SETTLEMENT AGREEMENTS

Most settlement agreements contain very similar provisions. This guide sets out a general explanation of the most common terms. Each settlement agreement will have its own particular terms which we will discuss, as well as any aspects of the common terms which differ from the general outline below. **This guide must therefore be read in conjunction with our specific advice on your own agreement.**

BASIC PURPOSE

The basic purpose of a settlement agreement is to effect a clean break between employer and employee. In simple terms, the employee agrees (usually, but not always, in return for being paid a sum of money) not to make any employment related claims against the employer. The employee signs away the right to make claims such as unfair dismissal, breach of contract, unpaid wages, redundancy, etc and cannot later submit a claim to the employment tribunal or the court. We will discuss the particular claims which might be relevant to a particular case.

It is important to note that the agreement will usually settle all employment related claims, not just those directly related to termination of employment. For example, perhaps some months ago the employee had a discrepancy in his pay which he has been trying to resolve with his employer. For unrelated reasons, his employment comes to an end before he has resolved that problem and he is asked to sign a settlement agreement. Although the pay dispute has nothing to do with the reason why he is being asked to sign the settlement agreement, the agreement will probably be wide enough to prevent him taking any further action with regard to the pay dispute. He must therefore (a) accept that he is not going to get the disputed wages; (b) persuade his employer to include an additional payment under the settlement agreement to deal with that issue or (c) specifically exclude that dispute from those settled by the agreement.

The agreement will sometimes say that it does not apply to certain types of claim – most commonly, personal injury claims of which the employee is not aware at the time of the agreement and claims relating to pension rights. If the agreement does contain such an exclusion, it means that the employee would still be able to pursue claims of that nature despite signing the settlement agreement.

The agreement will usually say that if, despite signing the agreement, the employee does make a claim, he will have to pay back any sums paid to him under the agreement. While it *may* be possible to argue that this provision is not enforceable, it does obviously make a breach of the agreement potentially costly.

COMPENSATION AND OTHER PAYMENTS

The agreement will specify any sums being paid to the employee. Normally this will include pay and other benefits up to the termination date which will be subject to tax and national insurance in the normal way. In addition, the employee would usually expect to receive holiday pay (less tax and national insurance) for untaken holidays which have accrued during the period from the start of the holiday year up to the termination date. There may also be a payment for holidays which would have accrued during any period of notice to which the employee is entitled but has not served.

In addition, the agreement may provide for a compensation payment to be made to the employee or for pay in lieu of notice. What these payments are and the tax treatment of them will depend on the particular circumstances. Broadly, if the employee receives pay in lieu of notice under a term of his contract, the payment will be subject to tax and national insurance. If the contract does not provide for a payment in lieu of notice, or if the payment is not related to the notice period, then it may be possible for the employer to pay the compensation (or the first £30,000 of it if it is a greater sum) without deduction of tax and national insurance.

TAX INDEMNITY

Most settlement agreements contain a tax indemnity provision. This means that if HM Customs and Revenue decide that the employer ought to have deducted more tax or national insurance from the payments made under the agreement than they have done, then the employee is responsible for paying that additional tax. If the employer is required to pay over additional tax or national insurance to HMRC, the employee will be required by this provision to reimburse the employer.

CONFIDENTIALITY

The agreement is likely to require the employee to keep the terms of the agreement confidential (but is likely to allow discussion with immediate family and professional advisers, and also where required by law to disclose it). It may also impose wider obligations of confidentiality in relation to information which obtained during employment – details of customers, trade secrets etc – or confirm that obligations of this kind contained in the contract of employment still apply. Sometimes the employer will pay the employee a small sum of money (perhaps £100) for agreeing to such obligations – this is because there is a specific tax charge for payments made in return for such obligations. By assigning a nominal payment to these obligations (from which tax and NIC will be deducted) it reduces the risk that the whole compensation payment could be treated as being in return for these obligations and subjected to tax.

REFERENCE

The agreement may provide for an agreed form of reference to be issued in response to any request.

PROPERTY

The agreement will normally contain either an obligation to return any of the employer's property by a specified date (usually the termination date) or a warranty (i.e. a statement confirming) that the employee has already done so. 'Property' will usually include keys, credit cards, documents, copy documents and any other kind of property. Documents will include electronic copies of documents.

LEGAL COSTS

In most cases, the employer agrees to pay a contribution to the employee's legal costs in relation to obtaining advice on the agreement. Where the employee is our client, we have to issue our invoice in the employee's name but we mark it as being payable by the employer. We are generally happy to deal directly with the employer in order to obtain payment. However, because we have no direct contract with the employer, we cannot directly enforce payment against the employer. Therefore if the employer fails to pay our invoice, we would have to ask the employee to pay it and the employee would then have to seek reimbursement from the employer. In the event that our actual costs exceed the amount which the employer is willing to contribute, we reserve the right to make a charge to the employee for the balance.

ENTIRE AGREEMENT

The agreement will usually contain a clause to the effect that the document is the whole agreement between the parties and nothing else is enforceable. This means that if, for example, the employee has been made a promise by the employer, perhaps of an additional payment or that he can keep a laptop, and it is not written down as part of the settlement agreement, it is very likely that the employee will be unable to enforce that promise. The same applies to similar promises made by employees to employers. It is important therefore that the document records everything that has been agreed.

MISCELLANEOUS

For legal reasons, the agreement will set out various matters such as the fact that the employee has received legal advice from a solicitor or other relevant adviser, that the person who gave him the advice is properly insured and that various statutory provisions have been satisfied. Failure to satisfy these requirements can mean that the agreement is not effective to stop the employee making further claims.

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