The Pharmacists' Defence Association and the Pharmacists Defence Association Union's Response to the Department for Business, Energy and Industrial Strategy's Consultation on Confidentiality Clauses

29 April 2019

About the Pharmacists' Defence Association

The Pharmacists' Defence Association (PDA) is a not-for-profit organisation which aims to act upon and support the needs of individual pharmacists and, when necessary, defend their reputation. It currently has more than 28,000 members. The PDA Union was inaugurated in May 2008 and achieved independent certification in 2011.

The PDA is the largest pharmacist membership organisation and the PDA Union is the only independent Trade Union exclusively for Pharmacists, in the UK.

The primary aims of the PDA are to:

- Support pharmacists in their legal, practice and employment needs
- Represent the individual or collective concerns of pharmacists in the most appropriate manner
- Proactively seek to influence the professional, practice and employment agenda to support members
- Lead and support initiatives designed to improve the knowledge and skills of pharmacists in managing risk and safe practices, so improving patient care
- Work with like-minded organisations to further improve the membership benefits to individual pharmacists
- Arrange insurance cover for individual pharmacists to safeguard and defend their reputation.

Summary

The Department for Business, Energy and Industrial Strategy (BEIS) is consulting on confidentiality clauses.

From the consultation document:

The consultation seeks views on what limitations might be put on confidentiality clauses, to ensure they cannot be misused and to clarify what they can and cannot cover. In particular, the Government proposes to legislate that no confidentiality clause can prevent a person making any disclosure to the police. This will make it clear that, regardless of what a confidentiality clause says, a victim can discuss a matter with the police or report a crime without fear of reprisal under a confidentiality clause.

Even within their legal limitations, confidentiality clauses can be approached unethically and drafted in such a way as to hide from workers or victims their rights and protections and intimidate them from making any kind of disclosure to anyone. To combat this, the Government proposes to make it clearer to workers that they still maintain some disclosure rights even when they sign a confidentiality clause. The government proposes to require that confidentiality clauses clearly set out their limitations, either in settlement agreements or as part of a written statement of particulars, so workers know the rights they have when they have signed one.

The consultation also considers how to enforce the proposed requirement on wording of confidentiality clauses and proposes separate mechanisms for settlement agreements and the written statement of particulars. The Government proposes that any confidentiality clause in a settlement agreement that does not meet new wording requirements is made void in its entirety. This should encourage employers to ensure they draft confidentiality clauses correctly otherwise they will be taking the risk that the reason behind the dispute is made public. Requirements over the wording of the written statement of particulars already have an enforcement mechanism through the employment tribunals which will

automatically extend to the new requirements to explain the limits of confidentiality clauses there.

The consultation runs from 4 March to 29 April 2019.

Questions

1. **Do you have any examples of confidentiality clauses, in employment contracts or settlement agreements, that have sought to cloud a worker's right to make a protected disclosure, or overstretch the extent to which information is confidential? If so, please describe these.**

   A statement in a settlement agreement saying that "*for the purposes of this agreement the Public Interest Disclosure Regulations do not apply*" when clearly they did.

   A statement saying that discussion of the contents of the agreement to any person other than spouse or partner renders that agreement null and void.

   A statement saying that should the worker believe that the employer is in breach of the agreement and subsequently seek redress through the courts then all monies paid to the worker in the first instance have to be repaid prior to the application to the courts.

   Statements saying that should any detail be disclosed to any third party that the employer will seek repayment of all monies paid, seek all court costs in obtaining these monies and seek pecuniary damages against the employee.

   In one agreement the employee could make no defamatory remarks about the employer, but the employer could release to any prospective employer the former employee may seek work with complete details of the reason for the settlement agreement.

   Though lawyers distinguish between confidentiality clauses and those prohibiting derogatory statements, "non-derog" / "non-disparagement" clauses can also have the effect of amounting to a confidentiality clause. Statements to the effect that a person "will not say anything negative" about the organisation in the future can lead

the person to believe they could not whistleblow about the matter in the future; almost by definition, whistleblowing will involve highlighting some negative aspect or perceived negative aspect of the employer's behaviour or what they experienced during their work there. We have seen examples of such clauses. Legal proceedings such as regulatory hearings may be ongoing after a person has left employment and a settlement agreement has been reached, meaning that the person may need to talk about the employer in such proceedings afterwards. They may potentially also need to communicate about the employer in a future job role if they continue to work in the same industry; for example, they may come to work in regulation or for a professional body or trade union.

2. **In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?**

   Yes. We echo the views expressed by the Women and Equalities Select Committee. Current legislation on employment protections for whistleblowers is complicated and makes it difficult for workers to be sure if a particular disclosure is protected or not. This lack of certainty clearly puts people off reporting harassment, even if they were aware that a confidentiality clause would not affect their whistleblowing rights.

   As a union we are able to advise our members accordingly, but those workers who do not have the benefit of a trade union are confronted with a legislative process that acts as a deterrent.

3. **What would be the positive and negative consequences of this, if any?**

   The positive benefit to an individual of implementing this proposal would be the knowledge that they were dealing with an independent third party that has the power to act within the full confines and protections as afforded by the law.

   Unfortunately, the negative consequences are all too apparent. We have a police service that has been the subject of crippling cuts in numbers and resources and in

consequence would be hard pressed to take on additional specialist tasks. We are concerned that whilst the police may have the necessary powers, they may not have the manpower and in consequence disclosure cases may become yet another statistic.

