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for everyone

Guidance

Non-disclosure agreements

February 2020

Non-disclosure agreements

About Acas – What we do

Acas provides information, advice, training, conciliation and other services for employers and employees to help prevent or resolve workplace problems. Go to www.acas.org.uk for more details.

'Must' and 'should'

Throughout the guide, a legal requirement is indicated by the word 'must'.

The word 'should' indicates what Acas considers to be good employment practice.

February 2020

Information in this guide has been revised up to the date of publishing. For more information, go to the Acas website at www.acas.org.uk.

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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Non-disclosure agreements

About this guide

This guide helps employers, managers, HR professionals, workers, worker/trade union representatives and job applicants to understand:

- what non-disclosure agreements are
- when non-disclosure agreements might be used appropriately
- when non-disclosure agreements might be inappropriate because they are unlawful or raise serious moral or ethical issues, for example because they are misleading, cover up wrongdoing or have been entered into under pressure so that they are not genuinely voluntary
- that non-disclosure agreements should not be used as a default option
- how to change and improve workplace practices around non-disclosure agreements so that they are never entered into as a matter of routine.

What are non-disclosure agreements?

Non-disclosure agreements are agreements that restrict what a person or organisation can say, or who they can tell, about something.

These sorts of agreements must be reasonable and take account of relevant human and employment rights like the right to a fair trial and freedom of expression.

For employment purposes and the purposes of this guide, many non-disclosure agreements are referred to as 'confidentiality clauses'.

In this guide, two types of confidentiality clauses are mainly considered:

- The first type is where a confidentiality clause seeks to keep [particular details of an agreement confidential](#).
- The second type is where a confidentiality clause keeps [the fact that an agreement has been made confidential](#).

There are also [other types of confidentiality clauses](#), like those keeping some things a worker learns in the course of their work confidential.

Keeping the details of an agreement confidential

Keeping some or all of the details of an agreement confidential doesn't stop someone from saying that an agreement has been reached, it just means they can't tell anyone about the contents of what has been agreed.

A confidentiality clause may be used when an employer and worker want to settle an issue but typically want to keep:

- the sum of money agreed in the settlement confidential
- some or all of the other settlement terms confidential
- some or all of the circumstances leading to the settlement confidential.

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A confidentiality clause that seeks to keep the details of an agreement confidential may also seek to [keep the agreement itself](#) confidential.

Keeping the agreement itself confidential

A confidentiality clause might sometimes be used as part of an agreement to hide the fact that an agreement has actually been reached.

This might be when the circumstances leading to the agreement are something only the employer and worker know about and which they don't want others to know about.

Other types of confidentiality clause

Confidentiality clauses might also be considered:

- to keep the organisation's information or certain things a worker learns in the course of their work confidential. This is likely to be a consideration when an employer needs a high level of protection for customer or client identities, intellectual property or other sensitive business-critical information
- to keep certain things a worker has seen or experienced confidential.
- to prevent the worker and/or the employer making critical or insulting comments. These comments might be about the employer or worker themselves, specific people in the workplace, the service that an employer provides, or their customers and clients.
- to help protect an employer and/or a worker from the damage that could otherwise come if the circumstances of a dispute or dismissal became widely known.

These types of confidentiality clauses will sometimes be lawful and appropriate, but this is not always the case and they can raise serious moral or ethical issues.

When might confidentiality clauses be used?

Confidentiality clauses in settlement agreements

Settlement agreements are legally binding contracts which can be used to settle a workplace dispute or to end an employment contract on agreed terms. They waive an individual's and/or employer's right to make a claim to a court or employment tribunal on specific matters covered in the agreement. All legal requirements must be complied with, which includes the individual obtaining independent advice.

The main purpose of a settlement agreement is usually to resolve a dispute or workplace issue. Including a confidentiality clause may not be necessary, appropriate or good employment practice.

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Confidentiality clauses in settlement agreements will always be unenforceable where they attempt to hide something that they cannot legally keep confidential. Also, any such attempt may mean the clause would not be valid. For example, a confidentiality clause in a settlement agreement is unenforceable if an employer is trying to stop or restrict workers from asking or answering questions which may identify gender-related pay discrimination (making a 'relevant pay disclosure' under the Equality Act 2010).

