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Nondisclosure agreements, or NDAs, are contracts typically between an employer and an employee.[1] These were originally created to protect a company's confidential information, by ensuring that employees can't disseminate it.[2] NDAs have become commonplace corporate practice to protect confidential information such as trade secrets, or "proprietary processes".[3]However, there are two general areas that employers have exploited the use of NDAs in recent years. The first has been uncovered through the #MeToo Movement, and the second has recently come to light with the Theranos trial.

The first area where nefarious NDA use has been exposed has been through the #MeToo movement.[4] NDAs have been utilized by companies as gag orders, preventing employees from speaking up about sexual misconduct, discrimination, and harassment in the workplace.[5] In the face of this injustice, states have reacted by broadening their laws banning the use of NDAs for both sexual harassment and discrimination in the workplace.[6] A prime example is California, who passed the "Silenced No More Act" in 2018, which extends bans on NDAs from sexual harassment to include discrimination as well.[7] These steps taken to further ban the use of NDAs to prevent discrimination and harassment are milestones in legislation.

However, the second area of NDA misuse, regarding unlawful company practice still run abound, as seen in the startup Theranos. The unicorn company Theranos was a blood-testing startup whose technology simply did not work and has been subject to many suits regarding its corporate practices of defrauding investors.[8] This litigation has exposed Theranos's aggressive reliance on NDAs to hide their illegal practices. Theranos had their employees sign NDAs before their initial interview,[9] in addition to another one upon resignation.[10] Indeed an exit NDA and searching one's bag was standard exit protocol for the company.[11] Once an employee refused to sign an NDA upon resignation and in retaliation CFO Sunny Balwani ordered Theranos security officers to block him from exiting the property.[12] This bulldogged use of NDAs as a protection, decrying that all the information is a "trade secret", prevented many employees from reporting Theranos's illegal corporate practices.[13]

There has been Legislation enacted in recent years to prevent corporations from using NDAs as blocks to whistleblowers, as seen with the Federal enactment of the Defend Trade Secrets Act (DTSA) in 2016.[14] The steps taken in the DTSA allow whistleblowers to disclose information that is "solely for the purpose of reporting or investigating a suspected violation of law" to a government official or attorney despite their NDAs.[15] This statutory protection is only effective when an employee has notice of it. As an incentive for employers to disclose this immunity to employees, employers are denied exemplary damages or attorney fees if they don't provide notice.[16] In light of this, the ABA advises employers to update their policies to include notice of the whistleblower immunity.[17] However, as seen in the persistent use of NDAs in Theranos, employers have not been significantly swayed to disclose whistleblower immunity to their employees. The DTSA therefore does not offer whistleblowers a substantive protection from their employers and their NDAs. Some lawyers have noted that the wording of the DTSA has been construed by Courts as an affirmative defense that must be raised in litigation itself.[18] Despite this supposed immunity, whistleblowers are still compelled to go to Court in order to raise this defense. Courts themselves are seldom swayed to overlook an NDA and usually only do so for public policy reasons.[19] Rather, in most cases, Courts favor arguments for a company's trade secrets.[20]

Abigail Stevens advocated a more radical approach, grounded in the First Amendment.[21] She states that NDAs, in its very nature, may violate a "core constitutional right" of freedom of speech.[22] Abolishing NDA's entirely is far from being enacted by Legislatures, however, there are reforms that can be made in the existing structure of the DTSA to ensure NDAs are not used to cover up illegal and fraudulent practices. There have been significant strides by both the Federal and State Legislatures to protect whistleblowers from excessive enforcement of NDAs. However, as seen through the Theranos scandal and the Courts continued construction of the DTSA, this provides insufficient protection to whistleblowers attempting to expose unlawful company practices. An extended look at the wording and construction of the DTSA is necessary to ensure that NDAs are not used to cover up illegal and fraudulent practices in the future. Specifically, the employer incentive to disclose the whistleblower immunities to their employees seems to hold little or no clout, and this Section should be subject to rigorous reforms.

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[12] *Id.* at 107.
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[20] *Id.*
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