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Free initial consultation for UK employees



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Tax and tax indemnity

The general guideline is that first £30k of the severance payment can be free from deductions of tax and NI where the settlement agreement reflects the payment to be “compensation for loss of office”. In some circumstances, your notice period can be included within the £30k sum but only if there is no PILON (pay in lieu of notice) clause in your contract of employment. A redundancy payment is also included automatically within the £30k threshold. Most employers will want a tax indemnity clause in the agreement which enables them to “claw back” the tax element from you in the unlikely event that the Inland Revenue later decide that tax should have been deducted. You should always ensure, however, that there is no clause in the agreement shifting the onus on you to be liable for any costs, penalties and interest within the tax indemnity clause. This should be the responsibility of your employers.

Mutual non-derogatory clauses

You should try and ensure that there are mutual non-derogatory clauses in the settlement agreement, which provide that you and your employer cannot “bad-mouth” each other or bring each other into disrepute. Not all employers will agree to a mutual clause as this can be very difficult to enforce by large scale employers. A way round this is to insist that employers agree a clause whereby they use “their best endeavours” which many will agree to. In some cases, you can name specific individuals such as your direct line managers and the HR person in the non-derogatory clause.

Job references

There is no obligation for an employer to provide a job reference to a departing employee although many will invariably provide a standard reference setting basic information such as dates of employment and job title. Whether it is a standard or full reference, this should be attached to the settlement agreement wherever possible, together with a clause that no oral references will be given in any less favourable manner. It is the ideal time to obtain this.

Time limits for payment

The settlement agreement should set out when the termination payments under the agreement will be made (such as the next payment run or within 14 or 28 days). This should be in respect of all termination payments including notice, ex gratia sums, outstanding holiday and redundancy pay.

Post-termination restrictions

Some employers will try to introduce post- termination restrictive restrictions into the settlement agreement for the first time or seek to vary existing covenants that you may have. Such covenants will usually govern whether you can poach clients and key employees, or work with a competitor and will be limited to 6 or 12 months after your employment ends. If such covenants already appear in your contract of employment, then they are simply “confirmatory” in the settlement agreement. If you have not previously agreed to covenants in your contract of employment or your employer is seeking to vary the existing covenants, you do not have to accept this in the settlement agreement. Even where you do have previous restrictive covenants in your contract, you may want to consider asking for a variation or waiver of these in your settlement agreement. Some employers will be receptive to this.

► For further information

Please contact Philip by telephone on 020 7100 5256 or email:
pl@landaulaw.co.uk

► Cost guarantee

We guarantee we will not charge more than what your employer is prepared to contribute towards legal fees for the review of your settlement agreement

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Your reason for departure

Many settlement agreements will state that you cannot refer to the reason for your departure to anyone, even in a redundancy situation. This could place you in difficulties in terms of what you should say to new employers at interview, and what about your partner and immediate family? An exception should be carved out in the settlement agreement if possible to talk openly about your departure in limited circumstances and to specific parties. Also, you may want the reason for your leaving stated in the settlement agreement for you to be able to obtain redundancy income protection benefits where you have to prove the reason for your departure.

Return of company property

Many settlement agreements contain a clause that you must return company property within a certain time, and this is usually by the termination date. If you are unsure what “company property” amounts to, this should be checked before the settlement agreement is signed and if necessary an itemised list should be agreed with your employer.

Breach of settlement agreement

There may be a clause in the settlement agreement which states you must return all monies mentioned in the agreement if you are in breach. Be careful here. If you are contractually entitled to notice monies anyway- why should you return this, even if you are in breach? The same goes for redundancy payments. The relevant clauses should be modified so that they are only operative if there is a “material” breach, and the sum capable of being returned should only be the additional sums you are being paid over and above what you are entitled to anyway.

Garden leave

Some employers will insist that you stay at home rather than work your notice. You do still remain an employee, however, and contractually bound to the company for this period. The right to impose garden leave is usually reserved in your contract of employment. You otherwise do not have to automatically agree to this in the settlement agreement – although most people would be more than happy to stay at home and “tender the garden” whilst they are being paid.

