

The use of settlement agreements and confidentiality clauses

December 2013

1. Introduction

There has been a lot of coverage about the need for openness, transparency and candour in the NHS following the publication of the Government's response to the Francis Inquiry report on Mid Staffordshire NHS Foundation Trust. More specifically, attention has been drawn to the issue of using clauses which are intended to prohibit, or are perceived to prohibit, a member of staff or former employee from raising a genuine concern about patient safety or other issues, under the Public Interest Disclosure Act 1998 (PIDA), more commonly referred to in the media as "gagging" clauses. Any such clauses should not be confused with the use of confidentiality clauses often included in settlement agreements which are intended to support both parties to move on after a dispute or where sensitive or personal information is involved.

Settlement agreements (formerly known as "compromise" agreements) used appropriately and in line with this guidance, should ensure disputes can be settled in an open and transparent way.

This guidance, originally published in April 2013, was revised in December 2013 to reflect changes introduced by the Enterprise and Regulatory Reform Act ("ERRA") 2013. These changes include:

- the renaming of compromise agreements – employers considering the use of any such arrangements on or after 29 July 2013 should refer to them as "settlement" agreements. There is no requirement to make amendment to any agreements made prior to this date.
- the introduction of new provisions under Section 111A of the Employment Rights Act ("ERA") 1996 for pre-termination negotiations to remain confidential¹.
- publication of a new statutory Code of Practice on Settlement Agreements by ACAS. The Code includes an explanation of new law, basic guidance on how to offer a voluntary settlement and guidance on what would constitute "improper behaviour". Employers will find it useful to read the Code in conjunction with this document, a copy can be downloaded from the ACAS website at: www.acas.org.uk

NHS organisations will still be required to obtain HM Treasury approval to any offer of a termination payment, so any agreement to make such a payment reached during settlement discussions will need to be expressed to be subject to such approval being obtained.

¹ Any pre-termination negotiations could still be admissible in other types of complaints including for discrimination, whistleblowing and trade union detriment.

2. Purpose of this document

While the information in this document is not intended to provide legal advice, it has been produced with legal input from Capsticks LLP to help outline some of the legal boundaries which employers need to think about when considering the use of settlement agreements when terminating employment. This includes providing clarity on:

- what a settlement agreement is
- when to use a settlement agreement
- an example clause relating to PIDA which should now be included in all agreements
- the statutory requirements
- the types of confidentiality clauses that can be legitimately used
- the changes that came into force in June/July 2013.

It also provides links to other related NHS guidance and resources.

3. What is a settlement agreement?

A settlement agreement (formerly referred to as a “compromise” agreement) is a legally binding agreement between an employer and employee used to set out the terms and conditions reached, when a contract of employment is to be terminated or a dispute is to be resolved.

Typically such terms might include a provision that the employer will make payment of salary, including any accrued, but untaken holidays up to the date of termination; payment in lieu of the employee's notice period if the employee is not required to work their notice; and/or payment of compensation for loss of employment.

The main function of a settlement agreement is to draw a line under the employment relationship or dispute and, except in certain circumstances, prevent any further compensation claims being made against the employer by the employee in an Employment Tribunal or Court. Used appropriately they provide, for the employer, value for money as the cost of settlement can be less than the cost of defending the case; and for the employee, certainty of outcome. It may also be used to deal with all other claims which an employer or employee may have such as those relating to a breach of contract.

The issues settlement agreements raise are complex, and may involve other members of staff or employees in other organisations, as well as patients. While settlement agreements are intended to give employers and employees a high level of protection in relation to future claims being made, there are issues that cannot be compromised such as an employee's rights to claim a protective award for failure to consult in collective redundancy and transfer of undertaking (TUPE) cases; or rights under PIDA as further explained below.

It is therefore essential that you seek legal advice before agreeing a settlement arrangement with an employee.

