

Will NHS Whistleblower 'Gagging Orders' Soon Be Confined to the History Books?

```
[et_pb_section fb_built="1" _builder_version="3.0.100"
background_image="http://davidk423.sg-host.com/wp-content/uploads/2017/09/bdbf_final-stages-1-4-1.jpg" custom_padding="|||"
global_module="2165" saved_tabs="all"] [et_pb_row
_builder_version="3.25" custom_padding="|||"] [et_pb_column
type="4_4" _builder_version="3.25" custom_padding="|||"
custom_padding__hover="|||"] [et_pb_text
_builder_version="3.26.6" background_layout="dark"
custom_margin="0px|||" custom_padding="0px|||"]
```

Employment Law News

```
[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section] [et_pb
_section fb_built="1" admin_label="section"
_builder_version="3.22.3"] [et_pb_row
column_structure="3_4,1_4" admin_label="row"
_builder_version="3.25" background_size="initial"
background_position="top_left"
background_repeat="repeat"] [et_pb_column type="3_4"
_builder_version="3.25" custom_padding="|||"
custom_padding__hover="|||"] [et_pb_text
_builder_version="3.26.6" text_orientation="justified"
use_border_color="off"]
```

Will NHS Whistleblower 'Gagging Orders' Soon Be Confined to the History Books?

In a recent piece in the British Medical Journal (BMJ), I was asked to comment on the use of so-called 'gagging orders' within the NHS and whether they are legally enforceable. In my experience as an employment law solicitor, even with such an order in place, there is nothing to prevent an NHS employee from making a 'protected disclosure'. After all, if that individual has reason to believe criminal activity is going on, or there is a real threat to the health and safety of staff or patients, this must be brought to the fore. In the following article, my aim is to explain what is really going on in our healthcare system with regard to the treatment of whistleblowers, why some who do blow the whistle are subsequently barred from speaking out after the event, and the regulatory perspective on NDAs designed to gag whistleblowers from speaking up.

Promises to ban 'gagging orders' are nothing new

The NHS has heard it all before. In 2013, Jeremy Hunt, went on the offensive over the use of gagging orders in the NHS, stating there would be "consequences" for NHS executives if they were found to have wrongly gagged a former manager for raising concerns over patient safety. [Speaking](#) to Radio 4 in 2013, Mr Hunt stated "firstly, we must have a culture where people are not afraid to speak out and secondly I was very concerned that it appeared that someone was being leaned on not to speak out and most of all I want to get to the bottom of whether there is any truth in what he was saying."

At the time, whistleblowing was in the news because Gary Walker, the former chief executive of United Lincolnshire Hospitals Trust, publicly stated he had been sacked in 2010 for raising concerns regarding patient safety ahead. Six years later in 2019, it was our new Health Secretary, Matt Hancock, who [stated](#) he was "determined to end" settlement agreements which infringe on the rights of staff to blow the whistle. Quite whether Mr Hancock can succeed where Mr Hunt failed remains to be seen.

Are gagging clauses worth the paper they are written on?

In the case which caused Matt Hancock to raise his concerns, Sue Allison, a specialist breast radiographer with 34 years' experience had entered into a settlement agreement with her employers after she raised concerns in 2012 over missed cancer diagnoses and poor standards of care within a breast care department at Morecombe Bay NHS Foundation Trust. According to Mrs Allison's account, she was "[bullied, defamed and blacklisted within the NHS](#)". She has also struggled to find new employment since 2012. In March 2019, the Employment Tribunal heard her case and it was determined that the NDA was, in fact, invalid, and Mrs Allison had a "prima facie case of whistleblowing detriment" and, therefore, should be permitted to bring a grievance relating to her mistreatment without being gagged.

This case demonstrates the hard reality that the NHS is continuing to misuse non-disclosure agreements (NDAs) as a means to prevent whistleblowers from speaking out. And, worse, the gagging clauses contained within these NDAs are often not valid.

In my own experience, every settlement agreement I have read has contained some form of confidentiality (gagging) clause. Even if the law allows an NHS employee to raise a 'protected' disclosure, they are often prevented from being open about what happened to them once they have entered into an agreement with their employer, preferring to say nothing for fear of being in breach of the settlement.

The SRA's perspective on NDA's to prevent whistleblowing

Recent high-profile cases, such as the one involving Harvey Weinstein, show how those in power have used NDA's to silence people from speaking openly. Even Weinstein's own assistant, Zelda Perkins, was subject to an NDA, which she eventually broke when she spoke to the Women and Equalities Committee

inquiry into workplace sexual harassment. Her NDA, which was entered into under considerable duress, was written in such a way as to prevent her from speaking to anyone about what she had seen and experienced while working with Weinstein.

Responding to mounting pressure, in March 2019, the Solicitors Regulation Authority (SRA) [published guidance](#) specifically intended to warn against the use of NDAs which are intended to make a person feel they cannot report wrongdoing and threaten litigation or other adverse consequences if they do so. They have also recommended the possible use of a “cooling off” period for employees who have entered into an NDA.

Solicitors acting on either side of the fence need to be very careful about the wording and effect of NDAs.

Final words

The bravery of whistleblowers to bring attention to wrongdoing, dangerous behaviour, threats to patient safety and misconduct should be supported and not suppressed. We have acted in numerous complex, high profile and high value [cases](#), pushing the boundaries of [whistleblowing law](#) in favour of the whistleblower each time. Those in power that continue to perpetuate cover-ups have no place in our private and public institutions. In the context of the NHS, such behaviour is blatantly dangerous and potentially places lives in danger. If you are considering blowing the whistle, but are unsure of your rights, or concerned you may pay a significant price for your honesty, you should speak to an employment lawyer without delay. Not only will they explain your rights and protections under the law, but they will also provide support and guidance. BDBF has won some of the highest [whistleblowing compensation claims](#) for its clients. Remember, you are on the side of right and justice – and your brave actions may just prevent harm to a member of staff or patient.

If you have any questions regarding employment law matters,

please do not hesitate to call us on 020 3828 0350.

BDBF are a leading firm of whistleblowing and employment law specialists in the City of London.

```
[/et_pb_text][/et_pb_column][et_pb_column      type="1_4"
_builder_version="3.25"      custom_padding="|||"
custom_padding__hover="|||"][et_pb_sidebar orientation="right"
area="sidebar-1"      _builder_version="3.0.74"
remove_border="off"][/et_pb_sidebar][et_pb_column][et_pb_row
][et_pb_section]
```