



Department for
Business, Energy
& Industrial Strategy

CONFIDENTIALITY CLAUSES

Consultation on measures to prevent misuse
in situations of workplace harassment or
discrimination

Closing date: 29 April 2019



OGL

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Executive summary

The Government is committed to upholding and upgrading workers' rights, having placed good work and good jobs at the centre of the modern Industrial Strategy. As part of our commitment to this upgrade, we are now consulting to ensure that harassment or discrimination of any sort cannot be tolerated in the workplace. The purpose of this consultation is to seek evidence and views of the use of confidentiality clauses in the employment context, and to propose further regulation to tackle their misuse.

Confidentiality clauses have a right and proper place in the employment context. They can be used primarily in two ways: as part of employment contracts, to protect trade secrets for example, and as part of settlement agreements, for example to allow both sides of an employment dispute to move on with a clean break.

There are also existing legal limitations on confidentiality clauses. In particular, they cannot remove the protections around making a protected disclosure, or 'whistleblowing', though there are certain legal criteria that must be met for a particular disclosure to be protected. Confidentiality clauses also cannot ordinarily prevent someone taking a matter to an employment tribunal, though settlement agreements (which usually contain a confidentiality clause) can waive this right. In order for settlement agreements to be valid the worker must have received independent advice.

However, there is evidence that despite these protections some employers have used confidentiality clauses to suggest victims of harassment cannot make any disclosures and intimidate them into silence when they have faced harassment or discrimination. For example, a confidentiality clause might be all encompassing, to make a worker believe that they cannot discuss anything that occurs in the workplace with anybody, despite case law establishing that this is not necessarily the case. A confidentiality clause might suggest to the worker that they do not have rights, such as whistleblowing or taking a matter to a tribunal, that in fact cannot be abrogated. Or they could be unreasonably expansive and insist that a worker not discuss the issue under consideration with people such as the police, a doctor, or a therapist.

This consultation therefore seeks views on what further limitations might be put on confidentiality clauses, to ensure they cannot be misused in this way or 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. We intend 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.

For a settlement agreement to be valid, the worker must have received independent advice (from somebody such as a lawyer or trade union official). The Government proposes to extend this requirement to ensure the worker receives advice specifically on any confidentiality provisions within the agreement, and its limitations.

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.

Introduction

Confidentiality clauses are provisions which seek to prohibit the disclosure of information. They serve a useful and legitimate purpose in the employment context, as part of both employment contracts and settlement agreements. However, a number of cases have come to light where employers have used confidentiality clauses to prevent victims of workplace harassment or discrimination from speaking out.

As the Government made clear in its response to the Women and Equalities Select Committee's inquiry on sexual harassment in the workplace, harassment of any sort is abhorrent and cannot be tolerated in the workplace. While most employers take their obligations and responsibilities to their workers seriously, there is evidence to suggest that some employers have been exploiting an imbalance of power in a workplace relationship to convince victims of harassment or discrimination to sign confidentiality clauses which require them not to disclose anything to anyone. As such these are unlikely to be legally enforceable. This can leave the victim afraid to report an incident to appropriate authorities or speak out to anyone about what they have experienced, and leave others exposed to similar treatment.

The Government therefore agrees with the Committee that confidentiality clauses in the context of employment/working relationships require better regulation. The purpose of this consultation is to better understand how confidentiality clauses and the legal framework around them work in practice and assess what changes are required to ensure individuals are appropriately protected from their misuse.

This consultation will therefore examine:

- Whether there should be more limitations on confidentiality clauses in the employment context, to make it easier for workers and their advisers to understand when they are permitted in law to make a disclosure to the police or other people despite the existence of a confidentiality clause.
- How to ensure workers are clear about the rights they maintain when they sign a confidentiality clause or start work for a new employer.
- How to enforce any new regulations on confidentiality clauses.

We would like to hear about people's experience with confidentiality clauses, views of the government's proposals (including the potential consequences), and any other thoughts or ideas from interested parties.

There are a number of different terms used for confidentiality clauses, including 'non-disclosure agreements' (NDAs). NDAs can be standalone confidentiality agreements, they can also be clauses regarding confidentiality within wider employment contracts or settlement agreements. This consultation therefore uses the term 'confidentiality clause' whether as a standalone agreement or part of a wider contract or settlement. It is focused on the use of such clauses in the context of the employment/worker relationships.

