

Title: Confidentiality Clauses: measures to prevent misuse in situations of harassment or discrimination IA No: BEIS004(C)-19-LM RPC Reference No: Lead department or agency: BEIS Other departments or agencies:	Impact Assessment (IA)			
	Date: 26/03/2019			
	Stage: Consultation			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
Contact for enquiries:				

Summary: Intervention and Options **RPC Opinion:** RPC Opinion Status

Cost of Preferred (or more likely) Option (in 2016 prices)			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status Qualifying provision
£m -115.8 to -162.2	£m -93.5 to -127.3	£m 10.9 to 14.8	

What is the problem under consideration? Why is government intervention necessary?
Confidentiality clauses serve a useful and legitimate purpose, as part of both employment contracts and settlement agreements in the employment context. Recent evidence has demonstrated that some employers have exploited the imbalance of power in the workplace to use such clauses to intimidate victims of harassment or discrimination into silence. Government intervention is required to ensure that the legal limits of confidentiality clauses are made clear to individuals who sign them, and clarity is provided that such clauses cannot be used to prevent reporting of potential criminality to the police.

What are the policy objectives and the intended effects?
The policy objectives are to ensure that employers cannot use individuals' lack of knowledge of the legal limits to the coverage of confidentiality clauses to intimidate them into silence, for instance when they have experienced harassment or discrimination in the workplace.
The intended effects are that individuals covered by confidentiality clauses do not feel unable to disclose wrongdoing, either to the police or to other relevant people or organisations (such as 'prescribed persons' under 'whistleblowing' regulations) due to the confidentiality clause.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base) The consultation is considering a range of regulatory changes (a combined option 1, 2 and 3 is the preferred option):
Option 1) Legislate that no provision in an employment contract/written statement of employment particulars or settlement agreement can prevent any kind of disclosure to the police.
Option 2a) Requiring that a specific set of wording included in legislation that sets out the legal limits to confidentiality clauses is included in all new employment contracts/written statements and settlement agreements with confidentiality clauses.
Option 2b) Requiring all new employment contracts/written statements and settlement agreements with confidentiality clauses to clearly set out the legal limits of these confidentiality clauses.
Option 3) Specifying that for a settlement agreement to be valid, the independent advice the worker must receive has to cover the nature and limitations to any confidentiality clause included in the agreement.
Non-regulatory options have been ruled out as they will not provide sufficient protection from employers who choose to misuse confidentiality clauses to intimidate victims into silence.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			N/A		
Is this measure likely to impact on trade and investment?			No		
Does this measure comply with our international trade and investment obligations, including those arising under WTO agreements, UK free trade agreements, and UK Investment Treaties?			Yes		
Are any of these organisations in scope?		Micro Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: Kelly Tolhurst Date: 11/0/2019

Summary: Analysis & Evidence

Policy Option 1

Description: Legislate that no provision in an employment contract/written statement or settlement agreement can prevent any kind of disclosure to the police

FULL ECONOMIC ASSESSMENT

Price Base Year 2018	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0	0

Description and scale of key monetised costs by 'main affected groups'

There are no monetised costs, as this Option is largely clarifying the law to make clear that employers can discuss issues with the police without falling foul of a confidentiality clause.

Other key non-monetised costs by 'main affected groups'

It is possible that where this further clarity results in individuals feeling able to disclose information to the police, this may facilitate a new or ongoing investigation. This may place some costs on individuals or employers being investigated for potentially carrying out criminal acts.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0	0

Description and scale of key monetised benefits by 'main affected groups'

We have not monetised any benefits for this option.

Other key non-monetised benefits by 'main affected groups'

The policy could potentially benefit individuals who have signed settlement agreements who feel intimidated into silence due to a lack of awareness about their rights to disclose information – for instance in the public interest. Where additional investigations are generated, it may help to bring wrongdoers to justice, and potentially lead to improved workplace culture (for instance in the organisations affected).

Key assumptions/sensitivities/risks

Discount rate (%)

We do not have any quantitative evidence of the number of settlement agreements, or the number of individuals who have signed settlement agreements who are unaware of their rights to disclose to the police.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	Score for Business Impact Target (qualifying provisions only) £m:0
0Costs: 0 Benefits: 0 Net: 0	

Policy Option 2a

Description: The inclusion of a specific set of wording included in legislation setting out the legal limits to confidentiality clauses in all new employment contracts/written statements and settlement agreements with confidentiality clauses

FULL ECONOMIC ASSESSMENT

Price Base Year 2018	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: -22.8

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	22.8		22.8

Description and scale of key monetised costs by 'main affected groups'

Familiarisation costs for all employers, at £20.5 million, of which £20.3 million is for private sector businesses. The one-off cost of placing the specific required text into templates for employment contracts/written statements and settlement agreements at £2.4 million, of which £2.2 million is for private sector businesses. There are no expected ongoing costs.

Other key non-monetised costs by 'main affected groups'

The option may lead to some additional disclosures of potential wrongdoing, which may lead to some new investigations affecting some individuals or employers.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0	0

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Individuals will be clear that there are legal limits to confidentiality clauses in their employment contracts/written statements of employment particulars and settlement agreements, which may help to limit intimidatory situations around settlements, and improve the individuals' wellbeing. It may lead to some additional disclosures of wrongdoing, which may result in more general improvements in workplace culture.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

We have assumed that employers will use templates as the basis for drafting employment contracts/written statements and settlement agreements, and will amend these templates to make them compliant with the proposal. We've assumed that micro and small businesses will not have dedicated internal HR/employment law professionals, and therefore would make use of their external HR or legal consultants or free online templates provided by HR or legal consultancies. We have conducted sensitivity analysis for this assumption.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m: Costs: 2.6 Benefits: 0 Net: 2.6	Score for Business Impact Target (qualifying provisions only) £m: 12.2
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Policy Option 2b

Description: Requiring all new employment contracts/written statements and settlement agreements with confidentiality clauses to clearly set out the legal limits of these confidentiality clauses.

FULL ECONOMIC ASSESSMENT

Price Base Year 2018	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: -25.1

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	25.1	0	25.1

Description and scale of key monetised costs by 'main affected groups'

Familiarisation costs for all employers, at £20.5 million, of which £20.3 million is for private sector businesses. This option has one-off costs for drafting clauses, as well as (in line with Option 2a) the cost of placing them into templates.

The one-off cost of drafting the required text is £2.2 (£2.1 million for the private sector)

The one-off cost of placing the required text into templates for employment contracts/written statements and settlement agreements at £2.4 million, of which £2.2 million is for private sector businesses (as in option 2a).

There are no expected ongoing costs.

