

Guidance

The use of confidentiality agreements in discrimination cases

October 2019

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First published October 2019

ISBN 978-1-84206-804-5

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About this document

The Equality and Human Rights Commission has issued this guidance using its powers to provide information and advice under section 13 of the Equality Act 2006. It aims to clarify the law on confidentiality agreements in employment and to set out good practice in relation to their use. In doing so, we seek to improve understanding and transparency in relation to discrimination at work so that systemic problems can be better identified and tackled.

This guidance is not a statutory code issued under section 14 Equality Act 2006. Therefore, while an employment tribunal or court is not obliged to take this guidance into account, it may still be used as evidence in legal proceedings where it is relevant.

As our statutory remit concerns compliance with the Equality Act 2010 and human rights law, this guidance focuses on the use of confidentiality agreements in relation to discrimination, harassment and victimisation claims. There is a list of useful sources of advice and guidance on [page 37](#) for those who require further information on related matters outside this guidance's scope.

In developing this guidance we have consulted representatives from a range of groups, including government departments, public sector bodies, trade unions, representative bodies, lawyers, regulators and third sector organisations. These contributions have enriched and improved the content and we are grateful for their help.

Please note that we use the terms:

- 'must': where the person or organisation referred to has a legal duty
- 'can': where the person or organisation has a power (not a duty) under statutory or common law
- 'should' or 'could': for guidance on good practice.

Confidentiality agreements are sometimes referred to as confidentiality clauses, non-disclosure agreements (NDAs) or gagging clauses. We use the term 'confidentiality agreement' throughout this guidance to refer to any form of agreement or contract, or a clause within a wider agreement or contract, under which it is agreed that certain types of information will not be discussed or passed on.

Foreword

The #MeToo movement has exposed the scale of the sexual harassment problem in all types of workplace and has highlighted the fact that many of those who have experienced it felt unable to speak up.

Employers have a duty to provide a safe working environment for all staff. To achieve this, it is important they create a culture in which workers feel able to discuss their experiences and expose sexual harassment and all other forms of discrimination. This in turn will help employers to identify patterns of discrimination and tackle their root causes. If people do not feel they can speak up, this can mask systemic discrimination and can have a detrimental impact on a worker's health and well-being and their ability to pursue their rights.

As we discussed in our report, [‘Turning the tables: ending sexual harassment at work’](#) (2018), there are many reasons why workers may not feel able to speak up about discrimination. These reasons include the belief that a complaint will not be taken seriously, fear of being victimised, fear that the alleged perpetrator will be protected and a lack of appropriate reporting procedures. It is also clear that confidentiality agreements are part of the problem.

We recognise that confidentiality agreements (also known as non-disclosure agreements or NDAs) have legitimate uses. For example, they may be used to protect confidential information or used in cases where a worker wants to make sure the details of the discrimination to which they have been subjected will not be discussed.

However, evidence suggests that in some circumstances confidentiality agreements have been used to cover up the worst instances of discrimination. There is also evidence, including from the Equality and Human Rights Commission's own enforcement work, to suggest that the inclusion of confidentiality agreements in terms and conditions or settlement agreements has become commonplace. This can prevent workers from speaking about their experiences, create confusion as to what they can and cannot say, and make them fearful about what will happen if they do speak up.

The use of confidentiality agreements impacts on the culture of an organisation as a whole and not just on the workers who sign them. Workers will be encouraged to share their experiences if others have done so first; silencing those who have felt able to raise their concerns will deter others from coming forward.

The purpose of the Equality Act 2010 is to protect people from discrimination in their work and other contexts and to support progress in equality. It is important that confidentiality agreements are used lawfully and in a way that supports equality while reducing discrimination.

Introduction

Scope of this guidance

Who this guidance applies to

This guidance covers the use of confidentiality agreements between employers and all those who are protected by the work provisions of the Equality Act 2010. That includes:

- employees: those who have a contract of employment
- workers: those who contract to do the work personally and cannot send someone to do the work in their place
- apprentices: those who have a contract of apprenticeship
- crown employees: those employed by a government department or other officers or bodies carrying out the functions of the crown
- House of Commons staff and House of Lords staff
- job applicants
- contract workers, including agency workers and those who contract to provide work personally such as consultants
- police officers
- partners in a firm
- members in a limited liability partnership
- personal and public office holders
- those who undertake vocational training.

For simplicity, this guidance refers collectively to all those listed as ‘workers’. For further information on who is protected by the work provisions of the Equality Act 2010, please see [the Equality and Human Rights Commission’s Code of Practice on Employment](#).

