

UK: EMPLOYMENT UPDATE

In July the Government published proposed action points on the use of confidentiality clauses (sometimes referred to as NDA's) in employment contracts and settlement agreements. The Government was rather opaque on the timeframe for implementing its proposals and realistically it is unlikely that new legislation will be implemented before 2020. However, the Equality and Human Rights Commission ("EHRC") have just published Guidance on the use of confidentiality agreements in discrimination cases setting out good practice and clarifying the law on their use. This Briefing explores that Guidance and possible action points for employers.

Status of Guidance

The EHRC Guidance is just that; guidance. It is not a statutory code that the courts and employment tribunals are obliged to take into account; however, it is anticipated that it will form the basis of a statutory Code of Practice on sexual harassment and harassment at work.

Non-compliance with the new EHRC statutory Code, once it is in force, will have to be taken into account by employment tribunals in any case in which it appears to be relevant. Accordingly, although not bound by the Guidance, employers should give some thought as to what aspects of their current confidentiality agreement arrangements may need refining.

Key aspects of the Guidance are set out below.

Case by case assessment

It is common practice for employers to make use of template settlement agreements with standardised confidentiality provisions. Often aimed at protecting sensitive commercial information, the wording is broad enough to potentially fetter an individual's ability to disclose information relating to a discrimination or harassment issue, even if this was not the underlying intention. Such an approach is potentially contrary to the good practice outlined in the Guidance.

The Guidance suggests that in most cases, it will not be necessary or appropriate for an employer to use confidentiality agreements that stop a

Key issues

- EHRC Guidance on the use of confidentiality agreements in discrimination cases
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worker discussing an act of discrimination with others but that their use may be appropriate in circumstances where:

- the employee asks for a confidentiality agreement or confirms to the employer that they would like to use one e.g. they would like the act of discrimination kept confidential;
- the employer wants to use a confidentiality clause in a settlement agreement with a witness to an act of discrimination and where the victim of that discrimination has made clear that they want the matter to remain confidential;
- in rare instances, following a thorough investigation and a fair hearing of a complaint, the evidence shows that an employee has been falsely accused of discriminating against another employee and the employer uses a confidentiality agreement to protect the reputation of the falsely accused individual; and/or
- there are legitimate business interests; e.g. an employer wants to maintain confidentiality for the duration of an investigation into the discrimination and any disciplinary and tribunal proceedings to avoid prejudicing such proceedings.

The Guidance suggests that, on each occasion that a confidentiality agreement is used, an employer should consider:

- whether there is a clear reason why it is needed;
- what the benefit to the employer of including it would be;
- the impact of the confidentiality agreement on the employee;
- the impact that confidentiality agreements may have on the culture of the organisation; and
- the benefits of not using confidentiality agreements.

If an employer elects to use a confidentiality agreement, the Guidance suggests that the employer should inform the employee why it has formed the view that it should be used so that the employee can consider with their independent adviser whether it is reasonable for the confidentiality agreement to be used.

Tailored language

If used, confidentiality agreements should be tailored to the specific circumstances in question and go no wider than necessary; e.g. imposing an obligation of confidentiality in relation to the compensation sum paid but permitting the employee to discuss the act of harassment itself. If this suggestion is adopted then employers may need to revisit their existing templates and possibly adopt a suite of tailored and targeted confidentiality clauses, to address a variety of scenarios.

Reciprocal obligations

If used, confidentiality agreements should not normally impose an obligation on an employee that is not also imposed on the employer; e.g. if an agreement obliges the employee not to discuss a certain issue, it should also place a mutual obligation on the employer to require its other employees not to discuss the same issue.

In practice, absolute reciprocity is very hard to achieve as most employers are not in a position to police their entire workforce and what they say. A best endeavours undertaking from the employer is much more realistic.