There are also some circumstances, such as safeguarding, where an employer risks committing a criminal offence by including a particular confidentiality clause in a settlement agreement. For example, any agreement preventing a school or college from making a DBS referral is likely to result in a criminal offence being committed.

For more information on settlement agreements, go to www.acas.org.uk/settlementagreements

Confidentiality clauses in Acas settlements

Workers must usually notify Acas before they make an employment tribunal claim and Acas will try to help parties reach a settlement through conciliation. Where a resolution is reached, the Acas conciliator will record what has been agreed on an Acas settlement form (known as a COT3). Both parties will sign this as a formal record of the agreement.

An Acas COT3 settlement is a legally binding enforceable agreement. This means that the worker or employer will not be able to make a future court or tribunal claim on those matters covered in the agreement. If a related tribunal or court claim has already been lodged, it will not proceed.

An Acas settlement sets out the terms of the agreement reached by the parties. In many cases, it will not be necessary, appropriate or good employment practice to use a confidentiality clause in the agreement.

An Acas conciliator will only record the terms of settlement when they are satisfied that the parties understand the implications of any agreement. Acas conciliators do not decide whether a confidentiality clause is appropriate or not, but they will talk to both parties about the implications and limitations of such an agreement. They will also help with suggested wording and emphasise the fact that a confidentiality clause that tries to prevent whistleblowing or the reporting of future discrimination, harassment, sexual harassment or whistleblowing is likely to be unenforceable.

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For more information on Acas settlements go to www.acas.org.uk/dispute-resolution

Confidentiality clauses in employment contracts

Confidentiality clauses can be used in employment contracts to restrict workers from disclosing sensitive commercial information to third parties. These usually cover protecting information about clients, customers, intellectual property and trade secrets during employment or after employment ends. They should not be used if doing so raises serious legal, moral or ethical issues.

Employers should draw any such confidentiality clauses to the attention of their workers who may wish to seek trade union or legal advice on their implications.

Employers should not ask a worker to agree to a confidentiality clause without giving them time to consider it. For example, they should not present a worker with a confidentiality clause for the first time when the worker is arriving for their first work shift. Also, agreeing to a confidentiality clause after a worker has been doing their job for a while does not mean the clause will apply retrospectively.

When an employment contract is in effect, there are some things that are so obvious they don't need putting in writing. They are known as 'implied' terms and include requiring a worker to be trustworthy, to work for their employer in good faith and not disclose or misuse their employer's confidential information. These can be useful at a very general level, but where there is any specific need for confidentiality, it is usually better to put that need clearly in writing. This is known as an 'express' term.

Once employment has ended, an employer will not usually be able to enforce any of the confidentiality clauses made in an employment contract. If there are any terms that include a confidentiality clause and clearly state they will continue to apply after employment has ended, workers should seek legal advice if they intend to act in any way that a confidentiality clause aims to prevent.

Collective agreements and employment contracts

Where a workplace has one or more recognised trade unions, or elected worker representatives, there may be existing arrangements in play which require an employer to consult and/or negotiate contractual changes collectively as well as with the individual workers. This can include adding, changing or removing a confidentiality clause.

Confidentiality clauses in other circumstances

Other examples of the use of confidentiality clauses include:

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- agency worker assignments (where an agency worker is asked to sign a confidentiality clause for a particular assignment)
- volunteering arrangements (which could include unpaid internships, charity work and unpaid training where an individual is required to agree to a confidentiality clause)
- redundancy and severance schemes, both compulsory and voluntary (particularly where the value of a redundancy payment is enhanced and made subject to non-disclosure).

Any confidentiality clauses should be carefully considered by both employer and worker and drafted with the help of advice and used only where necessary.

Who can request confidentiality clauses?

Depending on the circumstances, confidentiality clauses could be requested by:

- an employer
- a non-legal employer representative (like an outsourced HR service)
- a worker
- a non-legal worker representative (like a trade union or worker rep)
- a solicitor acting on behalf of an employer or worker.

When should confidentiality clauses be avoided?