Other key non-monetised costs by 'main affected groups'

The option may lead to some additional disclosures of potential wrongdoing, which may lead to some new investigations affecting some individuals or employers.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0		0

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Individuals will be clear that there are legal limits to confidentiality clauses in their employment contracts/written statements of employment particulars and settlement agreements, which may help to limit intimidatory situations around settlements, and improve the individuals' wellbeing. It may lead to some additional disclosures of wrongdoing, which may result in more general improvements in workplace culture.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

We have assumed that employers will use templates as the basis for drafting employment contracts/written statements and settlement agreements, and will amend these templates to make them compliant with the proposal. We've assumed that micro and small businesses will not have dedicated internal HR/employment law professionals, and therefore would make use of their external HR or legal consultants or free online templates provided by HR or legal consultancies. We have conducted sensitivity analysis for this assumption.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:	Score for Business Impact Target (qualifying provisions only) £m: 12.4
Costs: 2.9 Benefits: 0 Net: 2.9	

Policy Option 3

Description: Specifying that for a settlement agreement to be valid, the independent advice the worker must receive has to cover the nature and limitations to any confidentiality clause included in the agreement.

FULL ECONOMIC ASSESSMENT

Price Base Year 2018	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -161.2	High: -110.1	Best Estimate:
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)
Low	0.1		12.8		110.1
High	0.1		18.7		161.2
Best Estimate			0		
Description and scale of key monetised costs by 'main affected groups'					
The estimated familiarisation costs for independent advisers are around £0.1m. The estimated annual cost to employers for paying for the cost of additional advice is between £12.8 million and £18.7 million (of which £9.8 million to £14.1 million is for private sector businesses).					
Other key non-monetised costs by 'main affected groups'					
The option may lead to some additional disclosures of potential wrongdoing, which may lead to some new investigations affecting some individuals or employers.					
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)
Low	Optional		Optional		Optional
High	Optional		Optional		Optional
Best Estimate	0				0
Description and scale of key monetised benefits by 'main affected groups'					
Other key non-monetised benefits by 'main affected groups'					
Employees and workers signing settlement agreements will benefit from having the nature and limitations of any confidentiality clause in their settlement agreement explained to them, along with information about the type of disclosure they would still be able to make. This should provide greater clarity to these individuals, and may have wider benefits if it leads to disclosures that help the authorities to tackle wrongdoing by employers.					
Key assumptions/sensitivities/risks					Discount rate (%)
We do not have good information about the number of settlement agreements made outside the employment tribunal process, and so have assumed that these type of settlement agreements predominantly occur in large employers for higher paid staff, in line with information from business stakeholder groups' evidence to a related consultation in 2012. We have assumed that, as is standard, employers would continue to pay for independent advice for employees/workers, including the cost of the additional advice.					3.5

BUSINESS ASSESSMENT (Option 4)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m: 42.9 to 61.5
Costs: 9.9 to 14.1	Benefits: 0	Net: 9.9 to 14.1	

Evidence Base (for summary sheets)

Problem under consideration;

1. Confidentiality clauses are generally used, in the employment context in two main ways:
 - a. As part of employment contracts, to protect confidential information related to the employer. This could include trade secrets, its intellectual property, its clients and its data. Case law has held that all employment contracts carry an implicit duty of confidentiality, so they may not have to include specific confidentiality clauses.
 - b. As explicit clauses in settlement agreements which have been negotiated to resolve workplace disputes between an employer and worker. The confidentiality clauses are designed to prevent information relating to the dispute from being disclosed more widely, in the interests of both parties to the dispute.
2. There are certain legal limitations on the extent of confidentiality agreements, 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 a worker can agree to waive their right to bring a claim under a legally valid settlement agreement). Perhaps most importantly, a confidentiality clause can never abrogate 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.
3. Case law has established that confidentiality provisions cannot be unlimited, even if they are drafted in such a way to suggest they cover anything a worker might learn while working for a particular employer. Simply writing an expansive confidentiality clause into a 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. The public interest is also able to override a duty of confidentiality.
4. However, evidence has come to light that in some cases confidentiality clauses are being used to intimidate the victims of harassment or discrimination into silence, despite these existing protections. The Women and Equalities Select Committee (WESC) July 2018 report on sexual harassment in the workplace sets out some specific cases where such clauses are being misused¹. These include the Presidents Club Dinner and the Zelda Perkins cases. Such exploitation of confidentiality clauses can have a negative impact on the individuals affected, causing stress and undermining their confidence in the workplace environment. Also, individuals subject to such clauses may "not report serious wrongdoing to the police", and may feel "compelled not to assist with relevant law enforcement investigations" and may "feel unable to speak openly and in the public interest about serious wrongdoing" potentially limiting public debate². The WESC Inquiry established that lack of awareness among individuals about a potentially complex area of law was a major factor in enabling confidentiality clauses to be used to intimidate workers into silence³.

Rationale for intervention

5. As suggested above, the reasons for Government intervention on confidentiality clauses are to improve equity and fairness in the workplace.
6. The misuse of confidentiality clauses to intimidate workers into silence is likely to negatively impact on the wellbeing of the worker concerned. As such practice is designed to cover up wrongdoing, it could enable poor workplace culture to perpetuate, thereby negatively affecting other workers. It may lead to serious wrongdoing not being investigated, or the hampering of

¹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>

² <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>, paragraph 110.

³ <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>, paragraphs 118 to 121.

investigations taking place due to evidence not being reported. More widely, public progress in improving behaviours may be slowed if information is not introduced into the public debate.

Policy objective

7. The policy objective is to provide greater clarity to individuals of the legal limits to confidentiality clauses and their right to disclose potential wrongdoing to the police. This will make it more difficult for employers to intimidate workers into silence to cover up wrongdoing. This should help in improving workplace culture in establishments where confidentiality clauses are subject to misuse. It could also help facilitate wider improvements in workplace culture through greater awareness of bad behaviours.

Policy Options

8. **Option 0** – the no change option. The lack of awareness among individuals about the legal limits of confidentiality clauses would remain unchanged. This would leave workers potentially vulnerable to the use of such clauses to intimidate them into non-disclosure of wrongdoing in the workplace. Therefore this is not an acceptable policy option.
9. The consultation considers three complementary options, with the preferred policy position being to proceed with all three in combination.
10. **Option 1** - legislate to make explicit that no provision in an employment contract or settlement agreement can prevent disclosure to the police.
11. **Option 2** – legislate to require all employment contracts (or written statements of employment particulars) and settlement agreements with a confidentiality clause to include text clearly setting out the legal limitations of confidentiality clauses. This would either be through:
 - a. A specific set of clauses set out in legislation, or
 - b. By specifying general requirements, but leaving the specific drafting as the responsibility of employers.
12. **Option 3** – Legislate to specifically require that the independent advice that workers must receive for a settlement agreement to be valid (under Section 203(3) of the Employment Rights Act 1996) has to cover the nature and limitation of any confidentiality clause included in the agreement, and the disclosures that the worker is still able to make.
13. We have ruled out a non-regulatory option. The evidence suggests that in some cases the lack of clarity on the legal limits of confidentiality clauses is deliberately exploited by employers to intimidate workers to not disclose wrongdoing. Therefore, it is unlikely that a non-regulatory approach would achieve the required policy outcomes.

