

Cabinet Office Guidance on Settlement Agreements, Special Severance Payments and Confidentiality Clauses on Termination of Employment

Cabinet Office Guidance on the use of Settlement Agreements, Special Severance Payments and Confidentiality Clauses on Termination of Employment

1. This guidance covers the use of settlement agreements (formerly known as compromise agreements) to terminate employment and the associated use of confidentiality clauses and special severance payments.
2. This guidance explains the principles and process to be followed when considering the use of settlement agreements when terminating employment. It aligns with both HM Treasury guidance on **Managing Public Money**¹ and the **ACAS Code of Practice: Settlement Agreements**.²
3. This guidance applies to all Civil Service organisations and their ALBs³, and includes all cases where public money is being spent on civil servants or non-civil servants employed by government departments or Arms Length Bodies (ALBs).
4. This guidance includes cases where agreements are reached without a statutory settlement agreement being used, for example following involvement by the Advisory, Conciliation and Arbitration Service (ACAS) in resolving the dispute, known as 'COT3 agreements'. Departments should always use this guidance in conjunction with HM Treasury guidance on special severance cases and ensure they seek appropriate legal advice for each individual case.
5. This guidance applies to all confidentiality clauses regardless of whether these are linked to termination of employment.

Settlement Agreements

6. A settlement agreement may be used in connection with the termination of employment following legal advice and where there is mutual agreement that this would be in the best interests of both the employee and employer. Settlement agreements are entirely voluntary and parties do not have to enter into discussions about them or agree to them if they do not wish to do so.
7. A settlement agreement should not be used in the following circumstances:
 - to avoid taking appropriate performance/attendance management or disciplinary action. Separate policies and procedures exist to address poor performance or attendance;
 - to cover up individual or organisational failure;
 - to prevent an employee from speaking out - for example, to mask malpractice;
 - to terminate a person's employment because they have made a protected disclosure under the Employment Rights Act 1996 (often known as "whistle blowing").

¹ ¹ Managing Public Money: available at <https://www.gov.uk/government/publications/managing-public-money>

² <http://www.acas.org.uk/media/pdf/j/8/Acas-Code-of-Practice-on-Settlement-Agreements.pdf>

³ These include Ministerial Departments, Non-Ministerial Departments, Executive Agencies, Crown Non-Departmental Bodies and Non-Departmental Public Bodies (NDPBs).

Special severance payments

8. A special severance payment is a payment made to the employee outside their statutory or contractual entitlement upon termination of their employment contract. Special severance payments are expected to be rare and exceptional. If a Department is considering making a special severance payment, they must take legal advice and be able to demonstrate that any payment is in the public interest and provides value for money for the Exchequer. Any payment may be open to public scrutiny, including by the National Audit Office and the Committee of Public Accounts.
9. Accounting Officers are responsible for ensuring that any special severance payment demonstrates value for money and that expenditure is used 'efficiently, economically and effectively.' They must set out clear governance routes, delegation authority and responsibilities that apply to special severance payments in the Department and any ALBs.
10. Accounting Officers are also responsible for ensuring that HM Treasury approval is obtained in all cases prior to the Department offering any payment, either orally or in writing. Departments must submit a full business case to HM Treasury to demonstrate that any special severance payment provides value for money for the Exchequer.

Confidentiality clauses

11. A confidentiality clause should only be used when necessary and not be included in settlement agreements as a matter of course. Departments should always consider whether each part of a confidentiality clause is required in a particular case, and take legal advice on the use of any confidentiality clause and the agreement as a whole. These principles apply whenever confidentiality clauses are used, even where they are not linked to termination of employment.
12. Confidentiality clauses should not seek to stifle or discourage staff from raising concerns with a regulatory or other statutory body about wrongdoing or poor practice in the Department, or give the impression that they affect the protection provided to an employee who acts as a "whistleblower" under the **Public Interest Disclosure Act 1998** (PIDA).
13. Employees who disclose information about matters such as wrongdoing or poor practice in their current or former workplace are protected under PIDA, subject to set conditions which are given in the Employment Rights Act 1996. This means that confidentiality clauses cannot and should not prevent the proper disclosure of matters of public interest.
14. If a confidentiality clause is to be used, departments must expressly remind the individual of their rights under the PIDA. Standard wording for the relevant sub-clauses of a confidentiality clause is attached at **Annex A**.
15. Departments should always seek legal advice on the appropriate use of confidentiality clauses. Confidentiality clauses must not override the obligation on departments to disclose appropriate details in relation to a department's essential business needs or those of Government. For example: for departmental and government management processes; where required by law; where required by a parliamentary committee; or under government guidance on the publication of information. Such clauses will therefore need to include suitable exceptions to allow for publication in appropriate circumstances, and the suggested wording in **Annex A** covers this.