Bonuses

The bonus clauses may be quite detailed, especially where they are with reference to discretionary awards and stock options (some deferred). You need to ensure that the clauses reflect the correct position and that in relation to the release of stock you are considered to be a “good leaver” to facilitate such release. The only reference to bonus may in some cases be a simple line that provides for the agreement being “in full and final settlement of all claims- including bonus”. Look out for this if you don’t want to automatically exclude any future claim for your bonus.

Outstanding holiday entitlement

You are entitled to accrued but untaken statutory holiday as a matter of law and this should be included in the agreement. You are not entitled to accrued holiday for the period of your notice unless you are also working this. Your employer cannot deduct holiday that you have taken in excess of your entitlement unless this right is reserved in your contract of employment.

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Pay in lieu of notice

Where you are not working your notice or on garden leave, you should at least be entitled to a payment in lieu of notice and this payment should be set out in the agreement.

Legal fees

There is no obligation for an employer to contribute towards your legal fees although most will invariably do so. Most contributions are between £250 and £500 plus VAT although they can be more or less depending on who your employer is and your level of seniority.

At LZW, we guarantee that you will not be charged more than the legal costs your employer is prepared to contribute for reviewing your settlement agreement.

Waiver of claims

It is not possible to waive your claims in respect of either accrued pension rights or personal injury matters that you were not aware of at the time of entering into the agreement. This is regardless of what the settlement agreement states. It is always best, however, to ensure that this is properly reflected in the agreement.

Confidentiality clauses

There is almost always a clause stating that you must keep confidential both the existence of the settlement agreement together with its terms. It is important to make sure you are not in breach of this and employers are generally proactive in monitoring for any default on your part.

Termination date

You could be asked to sign a settlement agreement with a termination date sometime in the distance. Where this happens, employers will often ask you to sign a 2nd settlement agreement at the termination date. This is usual and is intended to “mop up” any claims that could have arisen between the 1st and 2nd settlement agreements. Such “2 tier” agreements requires trust between the parties as you will have already compromised your rights after the signing of the first agreement.

New job offers

You are usually not under any obligation to disclose the fact that you have a new job to your employer. There could be a clause in the settlement agreement, however, in which you are asked to warrant that you have not been offered a new job. The reason for this is that it may affect what your employer is prepared to pay you under the agreement. You must inform your lawyer if you do have a new job as there might be an opportunity to amend or delete the clause, failing which you could otherwise be in breach.

Deadline for signing

You will more often than not be given a deadline to sign the agreement. Don't worry too much about this as it is often possible to extend any deadline as long as you are seen to be seeking legal advice and not overly delaying matters. This is not to say that any deadline should be ignored, but at the same time, you don't want to be accepting an onerous settlement agreement based on an unrealistic timetable. We often extend deadlines without too much difficulty.

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Full and final settlement and negotiation

The most important point perhaps for you to be aware of is that once you sign the settlement agreement, there is no going back! The agreement if properly drafted, is in full and final settlement of any claim you could make against your employer. You need to properly consider (with your employment lawyer) whether the agreement truly reflects wither what has been agreed or is your proper entitlement. There are often solid reasons to negotiate on the initial settlement proposal from your employer and which employers will be receptive to, but it will be too late once you sign the agreement.



Philip Landau

Philip is a specialist and experienced employment lawyer at Landau Law Solicitors, representing employees at all levels both in the city and nationwide. He has a national reputation in employment law and a high success rate with thousands of satisfied clients.

Philip advises on all areas of employment law including redundancies, bonus issues, unfair dismissal, performance improvement plans, appraisals, breach of contract, discrimination and settlement agreements.

Philip has appeared on BBC TV, ITV, and both national and local radio as an employment law expert. He has also been quoted in many newspapers and has written numerous articles on leading websites, including The Guardian for whom he is their employment law expert. Philip also provides employment law advice to members of The Institute of Leadership and Management, which is the UK'S largest management body.

Philip offers a free initial consultation wherever you are in the UK.

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