Monetised and non-monetised costs and benefits

Option 1:

14. Option 1 effectively makes explicit in law that people are able to discuss any issue with the police without fear of being caught by a confidentiality clause. No additional requirements are placed on employers, individuals or the police. It is already expected that the police will consider and potentially investigate any information disclosed to them. The police are not expected to check whether the information disclosed is subject to a confidentiality clause.

Cost

15. There are no direct costs to employers, individuals or the police. The option would state explicitly in legislation a position that might already be understood to be the existing law operating in the UK: that you can report potential wrongdoing to the police in any circumstances⁴.
16. It is possible that some individuals who had signed a settlement agreement may feel unshackled to report their case to the police, for instance if they had been previously led to believe that the confidentiality clause in their settlement agreement meant that they shouldn't. This may lead to new or enhanced police investigations of potential crimes. It is not possible to estimate the number of additional investigations that may be generated. It is likely that individuals rather than employers would generally be the target of police investigations. It is also not clear the extent to which those subject to the additional investigations would have a case to answer. It is not possible to monetise any costs to individuals or employers who may be subject to any additional investigations generated by Option 1.

Benefits

17. Individuals subject to intimidation when involved in negotiations for a settlement agreement would benefit from the explicit statement in law that confidentiality clauses in such agreements would not prevent them disclosing their case to the police. This may help to reduce the negative impacts that individuals in these circumstances tend to suffer. Any additional investigations generated due to Option 1 may also lead to the prosecution of those committing criminal acts. This could also have a wider benefit in improving the workplace culture where these individuals were operating. It is not possible to monetise these benefits.

Option 2

18. This option would require all new employment contracts (or written statements)⁵ and settlement agreements to include clauses clearly setting out the legal limits of confidentiality clauses. This could be done in one of two ways:
 - a. Setting out in legislation the specific text that would need to be included in each new contract and settlement agreement
 - b. Setting out the general requirements for the text, but make individual employers responsible for drafting the clauses.
19. This proposal only requires new employment contracts or settlement agreements, on commencement of the policy, to include the clear text. Therefore, employers will not have to re-supply all workers with revised employment contracts, or provide revised versions of existing settlement agreements (which would be difficult to achieve in practice as it is likely that employers would have lost contact with the worker involved in most cases). However, employers may need to provide revised versions of existing contracts if they are updating employment terms and conditions, at this stage the updated employment contracts should include the required text.

Costs

Familiarisation costs

20. We assume all employers would need to familiarise themselves with this change. This is potentially a conservative approach. While employment contracts due implicitly confer a duty of confidentiality on workers, not all such contracts will actually set out confidentiality clauses. Also, not all employers will make use of settlement agreements. We assume it would take employers a similar amount of time for employers to familiarise with this option as for the changes involved in extending the right to a written statement to

⁴ This does not mean that in the specific environment of negotiating a settlement agreement individuals cannot be confused by employers about the legal extent of the disclosure agreement, as suggested in paragraphs 115, 123 and 124 of the WESC Report on sexual harassment in the workplace.

⁵ Option 2 may require the clear text setting out the legal limits of confidentiality clauses to be included in the written statement of employment particulars that employers are required to provide to all workers and employees. In many cases the employment contract will comprise the written statement.

'dependent contractors', and specifying additional information for a written statement to include. Because it includes requiring specific information to be set out in written statements, this policy has strong similarities with option 2. The impact assessment (BEIS038(F)-18-LM)⁶ for this policy assumed it would take 30 minutes for familiarisation. We assume that in small and micro employers that a general manager would familiarise themselves with the proposed change in Option 2, while at medium or large businesses it would be an HR director or manager.

Businesses

21. We get information on the number of private sector (including the non-profit sector) business employers from the BEIS 2018 Business Population Estimates⁷. We estimate the labour costs by taking the hourly wage excluding overtime from the Annual Survey of Hours and earnings 2018 for corporate managers and directors (£22.59) and HR directors and managers (£24.66). We then uprate these for non-wage labour costs based on Eurostat's 2017 estimate for UK non-wage labour costs as % of wages (20.66%). Taking the half estimate for familiarisation time we get the following estimate for private sector employer's familiarisation costs:

Table 1: Private sector employers' familiarisation costs

<u>by number of employees</u>	<u>Private sector employers</u>	<u>non-profit sector employers</u>	<u>Familiarisation cost per employer</u>	<u>total familiarisation cost (£)</u>
1 ⁸	146,160	35,040	13.63	2,469,756
2-4	734,145	19,855	13.63	10,277,020
5-9	256,985	15,055	13.63	3,707,905
10-19	137,420	9,115	13.63	1,997,272
20-49	72,230	5,095	13.63	1,053,940
50-99	22,995	1,950	14.88	371,182
100-199	9,825	1,155	14.88	163,382
200-249	2,015	275	14.88	34,075
250-499	3,800	605	14.88	65,546
500 or more	3,710	615	14.88	64,356
total	1,389,285	88,760		20,204,435

22. Employment lawyers may also need to familiarise themselves with the proposed change in Option 2. Again we assume 30 minutes of familiarisation time, and use ASHE 2018 hourly wages for a legal professional (£26.22) uprated for non-wage labour costs. We use the membership of the Employment Lawyers Association (around 6,000) as our estimate for the number of UK employment lawyers⁹. This produces an estimate for familiarisation by employment lawyers of around £95,000.

23. The total estimate for private sector familiarisation is therefore around **£20.3 million**.

Public sector

⁶ http://www.legislation.gov.uk/ukia/2019/5/pdfs/ukia_20190005_en.pdf

⁷ <https://www.gov.uk/government/statistics/business-population-estimates-2018>

⁸ For the non-profit sector this includes organisations with zero employees as well as those with one employee.

⁹ To corroborate this estimate, we did a search on the SRA/Law Society Find a Solicitor search application, looking for those who covered employment law work. This identified 5,185 such solicitors in England and Wales.

24. Following the same approach as for private sector employers, we estimate the following costs for public sector employers:

Table 2: Public Sector employers' familiarisation costs

<u>number of employees</u>	<u>Government employers</u>	<u>Familiarisation cost per employer</u>	<u>total familiarisation cost</u>
Zero or 1 employee	4,565	13.63	62,221
2-4	1,625	13.63	22,149
5-9	600	13.63	8,178
10-19	405	13.63	5,520
20-49	1,105	13.63	15,061
50-99	1,260	14.88	18,749
100-199	1,275	14.88	18,972
200-249	265	14.88	3,943
250-499	505	14.88	7,514
500 or more	955	14.88	14,210
total	12,560		176,518

25. The total familiarisation cost is estimated at around **£20.5 million**.

One-off transition costs

Option 2a)

26. This will require all new settlement agreements with a confidentiality clause and all new employment contracts to include some specific text that sets out the legal limits of confidentiality clauses. The specific text will be included in the legislation.

