

Direction to NHS Bodies
Use of Confidentiality and Clawback Clauses in connection with termination of Executive
Directors' contracts of employment
National Health Service Act 1977
National Health Service and Community Care Act 1990

The Secretary of State for Health, in exercise of the powers conferred on him by section 17, paragraph 10(1) of Schedule 5, and paragraph 8(3) of Schedule 5A to the National Health Service Act 1977⁽¹⁾, and paragraph 16(5) of Schedule 2 to the National Health Service and Community Care Act 1990⁽²⁾ hereby gives the following Directions:

Application, commencement and interpretation

1.—(1) These Directions apply to all NHS bodies in England and shall come into force on 5 February 2004.

(2) In these Directions-

“NHS bodies” means Strategic Health Authorities, Special Health Authorities, NHS Trusts, and Primary Care Trusts;

“severance agreement” means an agreement made between an NHS body and an executive director in connection with the termination of that person’s employment with that NHS body;

“termination payment” means any payment that an NHS Body agrees to make in connection with the early termination of an executive director’s employment (other than in cases of genuine redundancy and/or in the case of payments made in accordance with section 45 of the General Whitley Council Handbook “Arrangements for Redundancy Payments) and which-

- (a) is made in connection with the fact that the executive director’s employment is terminating or has been terminated; and
- (b) in the case of a executive director employed on a fixed term contract, is to be paid, before the date on which that fixed term contract would have expired through passage of time; or
- (c) in the case of a permanent employee, is to be paid before the date on which the contractual notice period to which that employee was entitled would have expired; and
- (d) is calculated in whole or in part by reference to the unexpired portion of that fixed term contract or contractual notice period.

Confidentiality clauses in severance agreements

2. (1) NHS bodies must ensure that where a severance agreement contains a confidentiality clause in regard to all or any of the terms of that agreement, the agreement must contain provision under which -

- (a) the NHS body undertakes to disclose the terms of the severance agreement to any other NHS body which is proposing to employ the former executive director, and
- (b) the executive director consents to such disclosure and to the further disclosure of the terms of the severance agreement by the Department of Health or the National Audit Office, if either, or both requests that information for the Appointed Auditor, the Public Accounts Committee and Parliament.

Recovery of termination payments (clawback clauses)

3.—(1) NHS bodies must ensure that any severance agreement which includes a termination payment in connection with the early termination of an executive director’s employment contains a provision (in these directions called a clawback clause) which-

⁽¹⁾ 1977 c.49.

⁽²⁾ 1990 c.19.

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- (a) requires the executive director to inform the NHS body of any employment which he obtains with another NHS body before the expiry date of the relevant fixed term contract or contractual notice period ("the expiry date"); and
 - (b) empowers (but does not oblige) the NHS body to recover the whole or part of the termination payment where the executive director has received, or is to receive, payment from the new NHS employer which is referable to the period before the expiry date.

Signed on behalf of the Secretary of State

A handwritten signature in black ink, appearing to read 'David Amos', written over a circular stamp or mark.

DAVID AMOS
Member of the Senior Civil Service