What is included in this guidance

Confidentiality agreements can be used legitimately by an employer to protect its confidential information – for example intellectual property, trade secrets or other sensitive commercial information. Such agreements may appear in a worker’s terms and conditions of employment or as part of an agreement between a worker and their employer to settle an employment related dispute.

This guidance is concerned only with confidentiality agreements that could stop a worker speaking about any act of discrimination, harassment or victimisation which contravenes the Equality Act 2010 (referred to collectively throughout as ‘discrimination’).

It applies to all forms of discrimination, harassment and victimisation under the Equality Act 2010 and applies in England, Scotland and Wales.

Why we have created this guidance

This guidance provides employers and workers with a clear explanation of the law in relation to confidentiality agreements. It describes good practice when using confidentiality agreements as well as explaining when they would be unlawful.

This guidance will help employers to better understand how and when they can use confidentiality agreements legitimately, and when such agreements will not be enforceable. Employers who use settlement agreements should therefore ensure that managers responsible for drafting or negotiating settlement agreements are aware of this guidance. Having read it, they will better understand how to:

- ensure that confidentiality agreements are drafted appropriately for the situations they encounter
- ensure workers understand what they are entering into
- maintain proper oversight of use of confidentiality agreements.

This guidance also sets out what information can be legitimately protected by confidentiality agreements. This will help workers to understand when they might be asked to sign such an agreement and, if they do sign, when they can discuss information and what rights they still have.

As much as possible, we have tried to simplify what is a complex area of law. However, any workers or employers who are unsure of their legal obligations should seek further advice. We have included sources of further guidance and advice on [page 37](#).

The Equality and Human Rights Commission

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Equality and Human Rights Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It also encourages compliance with the Human Rights Act 1998.

Our purpose is to protect and promote equality and human rights in Britain. We stand up for freedom, compassion and justice in changing times. Our work is driven by a simple belief: if everyone gets a fair chance in life, we all thrive.

We use a wide range of different methods to tackle discrimination, disadvantage and human rights abuses, work with other organisations and individuals to advance fairness, dignity and respect, and we are ready to take action against those who abuse the rights of others. Our statutory powers give us a range of tools with which to do this.

We are also Britain's national equality body and have been awarded an 'A' status as a national human rights institution (NHRI) by the United Nations. We work with equivalent bodies in Scotland and Northern Ireland, across Europe and internationally to protect and promote equality and human rights around the world.

Confidentiality agreements in terms and conditions of employment

The extent to which a confidentiality agreement restricts what a worker can discuss will depend on the wording of the agreement.

It is lawful for an employer to protect confidential information. An employer can seek to stop a worker discussing or using confidential information outside of work either during their employment or after their employment has ended. Such information might include, for example, customer contact lists, trade secrets, intellectual property or sensitive pricing information. The employer can also protect information belonging to other third parties with which the worker will come into contact. For example, a GP practice may wish to protect patient records.

Employers seeking to protect confidential information can either include a confidentiality agreement within the employment contract, written statement of particulars or any other type of terms and conditions provided to a worker at the start of employment. Alternatively, they can use a separate confidentiality agreement.

There is evidence that some confidentiality agreements used at the start of employment are drafted in such a way as to stop workers discussing discrimination that occurs in the future. Or are drafted in a way that makes it unclear whether the worker can discuss an act of discrimination that occurs in the future, which in turn discourages them from doing so.

However, employers do not have free reign over how to word confidentiality agreements. A confidentiality agreement in a worker's contract that seeks to stop a worker pursuing a claim based on an act of discrimination that happens in the future (that is, after the contract is signed) would not be enforceable. The Equality Act provides that workers cannot sign away their legal rights under the Equality Act in this way. A worker can only give up their right to pursue a claim using a valid settlement agreement or by agreement reached through the Advisory, Conciliation and Arbitration Service (ACAS), which are explained later in this guidance under 'Resolving disputes with workers', [page 16](#).

This relates to section 144 of the Equality Act 2010.

Example

K, a small agency owner, takes on D to work as a bartender at a charity event. Some high-profile guests will be there and K wants to make sure that anything overheard by her workers about the guests' business affairs is not discussed outside of the event. K asks her workers to sign a contract including a confidentiality agreement that says: 'You must not discuss anything that you hear at the Event whatsoever with anyone.'

At the event, D is subjected to sexually explicit comments by a colleague and wants to make a complaint of harassment. The confidentiality agreement makes D worry that she will breach her contract if she speaks about it. However, the confidentiality agreement is unlawful and cannot stop her from making the complaint.