27. Most employers are likely to use templates for their employment contracts and settlement agreements, to ensure that all the key legal areas of these documents are considered when completing documents for individuals or, potentially multiple staff in a similar role. Many employers, especially large and medium employers, will have templates specific to their organisation. However, some HR consultancies and legal businesses (and advice groups like Acas) make free templates for employment contracts, written statements of employment and settlement agreements available online¹⁰. We checked informally with stakeholders who confirmed that employers would often use templates to draft employment contracts and settlement agreements.

28. We assume that medium (50 to 249 employees) and large (250 or more employees) businesses will have their own in-house HR professional or department, as they will have larger workforces which will require greater HR input. For micro (1 to 9 employees) or small (10 to 49 employees) we assume that they will not have their own in-house HR resource. They will make use of their external HR or legal advisor, or will use the free templates available when writing employment contracts or settlement agreements. This is

¹⁰ Some examples for employment contracts and settlement agreements are:
<https://www.simplybusiness.co.uk/knowledge/articles/2017/01/contract-of-employment-template-free-pdf-word-download/>
<https://www.human-resource-solutions.co.uk/HR-Policy-Pages/Employment-Contract/Employment-Contract.htm>
<https://www.lawdepot.co.uk/contracts/employment-contract/#.XEb6nmBLEhc>
<https://www.monacosolicitors.co.uk/settlement-agreements/templates/>
[https://uk.practicallaw.thomsonreuters.com/6-200-3471?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-200-3471?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)
<https://www.rocketlawyer.co.uk/documents-and-forms/settlement-agreement.rl#>

in line with the evidence from Startups.co.uk, the independent small business advice platform. This suggests that businesses with less than 50 employees are considered not to have enough staff to warrant a dedicated HR employee, whereas employers with 50 or more staff will generally have at least 1 dedicated HR employee¹¹. This is further backed up by evidence from the Survey of Employment Tribunal Applications 2013, which shows that, for employers that were party to an employment tribunal case, large and medium sized businesses were much more likely to have an internal HR department than small or micro businesses¹².

29. By updating the templates to include the required text set out in the legislation, employers will ensure that when they update existing employment contracts or draft new employment contracts and settlement agreements the required text will form part of the document.

Medium and large employers

30. For medium and large employers we assume that they update their own templates specific to the business. This is a conservative approach, as some of these employers may use general templates rather than firm-specific ones. We estimate that in a medium sized business it would take 1 hour of an HR director or manager's time to update their templates (labour cost =£29.75). In a large business, on average we estimate it would take two hours, as they will tend to have more templates for different types of staff. It would be a fairly routine task in cutting and pasting the specified text from the legislation or related guidance, but potentially some employers may have a large number of templates. The updating will also involve updating handbooks, policies and collateral documents. As noted above, there are an estimated 38,215 medium-sized and 8,730 large employers in the private sector (including the non-profit sector) and in the public sector. This produces the following one-off transition costs for Option 2a for medium and large employers:

Table 3: One-off implementation costs for medium and large employers – Option 2a

	<u>Number of employers</u>	<u>Unit labour cost</u>	<u>Total cost</u>
Private sector:			
Medium employer	38,215	£29.75	£1,136,896
Large employer	8,730	£59.50	£519,435
Public sector:			
Medium employer	2,800	£29.75	£83,300
Large employer	1,460	£59.50	£86,870
total	51,205		£1,826,501

Micro and small employers

31. As noted above, only new contracts and settlement agreements after commencement would be required to include the text setting out the legal limits to confidentiality clauses under Option 2. Businesses would not be required to update existing documents specifically to include the required text.

¹¹ <https://startups.co.uk/small-business-hr-outsourcing/>

¹² Survey of Employment Tribunal Applications 2013, table 2.8

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf

32. Based on the evidence from Startups.co.uk, we assume that micro and small businesses will either use the free templates as the basis for drafting employment contracts or settlement agreements, or would get advice and assistance from their external HR or legal consultant. As costed below, we expect employment lawyers and HR consultants to update their templates. This means there will be **no transition or implementation cost** for micro and small businesses, as the actions of employment lawyers and HR consultants should ensure that their employment contracts and settlement agreements will be compliant following commencement.

Employment lawyers, legal businesses and HR consultancies

33. As with medium and large businesses, under Option 2a we expect that employment lawyers, legal businesses dealing with employment law and HR consultancies would need to update their templates for employment contracts, written statements of employment and settlement agreements to include the required text. This includes the free templates that some of these businesses make available online. We estimate that it would take 1 hour of staff time to do this, either at the hourly labour cost for a legal professional (£31.61) or an HR director or manager (£29.75) for HR consultancies.

34. As indicated above, we estimate that there around 6,000 employment lawyers. For HR consultancies, we use the Annual Business Survey 2017 estimate for SIC 78.3, *other human resources provision*, which includes HR consultancies, or 2,169 businesses¹³. For legal businesses, we take the estimate for solicitors firms in England and Wales from the Solicitors Regulatory Authority at December 2018, of 10,375¹⁴. This is potentially an overestimate as it will include firms that don't deal with employment law, but this is partially balanced by the fact that it doesn't cover employment law firms in Scotland and Northern Ireland. This is also a conservative approach as some employment lawyers may be employed by legal firms (or medium and large employers) rather than be self-employed.

35. We estimate the following implementation cost for these groups for Option 2a is as follows:

Table 4: One-off implementation costs for employment lawyers, legal firms and HR consultancies – Option 2a

	<u>Number affected</u>	<u>Labour cost</u>	<u>Total cost (£)</u>
Employment lawyers	6,000	£31.61	189,660
Legal firms	10,375	£31.61	327,954
HR consultancies	2,169	£29.75	64,528
total			582,142

Total one-off implementation costs

36. **The estimated total one-off implementation costs for option 2a are £2.41million, of which £2.24 million are to the private sector.**

Option 2b

37. Under Option 2b, as well as integrating the required text into templates for employment contracts and settlement agreements (as covered above under Option 2a), employers would also have to produce their own suitable text, clearly explaining the legal limits of confidentiality clauses.

¹³

<https://www.ons.gov.uk/businessindustryandtrade/business/businessservices/datasets/uknonfinancialbusinesseconomyannualbusinesssurveysectionsas>

¹⁴ https://www.sra.org.uk/sra/how-we-work/reports/data/solicitor_firms.page

38. We spoke to a lawyer who had drafted clauses that would meet the requirements for Option 2. They estimated that it would take between thirty minutes to an hour for a lawyer to draft such text. To be on the conservative side we take an estimate of one hour for the time to draft suitable text for employment contracts and settlement agreements. For medium and large employers, employment lawyers and legal firms we assume that a legal professional, at an hourly labour cost of £31.61, would draft the text. For HR consultancies, we assume it would be an HR director or manager at an hourly labour cost of £29.75. The estimated numbers for these groups are as set out above.
39. The estimated cost of drafting suitable text to meet the requirements of Option 2b is set out below:

Table 5: One-off costs of drafting clear text setting out legal limits of confidentiality clauses

	<u>Number affected</u>	<u>Hourly labour cost</u>	<u>Total cost</u>
Private sector medium and large employers	46,945	£31.61	1,484,069
Public sector medium and large employers	4,260	£31.61	134,671
Employment lawyers	6,000	£31.61	189,660
Legal firms	10,375	£31.61	327,954
HR consultancies	2,169	£29.75	64,528
total			£2,200,881

40. In addition, under Option 2b the costs of inputting the required text into templates would also be incurred. As noted above this was estimated at £2.41 million, of which £2.24 million was for the private sector.
41. **The total estimated one-off implementation cost for Option 2b is therefore £4.61 million, of which £4.30 million is for the private sector.**
42. As above, we expect that micro and small businesses will either use the free employment contract and settlement agreement templates available online or will be assisted by their external HR or legal advisors when they need to produce these documents. Therefore we estimate that there is no cost arising for these businesses from the proposed Option 2b.