Confidentiality clauses:

- should not be used as a matter of routine
- should not be used to cover up inappropriate behaviour or wrongdoing, particularly when there is a risk of repetition of such behaviour
- should not be used to mislead someone
- should not try to stop someone from reporting discrimination, harassment, or sexual harassment
- must not try to stop someone from whistleblowing
- must not try to avoid a legal requirement to make a referral to a regulatory body, government agency or to the police
- should not be used before alternative options have been explored.

Limits to confidentiality clauses

All confidentiality clauses should take into account that employers or workers may, in certain circumstances, need or want to share details of the agreement with:

- the worker's supervisor, manager or relevant colleagues
- Human Resources, finance teams, personnel teams or senior management
- the worker's immediate family, partner or spouse
- trade union representatives and officials
- legal representatives

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- relevant tax authorities
- medical and healthcare professionals including occupational health, general practitioners (GPs), counsellors and therapists
- prescribed persons or bodies named under whistleblowing legislation
- police, tribunals, courts of law or other law enforcement bodies
- relevant regulatory bodies like the Solicitors Regulation Authority.

Inappropriate and unlawful reasons for using confidentiality clauses

There are many circumstances where it may be inappropriate and/or unlawful to use confidentiality clauses, including when:

- agreements are used to cover up or deter workers from reporting matters including any form of discrimination, harassment, sexual harassment or whistleblowing
- an issue affects a number of other workers and keeping some or all of the details of a settlement confidential could have wider impacts due to a lack of transparency or lead to further complications
- a confidentiality clause is used as a matter of routine, leading to a culture which lacks openness and where workers do not feel confident that their complaints will be taken seriously or lead to workplace improvements
- the sum of money that was paid to settle an issue was unremarkable or obvious, like a dispute over holiday pay that everyone now agrees needs paying
- there is little or no point to confidentiality because the issue has already become public
- trying to hide an issue in this way makes it less likely an employer will address any underlying issues that could cause further problems
- identical agreements are used for all workers in an organisation even though they have different roles and responsibilities and some roles don't need a confidentiality clause
- the clause tries to prevent the making of derogatory comments where there is nothing to suggest that the employer and/or worker would actually make derogatory comments about each other
- a confidentiality clause is seen as a 'bargaining chip' for a worker seeking an agreed basic reference

Alternatives to using confidentiality clauses

Whenever a confidentiality clause appears to be a possible solution to a situation, alternatives should always be considered first.

There are lots of alternative approaches available, but they will vary depending on things like the size of the employer, the seriousness of the situation and what solutions might be considered acceptable by those involved.

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Employers should always consider the value of encouraging a working environment where workers and managers feel safe and empowered to address misunderstandings as early as possible and informally wherever appropriate. This is often achieved through simple but effective steps like keeping channels of communication open and training managers to identify early signs of conflict or disagreement.

Employers should consider on a case by case basis:

- if a confidentiality clause is needed
- if a confidentiality clause could cause serious moral or ethical issues
- what the consequences of using such a clause might be.

An alternative to a confidentiality clause will often be more effective.

Check if a confidentiality clause is required

There are many situations where an employer may seek to use a confidentiality clause when there isn't any real need for one.

Employers should always challenge themselves to check if a confidentiality clause is actually needed before requesting one.

For example... confidentiality clause isn't required

Salma is a trade union representative of a recognised trade union in her workplace. Following the General Data Protection Regulations (GDPR) coming into force in 2018, she believes that the confidentiality clauses that members in her organisation have agreed to are no longer needed for the purposes they were introduced for.

Salma and her colleagues meet with management to discuss the matter. Everyone acknowledges that changes to workplace practices have come about because of GDPR. They agree that this change, coupled with the additional protections and responsibilities the GDPR legislation includes, means that all confidentiality clauses should be reviewed and are likely to no longer be required.

Managing, learning and adapting

Problems and disputes at work are usually best addressed directly and transparently. This ensures that lessons can be learned for the future. Using a confidentiality clause to avoid tackling disputes can prevent organisations from addressing serious issues.

This approach may be challenging in the short term but is likely to encourage changes that would reduce or remove the risk of similar, future situations happening.

For example... managing, learning and adapting

Andre is the HR director of a large university. Problems in relations between staff are frequent, often because of things Andre finds 'trivial' like bickering over new research, or how department funding is allocated.