K should have made clear in the wording of the confidentiality agreement that workers were prevented from discussing only sensitive business information that might be overheard at the event.

A confidentiality agreement will also not be enforceable if a worker is under duress to sign it. Duress means:

- the worker is placed under unjustified pressure by the employer to sign the contract
- that pressure was a significant cause of the worker signing the contract, and
- because of the pressure the worker had a lack of choice as to whether to sign the contract.

Example

J turns up for his first day of work in a new job at a theatre. He is given a contract of employment, which includes a confidentiality agreement, and told to sign it. J asks if he can take the contract away with him to read through and make sure he understands it. His employer says he can have 15 minutes to read it before he starts work and that he must sign it then or the job will be withdrawn. J feels that has no other option than to sign the contract because he cannot afford to lose the job. The confidentiality agreement will not be enforceable by the employer because J was under duress to sign it.

J should keep a record of the duress he was placed under in case he ever needs to prove this to a court or tribunal.

Confidentiality agreements that seek to prevent lawful whistleblowing, reporting criminal activity or making other disclosures required by law would also be unenforceable. Further detail can be found in the 'Unlawful confidentiality agreements' section, [page 28](#).

Good practice

Employers should carefully consider the wording of agreements that seek to stop workers using or discussing confidential information. It should be clear from the wording what the worker can or cannot do and that the agreement does not stop them from speaking about any form of discrimination. An employer may do this by including, for example, a definition of what it considers to be confidential information. The employer's induction process and its policies and procedures should also make clear how workers can report discrimination and emphasise that all such reports will be taken seriously.

Employers should not put workers under pressure to sign a confidentiality agreement. The worker will need time to read and reflect on any confidentiality agreement. They may also wish to discuss it with a trade union representative, lawyer or other appropriate adviser if they are unsure as to its meaning or effect. Allowing the worker time to do this will also benefit the employer, as a confidentiality agreement is more likely to be enforceable if the employee was fully aware before signing of its meaning and effect.

The worker must always be given a copy of the signed confidentiality agreement to keep for their records.

Resolving disputes with workers

When resolving disputes with workers, it has become common for employers to include a confidentiality agreement as part of the terms on which the employer and worker settle legal claims that worker may have against the employer.

Under the Equality Act 2010, any agreement that limits a worker's rights under the Act will be unenforceable. So, a contract cannot generally, for example, stop a worker making a complaint or bringing a claim of discrimination. However, there are two exceptions to this rule. A contract that limits these rights will be enforceable if it is a 'qualifying settlement agreement' (as explained in the following section) or if it is a COT3 agreement made with assistance from an ACAS conciliation officer (as explained on [page 17](#)).

This relates to section 144 of the Equality Act 2010.

Settlement agreements

A worker and their employer may decide to resolve a dispute between them by entering into a settlement agreement in such a way that benefits both parties. A settlement agreement is a contract under which the worker gives up their right to pursue one or more employment claims that they may have against their employer. In return, the worker receives financial compensation, or some other form of compensation, from their employer.

To be enforceable, the agreement must meet the definition of a 'qualifying settlement agreement' set out in the Equality Act 2010. This means it must fulfil certain conditions, as follows:

- The agreement must be in writing.

- The agreement must relate to the particular complaint being settled.
- Before signing the agreement, the worker must have received advice from an independent adviser about what the terms of the agreement mean and their effect. Although not explicitly stated in the legislation, this would include any confidentiality clauses within the settlement agreement.
- The independent adviser must have appropriate insurance in place.
- The agreement must identify who the adviser is.
- The agreement must state that the independent advice has been provided and that the adviser has the appropriate insurance in place.

An independent adviser must be:

- a qualified lawyer
- an officer, official, employee or member of an independent trade union who is certified in writing by the trade union as:
 - competent to give the advice, and
 - authorised to provide the advice on behalf of the union, or
- a worker or volunteer at an advice centre who is certified in writing by the centre as competent and authorised to provide the advice.

ACAS and COT3 agreements

An alternative to using a settlement agreement to resolve a dispute between a worker and their employer would be to use ACAS's conciliation services. An ACAS officer can act as an independent third party to help the worker and employer reach a settlement. If a settlement is reached using this conciliation service it will be recorded in a form called a COT3 agreement.