Enforcement

43. Enforcement for Option 2 will be through different mechanisms for employment contracts and settlement agreements.

Employment contracts

44. The policy for confidentiality clauses in employment contracts requires wording to be included in the written statement of employment particulars. Therefore, it is proposed to enforce compliance with Option 2 using the same method used to enforce compliance with the requirement to provide workers with a written statement of employment particulars.

45. This method works as follows; if a worker or employee brings a claim to an employment tribunal and is successful at a hearing, and it is found during the consideration of the claim that the employer had not provided them with a written statement, then they would be entitled to additional compensation. Therefore, enforcement is linked to non-compliance with an additional employment right. Workers or employees could not make an employment tribunal claim just on the basis of not having a written statement.

46. For confidentiality clauses, the enforcement process would work as follows:

- a. An individual brings an employment tribunal claim against their employer (or previous employer) on the grounds of discrimination (or other jurisdiction).
- b. They win their claim at an employment tribunal hearing.
- c. During the evidence presented at the hearing it is found that the written statement did not include a clear statement of the legal limits of the confidentiality clause in the contract.
- d. Additional compensation is awarded to the claimant.

47. This approach will not cause any additional costs to businesses that are compliant with Option 2. Claims will not be brought specifically on the issue of whether the required clear text has been included in employment contracts (or written statements). However, where this non-compliance forms part of a claim related to a claim on other grounds, the non-compliant employer would be additionally held to account for this failure to comply.

Settlement agreements

48. Option 2 in relation to settlement agreements would be enforced in the following way. If settlement agreements with confidentiality clauses did not include the required clear text setting out the legal limits of confidentiality clauses then the confidentiality clause would be void in its entirety.

49. This would prevent employers from successfully being able to sue individuals who had signed a settlement agreement and then discussed the subject of the agreement with another party (in addition to those disclosure to whom already legally overrides any confidentiality clause). There are potential negative impacts from this enforcement approach for employers that do not comply with Option 2. For instance there is a risk of reputational damage to non-compliant employers if the issue is made public in the media. However, employers that are compliant with Option 2 would face no additional costs from this enforcement approach.

Option 3

50. Section 203(3) of the Employment Rights Act 1996 requires that for a settlement agreement to be valid the worker have received independent advice on the said agreement. The legislation states that independent advice should cover the terms and effect of the proposed agreement, particularly the ability of the worker to pursue their rights through an employment tribunal¹⁵.

51. This proposal would amend the legislation to explicitly set out that the independent advice would need to cover the nature and limitations of any confidentiality clause in the agreement and the disclosures the worker could still make.

¹⁵ <https://www.legislation.gov.uk/ukpga/1996/18/section/203>

52. Although the law as it stands may suggest that the independent advice should already cover confidentiality clauses, and some lawyers claim to do so¹⁶, it may be that often that isn't the case. We therefore take a conservative assumption that Option 3 in practice requires the independent advisers to provide additional advice, although in theory this advice should already be being provided.

Costs

Familiarisation costs

53. The Employment Rights Act 1996 specifies three groups as relevant independent advisers for workers on settlement agreements. These are:

- a. Qualified lawyers
- b. Officials, employees, officers or members of an independent trade union who has been certified in writing by the trade union as competent to give advice and authorised to do so on behalf of the trade union
- c. Employees or volunteers working at an advice centre who have been certified in writing by the centre as competent to give advice and as authorised to do so by the centre.

54. We do not know how many independent advisers trade unions or advice centres have. We expect that only a small proportion of union employees or representatives or advice centre employees or volunteers will be relevant independent advisers. This is because individuals would need to have a good understanding of the law to be competent to provide this service, and there are many roles within a union and an advice centre (such as the Citizens Advice Bureau) that are not directly linked to representing individual workers on employment issues. Only some unions will have the resources to provide in-house independent legal advice (many unions are small, with over a third having an annual income of less than £100,000). Larger unions, such as Unite¹⁷ and the National Education Union¹⁸, have specialised teams providing advice on legal issues such as settlement agreements.

55. We have estimated the number of potential independent advisers that trade unions and advice centres may have using the Annual Population Survey. We have assumed that staff in the following occupations may have the relevant skills: human resource managers and directors, solicitors, other legal professionals, legal associate professionals and HR and industrial relations officers. The number of staff in these occupations in the industries for trade unions (SIC 94.2) and advice centres (SIC 94.99) were respectively 1,175 and 1,840.

56. For qualified lawyers, we use the estimate used above for employment lawyers of 6,000.

57. We estimate that it would take these independent advisers around half an hour to familiarise themselves with the requirements of the legislation. This is in line with the familiarisation time for Option 2, as it is about understanding the implications of the same area of law (confidentiality clauses). The hourly cost for legal professionals is estimated at £31.61. The average hourly labour cost for union and advice centre advisers is based

¹⁶ https://www.cwi.co.uk/settlement_agreements.html , https://www.waterfrontsolicitors.com/blog/settlement-agreement-answers?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original

¹⁷ <https://www.unitelegalservices.org/services/employment-law>

¹⁸ <https://neu.org.uk/advice/settlement-agreements>

on the average of the median wages from ASHE 2018 for the five occupations used, at £24.78.

58. This gives the following total familiarisation cost:

Table 6: estimated familiarisation costs for independent advisors

	Number of advisors	Hourly labour cost	Familiarisation time (hours)	Total cost
Trade unions	1,175	£24.78	0.5	£14,560
Advice centres	1,840	£24.78	0.5	£22,801
Employment lawyers	6,000	£31.61	0.5	£94,839
Total				£132,200

Ongoing annual costs

59. It is general practice for the employer to provide some money for the worker to pay for independent legal advice on the terms and effect of an agreed settlement agreement before it has been signed. This is because such independent advice is required for the settlement agreement to be valid, and therefore it is in the employer's interest that the worker receives it. The Acas model settlement agreement includes a clause whereby the employer agrees to contribute to the costs of the worker getting independent advice¹⁹, and lawyers offering provision of independent advice generally state that employers will pay the costs of this advice (that is, the advice on the terms and effect of the agreed settlement agreement)²⁰.