4. Should disclosures to any other people or organisations be excluded?

Further to our response in respect of the negative consequences in the previous question, we would suggest that whilst the police would be the lead authority on disclosures made to them, that they must have the ability to either supervise or delegate the practical aspects to other authorities, for instance the Health & Safety Executive.

We understand that, as outlined in the consultation document, in cases of sexual harassment or discrimination, for example, workers must be able to report it to the police without fear of reprisal. Employers must not be able to use confidentiality clauses to prevent that, or to create the impression that a confidentiality clause would prevent it. However, it is far too narrow a perspective to say that only disclosures to the police should be excluded from confidentiality clauses.

Disclosures to other prescribed persons under current whistleblowing legislation have to meet specific tests, so workers may be unsure whether the information they are providing amounts to a protected disclosure. By way of example, issues relating to public funds which do not necessarily contravene a legal obligation but are nevertheless inappropriate may not amount to qualifying disclosures. A whistleblower may be unsure as to whether or not a legal obligation has been complied with (which would ultimately be for a court to decide at a later date). Confidentiality agreements should not be capable of preventing disclosures of such matters to a Prescribed Person.

Further, in addition to making the disclosure, people may also be required to share documents in support of it which provide evidence relating to the disclosure which is not technically part of the disclosure itself. This may include documents which contain information which amounts to the disclosure, but also other information which is superfluous to it.

It is our view that all disclosures to any Prescribed Person under whistleblowing legislation should be excluded from confidentiality clauses where the person disclosing the information believes it is relevant to a protected disclosure or related to it, or where the person believes there is a public interest in disclosing it.

Whilst the government is wary of making the number of such authorities too broad, it could be restricted to key existing regulatory authorities.

It should also be explicitly permissible that individuals can disclose the details of a non-disclosure agreement to a trade union or lawyer in order to seek the necessary advice about the nature of the disclosure limitations. Otherwise, the individual could be stuck in a "catch 22" situation, being unable to get the advice they need to check if further disclosure is prohibited or not.

5. **Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?**

Some settlement agreements contain a clause which prohibits the disclosure of the existence of the agreement itself (a "super gag"). That agreement may contain confidentiality clauses, meaning the individual may believe they are unable to reveal even the existence of a confidentiality clause. Employers must not be able to prohibit the disclosure of the existence of a confidentiality clause.

Employers must not be able to use non-disparagement clauses as a means of effecting a confidentiality clause in relation to public interest matters.

Public authorities are funded by the taxpayer and should not be able to implement confidentiality agreements on the basis of "brand protection".

The same rights set out here must also apply to self-employed individuals and not only 'workers'.

6. **Do you agree that all confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit? – and,**

7. **As part of this requirement, should the Government set a specific form of words?**
We take the view that there is an intrinsic link between these two items, with the emphasis on the government setting a specific form of words. Such a document would form the principle statement in settlement agreements and employment particulars. It is recognised that whilst a principle statement would provide an umbrella protection it may not cover all eventualities.

It is therefore suggested that an addendum could be included to cover such eventualities. To ensure that such addendums remain within the law they should be worded within the requirements of an Associated Code of Practice. Such a code would have legal standing and represent a plain language interpretation of those items that can or cannot be included and could in addition provide an indication of good practice.

8. **Do you agree that the independent advice a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions?**

Absolutely. The Pharmacists Defence Association Union has a number of trade union officials suitably trained and carrying specific indemnity insurance, who, as part of the advice given to our members, specifically give advice regarding confidentiality provisions.

9. **Do you think a confidentiality clause within a settlement agreement that does not meet any new wording requirements should be made void in its entirety? What would be the positive and negative consequences of this?**

   We agree that an agreement that does not meet the requirements should be void in its entirety.

   Regarding the positive advantages, we have anecdotal evidence that clauses have been used to silence or intimidate complainants. Similarly, we believe that clauses have been deliberately used to deter and create the impression that workers are unable to discuss any occurrence in the workplace with anyone, nor personally seek the help and guidance to assist in their health or welfare should it be adversely affected.

   It is difficult to find negative consequences of implementing this proposal as far as workers or employees are concerned. As far as employers are concerned, a poorly-worded document could lead to the disclosure of sensitive information.

10. **Do you agree with our proposed enforcement mechanism for confidentiality clauses within employment contracts? What would be the positive and negative consequences of this?**

    We certainly agree that recourse should be through the courts, but question whether it should be by way of an Employment Tribunal making an award of compensation or through the civil courts. Employment tribunals have jurisdiction over the written statement of particulars that must be given to all employees. The

civil courts have jurisdiction over issues of confidentiality and, in most cases, disputes arising out of settlement agreements.

In positive terms, the award of compensation through the legal system should act as a deterrent to employers. However, the amount of compensation must be a deterrent and not an economic expedient for an employer – see below.

The negative consequences are that currently Tribunals are limited in compensation by the Vento case, as updated by the Da'Bell ruling (*), a limitation not encumbering the civil courts. If the government intends to use the Tribunal system, then the compensatory guidelines must be separate from Da'Bell and more in line with those that can be awarded through the civil courts.

(*) Da'Bell v National Society for Prevention of Cruelty to Children EAT/0227/09

- the lower band: £500 to £5,000 (for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence);
- the middle band: £5,000 to £15,000 (for serious cases that do not merit an award in the highest band); or
- the upper band: £15,000 to £25,000 (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment).