The use of Confidentiality Clauses and Derogatory Statement Clauses within Settlement Agreements:

The rights and responsibilities of NHSScotland employees and employers

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NHS SCOTLAND

healthier scotland
SCOTTISH GOVERNMENT

Introduction

The Scottish Government and NHSScotland are committed to ensuring a culture of openness, transparency and candour, where staff are actively encouraged to speak up about wrongdoing and malpractice within their organisation, particularly in relation to patient safety, without fear of recrimination.

Attention has been drawn to the use of confidentiality and derogatory statement clauses in settlement agreements and the perception that these may be used to prevent employees from raising concerns about patient safety and/or malpractice; and that whistleblowers were being 'gagged'.

The Scottish Government and NHSScotland are clear that there should be absolutely no impediment to employees raising concerns about patient safety and/or malpractice in NHSScotland as this makes our health service better.

In order to make the position explicit in relation to whistleblowing, the former Cabinet Secretary for Health and Wellbeing announced in February 2014 that a standard style of wording would be drafted for use by all NHSScotland employers, as a starting point, when negotiating a settlement agreement with employees. Confidentiality/derogatory statement clauses will not be included in any negotiated settlement unless it is explicitly agreed, by both parties, that such clauses are to be used, and that there are clear and transparent reasons for inclusion.

From 1 April 2014, a strengthened process for Public Sector Settlement Agreements requires all public bodies, including Health Boards, to consult the Scottish Government prior to offering or entering into any settlement agreement (with the exception of voluntary exits where the package falls entirely within the individual's contractual arrangements). This process also allows the Scottish Government to monitor usage of confidentiality clauses and/or derogatory statement clauses for consistency with the Cabinet Secretary's commitments.

Whilst the aforementioned strengthened process applies only to 'settlement agreements' (see Section 1), the principles outlined in this Guidance apply to all settlements negotiated between NHSScotland and its employees to conclude employment disputes, including settlements facilitated by ACAS (The Advisory Conciliation and Arbitration Service). When ACAS facilitates settlement of an employment dispute, it is often recorded in a form called a COT3 (see Section 2). It should be noted, however, that procedures and requirements vary from those of settlement agreements as discussed in this Guidance.

Much has already been done to develop a culture where staff are encouraged and supported to raise any concerns, including:

- the introduction of the NHSScotland *Staff Governance Standard* which requires Employers to ensure that it is safe and acceptable for staff to speak up about wrongdoing or malpractice within their organisation, particularly in relation to patient safety. Under the Standard, staff must also ensure that they speak up when they see practice that endangers patient safety and/or which causes upset and alarm in the workplace in line with the whistleblowing policy;
- the development of a national Whistleblowing policy *Implementing & Reviewing Whistleblowing Arrangements in NHSScotland* Partnership Information Network (PIN) policy. Through the whistleblowing policy, employees are encouraged to raise any valid concerns they may have and are guaranteed to have their concerns taken seriously and investigated appropriately;
- the launch of the *NHSScotland Confidential Alert Line*, a dedicated service for NHS staff in Scotland, which provides a confidential service to staff should they have any doubt about whether or how to raise a concern, or worry about doing so. This provides an additional safe space for staff to discuss their concerns with legally trained staff and, if appropriate, have these concerns passed to the appropriate Regulatory body on their behalf;
- the introduction of non-executive Whistleblowing Champions in each Board. This role will act predominantly as an oversight and assurance mechanism, as well as a conduit to ensure that internal mechanisms within Boards are working effectively to support whistleblowing arrangements and staff in raising concerns.

Purpose of this document

This Guidance has been developed in Partnership to further support and inform employees and employers of their rights and responsibilities, should they decide, for whatever reason, to enter into a settlement agreement or a COT3 facilitated by ACAS.

The information in this document is not intended to provide legal advice. It has been produced to help guide both employees and employers and to help them consider their position when considering the inclusion of a confidentiality clause and/or derogatory statement clause in a settlement agreement or COT3, and detail employment and legal protections in relation to whistleblowing. This Guidance covers:

Section 1. What is a settlement agreement?

Section 2. What is a COT3?

Section 3. Why include a confidentiality clause or a derogatory statement clause in a settlement agreement?

Section 4. What is whistleblowing?

Section 5. Legal protections for employees who whistleblow (Public Interest Disclosure Act (PIDA)) 1998.

Section 6. What do I need to consider when entering into a settlement agreement?

- as an employee?
- as an employer?