60. As noted above, it is debateable whether independent advisors should already provide advice on any confidentiality clauses included in the settlement agreement. It is unclear whether, in these circumstances, lawyers will be able to charge more from employers for providing the required independent advice. However, in line with the approach taken above, we assume that lawyers will increase their charges for the provision of up to half-an hour's additional advice on average²¹, and this would be included in the invoice sent to the employer to cover independent advice costs. Lawyer's fees will vary, but we estimate that employment lawyers would charge £250 per hour²². This would mean that employers may face an increase of around £125 for the costs of required independent advice for workers for each settlement agreement.

61. We do not know how many settlement agreements between workers and employers are put in place each year. We do know how many Acas conciliated COT3 settlements there are, and we can estimate how many private settlement agreements there are in cases that have gone to early conciliation or the employment tribunal based on survey data. We

¹⁹ <http://www.acas.org.uk/index.aspx?articleid=4395>

²⁰ <https://www.citizensadvice.org.uk/work/problems-at-work/making-a-settlement-agreement-with-your-employer/>, <https://www.co-oplegalservices.co.uk/media-centre/articles-jan-apr-2016/employee-guide-to-negotiating-a-settlement-agreement/>, <https://www.masonbullock.co.uk/how-much-is-legal-advice-on-a-settlement-agreement/>, https://www.birdandco.co.uk/site/you/settlement-agreement-solicitors/?utm_source=google...ppc&utm_keyword=settlement%20agreements&gclid=EAlalQobChMImqie9vjF4AlVz7vtCh1ZswxiEAMYAiAAEglgefD_BwE

²¹ Based on the view of government lawyers. There is no quantitative evidence on the amount of time usually spent on independent advice to workers, but the Mason bullock link in the above footnote suggest the fee would be between £250 and £500, which could indicate somewhere between an hour and two hours.

²² As referenced in the Trade Union Act Implementation IA, p14, this is based on evidence from unions and some research of lawyers' pages online https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583579/trade_union_act_enactment_IA_BEI_S_clean.pdf

can also estimate how many settlement agreements there are that arise when an individual has an employment rights problem at work that results in their leaving their employer but without putting in a claim. However, it is unclear how many other settlement agreements are put in place, for instance where people in sensitive positions change employer.

62. Acas statistics²³ show that there were 16,597 early conciliation COT3 settlements between October 2017 and September 2018. The Acas annual report for 2017/18²⁴ shows that in 2017/18 there were 11,038 employment tribunal cases referred to Acas which reached an Acas conciliated COT3 settlement. However, there were slightly more employment tribunal cases disposed of in the year to September 2018 (22,718) than in 2017/18 (18,360), linked to the withdrawal of fees. We uprate the 11,038 using the ratio between these two levels of 1.24, to give an estimate of 13,658 ET cases that were COT3 settled in the year to September 2018.
63. Ministry of Justice statistics on employment tribunal (ET) claims can be used to estimate the number of ET cases that were settled privately through agreements between the claimant and employer. There were around 32,980 jurisdictional complaints withdrawn or dismissed upon withdrawal between October 2017 and September 2018. However, a claim can have more than one jurisdictional complaints (on average there 2.1 jurisdictional complaints per claim over the same period), so by dividing by the ratio between claims and jurisdictional complaints we get an estimate of around 15,474 withdrawn ET claims. As some claims are multiple claims, there can be more than one claim per case. By dividing by the ratio of claims to cases of around 1.7 over the period, we get an estimate of 8,815 ET cases withdrawn in this period. The Survey of Employment Tribunal Applications 2013 estimated that around 46% of withdrawn ET cases were privately settled. Applying this percentage provides an estimate of 4,093 privately settled ET cases between October 2017 and September 2018.
64. We estimate privately settled early conciliation cases as follows: Acas early conciliation quarterly reports show that 78,729 early conciliation notifications between October 2017 and September 2018 were not COT3 settled did not proceed to ET. Based on data from Acas's 2017/18 annual report, we estimate that 46% of these cases did not participate in early conciliation, and 54% did participate. Using Acas research²⁵ we estimate that 2.8% of those (non-COT3 settled, not progressing to ET) cases that participated in early conciliation were privately settled, compared to 3.2% of those not participating in early conciliation. Therefore, we estimate that around 2,341 ET notification cases that did not proceed to ET were privately settled between October 2017 and September 2018.
65. The estimate for settlement agreements for workers who are experiencing employment rights problems at work are based on statistics from the Fair Treatment at Work Survey 2008²⁶. This showed that 24% of employees reported that they had experienced employment rights problems at the workplace in the past two years (or 12% per year). Of these around 73% had stayed with their employer once the problem had been resolved, while 27% had left their employer. Half of those leaving the employer did so directly as a result of the employment rights problem. Of these 1% had signed a compromise agreement. We therefore apply these percentages to the total number of employees in the three months to November 2018, of 27,528,000. This produces an annual estimate of

²³ <http://www.acas.org.uk/index.aspx?articleid=5203>

²⁴ <http://www.acas.org.uk/media/pdf/m/2/Acas-annual-report-2017-2018.pdf>

²⁵ Acas evaluation of early conciliation 2015, <http://m.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf>

²⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192191/09-P85-fair-treatment-at-work-report-2008-survey-errs-103.pdf

4,460 for the number of settlement agreements with employees who left their employer as a direct result of an employment rights problem experienced at work.

66. As noted above, there are likely to be other situations in which settlement agreements are signed. We do not have any reliable data on the number of these additional settlement agreements. The Facilitating Settlement Agreements Impact Assessment from 2012²⁷ reported that business stakeholder groups asserted that settlement agreements (then called compromise agreements) are predominantly used in larger businesses amongst higher paid staff. We therefore use an estimate of high earning employers working in large business (with 250 or more employees) who resigned or were made redundant or dismissed from their previous employer as the basis for our estimate of these other settlement agreements. In the Labour Force Survey for the 4th quarter of 2018, an estimated 15,269 employees with hourly wages in the highest 20% and working in large businesses said they'd resigned, or been dismissed or made redundant from their previous job in the past three months, out of a total of 27,135 who had left their previous job for any reason in the past three months. Multiplied by 4 we get low and high estimates for the full year for other settlement agreements of 61,076 and 108,540.

67. Our total estimate for the annual number of settlement agreements is therefore:

Table 7: Estimated annual number of settlement agreements

	<u>Estimated number</u>	
Early conciliation COT3 settlements	16,957	
Post ET claim COT3 settlements	13,658	
Early conciliation private settlements	2,341	
Post ET claim private settlements	4,093	
Settlement agreements for workers who left work as a direct result of an employment rights problem	4,460	
	<u>Low</u>	<u>High</u>
Other settlement agreements	61,076	108,540
total	98,032	145,496

68. The annual cost to employers, at an additional £125 for each settlement agreement, is therefore estimated to be between £12.8 million and £18.7 million.

