

City of London Law Society Employment Sub-Committee

Response to Consultation on Confidentiality Clauses

29 April 2019

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.**

The media have reported some high-profile examples of clauses that have been thought to cloud a worker's right to make a protected disclosure or to overstretch the extent to which information is confidential. In our experience as employment lawyers practising in the City of London clauses of the type that have been reported are extremely rare.

It is also extremely rare for such a clause to be drafted with the deliberate intention of restraining the disclosure of matters that are potentially criminal in nature.

In the past confidentiality clauses in both employment contracts and settlement agreements may not in the body of the clause itself have made it clear that the individual retained the right to make a protected disclosure and to report a suspected crime to the police. Sometimes these rights would be referred to elsewhere in the agreement.

We therefore recognise that there are legitimate concerns that an individual who is party to a confidentiality clause may not always be aware of their right to blow the whistle, report a crime or make any other permitted disclosure.

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

On the face of it this would seem to be a beneficial change to the law, but we can see some potential negative as well as positive consequences. Please see below.

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

Positive

A positive consequence is that anyone who has a genuine concern that a crime may have been committed will know that they will not get into trouble for disclosing the facts to the police. This could be important in the case of sexual harassment where it can be unclear whether the alleged harassment amounts to a crime.

Negative

A possible negative consequence is that it would permit someone who has agreed a confidentiality clause subsequently to disclose embarrassing and newsworthy (but not criminal) information about the other party to the police maliciously and without any belief that a crime has been committed. We would hope that such information would remain with the police and not be leaked to the press, but it is of course the case that any additional permitted disclosure will increase the risk of information reaching the press. Should the information be leaked and published the other party to the confidentiality clause would have no recourse against the individual who disclosed the information to the police.

Positive and Negative

The right to make any disclosures to the police would of course also apply to third parties who are not directly involved in the matters being disclosed. An example of this might be a

disclosure by another employee, such as an HR Manager, who wanted the police to be made aware of wrongful conduct such as sexual harassment when no one else involved (employer, perpetrator or victim) wanted such disclosures to be made. This is clearly double edged. On the one hand it gives anyone the right to disclose any information to the police relating to others notwithstanding their own confidentiality obligations which would be beneficial if the disclosure revealed a crime that needed investigating in the public interest. On the other hand, this right could undermine a confidentiality agreement that has been entered into in good faith by the people directly involved in the matter in question.

Existing law

We would like to draw attention to the fact that the proposal does not represent a significant change in the law. Under the current law, disclosures to the police are permitted notwithstanding confidentiality obligations if there is a genuine belief that a criminal offence has been committed. It is a long-standing principle of the common law that there is no confidence in iniquity.

Conclusion

On balance we think the greater interest lies in allowing disclosures of any information to the police. However, we suggest that consideration be given to certain safeguards. Are any measures required to ensure that in practice such disclosures (if they do not become the subject of a police investigation) are kept confidential?

We thought about a requirement that the person making the disclosure act in good faith in the belief that a crime has been committed or might have been committed but we concluded that this would act as a deterrent and thereby undermine the benefit of the proposed change to the law.

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

It is already the case that disclosures of regulatory or suspected regulatory breaches can be made to regulators confidentially without placing the person making the disclosure in breach of a confidentiality obligation. In the case of some regulatory breaches there is a duty placed on regulated firms and individuals to report these to the regulator. We see no reason to change the law relating to disclosures to regulators.

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

Confidentiality clauses cut both ways and may be agreed to protect either or both the employer and the employee.

Some individuals who have been guilty of crimes or regulatory breaches want to secure confidentiality undertakings from their employers to cover up their crimes or wrongdoing. Confidentiality clauses should not be effective to achieve this purpose. Employers should be free to disclose crimes and wrongdoing by former employees, which we believe is already the legal position.

We suggest that disclosures in confidence to legal, medical and financial advisers be expressly permitted.

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

In principle we support this proposal.

We are in favour of a statutory notice to be included in all settlement agreements and in the written statement of particulars of employment in a form prescribed by statute that alerts the worker to their rights of disclosure.

We are concerned that an employee may not understand the extent of these rights in their circumstances. They may therefore either choose not to make a disclosure because of an erroneous belief that they are not permitted to do so or may decide to do so in the wrong way thereby inadvertently breaching their confidentiality obligations through ignorance.

We therefore recommend that the statutory notice refer the worker to detailed guidance on when and in what manner disclosures can be made

We suggest that ACAS is charged with providing clear and comprehensive guidance on disclosure rights. If the worker cannot decide from this guidance whether they can make a disclosure they should be advised to take legal advice on the specific disclosure they wish to make.

7. As part of this requirement should the Government set a specific form of words?

Yes, we think the Government should do this and that the precise form of words should be subject to further consultation.

At present we think the notice should expressly refer to:

Disclosures to police and regulators

Protected disclosures, including disclosures to the press where certain requirements are met

Disclosures to courts, tribunals and disciplinary bodies

Disclosures in confidence to legal, financial and medical advisers.

We would welcome the opportunity to comment further if consultation takes place on the precise form of words.

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

We consider that the adviser should be required to draw the worker's attention to the statutory wording setting out the exclusions and (if appropriate) the ACAS Guidance but should not be required to advise the worker on whether disclosures of the various categories of information known to them would or would not be covered by an exclusion or the manner in which disclosure can be made. This would be onerous, drive up costs, leave the employer uncertain as to whether the statutory advice has been given and (depending upon the wording of the agreement and the confirmation given by the adviser) potentially expose the adviser to a liability to the employer.

We do not think it is a concern of the employer to know whether specific advice has been given on the extent and breadth of the clause or on its applicability in relation to a specific set of facts or information, just that the adviser has drawn the worker's attention to the exclusions from the clause.

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 with this provided that the requirement is only to include in the settlement agreement the prescribed form of wording. The clause would then not be binding on either the employer or the employee.

This might be an issue for a worker who wanted confidentiality as the employer's failure to include the statutory notice could penalise the worker who is in the weaker bargaining position. We hope that the requirement for an independent lawyer to advise on the inclusion of the statutory notice will address this concern.

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 agree with this mechanism. We agree that it would not be right to make confidentiality clauses in employment contracts void though lack of the statutory notice.

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