

The use of settlement agreements and confidentiality clauses

May 2024

About us

NHS Employers is the employers' organisation for the NHS in England. We support workforce leaders and represent employers to develop a sustainable workforce and be the best employers they can be. We also manage the relationships with NHS trade unions on behalf of the Secretary of State for Health and Social Care.

Overview

While the information contained in this guidance is not intended to provide legal advice, it has been produced with legal input from Capsticks LLP to help outline some of the legal requirements for settlement agreements when terminating employment and considerations regarding any confidentiality clauses they may wish to include.

This guidance also uses and signposts to guidance from independent public body [Acas](#), the Advisory, Conciliation and Arbitration Service, and provides links to other related NHS guidance and resources.

What is a settlement agreement?

Settlement agreements (formerly known as compromise agreements) are legally binding contracts between an employer and a worker. When used appropriately and in line with guidance, they can be used to resolve a workplace dispute or to end an employment contract.

The main feature of a settlement agreement is that a worker usually agrees to waive their rights to continue with and/or make a claim to a court or employment tribunal on the matters covered by the settlement agreement. The employer may also agree to make some form of payment to the worker^[1] and/or provide an agreed reference.

Settlement agreements should only be used in exceptional circumstances. They should not be used as a substitute for good performance management or engaging with workers to find other constructive solutions to address workplace issues. It is important to note that a settlement is a voluntary agreement, individuals do not have to enter any discussions or accept the terms proposed.

Acas, the Advisory, Conciliation and Arbitration Service, has published a statutory [code of practice on settlement agreements](#) and non-statutory [settlement agreement guidance](#). Both documents include an explanation of the law, guidance on how to make a settlement offer and what would constitute proper behaviour. We advise employers to read the code and guidance in conjunction with this document.

[1] Employers should note that any payments made under a settlement agreement must comply with Annex 4.13 of [Managing](#)

What is a settlement agreement?

Public Money (May 2023) and Public Sector Exit Payments
Guidance on Special Severance Payments (May 2021) and the
NHS TDA's Guidance for NHS Trusts on processes for making
severance payments (June 2014).

Legal requirements for a valid settlement agreement

In order to be legally valid (and enforceable), the settlement agreement must meet the conditions set out in the Employment Rights Act 1996. Those conditions are:

- a) the agreement must be in writing;
- b) the agreement must relate to a particular complaint or proceedings;
- c) the employee must have received advice from a relevant independent adviser (who can be a qualified lawyer; a certified and authorised official, employee or member of an independent trade union; or a certified and authorised advice centre worker) on the terms and effect of the proposed agreement and its effect on the employee's ability to pursue that complaint or proceedings before an employment tribunal;
- d) the independent adviser must have a current contract of insurance or professional indemnity insurance covering the risk of a claim by the employee in respect of loss arising from that advice;
- e) the agreement must identify the adviser; and
- f) the agreement must state that the applicable statutory conditions regulating the settlement agreement have been satisfied.

The importance of legal advice

In order for the settlement agreement to be legally valid, employers must ensure the worker has access to independent legal advice before entering into the settlement agreement. Employers are not obliged to cover the cost of that independent legal advice, but it is recommended that employers consider whether it is appropriate to do so or to make a contribution in each case.

Employers are not required to obtain their own legal advice before entering into a settlement agreement. However, it is recommended they do so to ensure that the necessary legal requirements are met and the implications of the settlement agreement and its terms are fully understood.

When might settlement agreements be used?

Settlement agreements can be used to end the employment relationship on mutually agreed terms, for example:

- by reason of redundancy (compulsory or voluntary)
- at the end of fixed-term/temporary contracts
- as part of a voluntary exit scheme, such as a mutually agreed resignation scheme (MARS)
- where internal procedures have been exhausted without a resolution being reached
- where the employment relationship has irretrievably broken down, and the parties agree that termination of employment would be in everyone's best interests.

Settlement agreements are not limited to the termination of employment; they can be used at any stage of the employment relationship (by an applicant, worker or former worker) to resolve a workplace dispute or an actual or potential employment tribunal claim by agreement.

It is important to note that a settlement is a voluntary agreement, individuals do not have to enter any discussions or accept the terms proposed.

While settlement agreements provide an effective means to resolve a workplace dispute, they should not be used as a substitute for addressing poor performance or disciplinary matters through internal processes, particularly in relation to any matter that might otherwise arise out of, or may compromise the quality

and safety of patient services, or the care or wellbeing of workers.

Employers may be subject to regulatory action (for example, in respect of CQCs Well Led Review) if they are found to have used settlement agreements inappropriately.

Where employers are considering entering into a settlement agreement with a board member, they should be mindful that settlement agreements and discontinued investigations may be need to be considered in future fit and proper person assessments, see chapter eight for further details.

Freedom to speak up and settlement agreements

The NHS Standard Contract was amended in 2019 to clarify employer duties and worker rights to speak up or make protected disclosures under the Public Interest Disclosure Act 1998 (PIDA).

This includes a requirement for all NHS providers to include an express carve-out clause which makes it clear in any contract or agreement that a worker cannot waive their rights to speak up about or disclose any issue which would be a protected disclosure under current law.

A protected disclosure is defined in PIDA 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 they are subject;
- c) that a miscarriage of justice has occurred, is occurring or 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 likely to be damaged; or
- f) that the information tending to show any matter of failing within any of the preceding paragraphs has been or is likely to be deliberately concealed.

Nothing in a settlement agreement can prevent a worker from speaking up about these matters, either before or after the agreement has been signed, and this should be made explicitly clear in the settlement agreement.