ACAS conciliation can take place at any stage in a dispute. If a worker wishes to bring a discrimination claim in the employment tribunal, they must first notify ACAS of the dispute within three months of the discrimination (or they may lose their right to bring a claim). An ACAS officer will then contact the worker and employer to find out if both parties are willing to discuss settling the claim. If both parties are willing, then there will be a conciliation period. If either party does not wish to conciliate or if the conciliation period ends without the claim being settled, ACAS will give the worker a certificate allowing them to bring a claim to the employment tribunal.

If a worker makes an employment tribunal claim, an ACAS officer will be assigned to the case. The worker and employer may then discuss settlement through the ACAS officer at any point as the case progresses if they wish to do so. Further information about ACAS conciliation is available on the [ACAS website](#).

Confidentiality agreements in settlement and COT3 agreements

Confidentiality agreements in settlement and COT3 agreements have tended to be drafted in a way that stops the worker discussing acts of discrimination. This may either be explicit in the wording or implicit in the impression or effect that the wording has on the worker. For example, a confidentiality agreement will often say that a worker cannot:

- discuss the circumstances that led to them signing the settlement or COT3 agreement. Often such circumstances will include an act of discrimination
- make untrue, derogatory or disparaging comments about the employer or the worker's colleagues. Where an employer disputes the allegation of discrimination made by the worker, the employer may say that any allegation constitutes an untrue, derogatory or disparaging comment

- discuss the existence or terms of the settlement or COT3 agreement. Although this would not directly stop a worker discussing an act of discrimination, it may discourage them from doing so as they would be unable to say how the situation was resolved.

Confidentiality agreements that prevent workers discussing acts of discrimination must not be used where it would be unlawful to do so. We outline in ‘Unlawful confidentiality agreements’ ([page 28](#)) the lawfulness of such agreements and what an agreement cannot stop a worker saying or doing. (The lawfulness of confidentiality agreements entered into under duress is also covered on [page 14](#) under ‘Confidentiality agreements in terms and conditions of employment’, but this is less likely to be of relevance in relation to settlement and COT3 agreements.) Where confidentiality agreements are used lawfully in settlement and COT3 agreements, employers should be aware of and adopt the good practice detailed in the following section. This will help them to reduce the potential for confidentiality agreements to have an adverse impact on the individual worker and on workplace culture.

Good practice

Employers should consider on a case-by-case basis whether a confidentiality agreement is needed. If an employer uses a template settlement agreement, confidentiality clauses should not be included in the template as standard but added to it only as required.

In most cases, it will not be necessary or appropriate for an employer to use confidentiality agreements that stop a worker discussing an act of discrimination with others. However, their use may be appropriate in some cases, such as where:

- the worker asks for a confidentiality agreement or confirms to the employer that they would like to use one because, for example, they would like the act of discrimination kept confidential

The use of confidentiality agreements in discrimination cases

- the employer wants to use a confidentiality agreement in a settlement agreement with a witness to an act of discrimination, where the person who was the victim of 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 a worker has been falsely accused of discriminating against another worker and the employer uses a confidentiality agreement to protect the reputation of the falsely accused individual
- there are legitimate business interests. For example, an employer wants to maintain confidentiality for the duration of an investigation into the discrimination and any disciplinary and tribunal proceedings to avoid any such proceedings being prejudiced.

Each time an employer considers including a confidentiality agreement in a settlement agreement, the employer should weigh up the following factors:

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

Where confidentiality agreements are used, they should be worded to deal with the particular circumstances of the case; the wording should not go beyond what is necessary and appropriate in those circumstances. For example, if the employer's main concern is the worker discussing with other workers how much compensation they have been paid, then a confidentiality agreement could be drafted to prevent them discussing that without preventing them from discussing the act of discrimination itself.

If an employer is in any doubt as to whether the wording of a confidentiality agreement is appropriate, it should seek advice.

The employer should inform the worker why it has formed the view that a confidentiality clause should be used. This is so that the worker can consider with their independent adviser whether it is reasonable for a confidentiality agreement to be used.

The wording of the confidentiality agreement should allow the worker to have discussions with the following people and organisations:

- 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
- Her Majesty's Revenue and Customs
- 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
- a potential employer where and to the extent necessary to discuss the circumstances in which their previous employment ended.

Where confidentiality agreements are used, they should not normally impose an obligation on a worker that is not also imposed on the employer. For example, if an agreement obliges the worker not to discuss a certain issue, it should also place a mutual obligation on the employer to require its other workers not to discuss the same issue.

