

LEGAL UPDATES AND FACTSHEETS

COMPROMISE AGREEMENTS - 4 ESSENTIAL QUESTIONS

1 WHAT ARE THEY?

- 1.1 Compromise agreements are essentially formal, legally binding agreements between an employer and employee (or ex-employee) in which the employee agrees not to pursue particular claims that he or she has in relation to his or her employment or its termination, generally, in return for a financial settlement – referred to usually as the ‘*ex gratia* payment’.
- 1.2 They come about because the employer wishes to terminate the employee’s employment promptly yet at the same time avoiding the publicity and uncertain outcome of an employment tribunal or court case. Of course, if a dismissal has been effected fairly and following proper procedures, it may be that an employer will decide that there is no need for a compromise agreement.

2 WHAT ARE THE LEGAL FORMALITIES?

- 2.1 In order for a compromise agreement to be legally binding, a number of important conditions must be fulfilled. These are:
- The agreement must be in writing.
 - It must relate to the particular complaint.
 - The employee must have received independent legal advice from a relevant adviser as to the terms and effect of the agreement and, in particular, its effect on his or her ability to pursue his or her rights before an employment tribunal. (see par 4 below).
 - There must be in force, when the adviser gives the legal advice, a contract of insurance or professional indemnity insurance covering the risk of a claim by the employee in respect of loss arising as a result of the advice.
 - The agreement must identify the adviser.
 - The agreement must state that the conditions regulating compromise agreements under the relevant Act(s) are satisfied.

3 CONTRACTUAL; STATUTORY CLAIMS: WHAT COMPLAINTS ARE COVERED?

- 3.1 A compromise agreement may be used to settle more than one complaint. In this case, an employer should make clear each of the complaints being settled and refer to the relevant statutory provisions.
- 3.2 ‘Blanket’ (catch-all) compromise agreements are commonplace but their legal validity is questionable. Nevertheless recent case law indicates that the precise claims being settled do not have to be set out in the agreement in order for them to be duly compromised. Therefore, if a list of complaints is included the list should be illustrative (not exhaustive) so that other possible claims are not excluded inadvertently.
- 3.3 Where specific, actual complaints have been made or raised by an employee, these can be compromised but it is debatable to what extent such agreements can be used to settle future disputes about which the employee was unaware at the time of signing. One partial solution is for the employer to include a warranty in the agreement whereby the employee undertakes to disclose all known claims at the date of signing, so that these can be duly compromised.
- 3.4 In respect of *statutory claims* such agreements work well and may even be essential if the employer wants to vouchsafe no future action. Where for example there is potential for unfair dismissal or discrimination actions, a compromise agreement is necessary to obtain a valid waiver of the employee’s claims. *In such claims, any agreement by an employee to waive his or her statutory rights that is not in the form of a compromise agreement (or an ACAS COT3 agreement) will be invalid and unenforceable.* This means that the employee would still be eligible to lodge a claim in an employment tribunal, even though he or she might have already accepted a sum of money in apparent ‘full and final settlement’.
- 3.5 However, if an employer wishes to settle only *contractual claims*, there is no need for a compromise agreement. This is because an agreement to refrain from instituting proceedings in a contract claim is binding without the need for any special requirements to be satisfied. A simple waiver and release of claims will work.
- 3.6 Employers should also note that a compromise agreement is a ‘contract connected with employment’ for the purposes of the employment tribunal’s jurisdiction on contract claims. This means that an employee

can bring a claim for monies due under the agreement should the employer subsequently fail to honour it for whatever reason. The agreement is contractually binding once signed by all the parties. This also means that if one party breaches the agreement, the other is then no longer bound by its terms. So, for example, if the employer fails to pay what has been agreed, the employee can then pursue his or her claims in the employment tribunal or court.

4 WHO IS ELIGIBLE AS AN 'INDEPENDENT LEGAL ADVISOR'?

4.1 Since an employee is required to seek independent legal advice on a compromise agreement, employers should give serious consideration as to its necessity, particularly if they are confident that they have dealt with matters 'by the book' or where the likelihood of the employee bringing a claim is low.

4.2 The following persons qualify as independent legal advisors in terms of the legislation:

- Qualified lawyers (solicitors holding a practising certificate or barristers in practice or employed to give legal advice);
- Officers, officials, employees or members of an independent trade union, provided that they have been certified in writing by the union as competent and authorised to give advice;
- Employees or volunteer workers at advice centres giving free legal advice, provided that they have been certified in writing by the advice centre as competent and authorised to give advice;
- Fellows of the Institute of Legal Executives employed by solicitors' practices.

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The practice is a niche commercial legal practice providing business, property, and employment law services mainly to the business sector in Northern Ireland.

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- 1 By instructing us, you shall be deemed to have accepted our terms of business, from time to time applicable, which shall apply to the exclusion of any standard terms of purchase or any other terms which you may propose or supply to us.
- 2 Northern Ireland Law will apply to our relationship with our clients and any dispute or claim shall be subject to the exclusive jurisdiction of the Courts of Northern Ireland.
- 3 There shall be no variation of these terms without the prior written agreement of the Principal of the practice.

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