Non-Disclosure Agreements In Sports And The Workplace Are Different Beasts

Barring their use in the employment context could end up hurting victims the most

With the Paris Olympics over, the issue of safe sport and the treatment of athletes is back in the public discourse. Most recently, the Canadian Olympic Committee (COC) revoked the accreditation of Rana Reider, the personal track and field coach of one of Canada's top athletes, Andre De Grasse.

According to the COC, this decision was made after the organization learned of "new information" that made it inappropriate for Reider to remain accredited by Team Canada at the 2024 Games. Reider had just come off a year of probation with the U.S. Center for Safe Sport in May, after admitting to "a consensual romantic relationship" with an athlete. There has been speculation the new information cited by the COC is related to lawsuits filed in Florida by three female athletes alleging sexual and emotional abuse by Reider. (The coach has denied the allegations.)

Repeated misconduct of this nature is common in sports – but why?

Non-Disclosure Agreements (NDAs) are an oft-cited reason why abusers in sport seem to operate with impunity. Many athletes have NDA-type clauses built into agreements with their respective sporting associations that prevent them from disparaging the organizations. Often athletes must sign such agreements in order to be eligible for funding and to compete – as was the case with the Canadian Olympic bobsleigh and boxing teams' athlete agreements in 2022-2023. Critics of these types of NDAs argue that athletes fear coming forward with claims of harassment and abuse due to the possibility of reprisals and/or penalties for breaching their contracts.

The Canadian government, along with various sports organizations, have recently sought to address these concerns by introducing new codes of conduct, as well as providing templated athlete agreements (without NDA clauses) for national sport associations to adopt. It will be interesting to see in the coming years how these changes affect, and hopefully improve, some of the issues relating to abuse in sport at all levels.

The same concerns surrounding NDAs have been advanced in the employment context, with some arguing that they effectively silence victims of abuse, discrimination, and harassment to the benefit of employers and perpetrators. In Ontario, Bill 124,

Stopping the Misuse of Non-Disclosure Agreements, is currently working its way through the provincial legislature. It passed its first reading in June 2023.

Similar bills have been tabled in other provinces, including British Columbia. Among other things, Bill 124 will, if passed, effectively bar parties from entering into a non-disclosure agreement if the NDA has the effect of concealing details relating to a complaint of harassment, discrimination, or sexual abuse.

However, barring the use of NDAs in athlete agreements is very different from barring their use in the employment context. Whereas NDAs or NDA-type clauses are often included at the outset of an athlete's contractual relationship with a sports organization, in the employment context, NDAs are typically used to achieve settlements in contentious legal disputes. While some believe NDAs silence victims and prevent them from telling their story, the reality is they almost invariably serve to benefit victims in these types of cases.

Consider an example where a senior executive of a major company is alleged to have sexually harassed a more junior employee. That company, to protect their business and reputation, will in all likelihood be willing to pay a significant amount of money so that the facts of what occurred are kept out of the public eye. An NDA, as part of the settlement terms, would bar the junior employee from discussing both what occurred and the terms of settlement. Absent an NDA, the company would have less incentive to settle and pay large sums, leaving the employee to the mercy of the courts. And Canadian courts, even in the most egregious of cases, are reluctant to issue awards exceeding $200,000, while an employer with a signed NDA may be willing to pay millions to the employee – an outcome often seen in our practice.

In achieving favourable settlements, an NDA is far more useful to employees than what would be provided by a court. If Bill 124 is passed, and similar legislation passes elsewhere in Canada, there will undoubtedly be an impact on settlement discussions in employment cases, as employers will be less inclined to settle if there is no promise of confidentiality. Victims would be free to tell their story, but at a significant financial cost. And that would make those employees the ultimate victims of this legislation.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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