Annex A. Draft confidentiality clause and draft derogatory statement clause style of wording

Annex B. Letter template for employers to send to employees considering entering into a settlement agreement

Annex C. Confidentiality Clause Guidance Group – membership

Section 1. What is a settlement agreement?

A settlement agreement – which was previously known as a compromise agreement – is a legally binding agreement between an employer and employee. It is used to set out the terms and conditions reached when a dispute is to be resolved. Use of a settlement agreement is not restricted to situations where the employee's contract comes to an end, but can also record the terms of an agreement when the employment relationship continues.

When the relationship is ending it may typically include a provision that the employer will make payment of salary, including any accrued but untaken holidays up to the date of termination; and may include payment of compensation for loss of employment.

The main purpose 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.

Settlement agreements can be proposed by both employers and employees although they will normally be proposed by the employer.

Used appropriately, a settlement agreement provides, for the employee and employer, certainty of outcome; and can also represent value for money, as the cost of a settlement can be less than running an Employment Tribunal case.

A settlement agreement may also be used to deal with a range of other claims which an employee may have, such as:

- Breach of contract
- Unfair dismissal
- Discrimination

The issues that settlement agreements seek to resolve can be complex and may involve other members of staff or employees in other organisations. While settlement agreements are intended to give employees and employers a high level of protection in relation to future claims being made, no clause within a settlement agreement can override the legal rights of employees who agree to settle a claim, including a whistleblowing claim, to whistleblow in the future, as set out in the *Public Interest Disclosure Act (PIDA) 1998* (see Section 4).

Likewise, the legal rights outlined above extend to employees who agree any form of negotiated settlement containing a confidentiality clause and/or derogatory statement clause.

It is essential that both the employee and the employer seek legal advice before agreeing a settlement agreement, as there are a number of statutory requirements that must be met for a settlement agreement to be legally binding. These are outlined below:

- The agreement must be in writing.
- The employee must have received independent legal advice from an independent advisor on the effect of the agreement. The independent advisor will often be a qualified lawyer but may, for example, be a trade union official, or an employee of an advice centre who is certified as competent to give this type of advice and is authorised to do so.
- The advice obtained by the employee prior to signing any agreement must be genuinely independent – this is 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 being made against them by the employee in respect of the advice they give.
- 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 agreement must state that the conditions regulating settlement agreements, as outlined above, have been satisfied.

It is important to note that a settlement agreement is a voluntary agreement. Individuals do not have to enter into any discussion about them, or accept the terms proposed in them.

The ACAS Code of Practice provides further information on settlement agreements and this can be accessed at: http://www.acas.org.uk/index.aspx?articleid=4395

Section 2. What is a COT3?

Settlement of a claim can also be reached through involvement with ACAS, the outcome of which, if agreed, is formalised in a document known as a COT3.

Whilst this Guidance focuses on the use of confidentiality clauses/ derogatory statement clauses within settlement agreements the presumption against their use also applies to a COT3.

ACAS is a Government funded organisation that helps mediate settlement of employment disputes. If an employee decides to make a claim to an Employment Tribunal, an ACAS Conciliation Officer will contact them to offer to help settle a claim and stop the case before the tribunal hearing.

If the employee agrees to this, ACAS will then contact the employer to find out if it is also prepared to negotiate through ACAS to try and settle any claim.

Neither the employee nor the employer has to use ACAS, but many find the service helpful, particularly if the employee doesn't have a representative, for whatever reason. This service is free.

The ACAS conciliator cannot provide either the employer or employee with legal advice and, unlike in the negotiation of settlement agreements, there is no requirement for an independent legal advisor, acting on behalf of the employee, to be involved. However, employees should consider seeking legal advice from a trade union representative, solicitor or other legal advisor.

If a claim is settled through ACAS it is binding on both the employee and employer. When the employee advises ACAS that they agree to the settlement, they can no longer proceed with the related Employment Tribunal and their case will automatically be withdrawn.

The settlement agreed by the employee and employer is usually recorded on a form called a COT3. As with settlement agreements, unless there are clear and transparent reasons for inclusion, and this is explicitly agreed by both the employee and employer, the COT3 should not contain a confidentiality clause/derogatory statement clause.

More information on the ACAS conciliation process and COT3s can be found at: http://www.acas.org.uk/index.aspx?articleid=1697.

Section 3. Why include a confidentiality clause or a derogatory statement clause in a settlement agreement?

