



SENIOR MANAGER AND DIRECTOR'S GUIDE TO SETTLEMENT AGREEMENTS:

WHAT IS A SETTLEMENT AGREEMENT?

A settlement agreement is a binding agreement between you and your employer. Once signed, it means that you are not entitled to bring a legal claim against your employer in relation to your employment.

Because you are giving up valuable rights a settlement agreement is only valid if you have been advised by an appropriate adviser, which is usually a Solicitor.

Some settlement agreements for senior employees make provision for a period of garden leave. You may be asked to sign two settlement agreements: one when your garden leave starts (the belt), and another when it ends (the braces).

There are two usual exceptions to settling all claims: Personal injury claims are usually excluded, unless you are aware of any actual or potential claims at the point of signing. Any rights accrued under your pension scheme are also excluded.

WHAT ARE THE USUAL TERMS AND WHAT IMPACT DO THEY HAVE?

1. PAYMENTS

- 1.1 There is usually a term for payment of sums of money. There are usually three types of payment. Payments under 1.1.2 and 1.1.3 are sometimes conditional on you observing all the terms of the settlement agreement and if you fail to do so your employer may not make payment or may recover any payment made.

- 1.1.1 Payment due under the contract for salary and benefits and accrued but untaken holiday up until the Termination Date, sometimes this includes any outstanding bonus and commission.
- 1.1.2 Compensation for loss of office including redundancy pay and an amount in recognition that the termination may be unfair or discriminatory.
- 1.1.3 A payment in lieu of notice.

2. TAX

- 2.1 Income tax and NICS are normally deducted at source for payments under 1.1.1.
- 2.2 Payments under 1.1.2 can be paid income tax and NICS free up to £30,000.00, thereafter income tax is payable at your normal income tax rate. This rule is qualified if any of your service was overseas. If you have worked overseas for your employer you may be entitled to an enhanced tax free element greater than £30,000.00.
- 2.3 The taxable status of a payment in lieu of notice depends on the terms of your contract. A payment in lieu of notice can be paid tax and NICS free, subject to aggregation with any payment under 1.1.2 and subject to what it says in your contract about whether your employer has the right to make a payment in lieu.
- 2.4 You may need to take specialist tax or financial advice to identify whether there are any options to defray or defer any income tax due. The usual method relates to making a pension contribution in lieu of receiving some of the excess payment above £30,000.00.
- 2.5 You can be asked to give a tax indemnity in a settlement agreement. That means if your employer has not deducted income tax and nics when it should have done you will be liable for any payment due. Whilst this clause sounds onerous, provided all payments have been taxed correctly then an indemnity should not be an issue. We have not had any instance where a tax indemnity has been engaged.

3. PENSION

3.1 Your membership of any pension scheme usually ceases on termination. Membership of a final salary pension scheme is a very valuable right, worth up to 25% of base salary. Many employers now only have money purchase schemes so as and when you obtain new employment you will usually be entitled to membership of such a scheme.

4. BENEFITS

4.1 You may have benefits like life insurance and BUPA. We can negotiate with your employer as to whether you can still be a member of such schemes for your notional notice period. It is usual for these benefits to cease on your termination date.

4.2 If you have an LTIP, other share allocation, or options, it is important that you obtain the scheme rules to see what if any shares or options you are entitled to on termination. Many schemes differentiate between good and bad leavers and the settlement agreement should reflect this.

4.3 You may need to take specialist corporate advice if you are subject to a shareholder's agreement.

4.4 At a senior level you may be offered outplacement consultancy. You may wish to consider whether you want to take this or accept any cash alternative on offer.

5. COMPANY PROPERTY

5.1 You will usually be asked to return all company property, including a car, on or after your termination date. It is advisable to draw up an inventory as to what you hand back and ask your employer to sign receipt of the inventory. Sometimes disputes occur regarding whether company property has been properly returned. These can be avoided by ensuring what you return is receipted.

5.2 If your employer requires you to hand back any confidential information and not take any copy or retain any copy, it is very important that you do so and observe

this term. There are frequently disputes as to whether an employee has retained property.

6. SECRECY

6.1 It is usual for both parties keep the fact and terms of any agreement secret. Resist any temptation to tell any colleagues, tweet about the deal, or comment on it on Facebook.

6.2 It is also usual that both parties agree not to make any derogatory comment about each other.

7. CONTINUING OBLIGATIONS

7.1 Sometimes the agreement asks you to observe terms of your employment contract after your agreement has been terminated. Usually these relate to restrictive covenants and keeping confidential information confidential. You should observe these obligations as these are frequently the source of dispute. You should check all contractual documentation and any other documentation to see what your obligations are after termination of your employment. Some restrictions are contained in side agreements.

8. DIRECTOR

8.1 You may be required to resign any Directorships. If these Directorships have been registered at Companies House you could be asked to sign the appropriate form resigning the Directorships as a condition of the settlement agreement.

8.2 You may wish to have confirmed that you are still covered by Officers and Directors Liability Insurance, notwithstanding the termination of employment.

9. LEGAL EXPENSES

9.1 The agreement frequently makes provision for the payment of legal expenses. Any additional costs incurred will be agreed with you and sometimes met by your employer.

10. REFERENCE AND ANNOUNCEMENTS

10.1 Many agreements make provision for a reference. Many employers now give only standard references. This can be negotiable so it may be worth drafting a reference for your employer to consider giving about you.

10.2 Announcements are quite often an integral part of the agreement. What is said to internal and external parties can be crucially important to both parties. It is worth giving some thought as to how you want your departure announced and it is in both parties' interests to agree a mutually acceptable announcement.

11. CLAIMS

11.1 A settlement agreement is one of a limited number of ways of giving up your statutory employment rights. As such you will not be able to claim for unpaid wages, unfair dismissal and discrimination after signing an agreement. The claims are usually listed in the agreement, many employers adopt a kitchen sink policy to listing them. Many will not apply to you. In a nutshell you ought to work on the basis that you will not be able to make a legal claim against your employer in any court after signing a settlement agreement.

12. REPAYMENT

12.1 Many settlement agreements make provision for having to repay the sums paid under the agreement if you breach any of its terms.

13. WARRANTY BY THE EMPLOYEE

Many agreements also provide for an employee to give a warranty which is a promise. These warranties usually relate to all or some of the following:

13.1.1 Whether you have an offer of another job on an employed or self-employed basis.

13.1.2 Whether you have committed an act of gross misconduct during employment.

13.1.3 Whether you have done anything which would affect the employer's decision to pay you any sum due under the agreement.

13.2 You need to pay particular attention to warranties as if you breach a warranty, your employer may not pay the sums due under the agreement or want repayment if already paid.

14. ENTIRE AGREEMENT

Many agreements have an entire agreement clause and this means that anything told to you orally or in writing by your employer does not count in determining any term of the settlement agreement. The settlement agreement covers everything and any other discussions are not relevant.

Disclaimer: These guides are for guidance only and should not be treated as a substitute for specific legal advice on your own situation.

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