

NHS Employers guidance on the use of settlement agreements and confidentiality clauses

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NHS Employers have recently published [Guidance on the use of Settlement Agreements and confidentiality clauses](#). The Guidance outlines the legal requirements for settlement agreements and the considerations for using settlement agreements and confidentiality clause for employees with specific mention of board member settlement agreements. Below we consider some of the key features:

Freedom to speak up and settlement agreements

The guidance reinforces the requirement set out in the 2019 NHS Standard Contract in respect of employers duties and workers' rights to speak up and make protected disclosures under the Public Interest Disclosure Act 1998. The guidance includes a requirement for all NHS providers to include in an express carve out clause which makes it clear in any contract of agreement that a worker cannot waive their rights to speak up about or disclosure and issue which would be a protected disclosures under current law.

Confidentiality Clauses used within settlement agreements

The Guidance urges NHS bodies and their legal advisors to consider proactively in every case whether a confidentiality clause is required and if so, it should be appropriately tailored to the specific facts of the case and should not go further than necessary.

- To consider whether the standard confidentiality clauses in contracts of employment which prevent disclosure of confidential information and therefore it may not be necessary to include a specific confidentiality clause in a settlement agreement.
- A non-disclosure agreement or confidentiality clause must never be used to try to prevent someone from making permitted disclosures for example whistleblowing and such clauses will be unenforceable;
- Employers should seek specific legal advice on any confidentiality clauses in the settlement agreement as it is important the individual understands and agrees with these before entering into a settlement agreement.

MARS Agreements

MARS agreements are also discussed in the guidance and as these should be open and transparent the guidance states that a clause in a MARS settlement agreement that requires the worker to keep the existence and terms of the agreement confidential is unnecessary.

Board members and the fit and proper person requirements

Careful consideration is urged to be given to the terms of a settlement agreement where a settlement agreement is entered into with a board member in circumstances which are relevant to the question whether the individual would meet the FPPT.

The guidance emphasises the need for any discontinued investigations and settlement agreements to be included within a Board Member Reference template for leavers and suggests the use of a clause in any settlement agreement with board members.

[View the guidance](#) →

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