Dear Colleague

Compromise Agreements, ‘Gagging’ Clauses and the Public Interest Disclosure Act 1998

Following the clear commitments on whistleblowing and confidentiality made by Sir David Nicholson in his role as NHS Chief Executive, I am writing on behalf of the Secretary of State for Health to seek your assistance in ensuring that all NHS staff are aware of their rights to speak up about matters of public concern. Both the Secretary of State and Sir David have written to the service on this issue in the last 18 months, but I should be most grateful if you would seek to ensure that your members and registrants are fully aware of their freedom to speak up where that is in the public interest.

You will all be aware of the ongoing debate in the media and in Parliament about whether whistleblowers in the NHS are given adequate support to raise concerns, and in particular, about the allegations of NHS organisations ‘gagging’ staff from speaking out on legitimate matters of public interest.

It is crucial that each national organisation with an interest tackles this issue together as one system and I am therefore writing to ask you to use your links with NHS staff to communicate and reinforce an important message with any members or registrants, who may have signed, or may in the future sign, compromise agreements.

Contracts of employment and compromise agreements are a matter between the employing organisation and its employee, and the use of confidentiality clauses is common across the public and private sectors to support both parties to move on after a dispute; or where sensitive and personal information is involved.

However, it is particularly important that the existence of a confidentiality clause does not in any way ‘gag’ – either intentionally or unintentionally - any individual who may wish to raise concerns in the public interest. It is vital all staff feel that they can raise concerns in an environment that is safe and one that values openness and transparency.
Since the introduction of the Public Interest Disclosure Act 1998 (PIDA), whistleblowers, irrespective of what is contained in any compromise agreement, are legally protected when making public interest disclosures, and the Employment Rights Act 1996 deems void any clause within the agreement that seeks to prevent disclosures made under PIDA. In January 2012, Sir David Nicholson, as Chief Executive of the NHS, wrote to the NHS to explain that we should go further and ensure that any compromise agreement containing a confidentiality clause should also make clear that the right to make a protected disclosure is not affected.

It is important that you reiterate to all of your registrants/members that if they have signed an agreement containing a confidentiality clause, they are still protected by PIDA if they feel the need to make certain disclosures in the public interest. This includes any agreements signed as a result of the judicial mediation process. If they are concerned about the legal impact of this, they should seek independent legal advice about whether their particular concerns are covered by the Act. Free confidential and impartial advice is available from the whistleblowers helpline on 0800 724725.

This focus on ensuring NHS staff are able to speak up about concerns is not only about those who may have previously signed compromise agreements but all staff.

The Health Secretary’s statement on 15 March 2013 made absolutely clear his expectations in outlawing ‘gagging’ clauses that have the effect of preventing protected disclosures and sought to provide greater clarity to NHS whistleblowers that they are encouraged and free to speak up about legitimate concerns covered by PIDA, such as patient safety and high death rates.

Furthermore, the statement sent a clear signal to the NHS that in future, special severance business cases will not be supported for onward approval by HM Treasury, unless confirmation is given that an explicit clause has been included within the compromise agreement associated with the severance transaction. That clause must be to the effect that no provision in the compromise agreement seeks to prevent the individual from making a protected disclosure under PIDA.

May I therefore also ask that you alert your registrants/members, and any of your own staff who may act in a legal capacity for any individual/party considering signing an agreement in the future, to these changes.

NHS Employers are also writing to all NHS organisations highlighting these issues and outlining some of the legal boundaries that employers need to think about when considering the use of compromise agreements in terms of employment, contractual and severance agreements; including providing clarity on:

- what a compromise agreement is;
- when to use a compromise agreement and the statutory requirements that must be met in order for it to be effective; and
• the use and types of confidentiality clauses that may legitimately be used.

The latest staff survey results show that while 90% of NHS staff say they know how to raise their concerns, only 72% say that they feel safe to do so. These figures, coupled with recent events, illustrate very clearly that we can and must do more. However, this cannot be achieved simply through central diktats from Whitehall. It is determined in the myriad of ways in which every organisation engages with every individual member of staff, every day of the week.

I hope that by taking this concerted action we can, as a system, further help to ensure that all individuals are positively encouraged to raise concerns in the public interest and know they are protected and supported if they choose to do so. Supporting staff to raise their concerns is critical in shaping an environment in which we can continue to deliver the best possible care for patients.

Yours faithfully

Gavin Larner
Director
Professional Standards