

What is a Settlement Agreement?



Death, taxes, moving home and divorce can be the most stressful things in life. However, losing your job counts towards that too; not knowing where the money is going to be coming from, suddenly being launched into the position of looking for another job... It all adds up.

For those who might have a claim against their employer when their employment is coming to an end or has come to an end, the law has created settlement agreements (formerly known as compromise agreements) to spare both the employee and the employer from the long, drawn-out process of going to an employment tribunal.

However, receiving a settlement agreement can still be a daunting experience.

We have therefore set out to explain the process involved in receiving a settlement agreement and receiving advice on it.

Why might I receive a settlement agreement?

You might receive a settlement agreement because there is a risk (or a certainty) that you have live claims against your employer. Conversely, the risk might be relatively low, but your employer simply might not want to have to take the time and incur the costs of defending itself in an employment tribunal claim. That said, sometimes it is worth the cost and the time for both employees and employers to go to the tribunal.

During the difficult times presented by COVID-19, employers may also not be able to afford the cost of a lengthy redundancy consultation process and may offer their employees a settlement agreement instead of taking the risk that:-

- i) the costs of the process might weaken their finances further, and
- ii) the failure to consult employees over the redundancy process might lead to tribunal claims.

How will I know that I am getting a settlement agreement?

Although employers have been known to simply give their employees a settlement agreement with no further introduction and to ask them to get it signed, a prudent employer might start a process to introduce you to the idea of receiving a settlement agreement.

For example, they might call you in for a standalone meeting to discuss the agreement or they might couple it with a meeting that you are already expecting to attend (such as a disciplinary, grievance or performance management meeting).

Your employer might say:-

- That they would like to have a “protected conversation” with you. They might quote the relevant legislation (Section 111A of the Employment Rights Act 1996) but, even if they don’t, this phrase will prevent you from referring to the settlement agreement and any negotiations relating to it should you decide to bring a claim of unfair dismissal. If there is a risk that you have a different claim, such as a claim of discrimination, automatically unfair dismissal (which is a different claim to unfair dismissal - for instance, if you have “blown the whistle” on your employer) or even if your employer has unlawfully been making deductions from your salary, then those claims will not be covered by this phrase; it will only protect conversations relating to a claim of unfair dismissal.
- That the conversation is “without prejudice” or “without prejudice and subject to contract”. This will only protect conversations that you have with your employer towards achieving a settlement where there is an existing dispute. If there is no existing dispute between you and your employer, then the conversation will not be protected. An existing dispute could be where you have raised a grievance, been brought to a disciplinary hearing, are going through a performance management process or have made a complaint of discrimination, although other circumstances may also qualify as being pre-existing disputes.
- That the conversation is a combination of both of the above – a conversation that is “without prejudice, subject to contract and protected by Section 111A of the Employment Rights Act 1996”.

Where any of these conditions apply, the details of any proposed settlement cannot be disclosed further either by you or by your employer (except as permitted in the settlement agreement).

Ideally, your employer should explain the core terms of the settlement agreement to you in the conversation and put them into writing as well, but this does not always happen.

In any event, you will be required by law to receive advice from a solicitor, an advice centre adviser or a trade union official who is certified as being qualified to provide you with advice (a “relevant independent adviser”) before the settlement agreement will be valid.

Can the relevant independent adviser who drafted the settlement agreement advise me on it?

No.

They will likely have advised your employer on the settlement agreement and the processes surrounding it. Therefore, they will not be a relevant independent adviser when it comes to giving you advice on the settlement agreement.

How will I receive the settlement agreement?

Your employer may provide you with the settlement agreement in hard copy although, in these times when the health of everyone is a very serious concern, your employer may provide it to you electronically and be happy for it to be signed, dated and completed that way.

What will be in the settlement agreement?

Like a contract of employment, each settlement agreement should be tailored to the employee who is receiving it. Therefore, it could conceivably contain any terms provided that both you and your employer agree to them.

That said, there are certain things that affect all settlement agreements, including that -

- It must be in writing;
- It must relate to the particular circumstances that have led to it being produced (i.e. a redundancy process, performance management procedure, etc.) and detail the specific claims that are intended to be settled by it;
- It must identify your relevant independent adviser;
- You must have received advice from your relevant independent adviser on the terms and effects of the settlement agreement and your ability to bring a claim before an employment tribunal;
- Your relevant independent adviser must be covered by a policy of professional indemnity insurance to protect you in case they are giving you negligent or incorrect advice (as any claim that you might have for negligent or wrong advice would be against your relevant independent adviser and not your employer); and
- It must confirm that the above requirements have all been satisfied.

What might a settlement agreement contain?

Typically, a settlement agreement may contain certain standard clauses that we have detailed below.