Advice and support

Negotiations over the terms of a settlement agreement will often happen before the worker takes independent advice on the terms. The employer should make sure that the worker has the opportunity to be represented or supported during the negotiation phase by an independent adviser, trade union representative or colleague of their choice. If the worker cannot secure such representation or support, the employer should consider starting the [ACAS early conciliation process](#) to resolve the matter through a COT3 agreement, so that there is a neutral third party to facilitate negotiation of the terms.

A worker must take independent advice for a settlement agreement to be legally binding (see 'Settlement agreements', [page 16](#)). Therefore, unless the worker chooses to use an independent adviser who will not charge for this service, the employer should pay for the worker to receive independent advice on the terms of the settlement agreement.

A worker may not decide whether to enter into an agreement until they have received independent advice. Therefore, the employer should pay the worker's costs even if, having received the advice, the worker ultimately finds the terms unacceptable and reasonably decides not to sign the agreement. Following the good practice set out in the first paragraph of this section will help to avoid such situations arising.

An employer can place a reasonable limit on the costs it is willing to pay for the worker to take independent advice. The costs contribution should be sufficient to allow the worker to take advice from an independent adviser on the settlement agreement, including any confidentiality agreement, and to ask their adviser to seek changes to it if necessary. What is considered reasonable will vary from case to case, depending on factors such as the length and complexity of the settlement agreement, the background to the agreement and the local rates for advisers. The employer should take advice from the lawyer who drafts the agreement on the level of costs contribution and take into account the views of the worker's independent adviser.

The employer should give the worker a reasonable amount of time to seek independent advice and to consider the terms of a settlement agreement. Normally, and unless there are exceptional circumstances, this should be no less than 10 days from the point at which the worker is asked to take advice on the agreement. The employer must not dictate from whom the worker takes independent advice.

Employers should take legal advice where necessary regarding the use of confidentiality agreements to make sure that they are used and worded appropriately. However, employers should not delegate all responsibility for drafting and negotiating confidentiality agreements to their lawyers. Employers should ensure that they provide instructions to their lawyers on the use of confidentiality agreements when drafting the agreement and when any amendments to confidentiality agreements are being negotiated.

Those who advise employers and workers on confidentiality agreements should ensure that they remain up to date with their regulatory obligations and any guidance issued by regulators on this subject.

Settlement agreements and future claims

Under the Equality Act 2010, there is no positive legal duty on an employer to take steps to prevent discrimination. However, an employer will be liable for discrimination by one of its workers against another unless it took all reasonable steps to prevent the discrimination occurring (the ‘reasonable steps defence’).

To rely on the reasonable steps defence, an employer must investigate allegations of discrimination, take actions to address discrimination and take any reasonable steps to prevent discrimination occurring again in the future. If the employer does not do so, it will be unable to show that it took all reasonable steps to prevent discrimination occurring – either in relation to the immediate act of discrimination with which it is dealing or discrimination that occurs in the future.

To rely on the reasonable steps defence it therefore follows that, where a settlement agreement has been used to settle a claim, the employer must not treat this as the end of the matter. The employer 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 reasonable steps to prevent discrimination occurring again in the future. For further detail on the reasonable steps defence, please see the [Equality and Human Rights Commission's Code of Practice on Employment](#).

Tackling the underlying problem

It is important that employers keep track of discrimination complaints and of their use of confidentiality agreements. This will allow the employer to identify systemic issues and the measures needed to tackle them. It will also help the employer to ensure that confidentiality agreements are not being misused in individual cases or overused to mask systemic problems.

Employers should monitor their use of confidentiality agreements. Large employers, employers who use a significant number of settlement agreements and employers who operate across multiple sites should keep a central record of confidentiality agreements. This will allow them to monitor potential systemic discrimination issues in their organisation. A central record could include, for example:

- 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.

As keeping such a record is likely to involve processing workers' personal data employers should ensure that in doing so they comply with data protection laws. Guidance on data protection can be found on the website of the [Information Commissioner's Office \(ICO\)](#). Failure to comply with data protection laws could result in adverse consequences for an employer including, for example, a fine from the ICO or a claim from a worker whose personal data has not been handled in accordance with data protection requirements.

To check that confidentiality agreements are not being misused or overused:

- 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
- confidentiality agreements should, where reasonably possible, be signed off by someone who was not involved in the act of discrimination 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 the workplace culture, systemic discrimination or repeated or highly serious acts of discrimination by one individual.

Public Sector Equality Duty (PSED)

Public authorities and those exercising public functions must comply with the PSED. This means that when carrying out their functions, they must pay due regard to the need to:

- Eliminate discrimination, harassment and victimisation;
- Advance equality of opportunity between people who have a protected characteristic and people who do not;
- Foster good relations between people who share a protected characteristic and people who do not.