In order to address this issue, Andre thinks that all staff should agree to a set of wide-ranging and detailed confidentiality clauses to prevent the staff from discussing the heated issues. However, he is aware that there is a lot of media attention around this at the moment, so he attends a conference about non-disclosure agreements. There he learns that such an approach could cause all kinds of serious issues, from poorer morale and productivity through to workers not feeling able to report discrimination or sexual harassment concerns to managers.

Andre and key HR staff attend further training in the area and then explore the potential use of confidentiality clauses in partnership with the board, workers and recognised trade unions before deciding against this approach. Instead, he commissions a new staff engagement survey and arranges 'dispute resolution' training for managers, so that they are better equipped to quickly and effectively address staff relationship issues.

Follow informal and formal procedures properly and fairly

Mistakes, accidents and incidents can happen in any organisation. If a worker's complaint, actions or behaviour have brought an issue to an employer's attention, seeking a confidentiality clause as part of the solution will often not be the best way forward.

In the vast majority of circumstances, tackling the problem should involve a quiet and private chat or conversation with the worker. Where a concern remains, there should then be an investigation. It may also involve following disciplinary, grievance, capability or absence management procedures.

It is better for workplace relations for an employer to follow their existing procedures in a fair, consistent and transparent way instead of trying to resolve the issue with an agreement covered by a confidentiality clause. If an employer has considered this and is still concerned, they are advised to seek legal advice.

For example... follow informal and formal procedures properly and fairly

Tala handles donations for a small charity. Her manager, Jenni, has just left. Tala is asked to take over some of Jenni's paperwork. After closer inspection, it looks like Jenni may have dishonestly misdirected donations. Tala believes in the charity, and just wants the concern to be dealt with so she tells her new manager.

Tala is called to a meeting with one of the board members. She is told that her allegations are too serious for her to continue working for the charity. She is offered a settlement which includes compensation and a confidentiality clause. Tala is upset and refuses to sign. A whistleblowing organisation helps her to take the matter to the media, forcing the charity to address the issue, but in a very embarrassing and damaging way.

If Tala's manager or HR director had followed proper internal processes - like conducting an investigation or following a whistleblowing procedure - instead of seeking to hide what had happened by using a confidentiality clause, it's likely the matter would have been resolved sooner and without such damage.

Reaching an agreement without confidentiality clauses

Sometimes it may be tempting to include a confidentiality clause because something is already being agreed to and including a confidentiality clause feels like getting something extra for little or no additional cost.

Many contracts, settlements and other legal agreements do not need confidentiality clauses. And, in many cases, adding an unnecessary confidentiality clause can have unintended negative consequences, particularly on workplace values and behaviours.

It is good practice to avoid considering or using a confidentiality clause unless a strong case to include one exists.

For example... reaching an agreement without a confidentiality clause

Mohamed owns a medium-sized international food supermarket. He employs a diverse workforce and has recently disciplined a number of workers for race discrimination.

Mohamed also entered into a settlement agreement with a worker who left for unrelated reasons where, following a conversation with his accountant, he included a confidentiality clause not to disclose the details of the agreement. Mohamed didn't really see much need for the confidentiality clause because the agreement was mainly concerned with holiday pay but he also felt there was no harm in including it.

Many of the remaining staff are now angry because they think the staff member who left got compensation for being discriminated against and that Mohamed is trying to hide something.

If Mohamed had realised there was no need to make the settlement agreement confidential, he could have told his workers it was just about holiday pay. Instead, he now finds his efforts to tackle race discrimination have been undermined.

Tackling misuse of confidentiality clauses

Whilst there are some legitimate uses for confidentiality clauses, there are many situations where they are not appropriate or lawful. It is important for workers and employers to understand there are limits, and that misusing confidentiality clauses can be very damaging.

- Workers should not be told that confidentiality clauses take away their employment rights to make an employment tribunal claim, except where there is a lawful settlement agreement.
- It should always be made clear that confidentiality clauses do not stop workers from seeking medical or professional advice, or from talking to their employer.
- Employers should make their workers aware of what is and is not allowed by any confidentiality clauses they are asked to agree to.