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General information

Why we are consulting

The purpose of this consultation is to better understand how confidentiality clauses and the legal framework around them work in practice and assess what changes are required to ensure individuals are appropriately protected from their misuse.

Consultation details

Issued: 4 March 2019

Respond by: 29 April 2019

Enquiries to:

Confidentiality clauses consultation
Labour Markets Directorate
Department for Business, Energy and Industrial Strategy
1st Floor, Spur 1
1 Victoria Street
London
SW1H 0ET

Email: ndaconsultation@beis.gov.uk

Consultation reference: Confidentiality clause consultation

Audiences:

People with experience of confidentiality clauses, both as workers and employers; legal advisers involved in the drafting of such clauses; and any other interested parties.

Territorial extent:

England, Wales and Scotland

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How to respond

Respond online at: beisgovuk.citizenspace.com/lm/confidentiality-clauses-measures-to-prevent-misuse/

or

Email to: ndaconsultation@beis.gov.uk

Write to:

Confidentiality clause consultation
Individual Rights and Migration Branch
Department for Business, Energy and Industrial Strategy
1st Floor, Spur 1
1 Victoria Street
London
SE1H 0ET

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Your response will most useful it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential please tell us, but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our [privacy policy](#).

We will summarise all responses and publish this summary on [GOV.UK](https://www.gov.uk). The summary will include a list of names or organisations that responded, but not people's personal names, addresses or other contact details.

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Quality assurance

This consultation has been carried out in accordance with the government's [consultation principles](#).

If you have any complaints about the way this consultation has been conducted, please email: beis.bru@beis.gov.uk.

Purpose of confidentiality clauses, their legal limitations, and misuse

In the employment context, confidentiality clauses are primarily used in two key ways. They can be clauses within wider contracts of employment or within settlement agreements. There are already legal limitations on such clauses, but evidence suggests a minority of employers are using them to intimidate victims of harassment into silence.

As part of employment contracts, confidentiality clauses have an important role in protecting trade secrets and other confidential information pertaining to an employer. This can be defined within the contract and could cover matters such as information about the way in which a company operates, its intellectual property, its data, clients, or similar confidential information. This form of protection does not need to be explicitly written down: case law has determined that all employment contracts contain an implicit duty of confidentiality.

Settlement agreements are agreements between parties that seek to resolve a workplace dispute without the need to escalate the matter further, which would usually be to an employment tribunal. Confidentiality clauses within settlement agreements are usually explicit and can prevent information relating to the dispute from being disclosed more widely, for the benefit of all parties involved (for example, to allow both to end the employment relationship with a clean break and to make a fresh start).

Existing legal limitations on confidentiality clauses in working relationships

There are certain legal limitations on the extent of confidentiality clauses, some expressed explicitly in statute, others as part of case law. A confidentiality clause cannot remove someone's statutory employment rights as set out in the Employment Rights Act 1996 or override anti-discrimination law under the Equality Act 2010 (though, as explained in more detail below, a worker can agree to waive their right to bring an employment tribunal claim in a legally valid settlement agreement). Perhaps most importantly, a confidentiality clause can never remove a worker's right to 'blow the whistle'. Section 43J of the Employment Rights Act 1996 (ERA) renders void any provision that seeks to do this.

Whistleblowing

To count as a protected disclosure ('whistleblowing') under the ERA (as amended by the Public Interest Disclosure Act 1998), an issue must satisfy certain legal criteria. It must be a 'qualifying disclosure', which requires the worker to hold a reasonable belief that:

- They are acting in the public interest (not purely a matter of personal interest or grievance).
- The disclosure they are making tends to show past, present or likely future wrongdoing. Wrongdoing includes criminal offences, dangers to health and safety, failure to comply with a legal obligation (which would include obligations under the Equality Act 2010, for example), or covering up wrongdoing.

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A qualifying disclosure is protected if it is made to an employer or other responsible person, or one of a list of 'prescribed persons' (usually the relevant regulator or professional body) or certain other persons, such as MPs and legal advisers.¹ In its response to the Women and Equalities Select Committee's report on sexual harassment, the Government agreed to add the Equalities and Human Rights Commission to this list of 'prescribed persons', and to explore adding the police. In more limited circumstances, disclosures made to others (such as the media) can also be protected.

