

Settlement agreements



You are a senior or C Suite Executive. Your employer has offered you a settlement for you to leave the business.

It is very important to get the right legal advice about your settlement and if necessary your claim, before agreeing to the terms of a settlement agreement. We can help. Our HR Solicitors have specialist expertise negotiating hundreds of settlement agreements with global organisations. We have been helping senior executives get the best exit deal for over 11 years.

Read this article which explains what you need to know, to consider and to do next.

For immediate advice and help contact us hr@hradvice.co.uk or on 0203 755 5288 directly.

What is a settlement agreement?

A settlement agreement is a legally binding agreement between you and your employer. In the agreement you agree to settle your potential employment claims and in return your employer will agree to pay you financial compensation. Sometimes the agreement will include other things for your benefit like an agreed reference letter.

What do I need to know about settlement agreements?

The settlement agreement is part of the settlement negotiation and when the financial compensation is agreed it will be written down in that agreement.

Why have I been offered a settlement agreement?

You may have received a settlement agreement due to one of these four different, but typical, scenarios:

- Your board of directors or shareholders want to end the employment contract you have with the company eg because there are differing views with you as CEO on strategy or the business is not performing satisfactorily and they are trying to hold you as CFO responsible.
- You are being made redundant
- You and your employer can no longer work together and your employer is prepared to give you compensation for you leaving
- Your employer has started a disciplinary (eg for poor performance) and is prepared for you to leave early provided a settlement agreement is signed

Why do I need legal advice for my settlement agreement?

You must get independent legal advice from a qualified employment law solicitor. Your employer will not sign the agreement or make any payments to you until your employment law solicitor has signed the certificate (which is in a schedule to the agreement) confirming that he/she has given you legal advice.

Your solicitor has to explain to you what employment law rights you are waiving (giving up) in return for the settlement payments.

Why is my the settlement agreement headed “without prejudice” ? What does “without prejudice” mean?

All conversations, emails and the settlement agreement offer are stated to be “without prejudice”.

A without prejudice statement made in a genuine attempt to settle an existing dispute cannot be used at an Employment Tribunal as evidence which prejudices (adversely affects) the interest of the person who made it. This protects both you and the employer.

This means that if you discuss a settlement package (but never sign the settlement agreement) your employer cannot say at an Employment Tribunal that you accepted you were at fault and/or you did not want to pursue your employment claims.

What are the legal requirements for a valid settlement agreement?

For a settlement agreement to be legally binding, there are a number of conditions that must be met:

1. The agreement must be in writing
2. The agreement must relate to a particular complaint or particular proceedings
3. The employee must have received legal advice from a relevant independent adviser (for example, a qualified employment lawyer or union official) on:
 - the terms and effect of the proposed agreement; and
 - its effect on their ability to pursue any rights before an Employment Tribunal
4. The independent adviser must have current professional indemnity insurance covering the risk of a claim against them by the employee for the advice
5. The employee’s adviser must be identified
6. The agreement must state that the conditions regulating settlement agreements have been satisfied.

What is included in a settlement agreement?

Other than the legal requirements listed above, the contents of a settlement agreement are up for negotiation. As your employment solicitor we would advise you and depending upon your situation, aim to negotiate the following outcomes for you:

1. An agreed leaving date
2. Payment of any outstanding salary and benefits
3. Payment of all salary and benefits for your notice period – whether you have to work your notice period or not
4. Compensation for your loss of employment – particularly if it will take you a long time to get another role

5. Payment of outstanding bonuses and the right to exercise share options, share plans etc

6. Contribution to your legal fees

Employers usually offer between £350 to £750 + VAT for your employment solicitor to explain what employment law rights you are waiving in your settlement agreement. As there will be extra legal fees for negotiating a settlement we ask the employer to pay for those extra fees but this cannot be guaranteed so you may have to pay our additional legal fees

7. An agreed reference so you can use the reference when looking for another role

8. If your employer is going to make an announcement to staff, an agreed announcement so you know the content in advance and when it will be announced. You will need to waive any employment law claims you have against your employer. The settlement agreement will list out all the possible types of claims which you could have (in a schedule to the settlement agreement) and you will be required to waive those claims and accept the compensation payment in full and final settlement of any actual claims that you may have.

Your employer will want you to:

- Confirm that your existing restrictive covenants (eg not to approach customers) will continue
- Confirm that you will continue to keep any information of the employer confidential
- Give an indemnity to the employer in relation to income tax and National Insurance Contributions if the taxation of the payments have not been correctly taxed
- Agree not to make any statements to other staff or on social media about the company and/or the terms of your settlement.

The employer may want you to:

- Stay at home on gardening leave while negotiations close and your settlement agreement is agreed and signed and/or while you work any agreed notice period
- Return any company property eg phone, laptop etc

Which types of employment claims can be settled by a settlement agreement?

A large number of statutory claims can be settled by a settlement agreement, e.g claims for:

1. Unfair dismissal because eg your employer does not have a fair reason (e.g poor performance or gross misconduct) for dismissing you
2. Pregnancy or maternity-related discrimination
3. Discrimination, victimisation or harassment related to sexual orientation.

The settlement agreement will also state an agreed leaving date and give you compensation for your notice period if your employer does not want you to work your notice.

Which types of claim cannot be settled by a settlement agreement?

There are a number of statutory claims that cannot be settled by entering into a settlement agreement, including some types of:

1. Personal injury claims. If you have a claim then you can still bring this claim separately
2. Pension claims. Your accrued pension rights up to your leaving date will be unaffected and your pension should be paid as normal when you retire in accordance with your pension scheme with your employer
3. Claims following the transfer of a business using the TUPE procedure.

Can any compensation be paid free of tax?

Up to £30,000 of any compensation payment may be paid tax free.

Where a payment is made to an employee on the termination of employment, it is either taxable:

- in the normal way as earnings under the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) because it is the payment for the notice period; or
- taxed as a termination payment under sections 401 to 416. The first £30,000 of payments that fall within section 401 are exempt from tax and any excess will be subject to income tax in the normal way.

The settlement agreement will explain which payments are taxed and which payments fall within the £30,000 limit.

What is the “ACAS Code on Settlement Agreements”?



Sometimes employers also say the settlement offer is made in accordance with the ACAS Code on Settlement Agreements. This explains more about the Acas Code of practice on Settlement Agreements. Employers sometimes state that negotiations using this Code are “Pre-Termination discussions”. Employers can start these discussions under section 111A of the Employment Rights Act. This means the discussions are protected from disclosure at an Employment Tribunal and are similar to “without prejudice” discussions and correspondence.

However usually when senior C Suite Executives are involved, employers prefer to negotiate directly on a “without prejudice” basis with the Exec’s chosen employment law solicitor, rather than follow all the ACAS Code process. Why? The Acas Code process has a minimum 10 day period for an employee to consider a settlement offer and then respond. Employers prefer to speak directly with your employment law solicitor because it’s quicker. In our experience Settlement Agreements take on average a week to negotiate and agree if both sides are keen to get it done.

Hiring an experienced employment law solicitor to negotiate your settlement agreement works doubly to your advantage, 1) Employers often prefer negotiating with a senior executive who is well advised by an

