

Health Service Circular

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The Secretary of State has powers under a number of provisions in the primary legislation relating to the NHS to give directions to Health Authorities, Special Health Authorities and NHS Trusts. These are legally binding and must be complied with by the recipient. They may be addressed to only one body, or a number of bodies, or all bodies falling within a particular category (such as all Health Authorities).

Use of confidentiality and clawback clauses in connection with termination of a contract of employment

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Use of confidentiality and clawback clauses in connection with termination of a contract of employment

Summary

1. A National Audit Office Report on adjustments to waiting lists¹ highlighted the inappropriate use of confidentiality clauses in severance agreements involving NHS managers. The clauses risked inhibiting disclosure of the terms of the severance agreements in circumstances where it was in the public interest for disclosure to be made. The Report also criticised the absence of “clawback clauses” in severance agreements for managers. The absence of such clawback provisions means that managers can negotiate what may be a considerable termination payment from their NHS employer only to be employed at a senior level by another NHS employer shortly thereafter, without having to repay any part of the termination payment.
2. The National Audit Office recommended that the Department of Health should strengthen the existing guidance on the use of confidentiality clauses and clawback clauses.
3. This Circular reflects the commitment given by Sir Nigel Crisp, in his capacity as Accounting Officer to the Public Accounts Committee Hearing on 14 January 2002 to strengthen and clarify the existing guidance concerning these issues, and the commitment given by Government in the Treasury Minute dated 28 November 2002.
4. This Circular and Direction on clawback clauses and confidentiality clauses contained herein applies to Board Members including Chief Executives and Executive Directors, regardless of whether they have a permanent or fixed term contract.

Current Guidance on Confidentiality Clauses & Calculating Termination Payments

5. Existing Guidance on the use of confidentiality clauses & calculating termination payments is contained in Health Service Circular 1999/138 for NHS Trusts: “*Conditions of service for general and senior managers: early termination of fixed term rolling contracts*”, issued on 17th June 1999, and in Health Service Circular 1999/140 “*Conditions of Service for General and Senior Managers employed by Health Authorities*” issued on 2nd July 1999.
6. This Circular replaces the advice in HSC1999/138 and in HSC 1999/140 relating specifically to the use of confidentiality clauses in severance agreements between senior or general managers and their NHS employers.
7. Subject to the above, Health Service Circulars 1999/138 & 1999/140 remain current, and must be followed when calculating “termination payments”, for fixed term rolling contracts.
8. In the case of termination of employment on disciplinary grounds, payments are not appropriate. Employers should follow good practice in disciplinary procedures as set out in ACAS guidance on discipline, and the Code of Conduct for NHS managers.

The Public Interest Disclosure Act 1998 and Confidentiality Clauses

9. Health Service Circular 1999/198 – “*The Public Interest Disclosure Act 1998: Whistleblowing in the NHS*” was issued following the implementation of the Public Interest Disclosure Act 1998 on 2 July 1999, and must continue to be followed.

10. Any confidentiality clause in a contract between an employee or ex-employee and his/her employer or ex-employer which seeks to prevent the employee making a "protected" disclosure in accordance with the Public Interest Disclosure Act 1998 read with the Employment Rights Act 1996 (hereinafter referred to as the "Public Interest Disclosure Act 1998") is void and ineffective.

Confidentiality Clauses and Severance Agreements

11. It is not contrary to Department of Health policy or the Public Interest Disclosure Act to use confidentiality clauses in contracts of employment per se. Indeed, employees are subject to various legal obligations dictating how they use, treat and disclose confidential information. Express terms are sometimes included in contracts of employment in order to emphasize a legal obligation relating to the protection of confidential information both during the employment and after the termination of that employment. An express confidentiality clause might be included in a contract where an employee has access to confidential patient information, or information considered to be a trade secret. These are not exhaustive examples of what constitutes confidential information. In the absence of an express term, the employee's contract of employment will be subject to implied terms relating to the protection of confidential information.
12. A severance agreement is any agreement made between an NHS employee or ex-employee and his/her employer or ex-employer in connection with the termination of the employee's employment with that NHS employer. It includes, but is not confined to, compromise agreements within s.203 Employment Rights Act 1996, as well as compromise contracts within s.75 Sex Discrimination Act 1975 and s.72 Race Relations Act 1976, and conciliation agreements made through ACAS. This Circular and Direction is concerned with severance agreements and confidentiality clauses in which the employee or ex-employee is, or was, a chief executive or executive director.
13. Subject to the above, it is not contrary to the Department of Health's policy for confidentiality clauses to be contained in severance agreements. However, employers must consider with their legal advisers whether a confidentiality clause is necessary in the particular circumstances of each case. Further, if it is decided that a clause is appropriate, then its terms should go no further than is necessary to protect the NHS Body's legitimate interests.
14. NHS Bodies are also responsible for ensuring that any terms in an agreement reached comply with their various statutory obligations regarding treatment of confidential information. NHS Bodies' attention is particularly drawn to the Data Protection Act 1998, the Official Secrets Act 1989 and the Public Interest Disclosure Act 1998.

Action:

Employers must consider with their legal advisers that where a severance agreement contains a confidentiality clause in regard to all or any of the terms of that agreement, the agreement complies with the provisions set out in the attached Schedule.

Clawback clauses and Termination Payments

15. The Guidance in HSC 1999/138 and HSC 1999/140 on calculating compensation for termination of fixed term rolling employment contract, also referred to as "termination payments" remains in force. This Circular and Direction supplements that guidance, and applies to any termination payments that an NHS Body agrees to pay or make in connection with the early termination of an employee's employment. The terms of this Circular and Direction are confined to chief executives and executive directors.

Action:

Employers must consider with their legal advisers whether any clawback clause complies with this Guidance and Schedule attached. In addition to the undertakings required by HSC 1999/138 and 1999/140, NHS Bodies must ensure that, subject to the terms of this Guidance, the additional undertakings set out in the attached Schedule are also provided before any termination payment is made. This is to ensure, so far as is possible, the enforceability of any clawback clause.

Associated Documentation

HSC 1999/138 'Conditions of service for general and senior managers: early termination of fixed term rolling contracts', for NHS Trusts.

HSC 1999/140 'Conditions of service for general and senior managers: early termination of fixed term rolling contracts', for health authorities.

HSC 1999/198 'The Public Interest Disclosure Act 1998: whistleblowing in the NHS'.

HSC 2002/008 Direction on pre and post employment checks for all persons working in the NHS in England.

The above mentioned HSCs are available on the Department of Health website at <http://www.doh.gov.uk/publications/coinh.html>

The Code for NHS managers can be accessed from www.doh.gov.uk/nhsmanagerscode

This Circular has been issued by:

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