There are a number of statutory requirements that must be met in order for a settlement agreement to be effective. These requirements are outlined below:

- The agreement must be in writing.
- The agreement must relate to a particular complaint, or particular proceeding. Employers will need to seek advice on all potential claims an employee may have to ensure potential employment claims are not left uncompromised.
- The employee must have received legal advice from an independent advisor. The independent advisor will typically be a qualified lawyer but may, for example, be a trade union official, an employee or member of an independent trade union. The advice obtained by the employee prior to signature must be genuinely independent. This is therefore the employee's opportunity to obtain their own advice about any aspect of the proposed agreement that they are unclear about, or are not comfortable with.
- The independent advisor must be identified in the agreement and have a current contract of insurance, or professional indemnity insurance, covering the risk of a claim against them by the employee in respect of the advice.
- The agreement must state that the conditions regulating settlement agreements have been satisfied.

It is important to note that settlement is a voluntary agreement, individuals do not have to enter into any discussion about them or accept the terms proposed to them. Negotiations between the employer and employee may be conducted until an agreement is reached or a decision is made by both parties that no agreement is possible.

The ACAS Code of Practice has been designed to explain the new law, provide guidance on how to offer a voluntary settlement and guidance on what would constitute "improper behaviour". Employers will find it useful to read the Code in conjunction with this document, a copy can be downloaded from the ACAS website at: www.acas.org.uk

4. When should a settlement agreement be used?

Settlement agreements can be used in a number of circumstances, such as dismissals (including redundancy) or in the settlement of an Employment Tribunal claim. They are particularly used to help minimise potentially long drawn-out processes, before being able to terminate the employment, or where your employee has raised a grievance which you have not been able to resolve. In cases where trust and confidence has irretrievably broken down, it can be mutually agreed that a termination of employment would be in everyone's best interest.

Settlement agreements should not be used to short-cut any investigations in relation to patient safety or care. It is therefore essential that they are not considered in isolation and employers ensure that they are aligned with processes and procedures relating to making referrals to professional bodies and safeguarding patients.

5. Types of confidentiality clauses used within a settlement agreement

Confidentiality clauses are often used in settlement agreements by employers across all sectors and can be mutually beneficial to protect the interests of both the employer and the employee. There are various types of confidentiality clauses used, but in the main these are likely to include:

- 1.** Clauses which cover the terms of that agreement – for example, prohibiting any parties concerned from reporting the detail about the terms of the agreement.
- 2.** Clauses which protect confidential information gained by the employee as part of their employment, such as business-sensitive data or patient records. It is important to outline to all staff, their responsibilities to comply with the Data Protection Act 1998 and confidentiality within their terms and conditions of employment.
- 3.** Clauses against derogatory comments being made which prevents the employee from making vexatious, disparaging or derogatory comments about the organisation and its staff. In such cases, there is usually a mutual clause which also prevents the organisation from making disparaging or derogatory comments about the employee.

While the clauses outlined above are used, you should consider in every case, whether or not they are appropriate in the circumstances. The precise terms may need to vary from case to case.

In all cases where outlining a confidentiality and/or clause against non-derogatory comments within a settlement agreement, it is essential that you make it explicitly clear to the employee within the written agreement, that this does not prevent them from raising legitimate concerns about a patient safety, or other issue, in the public interest under the terms of PIDA. We therefore recommend that the following clause should be included in all agreements:

"For the avoidance of doubt, nothing in this Agreement shall prejudice any rights that the Employee has or may have under the Public Interest Disclosure Act 1998² and/or any obligations that the Employee has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to his or her professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time."

This will help ensure that the parties signing the agreement are left in no doubt that they are encouraged to freely speak up about legitimate concerns. Employers may wish to clarify the process to follow and points of contact for a patient safety concern to be raised.

6. Negotiating "without prejudice" and "subject to contract"

While negotiating a settlement agreement, it is advisable to mark the draft agreement and any related correspondence, as being "without prejudice" and "subject to contract".

