

Settlement agreements: how to satisfy the employee

Keeping down the costs of settlement agreements is difficult, but there are ways to make the package attractive to the employee at little or no additional cost to the employer. **Huw Cooke** and **Grace Malone** consider some of the available strategies.

Professionals in HR have a key role to play in agreeing terms when an employee leaves a business in contentious circumstances. The remit from the business to deliver a financially tight package can often be hard to achieve when you are facing a difficult employee who is out to get the best possible deal. However, there are ways to make the package more attractive to the employee.

How should the settlement be documented?

The first step in terms of strategy is to identify the right type of arrangement for the circumstances. In its simplest form, settlement can be recorded in a letter, which is signed by the employee. In signing the letter, the employee agrees to waive any claims that he or she might have against the employer in return for a sum of money.

This is a low-fuss (and resource-light) option and would validly waive all contractual rights and claims against the employer (but not statutory claims – see below). It also has the advantage of not requiring the employee to seek legal advice in order to be valid.

However, in an employment law context, contractual claims are only half the story as employees may also have a number of statutory claims, such as unfair dismissal or discrimination. A waiver letter will not be effective in waiving statutory rights and claims (although it may have a deterrent effect on the employee).

As such, this type of settlement mechanism has its limitations and is most useful where the termination payment is small and the risk of statutory claims is low. For example, for an employee with less than two years' employment where there are no grounds for a discrimination or whistleblowing claim (which require no qualifying period of employment).

These low-risk scenarios are relatively unusual and, if your business requires greater protection, you will want to consider alternative settlement options.

If early conciliation through Acas has been triggered, or if a tribunal claim has been issued, negotiating an agreement can be a good option as an agreement through Acas (known as a COT3) requires the employee to waive both contractual and statutory claims.

Again, there is no need for the individual to obtain legal advice in order for a COT3 to be valid, although Acas will explain the implications of signing the agreement to the employee. COT3s tend to be best suited to straightforward scenarios, although, as the legal protection for the employer is extensive, they can be a good solution even if the termination payment is reasonably substantial.

In more complex situations, for example where a senior executive is leaving, a more sophisticated solution may be required, in which case negotiating a settlement agreement will be the best – and standard – option.

In order to provide an effective waiver against claims, these agreements have to satisfy various legal requirements (one of which is that the employee is required to seek legal advice on the implications of signing the agreement), but settlement agreements have the advantage of offering the greatest flexibility in respect of the terms and protection which can be included.

Making the offer more appealing

While the financial package will almost inevitably be the focus of discussions, if you reach an impasse where the business refuses to offer more money, there are ways to sweeten the deal that require little additional expense or effort for the employer. For example:

- Continue employee benefits until the next renewal date. For example, if the business offers private healthcare or life assurance and has already paid the yearly premium, it may be possible to continue cover at no additional expense (although you should check the scheme rules).
- Allow the employee to keep company equipment such as a car or a laptop. Often, the book value will have diminished so the cost to the business is minimal, while the value to the employee is significant (although there may be tax implications).
- Fund outplacement support to assist the employee in finding another job. This can be relatively inexpensive if you have an existing provider, or you could agree to a capped contribution.
- Get advice on the tax status of payments – for example, damages for failure to give notice are treated more favourably than a payment in lieu of notice.
- Structure payments tax efficiently for the employee – for example, make use of the £30,000 tax exemption for payments for redundancy and/or loss of employment, attribute part of the payment to injury for feelings in a discrimination case, make contributions to a pension or make use of any foreign service during employment. Tax advice should be sought and you should require the employee to indemnify the business against any HMRC demands. Also assist the employee in relation to any existing share options, for example, it might be possible to exercise discretion to extend the period for vesting.
- Offer to provide an agreed form of reference. This is not something a tribunal can award and so is attractive to the employee, particularly if their departure is acrimonious. However, employers do owe a duty of care when giving a reference, so ensure that any reference is

while keeping costs down



true, accurate and fair, and does not give a misleading impression of the employee.

- Agree an announcement to explain the employee's departure to the workforce, customers and other stakeholders. This can be useful with senior employees as the right message can be attached to a "surprise" departure.
- Consider offering individuals ongoing directors' and officers' liability insurance after the end of their employment.

Improving the business' position

When negotiating with the employee (particularly where you are being generous), there are a number of provisions to include that can benefit the business. For example:

- Require the employee to expressly re-state any confidentiality provisions and restrictive covenants contained in their contract of employment, or introduce new (and more enforceable) restrictions.
- Include an obligation on the individual not to make any derogatory statements, including on social media,

about the business or its staff. Be mindful that solicitors acting for individuals will often ask for this to be a mutual obligation. If you do agree to this, be careful to restrict it to named individuals only within your business (for example the employee's line manager) – anything broader will be too hard to police.

- Include a contractual obligation on the employee to assist the business with any future or ongoing legal or investigatory proceedings. This can be useful if you are in a regulated sector or the employee may be needed as a witness in litigation – although cooperation may be difficult to achieve in practice.
- Where the termination payment is significant, consider making it in stages over a six- to nine-month period.
- Include a written re-affirmation of waiver clause. If there is a delay between the employee signing the agreement and leaving the business, any claims arising between the date of signing and the end of employment may not be validly waived. A re-affirmation clause requires the employee to reaffirm the waiver of claims at the end of employment to ensure that any such claims are waived.
- Require the employee to withdraw any existing grievances (and/or not to make any new grievances) or subject access requests.
- Request that the employee provide any computer passwords and passwords for business-related social media accounts prior to leaving.
- Require the employee to resign any office that they hold (for example, statutory directorships).

Is there anything else to bear in mind?

It may sound trite but, once you have a signed and dated settlement agreement, do not put it in the "done and dusted" file. It will need to be actioned as follows:

- make sure that payment date(s) are diarised and arrangements are made for these to be paid (including double-checking that the employee has fulfilled any conditions required on his or her part);
- ensure announcements are circulated as agreed; and
- make sure that people understand any obligations they are under towards the ex-employee, for example in relation to providing references or refraining from making derogatory comments.

Understanding how settlement agreements can be structured and the flexibility that they offer is not just important to counter and better negotiate with employees and their advisers, but is a powerful way of securing a cost-effective outcome for the business.

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