Employers should therefore ensure the following clause, which has been drafted in accordance with the good practice set out in the Law Society's [practice note](#) and the Solicitors Regulation Authority's (SRA) [warning notice](#) on non-disclosure clauses/agreements, is included in any settlement agreement:

Permitted disclosures

Nothing in this agreement prevents the parties from making a disclosure:

- a) which amounts to a protected disclosure within the meaning of section 43A of the Employment Rights Act 1996;
- b) in order to report an offence to a law enforcement agency or to cooperate with a criminal investigation or prosecution;
- c) for the purposes of reporting misconduct, or a serious breach of regulatory requirements, to any organisation or body responsible for supervising or regulating the matters in question;
- d) if and to the extent required by law; and
- e) to the Equality and Human Rights Commission.

All other terms of this agreement are to be read subject to this clause.

Employers should ensure that current and former workers are familiar with their policy on raising concerns/speaking up and feel confident and able to speak up should they need to do so.

This includes, but is not limited to, matters related to patient safety, bullying and harassment, including sexual harassment, and cultural issues that may affect the quality of care being provided to service users or the wellbeing of workers.

Employers should ensure they and/or their legal advisors provide clarity to the worker and/or their legal advisor on the effect of the retained right to speak up in the settlement agreement (in accordance with the good practice set out in the Law Society's

practice note and the SRA's warning notice on non-disclosure clauses/agreements).

Confidentiality clauses used within settlement agreements

Settlement agreements may include wording that makes confidentiality a condition of the agreement. Confidentiality clauses are sometimes called ‘non-disclosure agreements (NDAs)’.

Such clauses commonly require the worker does not:

- disclose the existence of the settlement agreement, and/or any of the negotiations and/or any of the terms of the agreement; and/or
- disclose any confidential information relating to the employer; and/or
- make any disparaging comments about the employer;

except in certain specified circumstances.

In no circumstances should a confidentiality clause prevent a worker from disclosing the existence or terms of a settlement agreement:

- to their immediate family;
- to a GP or similar health care practitioner;
- for the purposes of taking professional legal and financial advice (including an employment support scheme such as [NHS England support scheme](#)); or
- as otherwise required by law.

While confidentiality clauses can have a legitimate use, employers should be mindful there is no such thing as a 'standard' case for the individual involved.

Ending their employment, even on a mutual basis, or resolving a disagreement can be a stressful time for a worker and employers have a duty of care to the worker to act reasonably and responsibly to protect their physical and/or mental health.

Employers, and their legal advisers, should therefore pro-actively consider, in every case, whether a confidentiality clause(s) is required. If a confidentiality clause(s) is needed, it should be appropriately tailored to the specific facts of the case and/or the individual involved and should not go further than necessary.

It is standard practice for NHS employers to include a specific confidentiality clause in their contracts of employment preventing the use or disclosure of confidential information (for example, patient records) during and after employment. Therefore, our view is that it should not be necessary for an NHS employer to include a specific clause on this point in a settlement agreement.

A non-disclosure agreement or confidentiality clause must never be used to try to prevent someone from making 'permitted disclosures' (see above), for example, whistleblowing, reporting a crime or reporting sexual harassment. Any such clause will not be valid or enforceable.

Employers should encourage the individual to seek specific legal advice on any confidentiality clauses in the settlement agreement as it is important the individual understands and agrees with these parts of the settlement agreement before signing it.

The [Acas non-disclosure agreement guidance](#) offers further information on confidentiality clauses.

Mutually Agreed Resignation Schemes (MARS)

The NHS Terms and Conditions of Service set out the principles for MARS in section 20. Where a settlement agreement is used in a MARS, the scheme rules do not prohibit the use confidentiality clauses.

However, it is our view that it is not appropriate to include confidentiality clauses, as explained below:

- The MARS process should be open and transparent and employers should be able to demonstrate a sound business case for the MARS and that it has acted fairly. Therefore, a clause in a MARS settlement agreement that requires the worker to keep the existence and terms of the agreement confidential is unnecessary.
- It is standard practice for NHS employers to include a specific confidentiality clause in their contracts of employment preventing the use or disclosure of confidential information (for example, patient records) during and after employment. Therefore, our view is that it should not be necessary for an NHS employer to include a specific clause on this point in a MARS settlement agreement.
- It is unlikely that the termination of employment under MARS will arise out of circumstances where the employer has a genuine cause for concern about the risk of the worker making derogatory statements about the employer.

Board members and the fit and proper person test requirements

From September 2023, NHS England's Fit and Proper Person Test Framework for board members (FPPT) has applied to NHS organisations' engagement of board members. The Framework establishes a means to ensure that board members meet the required FPPT standard.

Employers must be aware that where a settlement agreement is entered into with a board member - in circumstances which are relevant to the question of whether the individual would meet the FPPT - the terms of the settlement agreement are considered carefully.

There is a requirement that relevant settlement agreements and any discontinued investigations should be included in the board member reference template for leavers and be considered as part of a board member's initial and annual fitness assessments.

The following clause should therefore be included in any settlement agreement with a board member:

In accordance with the Fit and Proper Person Test Framework for board members, notwithstanding this [confidentiality] clause, information about this Agreement will be recorded in the Employee's Electronic Service Record (ESR) by the Employer and may be included within the Board Member Reference that the Employer is obliged to provide. The Employee agrees that this will not be a breach of confidence.

Further resources

- [Acas](#) provides a range of guidance and can give free advice on the use of settlement agreements.
- [Protect](#) is a whistleblowing charity that can provide free legal advice and support to whistleblowers and organisations.
- [Speak up Direct](#) offers free and independent advice on the speaking up process.
- The [National Guardian's Office](#) provides details on Freedom to Speak Up guardians for all organisations and how to contact them.

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