69. We estimate the public sector/private sector split in two ways. For settlement agreements linked to employment rights issues we take the estimates based on data in SETA 2013 table 8.7 that around 87% of Acas conciliated settlements and 79% of private settlements involved private or third sector employers. For other settlements, we use the % of employees in large employers: the 2018 Business Population Estimates show that around 28% of employees in large employers were in the public sector. By applying these percentages, we get an estimated annual private sector cost of between £9.8 million (Low estimate) or £14.1 million (high estimate).

Enforcement

70. Settlement agreements must be signed by the independent adviser where they set out that they have a contract of insurance or an indemnity in place to cover the risk of a claim by the employee party to the agreement against losses due to the advice provided.

²⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/34610/12-1146-facilitating-settlement-agreements-impact.pdf, p26.

71. The existing system of enforcement against poor advice would therefore continue to operate for Option 3. There are no data available about the number of claims made by employees against independent advisers to settlement agreements. It is not expected that Option 3 would substantially change the number of claims made.

Benefits

72. The benefits arising from Option 2 is that employment contracts (or written statements) and settlement agreements will contain text clearly setting out the legal limits of confidentiality clauses. Therefore, individuals will be made aware of those limits within the documents themselves. This may be relevant if a worker becomes aware of some issue relating to their employer's behaviour and practice, and wants to check what restrictions there are in their employment contract on them disclosing relevant information. Similarly, if an individual has signed a settlement agreement, but decides later that the information they have should be disclosed in the public interest the settlement agreement will set out the relevant information on the extent that any confidentiality clauses will restrict disclosure. This provides a clear record of the limits, that can be investigated when relevant by the individual affected.

73. The benefits arising from Option 3 are that those signing settlement agreements will be fully advised about the effect of the confidentiality clauses in their settlement agreements, and the disclosures they would still be able to make. This will provide assurances to these individuals at the time the agreement is being made that the confidentiality clauses included have legal limits.

74. These complementary options could lead to the individuals affected feeling less intimidated into silence, and feeling more enabled to disclose evidence of wrongdoing to police or to prescribed persons for whistleblowing purposes. If over time, they decide that the information they hold should be investigated, the options, especially option 2, will provide a clear indication of what disclosures are allowed. Therefore, these individuals' wellbeing is likely to be improved.

75. Also, if more evidence of wrongdoing is reported to appropriate organisations, this could have a wider benefit on the culture in affected workplaces. This would benefit other workers in these environments.

Risks and assumptions

76. We have assumed that all micro and small employers would use external advice from HR or legal consultancies, or use the free online templates, when producing employment contracts, written statements and settlement agreements. We have also assumed that medium and large employers will have their own internal HR staff who would update their own templates. As some medium sized employers are only marginally bigger than small employers it is possible that some small employers have internal HR staff, while some medium sized employers may not.

77. We have therefore conducted some sensitivity analysis to test whether Option 2 would have a relatively low impact on employers if some small employers also chose to draft their own text and place them in their own organisation's templates.

78. BEIS analysis of the Survey of Employment Tribunal Applications (SETA) 2013 estimates that of employers who were taken to an employment tribunal in 2013, 14% of those with

between 10 and 19 employees and 41% of those with between 20 and 49 employees had an internal department that dealt with personnel issues. SETA also indicates that most of these employers also used an external person or company for HR issues. This suggests that our above analysis remains plausible; that small businesses would be likely to obtain assistance from external HR or legal consultancies when drafting employment contracts, written statements or settlement agreements.

79. However below we estimate the additional costs if we assume that these small employers with an internal department dealing with HR drafted their own required text and input into their own templates.

80. The number of employers affected is as follows:

- a. For employers with 10-19 employees $(146,535 + 405) \times 14\% = 20,572$ (of which 20,515 are private sector)
- b. For employers with 20-49 employees $(77,325 + 1,105) \times 41\% = 32,156$ (of which 31,703 are private sector)

81. It isn't clear that small employers would have their internal HR responsibilities carried out by a dedicated employment lawyer or HR professional, due to the relatively small number of staff at these organisations. It may be more likely that the task would be undertaken as part of the role for a general manager. Nevertheless, to maintain consistency with the approach modelled above, we assume that one hour of an HR director or manager's time is required to update templates to include the text required by Option 2, and that one hour of a legal professional's time is required to draft the text, under Option 2b.

82. This would produce the following costs:

- a. The cost of updating templates: $(20,572 + 32,156) \times 29.75 \times 1 = \text{£}1.57$ million (of which £1.55 million is for the private sector)
- b. The cost of drafting clauses : $((20,572 + 32,156) \times 31.61 \times 1 = \text{£}1.67$ million (of which £1.65 million is for the private sector)

83. Using this alternative approach to estimating the costs to small businesses would increase the overall cost slightly with the **annual equivalent net direct cost to business²⁸ rising by £0.3million for Option 2b, and £0.2million for Option 2a.**

84. The basic assumption of the analysis is that employers and legal and HR consultancies are going to use templates as the basis for their drafting of employment contracts, written statements and settlement agreements. This is in line with the evidence we have, as discussed above. However, even if the process for drafting the documents wasn't so controlled, it is likely that once a suitable text was available to meet the requirements of Option 2, then the approach would generally be to cut and paste this text into new documents rather than re-draft again. Therefore, the cost estimates for Option 2 would be broadly similar.

²⁸ This is essentially the one-off transition cost to private sector small businesses spread over ten years,

Summary

85. The estimated cost of the options proposed in this consultation are as follows:

	<u>Familiarisation</u> (£m)	<u>Transition costs</u> (£m)	<u>Ongoing costs</u> (£m)
Option 1	£0	£0	0
Option 2a	20.5	2.11	0
Option 2b	20.5	4.31	0
Option 3	0.1	0	12.8 to 18.7
Enforcement of Option 2a or b, Option 3	0	0	0

86. The preferred option is to introduce a combination of Option 1, one of Option 2a or Option 2b and Option 3.

Direct costs and benefits to business

87. The estimated direct costs to business are related to Option 2a, Option 2b and Option 3. There are no estimated costs to business for Option 1. These are as follows:

- a. Familiarisation costs – these are the same for Option 2a and Option 2b, at **£20.3 million**. For Option 3, familiarisation costs to business are estimated at **£0.1 million**.
- b. One-off transition costs of inputting the required text into templates for employment contracts, written statements and settlement agreements – these costs are the same for Option 2a and Option 2b at **£2.2 million**.
- c. One-off transition costs of drafting the required clear text setting out the legal limitations of confidentiality clauses – these costs apply to Option 2b only, of **£2.1 million**.
- d. The estimated annual costs to business from Option 3, of paying for independent advisers to provide specific advice to employees on the confidentiality clauses included in their settlement agreement are between **£9.8 million** (low estimate) and **£14.1 million** (high estimate).
- e. The Equivalent Annual Net Direct Cost to Business for Option 2a is **£2.6 million** – (£2.4 million at 2016 prices, 2017 present value). The BIT score is 12.2.
- f. The Equivalent Annual Net Direct Cost to Business for Option 2b is **£2.9 million** – (£2.5 million at 2016 prices, 2017 present value). The BIT score is 12.4.
- g. The Equivalent Annual Net Direct Cost to Business for Option 3 is between **£9.9 million** (low estimate) and **£14.1 million** (high estimate)– (£8.6 million to £12.3 million at 2016 prices, 2017 present value). The BIT score is between 42.9 and 61.5.
- h. The Equivalent Annual Net Direct Cost to Business for Option 2a and Option 3 is between **£12.5 million** (low estimate) and **£16.7 million** (high estimate)– (£10.9 million to £14.6 million at 2016 prices, 2017 present value). The BIT score is between 54.3 and 72.9.
- i. The Equivalent Annual Net Direct Cost to Business for Option 2b and Option 3 is between **£12.7 million** and **£17.0 million**– (£11.1 million to £14.8 million at 2016 prices, 2017 present value). The BIT score is between 55.4 and 73.9.