This relates to section 149 of the Equality Act 2010.

The requirement to pay due regard to these matters applies when considering whether to use confidentiality agreements. For further information on who the PSED applies to and its requirements (and further specific duties which apply in England, Scotland and Wales), please see the [Equality and Human Rights Commission's guidance](#) on this subject.

Example

H, a porter at a hospital, is subjected to racial harassment by a colleague. The employer settles the claim and considers using a confidentiality agreement to limit discussion of the issue and the settlement. In considering whether to use a confidentiality agreement, the employer must comply with the PSED. To do so, it gives due regard to matters such as what impact the use of confidentiality agreements will have on:

- the employer's ability to eliminate racial harassment – for example whether such agreements:
 - prevent it from demonstrating how those who harass others will be dealt with
 - hinder its ability to collect data about harassment and tackle its root causes
 - prevent it from identifying repeat harassers because other workers who are harassed by the same person are not encouraged to speak up
 - prevent lessons being learned
- equal opportunities for people of different races in the organisation. Taking into account any impact on its ability to tackle harassment, it considers whether this in turn will affect whether people of different races prosper at work and the employer's ability to retain workers of different races
- relations between people of different races. For example, are confidentiality agreements perceived as an attempt to protect the perpetrator?

Unlawful confidentiality agreements

Whistleblowing

A confidentiality agreement will be unlawful if it seeks to stop a worker whistleblowing. Whistleblowing means making 'protected disclosures' as defined by the Employment Rights Act 1996 ([page 29](#)). Confidentiality agreements that seek to stop workers making protected disclosures must not be used.

This relates to sections 43A and 43J of the Employment Rights Act 1996.

If a worker makes a protected disclosure, their employer must not dismiss them or otherwise disadvantage them for doing so.

Protected workers

References to a worker in this guidance when discussing whistleblowing, are references to those who are protected against being dismissed or disadvantaged as defined in the Employment Rights Act 1996. The categories of those protected are similar but not identical to those who are protected against discrimination under the Equality Act 2010, as listed under 'Who this guidance applies to' on page 8.

A detailed discussion of who is protected under the whistleblowing provisions of the Employment Rights Act 1996 is beyond the scope of this guidance. For those who need to establish whether they are protected, Protect, the whistleblowing charity, provide detailed guidance on the law relating to whistleblowing [on their website](#) and also offer a confidential advice line.

The courts have stated that protection for workers who blow the whistle extends to former workers who are disadvantaged by their employers after their employment has ended, including where the relevant protected disclosure was made after the employment ended.

This relates to *Woodward v Abbey National plc* [2006] and *Onyango v Berkeley* [2013].

Protected disclosures

A disclosure of discrimination by a worker may amount to a protected disclosure, but this must be considered on a case-by-case basis. Those requiring more detailed information on the definition of a protected disclosure should refer to [Protect's website](#).

Whistleblowing occurs where a worker passes on facts about wrongdoing. They may pass the information on in any format, it doesn't have to be in writing.

To make a valid protected disclosure, the worker must reasonably believe that:

- by disclosing the information, they are acting in the public interest
- the disclosure shows wrongdoing which fits into one of the six categories listed in the Employment Rights Act 1996. For example, in the case of discrimination, the information may show that:
 - a legal obligation has been breached (for example, any form of discrimination, harassment or victimisation has occurred in breach of the Equality Act 2010)
 - someone has committed a criminal offence (for example, sexual assault), and / or
 - there is a danger to health and safety (for example, a failure to make a reasonable adjustments for a disabled worker is creating a risk to their health).

This relates to section 43B(1) of the Employment Rights Act 1996.

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- The disclosure is made to one of the people or organisations listed, and is made in the way described, in the Employment Rights Act 1996. For example, a worker can make the disclosure to:
 - their employer
 - their legal adviser if made whilst obtaining legal advice
 - an organisation on [the list of 'prescribed persons'](#). In this case, the worker must have a reasonable belief that the disclosure is within the remit of the prescribed person and that the disclosure is substantially true, or
 - other organisations if the relevant conditions set out in sections 43G or 43H of the Employment Rights Act 1996 (explained in detail on the [Protect website](#)) are satisfied.

This relates to sections 43C to 43H of the Employment Rights Act 1996.

When a worker considers whether their disclosure about discrimination is a protected disclosure, they may be unsure whether their employer will accept that they have a reasonable belief that they are acting in the public interest.