1. A Termination Date

Quite simply, this will be your last date of employment, as agreed between you and your employer.

However, a settlement agreement does not always have to result in the termination of your employment (although most settlement agreements will do this).

2. A Termination Payment

This can be described in a variety of different ways. It is most frequently called a termination payment but it can also be known as a settlement sum, a compensation payment or even just compensation.

Whichever description your employer uses, it should be represented as being compensation for the loss of your employment or loss of office.

The payment of this sum will often be reliant upon you agreeing to certain promises in the settlement agreement (which we have explored below), but special tax rules

may also apply. Where it has been made clear that you are receiving the payment either for the loss of your employment or for loss of office then:-

- If the payment is under £30,000, you should not be paying tax on it; or
- If the payment is over £30,000, the first £30,000 should still be paid to you tax-free, but the balance over and above £30,000 will be taxable at the appropriate tax rate.

3. Arrangements on the Termination of Your Employment

These are likely to concern such matters as the payment of your salary up to and including your last day of employment.

They could also include such things as:-

- Making a taxable payment to you in respect of any commission that may be owed to you;
- Confirming whether you are required to work your notice or, instead, going to receive a taxable payment in lieu of working your notice period (i.e. paid the equivalent of what your notice period would have been without having to work it); and
- Making a taxable payment to you in respect of any unused holiday that you have left over, capped at the Termination Date.

The golden rule with payments that you would ordinarily be receiving under your contract of employment (such as pay in lieu of notice, holiday pay, commission, etc.) is that they should still be taxed. The Termination Payment, on the other hand, should be a distinct, one-off payment that will be subject to the tax rules set out above.

There may even be arrangements to place you on garden leave, meaning that you will continue to be employed on your full salary until the Termination Date, but will not be required to perform any work unless your employer wants you to do so.

There may also be other arrangements to make when your employment comes to an end (or before that happens), including:-

- Submitting any expenses that you might have incurred in the course of your employment;
- Returning your employer's property, such as office keys, a company car, mobile phones, laptops, company credit cards, etc. in good condition;
- Retrieving your own property from your employer's premises;
- Submitting an announcement (even though your employer is likely to do this, it is important that you do not make any statements that differ from any agreed announcement);
- Reaffirming the settlement agreement. This might happen where a significant amount of time (usually four weeks or more) has passed between you receiving advice on the settlement agreement and the Termination Date. Your employer may require you to receive advice on a second settlement agreement to confirm that no further claims have arisen.

4. Warranties

Essentially, these are promises and can come in all forms. Frequently, they concern matters such as:-

- Confirming that you and those acting on your behalf have not taken steps to submit a claim to the employment tribunal or, if you have, that you will take steps to withdraw it;
- That you have not received a new job or the offer of a job at the time that the settlement agreement is signed, dated and completed by you and your employer;
- That you have not done anything sufficiently serious that would allow your employer to dismiss you for gross misconduct without giving you notice or pay in lieu of notice;
- That you have received advice from your relevant independent adviser after informing them of all the details that they need to be able to advise you;
- That your relevant independent adviser has confirmed that they have in force of policy of professional indemnity insurance to protect you should they have been providing you with negligent or incorrect advice (as any claim for negligent or wrong advice would be against them);
- That you will reimburse your employer for any tax and tax-related penalties that they incur on your behalf (other than penalties that properly rest with your employer, such as employer's National Insurance contributions);
- That you will reimburse your employer for all costs (legal or otherwise and possibly including the Termination Payment) if you subsequently breach the settlement agreement);
- That you agree to assist your employer should they need your help in any subsequent processes (legal or otherwise), such as if you have specific knowledge that they need to rely on in a claim. For instance, this could be the case if another employee raises a claim against the employer and you were that employee's line manager or a witness at the relevant time.

These are some of the most frequently seen warranties, but there can be others.

5. References

There is no statutory right to receive a reference from your employer, but there can be a contractual right to one (if your contract of employment or the settlement agreement allows for it).

Therefore, some settlement agreements will contain a promise to provide a reference (and hopefully the form of the reference that will be provided to a prospective employer as well), whilst others may not.

If the settlement agreement does not include a reference and you would like one, then you can always request that a reference is included in the agreement but do note that your employer does not have to agree to this.

6. Restrictive covenants

The more senior an employee you are or the more involved you are in your employer's trade secrets and processes, the more likely it is that you will have restrictive covenants in your contract of employment, which may be repeated in the settlement agreement.

These covenants are there to try and protect your employer's business. For instance, they may try and prevent you from taking key employees with you, to ensure that you do not set up in competition with your employer, to limit your ability to work for a competitor, and/or to prevent you from sharing your knowledge of your employer's confidential information and trade secrets.