The misuse of confidentiality clauses can be tackled by focussing on:

- [making a complaint to an employer about a confidentiality clause](#)
- [whistleblowing](#)
- [sexual harassment](#)
- [discrimination](#)
- [pressure, threats and intimidation](#)
- [working together to tackle the misuse of confidentiality clauses](#)
- [manager and worker awareness of confidentiality clauses](#)
- [monitoring and reporting the use of confidentiality clauses](#)

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- [working with trade unions](#)

Making a complaint to an employer about a confidentiality clause

A worker can make a complaint to their employer if they believe that someone in the organisation has abused or attempted to misuse a confidentiality clause.

A worker should check their organisation's procedures for making a complaint. This should include an opportunity to resolve a concern informally, often through a quiet chat with an appropriate manager. It must always include details of how to make a formal complaint in writing.

How should a complaint be handled?

All employers should follow the minimum standards for handling complaints set out in the [Acas Code of Practice on disciplinary and grievance procedures](#).

If a complaint is not resolved, a worker may be able to make a claim to an employment tribunal.

More information on making a complaint can be found at www.acas.org.uk/making-a-claim-to-an-employment-tribunal

Whistleblowing

A confidentiality clause cannot prevent a worker from making a 'protected disclosure' in the public interest. This is also called whistleblowing.

Examples of this include that a confidentiality clause:

- cannot prevent a care worker reporting danger to the health and safety of the vulnerable people they work with to a prescribed body
- cannot be used to stop a worker from reporting the deliberate cover-up of financial wrongdoing to a prescribed body
- cannot prevent a worker seeking legal advice about the subject of the protected disclosure
- cannot prevent a worker from seeking medical advice.

There are also additional legal protections that protect a worker from suffering any detriment or dismissal for whistleblowing.

It is good practice for employers to have a clear and up-to-date whistleblowing policy that encourages workers to make disclosures, including first to someone within the organisation.

Workers and employers who are using or considering confidentiality clause should be clear about what the law says about whistleblowing.

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More information on whistleblowing can be found at <https://archive.acas.org.uk/1919>

Sexual harassment

A confidentiality clause:

- should not be used to prevent the reporting of sexual harassment, including by a colleague, a member of management, customer or company owner
- cannot stop a worker reporting sexual harassment by making a '[protected disclosure](#)' or 'blowing the whistle'
- cannot prevent someone from reporting an incident of sexual harassment to the police as a possible criminal act
- cannot prevent an individual from disclosing future acts of sexual harassment
- cannot prevent a worker who has witnessed sexual harassment from giving evidence of what they have seen to a tribunal or court.

It is good practice for employers to have a clear and up-to-date set of policies that encourage workers to report incidents of sexual harassment, including first to someone within the organisation.

While a worker may want a confidentiality clause to be included in a settlement of a sexual harassment complaint, the employer should consider with the worker:

- Is a confidentiality clause necessary?
- Is a confidentiality clause in the interests of the wider workplace?
- Would anonymising the name of the worker making the complaint be enough?

This can be a very difficult time and discussion for a worker and employers must not put workers under [undue pressure](#) to agree to a confidentiality clause.

More information on sexual harassment can be found at www.acas.org.uk/sexualharassment

Discrimination

A confidentiality clause:

- should not be used to prevent the reporting of discrimination, including by a colleague, a member of management, customer or company owner
- cannot stop a worker reporting discrimination by making a '[protected disclosure](#)' or 'blowing the whistle'
- cannot prevent someone from reporting discrimination to the police as a possible criminal act

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- cannot prevent an individual from disclosing future acts of discrimination
- cannot prevent a worker who has witnessed discrimination from giving evidence of what they have seen to a tribunal or court.

It is good practice for employers to have a clear and up-to-date set of policies that encourage workers to report discrimination, including first to someone within the organisation.

Workers are protected from discrimination, harassment or victimisation on the 9 'protected characteristics' of Age, Disability, Gender Reassignment, Marriage and Civil Partnership, Pregnancy and Maternity, Race, Religion or Belief, Sex and Sexual Orientation.

More information on discrimination can be found at www.acas.org.uk/discrimination-bullying-and-harassment

Pressure, threats and intimidation

Confidentiality clauses should always be entered into voluntarily by both parties. They should not have the effect of making a worker feel as though they cannot make a complaint when they have been treated unfairly.

