

Labour & Employment Webinar: Effective Termination Agreements

7 July 2020



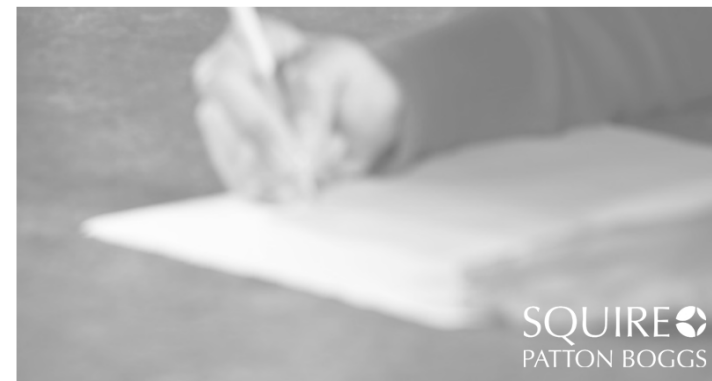
Today's presenter



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Settlement agreements - A reminder of the basics

- A settlement agreement is an agreement whereby a current or former employee (or worker) agrees to waive or settle claims against the employer in return (normally) for a payment
- Usually entered into on termination of employment, but this is not always the case
- A settlement agreement will normally be appropriate where:
 - An employee has already brought a complaint in an employment tribunal and the employer wishes to settle the matter; or
 - An employee leaves in circumstances where he/she might have a potential claim
- A settlement agreement is potentially appropriate wherever an employer pays over and above the statutory or contractual minimums due



Six key requirements for a binding settlement agreement



Writing

Must be in writing



Proceedings

Must “relate to the particular proceedings”



Independent Adviser

The individual must have received advice from a “relevant independent adviser” as to the terms and effect of the agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal



Identify Adviser

Must **identify the adviser**



Insurance

The relevant independent adviser must be covered by a policy of **insurance** to cover the risk of a claim by the individual



Conditions

The agreement must state that the **conditions regulating settlement agreements (which are set out in statute) are satisfied**

Settlement agreement vs COT3 agreement vs simple letter

| | Settlement agreement | COT3 agreement | Simple letter |
|------|---|---|---|
| Pros | <p>“Belt and braces” – valid way of settling statutory and contractual claims (with certain limited exceptions)</p> | <ul style="list-style-type: none">▪ Employee does not need to take independent legal advice▪ Can be useful if employee is not legally represented▪ Only valid way of settling certain claims, e.g. failure to inform and consult under TUPE | <ul style="list-style-type: none">▪ Employee does not have to take independent legal advice |
| Cons | <ul style="list-style-type: none">▪ Employee has to take independent legal advice – may lengthen/complicate process▪ More costly – employer will normally make contribution to employee’s legal fees | <p>Acas officer must be involved in negotiations – will not “rubber stamp” agreements that have already been made</p> <p>Sometimes more limited in scope in terms of claims settled</p> | <p>Valid way of settling contractual claims, but cannot settle statutory claims this way – of limited use in majority of circumstances</p> |

How would you raise entering into a settlement agreement with an employee?



- Pre-termination negotiations – be careful if there is any risk of whistleblowing/discrimination/breach of contract claims
 - Acas Code of Practice on Settlement Agreements - provides guidance for employers on making and recording settlement offers under s.111A ERA 1996
- “Without prejudice” offers – if opening such discussions at an early stage be aware of the inherent risks (no dispute)
- But be pragmatic – making the first move can sometimes result in a much quicker and amicable settlement

Termination Date

- When will the employee be leaving the Company?
- Will they be required to work out their notice period?
- Will they be placed on garden leave between now and the termination date?

Termination payment:

How much will the Company be paying the employee?

- Calculate employee's contractual entitlements
- Cost of buying out any claims?
- Expect to pay a sum that falls somewhere between their minimum contractual notice entitlements and the maximum they could expect to receive if they were successful in any Tribunal claims, taking into account their duty to mitigate/accelerated receipt, etc.

- All PILONs are now subject to income tax and NICs
- Employer NICs for termination payments in excess of £30,000 – since 6 April 2020
- Make good use of £30k tax-free exemption
- Allocate part of any taxable elements to consideration payable for other commitments e.g. new confidentiality clauses/restrictive covenants
- Some taxable elements can be allocated to legal fees to increase tax efficiency of payments

Key Point: If your opening offer does not include all/any tax breaks, it can give you additional scope to concede tax breaks as part of any settlement negotiations

Key questions/issues to be covered

- **Post-employment benefits:** Will the Company be providing any post-employment benefits?
- **Pension rights:** Is the Company going to make any payment into the employee's pension scheme?
- **Restrictive covenants:** Do you want to have protection post-employment?
- **Legal fees:** Standard practice for employer to make contribution towards legal fees

Additional issues to consider:

- Resignation or removal from office as a director as part of severance terms
- Is shareholder approval required for enhanced severance terms?
- Careful consideration must be given to timing and content of announcements
- Cover the transfer of any shares in a settlement agreement
- Sums paid to directors may be publicly available in accounts

Key questions/issues to be covered

- ☒ Reference
- ☒ Confidentiality clause
- ☒ Badmouthing clause
- ☒ Return of property
- ☒ Full and final settlement
- ☒ Reaffirmation certificate/agreement – if there is a material gap between signing the agreement and the termination date

Confidentiality provisions/NDAs – Future developments

- The government has confirmed it intends to:
 - legislate to ensure that a confidentiality clause in a settlement agreement cannot purport to prevent an individual making disclosures to the police, regulated health and care professionals or legal professionals
 - require that the limits of a confidentiality clause are clearly explained in a settlement agreement
 - legislate to ensure that individuals receive advice not only on the nature of the confidentiality requirement but also on the limitations of confidentiality clauses
 - produce guidance on drafting requirements for confidentiality clauses
 - introduce new enforcement measures for confidentiality clauses that do not comply with the legal requirements
- Acas and EHRC – already issued guidance on the use of non-disclosure agreements

Common employee adviser pushbacks

- **Reason for dismissal:** Do not state something that is not true, e.g. that the employee was made redundant if s/he was not
- **Tax indemnity:** Standard practice to include tax indemnity from employee
- **Alternative employment:** Flush out whether the employee has got another job lined up
- **Non-disparagement:** Be careful what you say – hard to control what other employees say
- **Outplacement counselling:** Cheap way of “sweetening” an offer, which is of real benefit to the employee
- **Legal fees:** Standard practice to make contribution. The amount is a matter for negotiation. Sometimes there can be a tax advantage for the employee in putting some of the compensation monies towards legal fees.



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