Wider Impacts

88. The small and micro business assessment is at Annex A.

89. The equalities assessment is at Annex B.

Trade or investment impacts

90. This policy proposal will have no impacts on trade or investment.

Annex A

Small and Micro business Assessment

1. There is no evidence to suggest that small and micro businesses will be disproportionately affected by the proposed policy. Our estimates suggest that small and micro businesses may face lower costs because they will be more likely to utilise the work of HR or legal consultancies to ensure that their employment contracts, written statements and settlement agreements are compliant with the law.
2. Micro and small businesses employ around 35% of employees and workers in the UK, compared to 49% for large businesses and 15% for medium sized businesses²⁹. There is no evidence available on the number of settlement agreements in place in the UK. As mentioned above, business stakeholder groups suggested in their evidence for the Facilitating Settlement Agreements policy in 2012 that settlement agreements (then compromise agreements) were used predominantly by larger employers. However, SETA 2013³⁰ suggests that around a third of employment tribunal cases that were resolved by a settlement agreement involved small and micro employers, broadly in line with the proportion of employees and workers based in this size of business.

²⁹ BEIS Business Population Estimates 2018.

³⁰ SETA 2013 table 8.7. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf

Annex B

Equality Impact Assessment

Background and purpose of consultation

1. This note records the assessment undertaken by the Department for Business, Energy and Industrial Strategy to fulfil the requirements of the Public Sector Equality Duty (PSED) for the department to have due regard to the need to:
 - i. Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Equality Act 2010.
 - ii. Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - iii. Foster good relations between people who share a protected characteristic and those who do not.
2. This equality impact assessment relates to the planned consultation on confidentiality clauses. The purpose of the consultation is to better understand how confidentiality clauses and the legal framework around them work in practice and assess what if any changes are required to ensure individuals are appropriately protected from their misuse. The consultation considers three things:
 - i. Whether there should be more limitations on confidentiality clauses, in particular whether we should clarify in law that workers are able to take a matter to a particular person (such as the police) despite the existence of a confidentiality clause.
 - ii. How to ensure the limits of a confidentiality clauses are clear to the workers that sign them, such as by requiring all confidentiality clauses to be clear as part of their terms what their statutory limits are, and for independent advice on settlement agreements to specifically cover confidentiality clauses.
 - iii. How to enforce any new requirements on confidentiality clauses.
3. Overall, the policy aims to ensure that workers are more aware of the limitations of a confidentiality clause contained in documents that they sign, and therefore more able to report issues of harassment or discrimination. Final policy proposals will be confirmed once the consultation has been completed and responses fully considered.

PSED aim 1: eliminating unlawful discrimination

Does the policy treat some people less favourably than others because of a protected characteristic, either directly or indirectly? Could it put some people with a protected characteristic at a particular disadvantage?

4. The policy aims to tackle the use of confidentiality clauses to silence victims or cover up cases of harassment or discrimination. It seeks to do this by changing the legal limitations on NDAs and how they are drafted, to make it easier for people who have signed a contract or settlement agreement with a confidentiality clause to know that they can make a public interest disclosure regarding harassment or discrimination or report a matter to the police if necessary. People with a protected characteristic are more likely to suffer harassment or discrimination. Analysis of the 2008 Fair Treatment at Work Survey (FTaW) showed that higher proportions of women, those with a disability, and gay, lesbian and bisexual employees reported that they experienced bullying and harassment at work. FTaW also showed that higher proportions of women, those with a disability, and BME employees

reported experiencing discrimination at work³¹. The policy should therefore help to tackle unlawful discrimination by making it less likely that people with a protected characteristic will be intimidated out of reporting such behaviour.

PSED aim 2: advancing equality of opportunity

Will your policy deliver a less good outcome for any groups compared to others? Will your policy remove or minimise disadvantages suffered by people with a protected characteristic? Is there evidence that different groups have different needs which are relevant to your policy? Is there evidence that particular groups are less involved in the area of your policy?

5. We have assessed that the policy proposals in the consultation will lead to a yearly cost to businesses of between £12.0 million and £16.6 million (subject to clearance). This will be borne by businesses who prepare employment contracts/written statements or settlement agreement, and businesses who pay for employees and workers to get the independent advice necessary for a valid settlement agreement. Therefore these do not specifically apply to groups with a protected characteristic.
6. Overall, the aim of the policy is to make it easier for people who have signed an employment contract or settlement agreement with a confidentiality clause to know that they can make a public interest disclosure regarding harassment or discrimination or report a matter to the police if necessary. People with protected characteristics are more likely to suffer discrimination or harassment so this policy should minimise that disadvantage by making it easier for them to report such matters.
7. However, confidentiality provisions are ubiquitous in employment contracts and settlement agreements, and people (with or without a protected characteristic) routinely receive employment contracts and can sign settlement agreements for a variety of reasons, often not related at all to discrimination or harassment. There is also limited data on confidentiality clauses overall so there is no substantial evidence to suggest that different groups have particularly different needs in relation to this policy, or the extent of involvement of particular groups in confidentiality clauses.

PSED aim 3: fostering good relations

How is this policy going to be received by people who do not benefit from it? Will your policy help to tackle prejudice and promote understanding between different groups?

8. People who will not benefit from it will be those who do not sign an employment contract or settlement agreement with a confidentiality clause, and possibly those that have but have no reason to report or disclose harassment or discrimination. The policy proposed in the consultation is a relatively technical change that will apply to all confidentiality clauses, regardless of whether they involve people with or without a protected characteristic. As such we do not expect the policy to be received in any particularly significant way by those that do not benefit from it. As a relatively technical change in the law and a requirement as to how relevant documents with confidentiality clauses are drafted, and settlement agreements are advised upon there is limited capacity for the policy to promote understanding between different groups or tackling prejudice.

Conclusion

9. We conclude that this consultation and the policy it recommends should have no adverse or disproportionately negative impacts on people who have a protected characteristic. In seeking to limit intimidation of victims of harassment or discrimination into silence, this

³¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192191/09-P85-fair-treatment-at-work-report-2008-survey-errs-103.pdf

consultation should have a small positive impact on people with a protected characteristic. As a relatively technical legal change, we believe that no steps need to be taken to advance equality of opportunity and foster good relations.