



# Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints – Fact Sheet for Small Business

This fact sheet complements the *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints*.

## Settlement agreements and confidentiality clauses

A business may enter into a workplace sexual harassment settlement agreement to resolve or settle a sexual harassment complaint.

A settlement agreement is a legally enforceable arrangement, which sets out the actions each party has agreed to take to resolve and close the complaint.

A confidentiality clause is a section within a settlement agreement that requires particular details to be kept confidential as part of reaching a settlement. Confidentiality clauses are sometimes referred to as non-disclosure agreements or NDAs.

## Preventing and responding to sexual harassment

As an employer it is important to remember you are responsible for complying with the *Fair Work Act 2009* (Cth), discrimination laws and work health and safety (WHS) laws and for eliminating or minimising the risk of sexual harassment in the workplace, as far as reasonably practicable.

Small business employers should ensure compliance with these duties, which may include (among other things) having policies and procedures in place about how to prevent sexual harassment and handle sexual harassment complaints. These procedures should consider the context of the small business, where most staff may be on familiar terms with one another. It should also consider situations where incidents of sexual harassment occur through someone external to the small business, such as a supplier or customer.

It is important to treat any allegations of sexual harassment seriously and ensure the matter can be fully investigated in a sensitive, fair and timely manner.



## Considering confidentiality clauses for small business

Confidentiality clauses should not be seen as a standard term of workplace sexual harassment settlement agreements and should be used on a case-by-case basis.

As a small business, you should consider how you want to communicate about sexual harassment, and ensure that any confidentiality clause does not prevent you from taking meaningful action to prevent and respond to sexual harassment in your business.

By adopting strategies for the appropriate disclosure of information about the incidence of sexual harassment in workplaces and how the organisation responds to complaints, organisations can position themselves as promoters of a safe workplace culture that take their responsibility to prevent and respond to sexual harassment seriously.

## Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints

The *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* sets out an approach to negotiating a settlement agreement to resolve an allegation of workplace sexual harassment in your business. You should consider the following approach to the use of confidentiality clauses in all workplace sexual harassment settlement agreements:

1. Consider the need for a confidentiality clause on a case-by-case basis.
2. The scope and duration of the confidentiality clause should be as limited as possible.
3. Confidentiality clauses should not prevent organisations from responding to systemic issues and providing a safer workplace.
4. All clauses in a settlement agreement should be clear, fair, in plain English and, where necessary, translated and/or interpreted.
5. The person who made the allegation should have access to independent support or advice to ensure they fully understand the meaning and impact of the settlement agreement, including any confidentiality clause.
6. Negotiations about the terms of a settlement agreement should ensure so far as possible the wellbeing and safety of the person who made the allegation, and be trauma-informed, culturally sensitive and intersectional.



## Questions to consider

- Have you considered the *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints*, and provided a copy of the Guidelines to the people who are involved?
- Will a confidentiality clause be inconsistent with any of your organisation's statutory duties (such as under the *Fair Work Act 2009* (Cth), discrimination law and WHS law), or limit the organisation's ability to collect data on or report on allegations of sexual harassment?
- Is your organisation managing the use of confidentiality clauses in a way that allows it to address existing or emerging cultural or systemic issues relating to sexual harassment, including repeated conduct?
- Are there aspects of the workplace sexual harassment complaint or allegation that should be made public – for example, to demonstrate your organisation's commitment to taking measures in response?
- Have all parties been given time and appropriate referrals to support services (including legal advice) to understand their rights and obligations under the settlement agreement?

## Who can I contact for more information or support?

*Where to seek help (sexual harassment and sexual assault support services, legal services, mental health services and advocacy support)*

- [Respect@Work website](#)

*For complaints and more information about workplace rights and entitlements*

- [Fair Work Commission website](#)
- [Australian Human Rights Commission website](#)
- [Fair Work Ombudsman website](#)

*Guide to external pathways to address sexual harassment (support services, anti-discrimination and human rights bodies, workplace relations bodies, and work health and safety regulators)*

- [Guide to external pathways](#)

*Other support services*

- [Translating and Interpreting Services website](#)
- [Blue Knot Foundation website](#)