Confidentiality clause

A confidentiality clause is commonly used in settlement agreements by employers across all sectors. In NHSScotland, there is a presumption against the use of confidentiality clauses. Such clauses are therefore optional rather than included as standard. The clear policy is that a confidentiality clause will only be included in any settlement agreement where it is explicitly discussed and agreed between the employee and the employer, and where there are sound reasons for this.

In the main a confidentiality clause is used to:

- Cover the terms of the agreement, prohibiting any party from reporting the detail about the terms of agreement – for example, disclosing to former colleagues any compensatory payment.
- To protect confidential information gained by the employee as part of their employment, such as business-sensitive data or patient records. It should be noted that the duty to maintain confidentiality is covered by an employee's contract of employment, and will persist after the expiry of that contract.

Derogatory statement clause

This type of clause is also commonly found in settlement agreements and is used to protect both employee and employer from disparaging and derogatory remarks being made by either party.

This can be important in drawing a line under the circumstances leading to a settlement agreement being necessary and ensure that both parties can move forward without fear of there being any disparaging/derogatory remarks made about them.

Use of confidentiality and/or derogatory statements clauses

The potential reasons for inclusion of confidentiality clauses and/or derogatory statement clauses described above are examples, as each case has to be considered on its own merits. However, in all cases, the use of a confidentiality clause and/or derogatory statement clause must be for sound and transparent reasons. The precise terms would be agreed by both parties on a case-by-case basis.

The reasons for the inclusion of a confidentiality clause and/or derogatory statement clause should also be recorded by the employer in a clear and transparent statement and copied to the employee.

If it is mutually and explicitly agreed that a confidentiality clause and/or derogatory statement clause is to be included in a settlement agreement, it must also be made clear to the employee, **and** within the written agreement itself, that this does not prevent the employee from raising any genuine concern about a patient safety issue, or any other issue which is in the public interest under the terms of PIDA (see Section 5).

A draft confidentiality clause and derogatory statement clause have been developed for this purpose, and these are available at Annex A. These drafts can of course be revised by both parties to the agreement until an agreed form of words has been arrived at. **However, NHSScotland employers must ensure that, whatever the agreed wording of the clause(s), paragraphs 1.5 and 1.6 are included unchanged.** Use of this form of wording will ensure that all the parties signing the agreement are left in no doubt that they are encouraged to freely speak up about legitimate concerns.

It should be noted that when a settlement is first drafted, this is the starting point for negotiation between employee and employer. None of the content in an agreement is binding until it is fully agreed and signed by both parties.

Any clause in a settlement agreement which is aimed at preventing the individual from raising a genuine whistleblowing concern would be invalid under PIDA.

Where a confidentiality clause and/or derogatory statement clause is used in a settlement agreement, the Scottish Government expects to see evidence from the Health Board that the member of staff has agreed to its inclusion. This provision has been built into the strengthened process for settlement agreements, with NHS Boards being required to provide a specific assurance that where a confidentiality clause and/or derogatory statement clause has been used, the wording has been discussed and agreed with the employee, either directly or through their representative and/or ACAS.

It is important to note that the inclusion of a confidentiality clause and/or derogatory statement clause is voluntary. Individuals can at any time, prior to finalisation of the settlement agreement, ask for a confidentiality clause and/or derogatory statement clause to be removed.

When the employer and employee sign a settlement agreement, ALL its terms become binding on both parties, and so it is imperative that when signing the employee knows, understands and agrees to the terms contained within the agreement – including any agreed confidentiality/derogatory statement clause.

Section 4. What is whistleblowing?

Whistleblowing is when a worker – the 'whistleblower' – reports suspected wrongdoing at work. Officially this is called 'making a disclosure in the public interest'. Sometimes it is referred to as 'making a protected disclosure', or, 'making a qualifying disclosure' – depending upon the circumstances. A worker can report things that they genuinely feel aren't right, are illegal, or if anyone at work is neglecting their duties. A full description of the procedure in NHSScotland is set out within the 'Implementing and Reviewing Whistleblowing Arrangements in NHSScotland' PIN.

PIDA outlines various types of disclosure which may qualify for protection. These disclosures are ones made by an employee who has a reasonable belief that one of the following is being committed, has been committed, or, is likely to be committed:

- A criminal offence;
- A miscarriage of justice;
- An act creating risk to health and/or safety;
- An act causing damage to the environment;
- A breach of any other legal obligation; or
- Concealment of any of the above.