Approvals process

16. From 1 February 2015, Departments must seek the prior approval of their Minister and then of the Minister for the Cabinet Office for the use of confidentiality clauses in settlement agreements which meet any of the following criteria:
 - a. involves any member of the Senior Civil Service;
 - b. is high visibility or is likely to be contentious (at any grade);
 - c. has a proposed payment of £100,000 or more (at any grade);
 - d. has a confidentiality clause that deviates, in respect of whistle blowing or protected disclosures, from the standard wording attached at Annex A (at any grade); or
 - e. where a decision to dismiss an employee based on disciplinary, performance or attendance issues has been overturned on appeal, but the employer wishes to terminate the employment contract (at any grade).
17. From 1 February 2015 Accounting Officers must seek the prior approval of the Department's Minister for any case involving a member of the delegated grades that includes a confidentiality clause of any kind.

Reporting to Cabinet Office

18. From 1 January 2015 departments and their ALBs are required to report to the Minister for the Cabinet Office on a quarterly basis any special severance payment made in connection with the termination of employment. These returns will enable Cabinet Office to provide assurance on whether the use of special severance payments across the Civil Service is both proportionate and appropriate, including the use of any confidentiality clauses alongside such payments.
19. Civil Service-wide data on special severance payments will be published annually by the Cabinet Office.

Annex A: Confidentiality Clause standard wording

Confidentiality clauses should not be included in settlement agreements as a matter of course. Departments should always consider whether each part of a confidentiality clause is required in a particular case, and take legal advice on how the below sub-clauses fit into the confidentiality clause and the agreement as a whole.

Sub-clause regarding employee's undertaking to keep the agreement confidential

In consideration of the sum of [£] (which shall be subject to statutory deductions), the Employee undertakes to the Employer:

to keep the existence, negotiation and terms of this agreement confidential except to the Employee's professional advisers, immediate family or where required by law. The Employee agrees to procure that the Employee's professional advisers and immediate family comply with the terms of this agreement as if they were a party to this agreement. In the case of the Employee's Trade Union representatives, the fact of and terms of this agreement can only be disclosed to the extent required by the union rules so long as those rules only require disclosure to union officials or advisors and not to the wider union membership.

Sub-clause relating to the whistleblowers' rights

For the avoidance of doubt, s43J of the Employment Rights Act 1996 applies in relation to protected disclosures as defined by s43A of that Act, i.e. nothing in this agreement can prevent the making of a protected disclosure (commonly known as "whistleblowing") in accordance with that Act.

Sub-clause containing exceptions to employer's undertaking to keep the agreement confidential

The Employer undertakes to the Employee to keep the existence, negotiation and terms of this agreement confidential, except for the purposes of essential management, accounting and audit processes or where required by law, by Parliament or by the Government Financial Reporting Manual and/or the Civil Service Guidance on Settlement Agreements.

Annex B: Scope of guidance

This guidance applies to all Civil Service organisations and their ALBs. All other Public Sector organisations are not in scope, for example the NHS, further education colleges, broadcasters, the police, the Armed Forces, universities and academies and site licence companies. You should consult your Accounting Officer if you are unsure if this guidance applies to you.

This guidance does not cover payments which may be made in connection with the termination of employment under the Civil Service Compensation Scheme⁴. It also does not cover the use of settlement agreements where the employee remains in employment, such as those relating to employee grievances. In these circumstances, departments should ensure they are following relevant departmental policy and ACAS guidance.

An employee does not have a right to a settlement agreement and agreeing one is at the discretion of the employer.

At all times, civil servants remain bound by confidentiality obligations which form part of their terms of employment, including the **Official Secrets Act**⁵. These obligations will cover confidential information to which the employee has had access during the employment, such as client files. For legal and practical reasons it may also be appropriate to confirm these obligations in a confidentiality clause in the settlement agreement.

⁴ <http://www.civilservice.gov.uk/pensions/latest-news/compensation-scheme>

⁵ <http://www.legislation.gov.uk/ukpga/1989/6/contents>

Annex C: Glossary of terms

Settlement agreement: Settlement agreements are legally binding contracts, used either to settle statutory disputes or claims, or disputes or claims under an individual employment contract. The agreement, which should be used only in exceptional circumstances, sets out the terms agreed by an employer and employee which settle the dispute and, where relevant, the terms on which the contract of employment will be terminated.

Special severance payment: A special severance payment is a payment made to the employee outside their statutory or contractual entitlement upon termination of their employment contract. It may be paid where an employee is dismissed or agrees the termination of their contract in a settlement agreement. It may also be paid in order to settle current legal proceedings such as an Employment Tribunal claim. In some cases an employee may also receive a payment under the Civil Service Compensation Scheme or under the terms of their contract of employment (for example, arrears of pay, accrued holiday pay, pay in lieu of notice etc.) or under a Tribunal or Court order.

Confidentiality clause: A confidentiality clause can include various elements. One element may be a requirement on the employee or employer, or both, to keep the existence, negotiation and terms of the settlement agreement confidential. In some cases confidentiality clauses may also include wording which precludes one or both parties from making derogatory comments about the other after the employment has ended.