A worker should never feel forced into agreeing to a confidentiality clause. Where a worker feels that they have been pressurised into agreeing a confidentiality clause, sometimes they can say that they agreed to the clause under duress. The confidentiality clause may then be invalid, and the contents of the agreement may be disclosed to any other person. This might also mean that a worker could lose trust in their employer.

Employers should give the worker a reasonable amount of time to seek independent advice and to consider terms of the confidentiality clause.

Employers should make it clear to their managers that any pressure, threats or intimidation applied in seeking agreement to a confidentiality clause are unacceptable and grounds for disciplinary action. They should also consider if their current policies, procedures and practices encourage or discourage such behaviours.

Working together to tackle the misuse of confidentiality clauses

Employers should work with their staff, trade unions, staff councils and any professional, sector or industry bodies to regularly review and update their policies, procedures and practices around confidentiality clauses.

It is important for employers to take steps to encourage workers to speak out when they have concerns and give them confidence that their

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concerns will be fairly dealt with. Agreeing a joint approach or statement with a recognised trade union and other relevant bodies can make such messages stronger. It can also provide more sources of support for a worker needing assistance or encouragement.

Manager and worker awareness of confidentiality clauses

Managers should be aware of any confidentiality clauses that are required in order for their workers to carry out their jobs.

Any manager responsible for staff who are bound by confidentiality clauses should be fully trained to:

- understand what confidentiality clauses cover and what they mean in practice
- support and inform their staff
- encourage their staff to raise concerns if they are unsure about the effect of any confidentiality clauses

It can also be helpful for managers to be given time and opportunity to discuss any questions or concerns with other managers or senior managers.

Any manager who is responsible for proposing, deciding or agreeing a confidentiality clause should only do so when they are fully informed and have access to legal advice and support.

Workers should never be pressured or rushed into agreeing to a confidentiality clause. If they are subject to a confidentiality clause while they are employed, they should be able to ask their managers about their agreement at any time and be reminded that their agreement does not prevent them from raising concerns.

Monitoring and reporting the use of confidentiality clauses

Employers should routinely monitor any policy, practice or procedure which could result in the use of a confidentiality clause or be affected by confidentiality clauses.

It can be helpful for an employer to collect and routinely report on their use of confidentiality clauses to their board, senior management or owners. Reporting on this usage can help make sure an organisation makes the most appropriate use of confidentiality clauses.

Reporting can also provide a signal to encourage other workers to raise concerns. Depending on the organisation, some or all information relating to the use of confidentiality clauses could be reported more widely but must be suitably anonymised. This requires careful handling and it is for an organisation to determine how and if it is able to do so.

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Confidentiality clauses might be used for a wide variety of purposes and can be included in a number of different contractual arrangements. This means that it can be challenging to identify any developing trends around particular uses of clauses. It also means that detailed reporting may inadvertently identify individuals or situations, especially in smaller employers or larger employers that only use confidentiality clauses occasionally. Employers should be mindful of this but focus on reporting in a balanced way that is able to identify issues and encourage change where it is needed.

For example... reporting the use of confidentiality clauses

Antonio is HR Director at a HR consultancy firm with 150 workers. The board has asked him to start reporting on the firm's use of confidentiality clauses.

Antonio's reporting identifies that one department is using three times the number of confidentiality clauses in staff employment contracts. Whilst Antonio is confident there is some need for these clauses in the department, he finds no evidence they need so many more than comparable departments.

Antonio discusses the matter with the department head, sharing good practice from other teams. Together, they report their findings to the board, along with an action plan that can reduce confidentiality clauses in the department without risking the firm's need for confidentiality.

Working with trade unions

Where a workplace has a recognised trade union, employers should work with the trade unions to review, identify, analyse and challenge the use of confidentiality clauses. In some cases, collective agreements may also mean an employer is committed to consult with a recognised trade union around their use of confidentiality clauses.

Trade union representatives are an alternative point of contact for workers when they feel unable to discuss concerns elsewhere, meaning they will often hold expertise, experience and insights that an employer may gain by working together and productively.

