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#Me Too - Non-Disclosure Agreements in the NHS

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The use of NDAs has been regularly in the headlines since the #Metoo campaign. NDAs which seek to prevent employees from talking about the terms, fact and circumstances leading to the settlement of a claim are commonly found in settlement agreements. The controversy which has arisen in the #Metoo campaign is due to the fact that these provisions prevent others knowing about serious and serial complaints of sexual harassment between employer and employee. There is now a growing level of scrutiny on the use of NDAs in a variety of cases and the government is considering their potential future regulation.

For those working in the NHS and the wider health and social care sector, it is important to reflect upon the use of confidentiality clauses in settlement agreements in the light of #Metoo, NHS Employers' Guidance on best practice and a recent Employment Tribunal decision.

Raising Concerns and "Speaking Up"

It is generally understood that settlement agreements should not prevent an employee from raising concerns following termination of employment and should not prevent the employee from referring such issues to regulators or professional regulatory bodies such as the NMC, GMC etc. However, earlier this year, following a Freedom of Information request which revealed that some settlement agreements in the NHS contained gagging provisions, the Health Secretary Matt Hancock vowed to end the use of NDAs in the NHS to prevent would-be whistleblowers from speaking up:

"Settlement agreements that infringe on an individual's right to speak out for the benefit of patients are completely inappropriate...making someone choose between the job they love and speaking the truth to keep patients safe is an injustice I am determined to end"

Use of Settlement Agreements and Confidentiality Clauses

In February 2019, NHS Employers released new guidance on settlement agreements which should be considered when entering into settlement agreements in the NHS. The recent guidance reflects earlier general advice issued in the NHS regarding settlement agreements and the need to exclude an individual's right to 'speak up' from any confidentiality provisions. It also goes somewhat further regarding the use of confidentiality clauses, no doubt with an eye on the wider #Metoo discussions and includes the following best practice guidance:

- sign-off of confidentiality clauses in settlement agreements by Chief Executives to ensure that their use complies with best practice;
- where the issues in the settlement agreement concern the Chief Executive, the Chair should sign off any settlement agreement which includes confidentiality provisions;
- to ensure that MAR settlement agreements are being used in appropriate circumstances and to promote openness and transparency in MAR settlement agreements, confidentiality clauses are not appropriate in MAR agreements.

Settlement Agreements and Statutory Compliance

In May 2015, an Employment Tribunal Judgment in an NHS case (Allison v University Hospital of Morecambe Bay NHS Trust) concluded that a particular settlement agreement which included NDA provisions signed by an authorised union representative had been entered into by the employee without any evidence that the union advisor had given advice in person or by telephone or otherwise. As the receipt

of legal advice is a requirement for a binding settlement agreement, the agreement in this case was deemed to be invalid. The impact was that the employee was allowed to introduce into her more recent whistleblowing claim in the Employment Tribunal, evidence regarding factual matters which the Trust believed it had settled under the earlier settlement agreement.

Whilst the Employment Judge had sympathy for the Trust's position in this case, as it had paid a compensation payment to settle earlier, the settlement agreement did not comply with the statutory requirements and was invalid. Although the agreement had been signed by the Claimant there was no evidence that the Claimant had in fact received any advice on its terms from her professional advisor before she entered into it, and the Trust could not rely upon the agreement to prevent the Claimant from reintroducing her earlier claim.

Three key things to take away:

1. Take care to ensure that Settlement Agreements entered into and drafted by lawyers are compliant with the context and spirit of regulatory guidance and best practice in the health and social care sector;
2. Give specific consideration to the facts and circumstances leading up to the Settlement Agreement and whether it is correct to include confidentiality provisions (e.g. harassment cases). Consider in particular how the Trust will respond to any subsequent enquiries regarding the employee or the settlement agreement (particularly relevant to high profile issues where you may receive FOIA, MP and media enquiries). Are confidentiality provisions going to prove necessary and helpful? If not, try to reach agreement with the employee about what will be said in any subsequent media or regulatory response by the employer;
3. Ensure that standard Settlement Agreements are amended to specifically require the legal advisor or authorised union official certifying the agreement to also state the date on which advice was given to the employee and whether that was in person, by telephone or video conference.

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