Whether a specific disclosure about harassment would meet these criteria and therefore constitute a protected disclosure would depend on the facts of a particular case. This could mean that a victim of harassment cannot always know with certainty whether they would be protected in making a disclosure or not.

There are good reasons for the constraints on what constitutes a 'protected disclosure' described above. If the legislation defining a 'protected disclosure' was more prescriptive, it could increase the risk that a disclosure would not qualify as a protected disclosure on a technicality or loophole. If it was too broad, that could lead to people seeking to resolve matters that are entirely personal grievances, and not in any wider public interest, through whistleblowing disclosures and the protections that cover them.

Other limitations on confidentiality clauses

A stand-alone confidentiality clause also cannot ordinarily prevent someone taking a matter to an employment tribunal. However, settlement agreements (which usually contain a confidentiality clause) can waive this right. For a settlement agreement to be valid and enforceable the employee must have received independent advice which, in particular, covers the effect of the settlement agreement on a person's ability to pursue their rights before an employment tribunal. Section 203(3A) of the Employment Rights Act defines an adviser for these purposes and includes lawyers and trade union officials.

Case law has also established that confidentiality provisions cannot be unlimited, even if they are drafted in such a way to suggest that they cover anything a worker might learn while working for a particular employer. Simply writing an expansive confidentiality clause into an employment contract will not in itself mean that particular information cannot be disclosed. Information needs to have a 'necessary quality of confidence' in order to be protectable by an express confidentiality provision.

Misuse of confidentiality clauses in working relationships

The Government shares the concern that confidentiality clauses which claim to limit a worker's disclosure rights are being used to intimidate or silence victims of harassment or discrimination, despite the existing legal protections. As the House of Commons Women and Equalities Select Committee's July 2018 report on sexual harassment in the workplace highlighted, this could occur through a number of ways.

For example, a confidentiality clause might be all encompassing, to make a worker believe that they cannot discuss anything that occurs in the workplace with anybody, despite case law establishing that this is not necessarily the case. A confidentiality clause might suggest to a

¹ The list of prescribed persons can be found at <https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2/whistleblowing-list-of-prescribed-people-and-bodies>. Though it doesn't include the police, it does include other bodies such as the National Crime Agency and the Serious Fraud Office.

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worker that they do not have rights, such as whistleblowing or taking a matter to a tribunal, that in fact cannot be abrogated. Or they could be unreasonably expansive and insist that a worker not discuss the issue under consideration with people such as the police, a doctor, or a therapist.

This could be exacerbated by a worker not being fully aware of their rights, or by complexity in the drafting and structure of the confidentiality clause that makes it hard for a worker to understand what its effect is. Equally, complexity in the law might mean that even when a worker is aware of their rights, they are not confident about whether it is permissible for them to legitimately breach a confidentiality clause by making a particular disclosure.

- 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.**

Putting more limitations on confidentiality clauses in working relationships

The extent to which confidentiality clauses can prevent someone making certain disclosures to particular people or organisations is not always clear and could be confusing. The Government therefore believes the law should be clarified to make clear that no confidentiality clause can prevent any disclosure to the police and seeks views on whether disclosures to any other people or organisations should be similarly protected.

The extent to which confidentiality clauses can cover workplace harassment or discrimination

As well as harming the victim, taking measures to hide harassment or other problems such as malpractice could put potential employees, customers or other businesses at risk. Preventing confidentiality clauses from covering harassment or discrimination could help prevent them being used to intimidate victims into keeping quiet.

It is important here to differentiate between confidentiality clauses in employment contracts and confidentiality clauses in settlement agreements. We consider both below.

Employment contracts

Confidentiality clauses in employment contracts serve a clear purpose in allowing companies to protect their trade secrets and confidential information. There is therefore no reason for such a confidentiality clause to seek to protect information about harassment or discrimination. Expressly legislating for that limitation might make it clearer to a worker when a confidentiality clause could and could not apply, and clearer to employers that they should narrow the non-disclosure provisions in employment contracts to match the legal limitations.

However, the law is already clear that confidentiality clauses, including in employment contracts, cannot prevent protected 'whistleblowing' disclosures. A whistleblowing disclosure can cover workplace discrimination or harassment.