Permitted Disclosures

The EHRC considers that the wording of the confidentiality agreement should allow the employee to have discussions with the following third parties:

- any relevant regulator;
- the police;
- any medical professional or counsellor who is bound by an obligation of confidentiality;
- a legal or tax advisor who is bound by an obligation of confidentiality;
- HMRC;
- the worker's spouse, partner or other immediate family members (provided they are also asked to keep the matter confidential);
- the worker's trade union; and
- a potential employer where and to the extent necessary to discuss the circumstances in which their previous employment ended.

Independent Advice

An employee must receive independent legal advice in order for a settlement agreement to be valid for the purposes of waiving statutory employment claims. The EHRC Guidance suggests, perhaps rather controversially, that the employer should pay the employee's legal costs even if, having received the advice, the employee ultimately finds the terms unacceptable and reasonably decides not to sign the agreement.

In addition, the Guidance considers that, in the absence of exceptional circumstances, the employee should be given no less than 10 days to take legal advice and consider the settlement terms.

Reasonable steps defence: settlement should not be the end of the line

Where a claim is brought on the basis that the employer is liable for the discriminatory conduct of one of its employees, it is a defence if the employer can demonstrate that it took 'all reasonable steps' to prevent the discrimination ("**Reasonable Steps Defence**"). The Guidance suggests that in order to rely on the Reasonable Steps Defence where a settlement agreement has been used to settle a claim, the employer must not treat this as the end of the matter. It must:

- still investigate the allegations where it is possible and reasonable to do so;
- take any reasonable further steps to address the discrimination; and
- take any reasonable steps to prevent discrimination occurring again in the future.

Record Keeping and accountability

The Guidance recommends that 'large' employers (it does not define large), employers who use a significant number of settlement agreements ("significant" is not defined) and employers who operate across multiple sites should keep a central record of confidentiality agreements to allow them to monitor potential systemic discrimination issues in their organisation. The Guidance suggests that the central record could detail:

- when confidentiality agreements have been used;
- what type of claim they were used for;
- who any allegations of discrimination were made against;
- what type of confidentiality agreement was used; and
- why they were used.

To increase accountability and oversight and prevent misuse or overuse of confidentiality agreements it is suggested:

- the employer's board of directors (or equivalent) should have oversight of the central record of confidentiality agreements;
- the use of a confidentiality agreement should be signed off by a director, (or equivalent) or by an appropriate delegated senior manager who was not involved in the act of discrimination in question or in hearing any grievance related to it;
- the board of directors (or equivalent) should ensure that policies and procedures require managers to escalate concerns about workplace culture, systemic discrimination or repeated or highly serious acts of discrimination by one individual.

Employer Action Points

Having regard to the EHRC Guidance, employers should audit their existing policies, practices and templates in relation to the use of confidentiality clauses in settlement agreements and employment contracts and assess:

- Whether existing template language is too broad therefore falling foul of the Guidance;
- Whether a bespoke approach to confidentiality clauses should be adopted to address different concerns such as commercially sensitive information, trade secrets, compensation amount and so on;
- Whether it is feasible to consider the inclusion of a confidentiality clause on a case by case basis instead of including it as a standard provision in the employer's template settlement agreement or whether confidentiality clauses should be dispensed with in their entirety;
- Whether template confidentiality clauses need refining to clarify that disclosures can be made to the third parties suggested in the Guidance (see Permitted Disclosures above);
- Whether it should become standard practice to notify the employee of the reasons why a confidentiality clause is considered appropriate;

- Whether, in practice, the allegations that give rise to termination agreements are investigated as a matter of course and if not, what changes need to be made to this practice;
- Whether a central record related to confidentiality agreements should be kept and if so what data retained;
- If a database is maintained, whether existing data privacy notices need to be amended to reflect this; and
- Whether there is adequate oversight of which individuals within an organisation authorise settlement agreements which contain confidentiality clauses.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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Employers should also keep an eye out for the consultation on the EHRC Statutory Code of Practice and the legislation implementing the Government's confidentiality clause proposals as further revision of policies, practices and paperwork may be required in the future.

The EHRC Guidance can be found [here](#).

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