Guide to Settlement Agreements

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Settlement agreements (previously known as compromise agreements) are legally binding contracts between an employer and an employee whereby an employee waives their right to make a claim covered by the settlement agreement to an Employment Tribunal or a Court.

A settlement agreement is usually entered into towards the end or just after an employee's employment has terminated. It sets out the terms of departure between the parties. In return for the employee waiving his/her rights to bring a claim against the employer the employer will usually pay the employee a termination payment (although this is not always the case).

Depending on the circumstances, some, if not all, of a termination payment may be able to be paid to an employee free from tax under a settlement agreement.

Settlement agreements can be proposed by either an employer or an employee, although it will normally be by the employer.

What conditions need to be satisfied for a settlement agreement to be legally binding?

In order for a settlement agreement to be legally binding the following conditions must be satisfied:

- the agreement must be in writing;
- the agreement must relate to a particular complaint or proceedings;
- the employee must have received advice from a relevant independent adviser, such as a solicitor;
- the independent adviser must have a current contract of insurance or professional indemnity covering the risk of a claim by the employee in respect of loss arising from the advice;
- the agreement must identify the adviser; and
- the agreement must state that the applicable statutory conditions regulating the settlement agreement have been met.

Settlement agreement meeting

It is usual for an employer to have a 'without prejudice' meeting with an employee to discuss a potential settlement agreement. An employee may want to involve someone to help them, such as a work colleague or a trade union representative. However, there is no statutory right for an employee to be accompanied at any such meeting. Employers may want to allow an employee to be accompanied when meetings are held as this can often help progress settlement discussions.

Settlement agreements are voluntary

Parties do not have to agree to enter into a settlement agreement or into discussions about them. It is usual that there is a process of negotiation and both sides make proposals and counter proposals until an agreement is reached or both parties decide no agreement can be reached.

Employees should be given a reasonable amount of time to consider a proposed settlement agreement. The ACAS Code of Practice specifies a minimum of 10 calendar days unless the parties agree otherwise. However, there is also a need to maintain momentum to discussions so there may be reasons to depart from the ACAS Code.

Once a valid settlement agreement has been signed, the employee will be unable to make a claim to an Employment Tribunal or a Court about any type of claim which is listed in the settlement agreement.

Where the employer and employee are unable to reach an agreement, the settlement discussions cannot usually be referred to as evidence in any subsequent claim (although see 'Pre-termination negotiations' below).

Employees obtaining independent legal advice

As set out above, in order for a settlement agreement to be legally binding one of the conditions that must be met is that the employee must take independent legal advice.

It is usual that the employer will pay the employee's legal fees (or at least a contribution towards their legal fees) associated with taking legal advice.

Pre-termination negotiations

Under the long standing 'without prejudice' rule, settlement negotiations cannot be referred to in any subsequent Employment Tribunal or Court proceedings if they are attempting to settle a pre-existing dispute between the parties. However, it can be argued that discussions about a potential exit do not fall within this protection as there may not be a pre-existing dispute.

Therefore, in an attempt to allow employers and employees to have frank and open discussions without subsequent consequences, new rules were introduced in 2013 to provide additional protection in relation to 'pre-termination negotiations'. Under these rules, settlement discussions cannot be referred to in any later ordinary unfair dismissal proceedings regardless of whether or not there is a pre-existing dispute. However, this protection does not apply to any other types of claim. It also does not apply if there has been "improper behaviour". This includes:

- All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
- Physical assault or the threat of physical assault and other criminal behaviour.
- All forms of victimisation.
- Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity, and marriage or civil partnership.
- Putting undue pressure on a party, for example: not giving reasonable time for consideration of the proposal in accordance with the Code; an employer saying, before any form of disciplinary process has begun, that if a settlement proposal is rejected then the employee will be dismissed; or an employee threatening to undermine an organisation's public reputation if the organisation does not sign the agreement, unless the whistleblowing provisions of the Public Interest Disclosure Act 1998 apply.

We regularly advise on the best approach to take to settlement discussions and pre-termination negotiations. Please contact us if you would like to discuss this further.

Dated: April 2015

This 'Brief Guide to Settlement Agreements' is intended as a guide only.

Drafting, negotiating and advising on Settlement Agreements is very fact sensitive and specific legal advice should be sought in relation to particular circumstances.

If you would like to discuss any of the issues raised in this Guide please do not hesitate to contact a member of our Employment department.