Settlement agreements

Confidentiality clauses in settlement agreements could be used to hide specific cases of harassment and discrimination that have happened, even when a victim has come forward and made a complaint to their employer. Preventing confidentiality clauses in settlement agreements from covering harassment or discrimination at all could therefore prevent victims from being intimidated into silence about their experience, if they want to discuss it with someone else or a particular authority. Repetitive use of settlement agreements could be used to hide a pattern of harassment or discrimination by a particular person or at a particular organisation, potentially putting other workers at risk.

However, confidentiality clauses in such agreements arguably can benefit the worker as well as the employer, by allowing them both to move on from the dispute without fearing that it will

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be replayed to other audiences in cases where, for example, both parties are making allegations against each other. There is also an argument that, without the possibility of a confidentiality clause, employers are less likely to consider settlement. This might increase the cost, stress and disruption for parties that end up escalating their disputes to a tribunal hearing or could dissuade victims who do not want to go through the process of a tribunal hearing from pursuing their complaints at all.

Excluding disclosures to specific people or organisations, such as the police, from confidentiality clauses

Given the above, the Government believes a key reform would be to make clearer in law the people to whom a victim can make a disclosure without falling foul of a confidentiality clause. This would avoid the risk of subverting existing principles of confidentiality but would still clarify in law that there are limits to what disclosures confidentiality clauses can prevent.

To some extent, whistleblowing legislation (which confidentiality clauses cannot override) already provides for this. However, the Women and Equalities Select Committee expressed concern that legislation on employment protections for whistleblowers was complicated and made it difficult for workers to be sure if a particular disclosure would be protected or not. This lack of certainty could put people off reporting harassment, even if they were aware that a confidentiality clause could not affect their whistleblowing rights.

The Government therefore believes it important to legislate to the effect that no provision in an employment contract or a settlement agreement can prevent someone making any kind of disclosure to the police. This would mean that workers could be sure that whatever the issue or disclosure, regardless of whether it meets any legislative whistleblowing tests, they can report a matter to the police without falling foul of a confidentiality clause. It would help clarify that a confidentiality clause that sought to stop somebody reporting a crime or discussing a matter with the police was unenforceable.

There may be other people or organisations to whom disclosures should be similarly protected, for a variety of reasons. The Government is wary of making this list too broad however, as it could undermine the point of confidentiality clauses by permitting non-harassment related disclosures to too many people and undermine the 'public interest test' that is applied to disclosures in the context of whistleblowing.

- 2. In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?**
- 3. What would be the positive and negative consequences of this, if any?**
- 4. Should disclosures to any other people or organisations be excluded?**
- 5. Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?**

Ensuring the limits of confidentiality clauses are clear to the worker

Even with the existing 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. The Government believes that confidentiality clauses should be required to 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.

Wording for all confidentiality clauses

The Women and Equalities Select Committee recommended that the Government should legislate to require the use of standard, approved confidentiality clauses which sets out the meaning, effect, and limits of confidentiality clauses when included in both settlement agreements and employment contracts.

We agree that more requirements are needed to ensure confidentiality clauses are clearer about their own limitations. It is important that workers understand the rights they maintain when signing them, so they cannot be intimidated out of disclosing information about harassment or discrimination. Legislation could require that confidentiality clauses make clear that they cannot prevent the worker making a protected 'whistleblowing' disclosure, report a criminal offence (or discuss any matter with the police), or highlight other relevant statutory obligations (such as disclosing information to a court).

The advantage of such a requirement is that it would help ensure that workers are clear about the limits of any confidentiality clause they agree from the outset. A simple requirement such as this should give employers and their legal advisers clarity, while still allowing them flexibility to negotiate wording as needed. Guidance could encourage any further best practice.

In the case of a written employment contract, it would be simplest for the confidentiality provisions and the limitations on them to be summarised in the written statement of particulars of employment that all employees must receive when they take up employment with a new employer.

The Select Committee recommended the Government set standard, approved wording for such clauses, and include a clear explanation of what disclosures are protected under whistleblowing law. However, the Government is concerned that requiring a single form of words in all written employment contracts and settlement agreements could become quickly out of date as other protections develop over time. It is highly unusual for legislation to require such specific wording to be included. Legislating for specific wording explaining what disclosures are protected under whistleblowing law could affect the way courts interpret the legislative definition of a 'protected disclosure' by imposing a more prescriptive meaning than the legislation intends.