"Without prejudice" means that any statements made in the course of negotiations cannot be used in evidence against the party that made them in any Employment Tribunal or court. It is important to note however, that this rule only applies where the discussions are a genuine attempt to resolve an existing dispute between the individual(s) concerned.

"Subject to contract" means that the agreement cannot be relied upon by the employer or the employee concerned, until it has been signed by both parties. The use of "subject to contract" is considered enough to avoid any claims that an agreement was reached orally before the settlement agreement was signed.

7. Settlement agreements and special severance payments

HM Treasury defines a special severance payment as a payment made to employees, contractors and others above normal statutory or contractual requirements when leaving employment in public service whether they resign, are dismissed, or reach an agreed termination of contract.

We have published *Guidance for employers within the NHS on the process for making severance payments* which you should refer to if you are considering a special severance payment. It includes the official approvals process for the different organisations within the NHS. All special severance payments require HM Treasury approval before the agreement between the employee and the employer can be finalised. In March 2013 the

² Part IV A Section 43 of the Employment Rights Act 1996 ("ERA") outlines the provisions under the Public Interest Disclosure Act ("PIDA") www.legislation.gov.uk/ukpga/1996/18/part/IVA

Government clarified that this also includes non-contractual severance payments agreed as a result of judicial mediation. Guidance can be found on our website at: www.nhsemployers.org/Guidance-for-employers-within-NHS-on-process-for-severance-payments

The approving body will require you to include an explicit clause in your settlement agreement, as described above in section 5, which makes clear that individuals will not be prevented from raising patient safety concerns, or other such issues, in the public interest. The template included in our severance payment guidance has been updated to include a section where you confirm that any settlement agreement or undertakings about confidentiality, leave severance transactions open to adequate public scrutiny.

8. Additional issues to consider

- Ensure there are mechanisms in place to regularly review existing employment and contractual arrangements, which include confidentiality clauses within them, to ensure that they are in compliance with current legislation and relevant guidance.
- There is no duty to provide a reference to an employee (except in certain sectors of activity such as the financial services sector). However, any reference provided must in substance be true, accurate and fair. You have a duty of care not only to your ex-employee but also to future employers. This includes where an agreed reference is provided as one of the terms of a settlement agreement.
- Ensure the settlement agreement deals with post termination restrictions or restrictive covenants contained in the contract of employment – for example, those concerning the solicitation of clients, suppliers or employees.

9. Legal requirements explained

Public Interest Disclosure Act

The Public Interest Disclosure Act 1998 (“PIDA”) is known in the UK as the whistle-blowing law. All relevant provisions of PIDA are incorporated within the Employment Rights Act 1996 (“ERA”), so you may also see reference to ERA in discussions about this area of the law. The Act gives statutory protection to employees who disclose information reasonably and responsibly in the public interest, and where they have subsequently suffered a detriment or have been dismissed as a result of raising that concern, either internally or to a prescribed regulator. It outlines the various types of disclosure which may qualify for protection under the Act as:

“Any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following:

- a. *that a criminal offence has been committed, is being committed or is likely to be committed,*
- b. *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
- c. *that a miscarriage of justice has occurred, is occurring or is likely to occur,*
- d. *that the health or safety of any individual has been, is being or is likely to be endangered,*
- e. *that the environment has been, is being or is likely to be damaged, or*
- f. *that the information tending to show any matter of failing within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."*

This statute means that it is unlawful for any employer to subject a worker to a detriment where they have made a protected disclosure.

This is also very likely to extend to clauses inserted into settlement agreements which are aimed at preventing an employee from making a post-termination protected disclosure.

Individuals who have suffered a detriment for raising a protected concern under the Act can take their employer to an Employment Tribunal. Where they have lost their job because of raising a protected concern, they could be fully compensated for their losses; the limit to any compensation awarded is uncapped. Awards for detriment short of dismissal (eg, being passed over for promotion) will also be uncapped and will be based on what is deemed just and equitable in all the circumstances.