Section 5. Legal protections for employees who whistleblow

The *Public Interest Disclosure Act (PIDA) 1998* is sometimes known in the UK as the whistleblowing law. All relevant provisions of PIDA are incorporated within the *Employment Rights Act (ERA) 1996*. This Act ensures that employees who whistleblow are legally protected. The Act gives statutory protections 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.

Individuals who have suffered a detriment, by any act, or any deliberate failure to act, for whistleblowing can take their employer to an Employment Tribunal.

Where an employee has lost their job as a result of whistleblowing, they could be fully compensated for their losses, with the limit of any compensation being uncapped.

Awards for detriment suffered, which is short of dismissal (e.g. passed over for promotion, having disciplinary action taken against them) will also be uncapped and will be based on what is deemed to be fair and equitable in the circumstances.

Ultimately, it would be for an Employment Tribunal to decide whether an employee had suffered any form of detriment in breach of PIDA, and if so, whether any award of compensation is due.

Section 6. What do I need to do when entering into a settlement agreement?

As an employee?

- Seek advice from an appropriate independent advisor as early as possible about the proposed terms and conditions of your settlement;
- make sure, with the assistance of your independent advisor, that you fully understand the effect of all of the terms before agreeing and entering into a settlement agreement;
- make sure, in discussion with your independent advisor, that the statutory requirements for settlement agreements to be legally binding are met (see Section 1);
- be clear whether or not you wish to have a confidentiality clause and/or derogatory statement clause inserted into your settlement agreement, and, if so, be clear of your reasons for this;
- if you decide that a confidentiality clause and/or derogatory statement clause is to be included in your settlement agreement, ask your independent advisor to ask your employer to record the reasons for the inclusion of the clause(s) and copy this to you;
- make sure that you know your rights under PIDA (see Section 5); and,
- be aware that regardless of whether or not a confidentiality clause is included in your settlement agreement, you have a responsibility to comply with the Data Protection Act 1998, any professional obligations, and confidentiality within your terms and conditions of employment.

COT3

- Whilst the principles outlined above also apply to a COT3, it should be noted that independent advice **is not** required, but employees should consider obtaining legal advice from a trade union representative, solicitor or other legal advisor (see Section 2).

As an employer?

- Consult the Scottish Government prior to offering or entering into any settlement agreement and set out your intended approach to confidentiality (in line with the Strengthened process for Settlement Agreements highlighted in the introduction to this Guidance);
- make sure that the employee knows that they must seek advice from an appropriate independent advisor as early as possible about the effect of a settlement agreement;

- **not include** a confidentiality clause and/or derogatory statement clause within any settlement agreement unless it is explicitly agreed with the employee that such a clause should be included, and, if this is agreed, be clear of the reasons for this;
- if the employee decides that a confidentiality clause and/or derogatory statement clause is to be included in their settlement agreement ensure that the reason for this is recorded in a clear and transparent manner and copied to the employee;
- where it is agreed that a confidentiality clause and/or derogatory statement clause is appropriate, use as a start point the draft style of wording in the confidentiality clause and derogatory statement clause contained within this Guidance (Annex A), and ensure insertion of sub-clauses 1.5 and 1.6, unchanged, which makes clear the employees' rights under PIDA;
- make sure that the employee has access to information on protections afforded to whistleblowers and that they know their rights under PIDA;
- ensure that the employee has been given a reasonable amount of time to consider the proposed conditions of the settlement agreement (including any confidentiality clause and/or derogatory statement clause) – the ACAS Code of Practice on settlement agreements specifies a minimum of 10 calendar days unless both employer and employee agrees otherwise;
- make clear to staff that regardless of whether or not a confidentiality clause is included in their settlement agreement, they have a responsibility to comply with the Data Protection Act 1998, any professional obligations, and with confidentiality provisions within their terms and conditions of employment;
- make sure that before agreeing a settlement agreement with an employee, legal advice has been sought on behalf of your Health Board and that the statutory requirements for settlement agreements to be legally binding are met (see Section 1); and,
- if a confidentiality clause and/or derogatory statement clause has been included in the finalised settlement agreement, you must confirm to the Scottish Government (in line with the guidance on the Strengthened process for Settlement Agreements), that wording has been discussed and agreed with the employee.

COT3

- Whilst the principles outlined above also apply to a COT3, it should be noted that independent advice **is not** required (see Section 2).

A letter template for employers to send to employees considering entering into a settlement agreement is provided at Annex B.