Advice on settlement agreements

For a settlement agreement to be valid, Section 203(3) of the Employment Rights Act 1996 requires that the worker has received advice from an independent adviser (such as a lawyer or a trade union official) as to the terms and effect of the agreement.

While this advice should ideally cover the nature of any confidentiality requirements, it might not always cover the extent to which a worker is still able to discuss their experience with anyone or the specific legal disclosure rights they maintain. The Government proposes to extend this requirement to specify that, for a settlement agreement to be valid, the independent advice a worker receives must cover the nature and limitations of any confidentiality clause in the settlement agreement, and the disclosures that a worker is still able to make.

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?**
7. **As part of this requirement, should the Government set a specific 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?**

Enforcement

Like the majority of employment rights or confidentiality issues, the Government proposes that any new regulation on how confidentiality clauses should be worded is best enforced through an employment tribunal or the civil courts process (depending on whether it pertains to an employment contract or a settlement agreement).

Enforcement of confidentiality clauses within settlement agreements

The Government proposes that enforcement measures in respect of confidentiality provisions in employment contracts and those in settlement agreement would need to be different, as they are used in different stages in the employment relationship and may be enforced in different 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.

The Government proposes that a confidentiality clause in a settlement agreement that does not meet the new wording requirements is made void in its entirety. In practice this would mean that an employee who breaches the confidentiality provisions of a settlement agreement could not be sued for doing so if the confidentiality provision was not drafted appropriately. The principal effect of this would be the reputational risk to the employer once the confidentiality over the reason for the employment dispute is removed.

This should encourage employers to ensure they draft confidentiality clauses correctly and make clear to the worker the disclosure rights they maintain even after signing a settlement agreement. If they do not, they will be taking the risk that the reason behind the dispute is made public with no recourse for the employer, making the entire reason (from the employer's perspective) for the confidentiality clause pointless.

The Women and Equalities Select Committee has recommended making it an offence to propose confidentiality clauses designed to prevent the disclosure of a protected disclosure or a criminal offence. However, the existence of a confidentiality clause is not necessarily conclusive proof of underlying misconduct or criminal misconduct. It would be difficult for employers to know what content is and is not acceptable in any given situation that might arise in the future, and it would be extremely difficult to monitor the wording of confidentiality clauses to the extent that a criminal sanction could be effectively enforced.

Enforcement of confidentiality clauses within employment contracts

Employment contracts usually cover matters of commercial sensitivity. Voiding such confidentiality clauses in their entirety could leave the trade secrets of an entire company exposed.

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The Government is proposing that, in the case of employment contracts, a requirement to be clear on the limits of any confidentiality clause should be included in the written statement of particulars that must be given to all employees. The requirement to give employees a written statement already has an enforcement mechanism through the employment tribunals, explained in the box below. This enforcement mechanism would apply to any new requirement to include in the written statement a clear description of the limits of any confidentiality clause.

Enforcement mechanism for the right to a written statement of particulars

When a worker brings a claim for an employment right to a tribunal, and it is found that their employer failed to comply with the requirement to provide a written statement, the worker is entitled to additional compensation in an employment tribunal award if they are successful in their claim.

For example, A successfully brings a case against their employer related to discrimination. During the tribunal hearing it is found that A's written statement of employment particulars did not correctly include a clear explanation of the limits of the confidentiality clause in A's contract. The tribunal therefore decides to increase the compensation granted to A.

This enforcement mechanism has the advantage of simplicity. It assumes that workers are unlikely to bring tribunal claims for the simple fact of a confidentiality clause not meeting any new requirement to be worded in a particular way. Instead, a claim is more likely to be related to a specific complaint to which the confidentiality clause might be relevant.

- 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?**
- 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?**

Consultation 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.**
2. **In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?**
3. **What would be the positive and negative consequences of this, if any?**
4. **Should disclosures to any other people or organisations be excluded?**
5. **Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?**
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?**
7. **As part of this requirement, should the Government set a specific 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?**
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?**
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?**

This consultation is available from: www.gov.uk/government/consultations/confidentiality-clauses-measures-to-prevent-misuse-in-situations-of-workplace-harassment-or-discrimination

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