

Health Service Circular



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The Public Interest Disclosure Act 1998

Whistleblowing in the NHS

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The Public Interest Disclosure Act 1998

Whistleblowing in the NHS

Summary

The Public Interest Disclosure Act 1998 became law on 2 July 1999. The Act gives significant statutory protection to employees who disclose information reasonably and responsibly in the public interest and are victimised as a result. An employee who is victimised in breach of the Act can bring a claim at an employment tribunal. Those who lose their jobs in breach of the Act can be fully compensated for their losses. There is no limit to the amount of awards that employment tribunals can make in these circumstances. Similarly, there is no cap on the awards for victimisation short of dismissal. Awards will be based on what is just and equitable in all the circumstances.

Gagging clauses in employment contracts and severance agreements which conflict with the protection afforded by the Act will be void. A summary of the main provisions of the Act is attached at Annex 1.

The Act does not require organisations to set up a whistleblowing policy, but provides strong reasons why they should. NHS Trusts and Health Authorities should have such policies already in place [EL(93) 51 - Guidance to Staff on Relations with the Public and the Media], but local policies will need to be reviewed and updated as necessary to ensure that they comply with the new statutory protection for employees.

Background

The fear of being labelled a trouble-maker, the fear of appearing disloyal and the fear of victimisation by managers and colleagues are powerful disincentives against speaking up about genuine concerns staff have about criminal activity, failure to comply with a legal duty, miscarriages of justice, danger to health and safety or the environment, and the cover up of any of these in the workplace.

In recent years the public has been shocked by disasters and scandals that have claimed lives and damaged others. The enquiries set up to uncover the facts behind these catastrophes have revealed all too often that they had been a consequence of a pattern of poor practice over a long period of time and that, although not officially recognised, were often known about by employees who had been too scared to speak up, or who had raised the matter only to find their concerns ignored.

The NHS has had its share of incidents which could, and should, have been prevented had staff felt able to raise concerns about healthcare matters in a responsible way without fear of victimisation. These incidents have damaged public confidence in the NHS. The public and the wider healthcare community is entitled to ask why it is that staff are unwilling to take it up with the powers that be and where they are why was nothing done about it.

NHS policy on freedom of speech was set out plainly in Alan Milburn's letter to Chairs of NHS Trusts and Health Authorities dated 25 September 1997, and Mike Deegan's complementary letter to Chief Executives of the same date. Ministers expect a climate of openness and dialogue in the NHS, a culture and environment everywhere in the NHS which encourages staff to feel able to raise concerns about healthcare matters sensibly and responsibly without fear of victimisation. The Public Interest Disclosure Act provides a fresh impetus for further action.

Action

Every NHS Trust and Health Authority should:-

- Have in place local policies and procedures which comply with the provisions of the Public Interest Disclosure Act 1998. The minimum requirements of local policies should include:-
 - (i) the designation of a senior manager or non-Executive Director with specific responsibility's for addressing concerns raised in confidence which need to be handled outside the usual line management chain.
 - (ii) guidance to help staff who have concerns about malpractice to do so reasonably and responsibly with the right people.
 - (iii) a clear commitment that staff concerns will be taken seriously, and investigated.
 - (iv) an unequivocal guarantee that staff who raise concerns responsibly and reasonably will be protected against victimisation.

and should prohibit:-

- (v) confidentiality "gagging" clauses in contracts of employment, and compromise agreements which seek to prevent the disclosure of information in the public interest.
- Ensure that all their staff are aware of local policy and procedures and their own responsibilities for raising genuine concerns in a reasonable and responsible way.

Enclosed with this circular is a resource pack, produced by Public Concern at Work¹. It includes a copy of the Public Interest Disclosure Act and a toolkit which has been designed particularly to help employers to draw up whistleblowing policies and procedures and, where these already exist, to update them to ensure compliance with the Act. The components of the toolkit are:-

- An introductory booklet which explains in simple terms what whistleblowing is and why it is important to your organisation and everyone involved with it. Along with four case studies and a practical summary of the Public Interest Disclosure Act, it takes you through the key aspects of whistleblowing policies.
- An implementation guide which gives a practical, easy-to-follow guide with all you need to roll-out a successful whistleblowing policy. Starting from the first meeting with management, taking you step-by-step through to the launch and monitoring of your policy. It includes a model policy, promotional and training aids and letters to legal advisers and staff.

