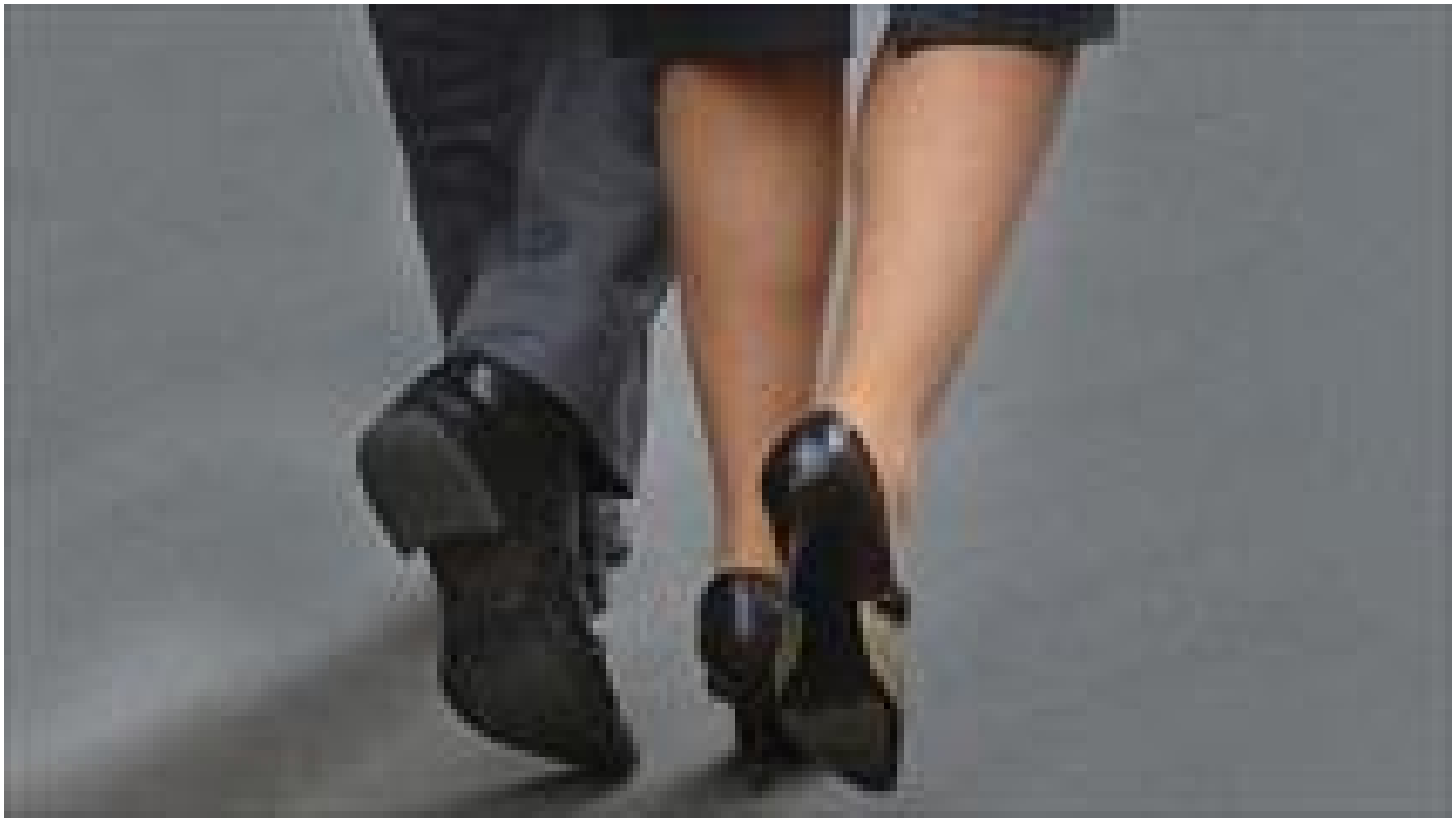

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