There are four factors that must be weighed up when considering whether a disclosure is in the public interest or not:

- the number of people in the group of workers that the disclosure is relevant to
- the extent to which the group of workers will be affected by the wrongdoing
- the nature of the wrongdoing disclosed, and
- the identity of the alleged wrongdoer.

This relates to [Chesterton Global Ltd v Nurmohamed \[2017\]](#).

Example

N works for a household name company, S, which employs 15,000 people. N has been asking S to put workplace adjustments in place for him for a long time, to help him in relation to his disability. N has good reason to believe from emails that he has seen and conversations with colleagues that his is not an isolated case. He believes that there is a deliberate policy on the part of his employer to keep workplace adjustments for disabled workers to a minimum in order to keep costs down. He makes a disclosure about this to his Member of Parliament.

N has a reasonable belief that his disclosure is in the public interest because:

- his disclosure affects a significant number of disabled workers
- the wrongdoing is discriminatory and is having an impact on the health of S's disabled workers and their ability to remain in work
- the wrongdoing is deliberate, and
- S is a household name listed on the stock exchange and in which many members of the public have a financial interest through their pension.

Example

B works as a childminder, looking after the children of K, a high-profile businessman. B is subjected to sexual harassment by K, including sexual assault. Although as far as she knows B is the only person affected by K's behaviour, the wrongdoing is of a very serious nature and contrary to the good image K portrays publicly to the benefit of his business. B has a reasonable belief that her disclosure is in the public interest.

Criminal activity

The use of a confidentiality agreement will amount to a criminal offence if, by trying to stop a worker discussing with the police any criminal activity, it is an attempt by the employer to:

- pervert the course of justice
- prevent the apprehension or prosecution of an offender, and / or
- conceal a criminal offence.

This relates to sections 4 and 5 of the Criminal Law Act 1967.

If the use of a confidentiality agreement amounts to a criminal offence, then it will not be enforceable.

Confidentiality agreements must not therefore seek to stop a worker discussing criminal activity, or cooperating in a criminal investigation.

Example

A is at a work social event in the local pub, and is 'upskirted' by one of her colleagues, C. A makes a complaint about this to her employer, which results in her signing a settlement agreement. Her employer includes a clause in the agreement that prevents her from discussing the incident with anyone, including the police. As upskirting is a criminal offence under the Voyeurism (Offences) Act 2019, this clause is unlawful.

If an individual discloses information showing that a criminal offence has been committed, this may also be a protected disclosure, if it is made in accordance with the conditions set out on [page 29](#). Although the police are not a prescribed person, a report of criminal activity to them may still be a protected disclosure if it is made in accordance with sections 43G and 43H of the Employment Rights Act 1996, which allow disclosures to other organisations if certain conditions are satisfied.

Actions required by law

A confidentiality agreement must not prevent a worker from:

- doing anything that they may be required to do by law, for example where required to give evidence to a court, a tribunal, a regulator or the police
- doing anything that they may be required to do by reason of a regulatory duty, for example where required by a professional code of conduct to report wrongdoing to a regulator.

Penalty clauses

Either a worker or an employer can make a claim for breach of contract if the other party breaches the settlement agreement. Employers may seek to include a clause within a settlement agreement, the purpose of which is to seek compensation from the worker if they breach it. Clauses requiring the worker to pay compensation that is out of all proportion to the damage caused to the employer by the breach, will be considered to be a penalty clause and unenforceable. Penalty clauses must not be used.

Example

A worker, J enters into a settlement agreement with his employer K. Under the agreement, J receives £50,000 in compensation. The agreement says that if J breaches any term of the agreement, he will have to return the full amount to K. K discovers that J has discussed the terms of the settlement agreement with a colleague, L, in breach of a confidentiality agreement. K demands the £50,000 back from J. However, K is not entitled to do so. K has not suffered any damage as a result of J telling L and L has agreed not to discuss the matter with anyone further.

Good practice

Although it will be for a court to determine whether a contractual clause is enforceable or not, confidentiality agreements (or any other clauses such as those regarding the recovery of money from the worker) should only be included where the employer reasonably believes that they are likely to be enforceable.

It should be clear to the worker from the wording of the settlement agreement that the confidentiality agreement will not stop them from:

- making a protected disclosure
- reporting a criminal offence or cooperating with a criminal investigation
- doing anything that they may be required to do by law
- doing anything that they may be required to do by reason of a regulatory duty.

These matters should be made clear to the worker either within the wording of the clauses or by annexing an explanatory statement to the agreement.