¹ Public Concern at Work is an independent charity and a leading authority on public interest whistleblowing, and was closely involved in setting the scope and detail of the Public Interest Disclosure Act.

- A computer disk which contains PowerPoint slides and OHPs with speaking notes for training and presentations to managers and staff. It also has file copies of key documents.
- Other tools, including a checklist to guide you through the preparation and implementation of your policy, the full Act with authoritative notes for use by you and your legal advisers, posters to display throughout your organisation, a pocket guide to reproduce for staff and gives details of a free helpline for staff.

Associated documentation:

- 'Guidance to staff on relations with the public and the media - EL(93)51' (June 1993).
- 'Dear Colleague' letter to Chairs of NHS Trusts and Health Authorities on Freedom of Speech in the NHS, from the former Minister of State for Health, Alan Milburn (25 September 1997).
- 'Dear Colleague' letter to Chief Executives of NHS Trusts and Health Authorities on Freedom of Speech in the NHS from the former Acting Director of Human Resources at the NHS Executive, Mike Deegan (25 September 1997).
- Maintaining Good Medical Practice, General Medical Council (July 1998).
- The Code of Professional Conduct, United Kingdom Central Council for Nursing, Midwifery and Health Visitors (1992)
- 'Dear Colleague' letter on concern in respect of the environment of care, United Kingdom Central Council for Nursing, Midwifery and Health Visitors (September 1998).

This circular has been issued by:

Hugh Taylor

Director of Human Resources

Annex 1

Summary of the main provisions of the Public Interest Disclosure Act 1998.

Malpractice

The Act applies to people at work raising genuine concerns about crime, breach of a legal obligation (including negligence, breach of contract, breach of administrative law), miscarriage of justice, danger to health and safety or the environment and any cover up of these. In the NHS this would include a worker raising concerns about risks to patients or about financial malpractice. It applies whether or not the information is confidential.

Individuals covered

In addition to employees, it covers other workers, trainees, agency staff, home workers and all self-employed NHS professionals (i.e. doctors, dentists ophthalmologists and pharmacists. The usual employment law restrictions on minimum qualifying period and age do not apply. It does not cover the genuinely self-employed (other than in the NHS), volunteers, the intelligence services, the army or the police

Internal disclosures

A disclosure to the employer will be protected if the whistleblower has an honest and reasonable suspicion that the malpractice has occurred, is occurring or is likely to occur. For the purposes of the Act, the employer of self-employed NHS professionals is deemed to be the Health Authority. Where a third party is responsible for the malpractice this same test applies to disclosures made to it.

Legal advice

To ensure that people concerned about malpractice can get independent and confidential advice about how the Act works, disclosures to lawyers are protected.

NHS and quango's

To promote accountability in public life, the same protection as for internal disclosures applies where someone in the NHS or a public body blows the whistle direct to the sponsoring Department. There is no requirement that such concerns should be raised internally first.

Regulatory disclosures

Special provision is made for disclosures to bodies which are prescribed under the Act. Such disclosures will be protected where the whistleblower meets the tests for internal disclosures and, additionally, honestly and reasonably believes that the information and any allegation contained in it are substantially true.

Wider disclosures

Wider disclosures (e.g. to the police, the media MPs, and non-prescribed regulators) are protected if, in addition to the tests for regulatory disclosures, they are not made for personal gain and if they satisfy a further two provisions. That is the concern must have been raised with the employer or a prescribed regulator, unless, there was reasonable belief

of victimisation, there was no prescribed regulator and there was reasonable belief that there would be a cover up, and the matter was exceptionally serious. If one of these preconditions is met and the tribunal is satisfied that the disclosure was reasonable, the whistleblower will be protected.

Full Protection

Where a worker or employee is victimised for blowing the whistle in breach of the Act, they may bring a claim to an employment tribunal. Workers and employees who lose their jobs in breach of the Act will be fully compensated for their losses. Awards for victimisation short of dismissal will also be uncapped and based on what is just and equitable in all the circumstances.

Gagging clauses

Such clauses in employment contracts and severance agreements are void insofar as they conflict with the Act's protection.