Except for matters relating to confidential information and trade secrets (which could last indefinitely, where this is reasonable), the restrictive covenants that your employer requires you to sign up to must be reasonable and no more than is required to protect their business, otherwise they will not be enforceable.

To try and ensure their enforceability, employers will usually limit the amount of time that they will apply for and/or the geographical area that they will apply in. For instance, you may have a restrictive covenant that prevents you from working for a competitor that operates within a 5-mile radius of any of your employer's workplaces for a period of six months.

Strictly speaking, employers should pay you a sum to agree to such promises and to ensure the ongoing enforceability of the covenants, but some settlement agreements do not do this. If an employer does pay you compensation to agree to those promises, then that payment should be subject to deductions, just like the other payments that flow from your contract of employment.

7. Legal Fees

Although it is not a legal requirement for an employer to contribute towards your fees in receiving advice on a settlement agreement, it is recognised as being good practice that they do.

It is important to bear in mind that, if your employer does not pay these fees or the settlement agreement does not proceed, you remain responsible for paying the legal fees to your relevant independent adviser.

The fees likely will not cover more detailed advice and services beyond the terms and effects of the settlement agreement, the circumstances leading up to it and your likely claims that you will be settling. Therefore, if you wish to negotiate the terms and effects of the settlement agreement or you wish to bring a claim against your employer instead, the contribution to your legal fees as promised by your employer likely will not apply.

Additionally, the legal fees likely will not cover any other advice that you may require as a result of the loss of your employment, such as financial or careers advice. If you would like your employer to contribute to the costs of such further advice, then it is best to ask if your employer will assist you financially, although again note that your employer is not required to do this.

8. Full and Final Settlement

This is a fancy way of saying that, if you have agreed something with your employer and it does not appear in the settlement agreement, then it will not be binding upon either of you, even if it something that you would ordinarily receive under your contract of employment.

This is because a settlement agreement will usually extinguish your entitlements under your contract of employment as it is the full and final agreement between yourself and your employer.

The agreement may also specify whether third parties are also meant to be protected by it (such as individuals or other organisations involved in a discrimination or whistleblowing complaint). It should also confirm whether it is intended to be governed by the law of England and/or Wales.

9. Without Prejudice and Subject to Contract/Protected by Section 111A Employment Rights Act 1996

Depending on the route that the settlement agreement was introduced to you, it may have this written on it (or variations this phrase).

This essentially means that, until the settlement agreement has been completed by you and your employer, it will remain an entirely private document that cannot even be referred to in legal proceedings.

Once it has been completed, the without prejudice nature of the settlement agreement will fall away and the agreement may be referred to in certain limited circumstances (for example, if you need to disclose it to HMRC and/or if there is a subsequent breach of the settlement agreement).

It is also usual for a settlement agreement to specifically state that it cannot be used to prevent you from whistleblowing after it has been completed. However, if you are considering blowing the whistle on your employer, you must follow your employer's whistleblowing procedure before approaching a relevant external organisation.

Usually, a settlement agreement will also contain quite specific confidentiality provisions that will ensure the ongoing secrecy surrounding the document, despite the exceptions set out above. If that is the case, then the confidentiality clause(s) will take the pace of the without prejudice nature of the document to prevent you from discussing it openly.

Do I have to accept the settlement agreement?

No.

It is entirely up to you whether you accept the settlement agreement or not.

However, it is important to note that either you or your employer may withdraw from the settlement agreement at any time before it is completed.

Can my employer withdraw the settlement agreement?

Yes, if the settlement agreement is still at a stage where it has not been completed.

After the settlement agreement has been completed, it can only be revoked or varied with the consent of the parties, which usually means you and your employer.

Can I negotiate the terms of the settlement agreement?

Yes.

However, firstly it is important to note that your employer does not have to agree to your suggested amendments or inclusions in the settlement agreement.

Secondly, if you instruct your relevant independent adviser to negotiate the terms and effects of the settlement agreement with your employer on your behalf, this may lead to increased legal fees. Your employer may agree to cover these increased fees but is not obliged to, in which case you will remain responsible for paying the balance of the fees to your adviser.