Employment Rights Act ("ERA") 1996

Employers should also be aware that under the Employment Rights Act 1996 statutory protection is provided to employees who make a disclosure in the public interest.

Section 43 J – Contractual duties of confidentiality in the Act states:

- 1) *Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.*
- 2) *This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.*

In summary, the Act makes it absolutely clear that any clause in terms of employment or contractual agreements, including severance agreements, which conflict with the protection afforded by the Act, will be made void by an Employment Tribunal or the Courts.

Enterprise and Regulatory Reform Act

The Enterprise and Regulatory Reform Act came into force on 26 April 2013. The Act introduced a number of changes targeted at encouraging organisations to promote a culture of openness and transparency.

The first of these changes came into force on 25 June 2013 which included:

- extending employer accountability where staff are subjected to bullying or harassment from co-workers as a result of them reporting a concern; and
- introducing a defence for those employers who can demonstrate that they have taken all reasonable steps to prevent any such victimisation.

The second phase of changes which came into effect from 29 July 2013 focused on improving the Employment Tribunal system by encouraging early conciliation through ACAS, rather than waiting for an Employment Tribunal claim to be lodged. As already outlined within this document, this included:

- a change in the name of 'compromise agreements' to "settlement" agreements; and
- introducing a new law which means that offers of settlement will not be accepted as evidence in Employment Tribunals as part of an ordinary unfair dismissal case (providing there has been no improper behaviour in the process of discussing the agreement). However, this additional protection will not apply to claims other than ordinary unfair dismissal, as already set out above.

This change in law is to remove the uncertainty around whether or not discussions that take place at the end of the employment relationship, should be relied upon where it is unclear whether there is an existing dispute between the two parties.

10. Additional documents

Compromise agreements and severance arrangements:

- On 21 March 2013, Monitor issued a [letter](#) addressed to all Chief Executives and Finance Directors of Foundation Trusts, outlining HM Treasury requirements for special severance payments.
- Secretary of State for Health wrote a [letter](#) addressed to all Chairs of NHS Trusts on 15 February 2013, to remind them of the importance of ensuring an open culture. His letter reiterates the legal position set out in the Public Interest Disclosure Act and the "spirit of guidance".
- Sir David Nicholson, as Chief Executive of the NHS issued a [letter](#) to Chief Executives and HR Directors of all NHS organisations on 11 January 2012, which stated:

“We recognise that contracts of employment and compromise agreements are a matter between the employing organisation and its employee, and that it is likely that most contracts would include some form of confidentiality clause, as employees will have access to sensitive patient and commercial information which should not be released. However, the [Public Interest Disclosure Act] PIDA provides that any clause or term in a contract, policy or other agreement between a worker and their employer is void insofar as it purports to preclude the worker from making a protected disclosure. Use of such clauses contravenes in the spirit of guidance issued by the Department of Health to NHS organisations in Health Service Circular 1999/198. I would particularly draw your attention to point (v) on page 3 of that circular which states that “NHS Trusts should prohibit the use of “gagging” clauses in contracts of employment and compromise agreements which seek to prevent the disclosure of information in the public interest.”

- [Guidance for employers within the NHS on the process for making severance payments](#) – NHS Employers updated guidance in April 2013 and December 2013 to assist those handling special severance payments for employees.
- [ACAS Code of Practice on Settlement Agreements](#)

Raising concerns:

- Web based resources for employers are available on the NHS Employers website.
- All professional regulators have clear guidance for their registrants on raising concerns:
 - [General Medical Council \(GMC\)](#)
 - [Nursing and Midwifery Council \(NMC\)](#)
 - [Health and Care Professional Council \(HCPC\)](#)
- [Speak up for a healthy NHS](#) – NHS Employers published guidance in June 2010 which focuses on supporting employers to promote best practice when devising, implementing and auditing their whistleblowing policies, including highlighting the importance of partnership working with trade unions to make sure responsibilities and processes are understood by all staff. This guidance is subject to review and will be republished January 2014.
- Health Service Circular HSC 1999/198: The Public Interest Disclosure Act 1998 – Guidance was issued by the Department of Health following the implementation of the Public Interest Disclosure Act (PIDA) in 1999. The Health Service Circular requires every NHS trust and health authority to have in place policies and procedures which comply with PIDA, and sets out some minimum requirements.

