

## REGULATORY TRIAGE ASSESSMENT

<b>Regulatory Triage Assessment – Department of Health</b> <i>(Maximum 2 sides of A4 to complete table below)</i>	
<b>Title of proposal</b>	<b>The Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018</b>
<b>Expected date of implementation</b>	October 2018
<b>Origin (Domestic/International etc.)</b>	Domestic
<b>Date</b>	15/11/17
<b>Lead Policy Contact</b>	Sheila Evans
<b>Lead Analytical Contact</b>	Nilum Patel
<b>Reason for Triage Assessment</b>	Low cost legislation
<b>Is the policy in scope of OI30?</b>	
<b>Please provide a brief description of the policy proposal</b>	
Introduce regulations that prohibit an NHS employer from discriminating against a job applicant on the basis that it appears to the employer that the job applicant has previously made a protected disclosure (within the meaning given by section 43A of the Employment Rights Act 1996).	
<b>How many businesses are likely to be affected?</b> <i>(This includes private business, third sector and Universities)</i>	
None. The legislation will only apply to NHS organisations.	
<b>What are the main impacts for business? Are these impacts direct or indirect?</b> <i>(Pending consideration of categorisation of impacts as direct/indirect.)</i>	
N/A	
<b>Please provide a quantification of the (direct) costs and benefits to business outlined above:</b>	
N/A	
<b>Please provide details of other costs and benefits that are likely to result from the policy:</b>	
<u>Costs:</u> Legal	
1. One of the main costs borne by this policy is the associated legal costs if and when a case of discrimination is brought before an employment tribunal or the civil courts. We estimate potentially up to 20 cases <sup>1</sup> per year could bring a claim before an employment tribunal of which 27% (5 cases) could be settled or withdrawn following the ACAS early conciliation scheme. A further 1 or 2 cases might seek to bring a claim before the civil Court for a breach of	

<sup>1</sup> Estimated from a survey of 19,764 staff, issued by Sir Robert Francis' "Freedom to Speak Up" reviews. The timeframe is unclear, so have assumed a 12 month period.

statutory duty. The total cost is estimated at £60,000 per year in England and Wales. (*Justice Impact Test (JIT) completed and cleared June 2016, revised JIT submitted, so estimated costs of £60,000 will be updated*)

## NHS

2. The legal costs of defending a claim are estimated to be between £5,000 and £8,000, including covering the claimant's costs if a claim is successful. These estimates are informed by previous IA's of whistleblowing in the Police Force<sup>2</sup> and estimates provided for 'safe space' cases in the Impact Assessment for setting up the Healthcare Safety Investigation Branch (HSIB). The total cost to the NHS is between £100,000 and £160,000, assuming all 20 cases are successful. Any costs from unsuccessful claims would be borne by the individual.
3. Her Majesty's Courts and Tribunals Service do not collect information about the amount of compensation awarded to whistle-blowers at employment tribunals,<sup>2</sup> so it is difficult to quantify this. However, given the nature of the legislation and our upper estimates of other costs, it may be reasonable to leave this unquantified.
4. There may be small additional costs in training for all NHS organisations to raise awareness of whistleblowing and ensure that job applicants are not discriminated against. However, we expect that guidelines and trainings could be incorporated into existing HR procedures.
5. Total costs of the policy are estimated to be between £160,000 and £220,000. This is considered to be an upper estimate of the costs.

### Benefits:

1. The policy should help encourage potential whistle-blowers to come forward, as their employment rights will be protected. NHS employers, knowing this, may have an incentive to reduce or eliminate potentially 'bad practices.' As a result, it could be expected there may be some form of productivity and/or efficiency gain, though this remains uncertain and difficult to quantify.
2. The policy will help promote openness, transparency and fairness within the NHS, making NHS organisations potentially more attractive places to work as well as improving trust from the public.
3. The policy may also help combat retention issues, allowing an NHS organisation to maintain clinical or specialist skills that may otherwise have been lost due to discriminatory behaviour.

**Policy signoff (SCS):** Jennifer Benjamin

**Date:** 5/03/18

**Senior Analyst signoff:** Alistair Rose

**Date:** 29/11/17

**Better Regulation Unit signoff:** Adebayo Adekaiyaoja

**Date:** 08/02/18

<sup>2</sup> Police Whistleblowing: Changes to Police (Conduct) Regulations 2012 and Home Office guidance on police officer misconduct.