Good practice principles

Handling difficult conversations

Any discussions involving confidentiality clauses should always:

- be conducted in a sensitive manner
- invite workers to ask any questions or raise any concerns
- provide informative answers

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Handling a discussion effectively can help to alleviate any feelings of anxiety or uncertainty and improve clarity and understanding about the terms of the proposed agreement.

Acas offers training on having difficult conversations. To find a course in your area go to www.acas.org.uk/training.

Proposing a confidentiality clause

- Before making any proposal, always give careful consideration to whether or not a confidentiality clause is necessary or appropriate in the circumstances
- Confidentiality clauses should never be proposed as a standard approach to a situation
- Always give a clear explanation of the reasons why a confidentiality clause is being proposed and what is intended to achieve
- Although there is no legal obligation to do so, it is good practice to allow a worker to be accompanied by a work colleague or trade union representative to any proposal discussion

Negotiating a confidentiality clause

- Consider the nature of confidentiality that may be required – a different type of clause will be needed to protect commercially sensitive information than will be needed to help resolve a dispute between employer and worker
- Consider the extent of confidentiality that may be required – this should be as specific as possible and ensure that a worker knows they can still raise genuine concerns and exercise their employment rights
- Workers should always be given a reasonable period of time to consider a proposed confidentiality clause
- Although there is no legal obligation to do so, it is good practice to allow a worker to be accompanied by a work colleague or trade union representative to any negotiations

How much time does a worker need to consider a confidentiality clause?

This will vary depending on what type of agreement the confidentiality is required for, but as a general rule a minimum period of 10 calendar days should be offered.

Drafting a confidentiality clause

A confidentiality clause should:

- be written in clear, plain English
- avoid, minimise or clearly explain legal terms
- avoid using work jargon and expressions
- have its meaning, effect and limits explained clearly in a prominent place in the agreement

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- avoid any ambiguous phrases or terms that could give a worker the impression that the confidentiality requirement is greater than the law allows
- be clear on the circumstances in which confidentiality does and does not apply
- never include terms that are known or thought to be unenforceable
- clearly state that it cannot act retrospectively if disclosures or reporting have already happened
- clearly state that workers are free to speak to professional legal advisers or medical or healthcare professionals, including counsellors and therapists
- state that it does not prevent a worker from 'blowing the whistle' by making a protected disclosure or giving details of relevant regulators or prescribed persons
- state that it does not prevent a worker from reporting matters including any form of discrimination, harassment, sexual harassment or whistleblowing
- state that it does not prevent a worker from exercising their employment rights other than where there is a legally binding settlement agreement or Acas settlement.

Drafting confidentiality clauses in agreements involving an employment dispute

A worker may agree to forgo their right to make a legal claim and use a settlement agreement or an Acas settlement to resolve the matter instead. This might, in certain circumstances, include a confidentiality clause.

In the case of settlement agreements, the agreement should always state which specific employment rights are being settled.

This can only happen when the law clearly permits it. For example, an agreement involving confidentiality might be used to settle a dispute over unpaid allowances for care home workers, but it could never be used to stop the workers from reporting the abuse of vulnerable adults.

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Further sources of advice, support and information

Related Acas guidance

Settlement agreements: www.acas.org.uk/settlementagreements

Resolving complaints and disputes: www.acas.org.uk/dispute-resolution

Whistleblowing: <https://archive.acas.org.uk/1919>

Sexual Harassment: www.acas.org.uk/sexualharassment

Discrimination: www.acas.org.uk/discrimination-bullying-and-harassment

Other sources of advice

Equality and Human Rights Commission (EHRC):

www.equalityhumanrights.com/en/publication-download/use-confidentiality-agreements-discrimination-cases

Trade Union Congress (TUC):

www.tuc.org.uk/research-analysis/reports/confidentiality-clauses

Solicitors Regulation Authority:

<https://www.sra.org.uk/solicitors/guidance/warning-notices/use-of-non-disclosure-agreements-ndas--warning-notice/>

The Law Society:

<https://www.lawsociety.org.uk/support-services/advice/practice-notes/non-disclosure-agreements-and-confidentiality-clauses/>

Acas business solutions

Acas specialists can visit an organisation, diagnose issues in its workplace, and tailor training and support to address the challenges it faces. To find out more, see the Acas website page Business solutions

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