One such requirement is that *“confidentiality gagging clauses in contracts of employment, and compromise agreements which seeks to prevent the disclosure of information in the public interest”* should be prohibited.

Annex A

Model clause³

“Confidential information” means any information of a confidential or secret nature relating to any and all aspects of the business of the Employer including but not limited to personnel data, financial information, budgets, reports, business plans, strategies, know-how, data, research, processes, procedures and programs, client/customer information, patient information, pricing, sales and marketing plans and details of past or proposed transactions whether or not written or computer generated or expressed in material form;

1. Confidentiality

- 1.1** In consideration of the Employer entering into and complying with its obligations under this Agreement, the Employee warrants that:
- a.** save for immediate family (having instructed them on all of the confidentiality provisions of this clause) and for the purposes of taking professional legal and financial advice or where required by any competent authority or by a Court of Law or HM Revenue and Customs or as otherwise required by law, [he/she] has not divulged and shall not divulge to any person whatsoever the fact of, negotiation and/or terms of this Agreement;
 - b.** in accordance with [his/her] common law duties and [his/her] contractual duties under the Contract of Employment [he/she] will not disclose to any person (except as required by law) any Confidential Information concerning any matter relating to the business or affairs of the Employer or its directors, officers, agents, employees or patients which Confidential Information has been acquired by the Employee in the course of [his/her] employment unless such information comes into the public domain otherwise than by a breach of confidence on the part of the Employee; and
 - c.** that [he/she] will not make or publish any untrue, disparaging, misleading or derogatory statements about matters concerning the Employer, its directors,

³ This example of a confidentiality clause is an extract from the model template of a compromise agreement (now referred to as a settlement agreement) provided by Capsticks LLP (as amended in January 2012, following the issue of Sir David Nicholson’s letter to Chairs of all NHS organisations reinforcing the importance of not restricting staff from raising concerns in the public interest).

officers or employees and/or take part in any conduct conducive or potentially conducive to bringing the Employer, its directors, officers, agents or employees into disrepute.

- 1.2** The Employer shall use its reasonable endeavours to ensure that its directors, officers, agents and employees shall not divulge the fact of, negotiation, nature and/or terms of the Agreement except to its professional advisers in connection with the conclusion of this Agreement or where required by any competent authority or Court of Law or HM Revenue & Customs or as otherwise required by law.
- 1.3** For the avoidance of doubt, nothing in this Clause [1] specifically and nothing in this Agreement generally, shall prejudice any rights that the Employee has or may have under the Public Interest Disclosure Act 1998 and/or any obligations that the Employee has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to [his/her] professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.
- 1.4** With regard to the confidentiality obligations generally on either party in this Clause [1], nothing in those obligations shall prevent this Agreement from being subject to scrutiny by a statutory body tasked with the scrutiny of public bodies, such as the National Audit Office or the Public Accounts Committee.

NHS Employers

NHS Employers represents trusts in England on workforce issues and helps employers to ensure the NHS is a place where people want to work. The NHS workforce is at the heart of quality patient care and we believe that employers must drive the workforce agenda. We work with employers to reflect their views and act on their behalf in four priority areas:

- pay and negotiations
- recruitment and planning the workforce
- healthy and productive workplaces
- employment policy and practice.

NHS Employers is part of the NHS Confederation.

Contact us

For more information on how to become involved in our work, email getinvolved@nhsemployers.org

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