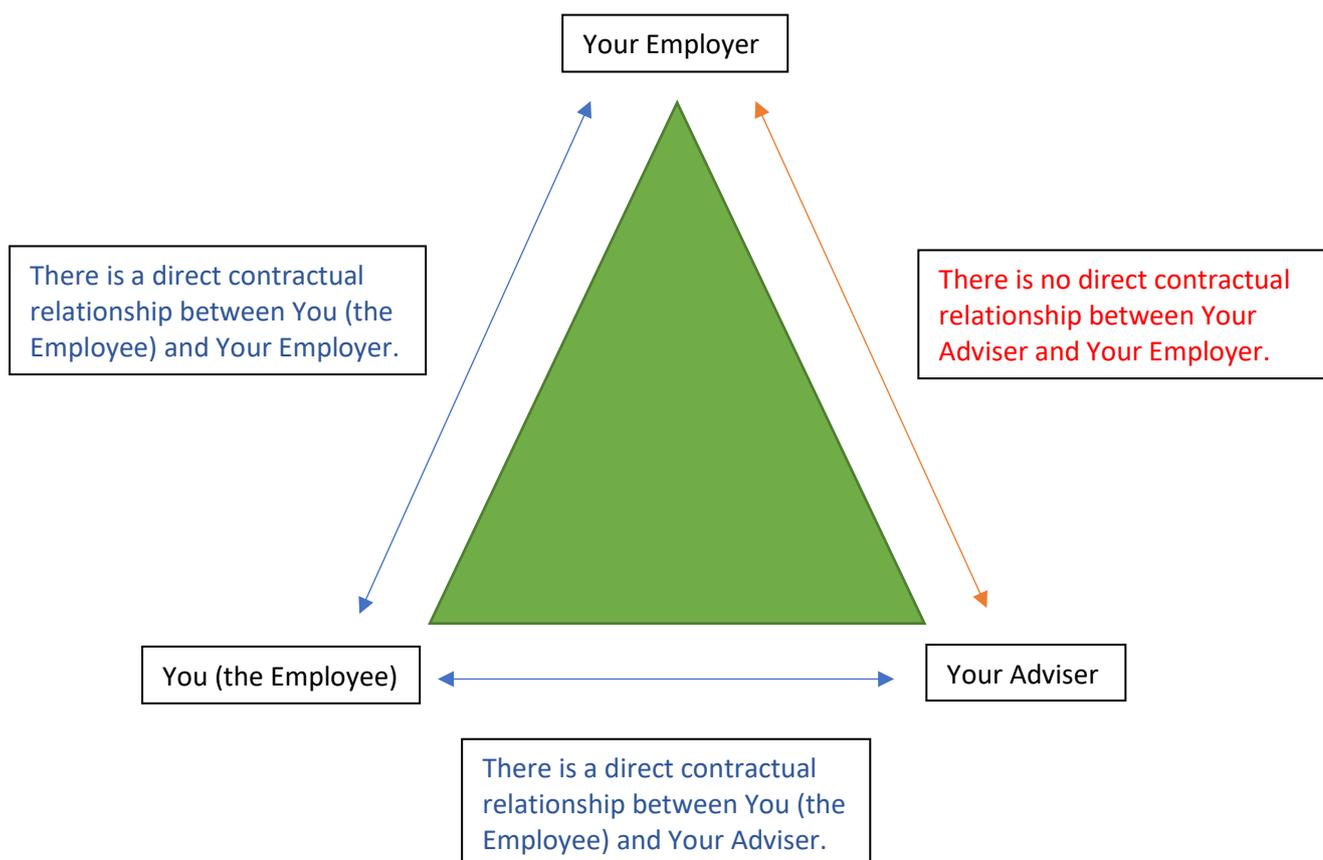
What do you mean by “when the settlement agreement is completed”?

This is when both parties have signed and dated the settlement agreement. After the last party to sign and date the document has done so, it is said to be completed and only at that stage will it becoming binding upon you and your employer.

What about the invoice for the legal fees?

As referred to above, if your employer defaults on paying their agreed contribution towards your legal fees, you will be required to pay those fees on their behalf as the direct contract will be between you and your relevant independent adviser, not between your relevant independent adviser and your employer.

The diagram below should assist in understanding this.



If the agreement has been completed and you are required to pay the fees because your employer is not paying, then you may still be able to recover the fees through the civil courts. Depending on the amount of the fees that are payable, then this may be a “small claim” and,

therefore, you would not be able to recover your legal costs for pursuing your employer through the courts, even though you would be able to pursue your employer for the legal fees relating to the settlement agreement.

Ideally, however, your adviser should do everything possible to compel your employer to pay the fees before you are required to do this.

What about when it's all over?

Then you get to continue with your life and your career as you wish.

When searching for suitable alternative employment, you may wish to check a number of sources, such as Jobcentre Plus, recruitment agencies, recruitment websites, HR professionals and specific company websites, which should help to extend your chances of gaining new employment.

Please note, however, that you must continue to comply with the statements and promises that have been set out in the settlement agreement.

This article does not constitute legal advice. If you require specific legal advice, then we recommend that you contact a legal adviser. TP Legal Ltd does not accept any responsibility whatsoever for any actions that you may take without first having obtained legal advice specific to your circumstances.

Please do not hesitate to contact us if you would like to discuss this article or any information contained within it further.