Sometimes settlement agreements include warranties under which the worker promises something to the employer. There is evidence that workers have sometimes been required to promise (or 'warrant') that they are not aware of anything that would be a protected disclosure or a criminal offence. This can put the worker in a very difficult position; they may feel under pressure to agree to the warranty even though they are aware of such information. If the worker then discusses the information at a later date, the employer may say they have breached the warranty. In this way, the warranty will potentially have the same silencing effect as a confidentiality agreement. As it is not lawful to use a confidentiality agreement to stop a worker making a protected disclosure or reporting a criminal offence, such warranties should not be used either.

Employers should, however, encourage workers to raise any issues relating to their employment including protected disclosures and criminal offences, without the threat of breaching a warranty. This should be done through the employer's usual processes such as one-to-ones and exit interviews.

Employers should have in place a whistleblowing policy and should make sure that this is well understood by its workers. The policy should provide workers with clear guidance on what a protected disclosure is and explain that any agreement that they enter into with the employer cannot stop them from making a protected disclosure.

Sources of further guidance

[Advisory, Conciliation and Arbitration Service \(ACAS\)](#): For information and advice on all aspects of workplace relations and employment law.

[Citizens Advice](#): A network of charities offering confidential advice online, over the phone, and in person, for free.

[Code of Practice on Employment](#): Definitive guidance from the Equality and Human Rights Commission about what the Equality Act means.

[Equality Advisory and Support Service \(EASS\)](#): The EASS Helpline advises and assists individuals on issues relating to equality and human rights, across England, Scotland and Wales. EASS can also accept referrals from organisations which, due to capacity or funding issues, are unable to provide face to face advice to local users of their services.

[Law Works](#): To find a legal advice clinic in your local area.

[Protect](#): For information and advice on whistleblowing.

[Solicitors Regulation Authority's Warning Notice](#): Sets out a solicitor's professional obligations when they are involved in drafting a confidentiality agreement.

[The Law Society's 'Find a solicitor' service](#): To find a solicitor in your local area.

[Law Society of Scotland's 'Find a solicitor' service](#): to find a solicitor in Scotland.

[Trades Union Congress](#): Represents affiliated trade unions. The TUC website provides guidance on workplace issues for workers and union representatives, and has a trade union finder tool for those considering joining a trade union.

Glossary of terms

ACAS (Advisory, Conciliation and Arbitration Service): Among other services, ACAS provide an individual conciliation service. Anybody planning to lodge a claim with the Employment Tribunal must first notify ACAS. Its role is to help both sides reach a mutually acceptable solution.

Confidentiality agreement: Any clause or separate agreement which prevents a worker (or their employer) from discussing or passing on information. Sometimes referred to as confidentiality clauses, non-disclosure agreements, NDAs or gagging clauses.

COT3 agreement: An agreement reached through the ACAS conciliation service under which a worker waives their right to pursue an employment related claim in return for something from their employer (usually compensation).

Discrimination: We use the word discrimination in this guidance to refer to any breach of provisions of the Equality Act 2010 concerning direct discrimination, indirect discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment and victimisation.

Employee: An individual who has a contract of employment with their employer. Employees are protected against discrimination, harassment and victimisation under the Equality Act 2010.

Independent adviser: A lawyer, an official, officer, employee or member of an independent trade union, or a worker or volunteer at an advice centre who meets the relevant statutory conditions, allowing them to advise a worker on the meaning and effect of a settlement agreement.

Penalty clause: A clause in a settlement agreement which requires a worker to pay a penalty (e.g. return their compensation) if they breach the settlement agreement which is out of all proportion to any damage caused to the employer by the breach.

Prescribed person: A person or organisation who is on the prescribed persons list and to whom a worker is allowed by law to make a protected disclosure.

Protected disclosure: When someone blows the whistle in accordance with the conditions set out in the Employment Rights Act 1996.

Settlement agreement: An agreement under which a worker waives their right to pursue an employment related claim in return for something from their employer (usually compensation).

Unlawful: Contrary to the law. A confidentiality clause which is unlawful will not be enforceable.

Whistleblowing: When someone passes on information about wrongdoing.

Worker: An individual who does work for an employer and is required to do the work personally – that is, they cannot send someone (a substitute) to do the work in their place and are therefore not self-employed. Workers are protected against discrimination, harassment and victimisation under the Equality act 2010. We use the word ‘worker’ in this guidance to include, workers, employees and all others protected by the work provisions of the Equality Act 2010.