Annex A

OPTIONAL CONFIDENTIALITY DRAFT CLAUSE

1.1 The Employee agrees that he/she will continue to be bound by the terms and conditions of employment which relate to confidentiality.

1.2 The terms and conditions of this Agreement are confidential to all parties and all parties agree that all matters relating to the termination of the Employee's employment and all circumstances leading to the termination of the Employee's employment will remain confidential between the parties and their appointed representatives, and will not be revealed to or discussed with any other parties, with the exception of: (i) the Employee's immediate family provided that the Employee has obtained their agreement to keep the information confidential; (ii) HM Revenue & Customs and any other statutory bodies; (iii) any other person to whom the employer is bound to report, or (iv) as required by law, including any court or tribunal, or as required in relation to appearance as a witness in any court or tribunal. In particular, no information will be given to the media either directly or indirectly.

NO DEROGATORY STATEMENT DRAFT CLAUSE

1.3 The Employee will not at any time in the future make any detrimental or derogatory statements about matters concerning the Employer, its employees or directors, his/her employment with the Employer, or the termination of that Employment.

1.4 The Employer will take reasonable steps to ensure that its employees do not make any detrimental or derogatory statements regarding the Employee. The Employer's obligations in this regard will be fully discharged by the sending of an email, the text of which will be as set out at Schedule 3, to the following persons within seven days of the signing of this Agreement by the Employer: INSERT NAMES. For the avoidance of doubt, the sending of that email will not be a breach of the foregoing clause regarding confidentiality.

RIGHTS IN RELATION TO PROTECTED DISCLOSURES

1.5 For the avoidance of doubt, nothing in this clause, nor in this Agreement generally, shall prejudice any rights that the Employee has or may have under the Public Interest Disclosure Act 1998 (sometimes referred to as whistleblowing rights) and/or any obligation that the Employee may have or raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to his professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.

1.6 With regard to the confidentiality obligations generally on either party in this clause, nothing in those obligations shall prevent this Agreement from being subject to appropriate scrutiny by a statutory body tasked with the scrutiny of public bodies such as Audit Scotland or the Public Audit Committee.

Annex B

Dear .....

We are advised that you are considering entering into a Settlement Agreement as an employee of .....

We would like to take this opportunity to draw to your attention the Guidance on 'The use of Confidentiality Clauses and Derogatory Statement Clauses within Settlement Agreements' which provides guidance on the rights and responsibilities of NHSScotland employees and employers on the use of such clauses. This Guidance can be found at [inset electronic link when published].

As an employee, we would ask that you fully consider this Guidance, and that you:

- seek advice from an appropriate independent advisor as early as possible about the proposed terms and conditions of your settlement;
- make sure, with the assistance of your independent advisor, that you fully understand the effect of all of the terms before agreeing and entering into a settlement agreement;
- make sure, in discussion with your independent advisor, that the statutory requirements for settlement agreements to be legally binding are met (see Section 1 of the Guidance);
- be clear whether or not you wish to have a confidentiality clause and/or derogatory statement clause inserted into your settlement agreement, and, if so, be clear of your reasons for this;
- if you decide that a confidentiality clause and/or derogatory statement clause is to be included in your settlement agreement, ask your independent advisor to ask your employer to record the reasons for the inclusion of the clause(s) and copy this to you;
- make sure that you know your rights under PIDA (see Section 5 of the Guidance); and
- be aware that regardless of whether or not a confidentiality clause is included in your settlement agreement, you have a responsibility to comply with the Data Protection Act 1998, any professional obligations, and confidentiality within your terms and conditions of employment.

COT3

- Whilst the principles outlined in the Guidance also apply to a COT3, it should be noted that independent advice **is not** required, but employees should consider obtaining legal advice from a trade union representative, solicitor or other legal advisor (see Section 2 of the Guidance).

I hope that you find this helpful, and please contact ..... if you have any queries regarding this letter.

Yours sincerely,

Annex C

Confidentiality Clause Guidance Group

Chair:	Shirley Rogers	Scottish Government
Members:	Norman Provan	RCN
	Tom Waterson	UNISON
	Norma Shippin	Central Legal Office
	Hazel Craik	Central Legal Office
	Lindsay Montgomery	Scottish Legal Aid Board
	Billy Harkness	Registers of Scotland
	Laura Ace	NHS Lanarkshire
	Bridget Howat	NHS Greater Glasgow & Clyde
	Malcolm Summers	Scottish Government
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