



Cabinet Office

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

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This document is also available from our website at [www.gov.uk/government/publications/civil-service-settlement-agreements-special-severance-payments-and-confidentiality-clauses](http://www.gov.uk/government/publications/civil-service-settlement-agreements-special-severance-payments-and-confidentiality-clauses)

1. This guidance covers the use of settlement agreements (formerly known as compromise agreements) and special severance payments on termination of employment and the associated use of confidentiality clauses (often referred to as non-disclosure agreements).
2. **For the avoidance of doubt, this guidance applies to all confidentiality clauses, regardless of whether these are linked to termination of employment.**
3. This guidance explains the principles and process to be followed when considering the use of settlement agreements when terminating employment. It aligns with the HM Treasury guidance on **Managing Public Money**<sup>1</sup> and the **ACAS Code of Practice: Settlement Agreements**.<sup>1</sup>
4. This guidance applies to all Civil Service organisations and their Arm's-Length Bodies (ALBs). For the purpose of this guidance, ALBs include Ministerial Departments, Non-Ministerial Departments, Executive Agencies, Crown Non-Departmental Bodies and Non-Departmental Public Bodies (NDPBs). It also includes all cases where public money is being spent on civil servants employed by government departments and non-civil servants<sup>2</sup> contracted to work for government departments or ALBs.
5. 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.

## 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 staff member 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;

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<sup>1</sup> [http://www.acas.org.uk/media/pdf/f/k/11287\\_CoP4\\_Settlement\\_Agreements\\_v1\\_0\\_Accessible.pdf](http://www.acas.org.uk/media/pdf/f/k/11287_CoP4_Settlement_Agreements_v1_0_Accessible.pdf)

<sup>2</sup> The Guidance applies to all Civil Servants and non-Civil Servants. This includes staff working for Civil Service bodies and ALBs where any money paid under a settlement agreement would be included in the parent department's accounts for example, to pay contractors, agency workers.

- to prevent a staff member from speaking out - for example, to mask malpractice or allegations of bullying, harassment or discrimination;
- to terminate a person's employment because they have made a protected disclosure under the Employment Rights Act 1996 (often known as "whistle blowing").

## Special severance payments

8. A special severance payment is a payment made to the staff member 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. Confidentiality clauses should not be used to prevent staff from raising or discussing allegations of bullying, harassment or discrimination or give the impression that they affect the protection provided to an individual who acts as a "whistleblower" under the **Public Interest Disclosure Act 1998 (PIDA)**.
13. Staff 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 in the public interest.

14. In some cases, confidentiality clauses may include wording which precludes one or both parties from making derogatory comments about the other after the employment has ended.
15. If a confidentiality clause is to be used, departments must expressly remind the individual of their rights under the PIDA which can be found at the following link: <https://www.gov.uk/whistleblowing>. Standard wording for the relevant sub clauses of a confidentiality clause is attached at **Annex A**.
16. 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. The standard wording in **Annex A** covers this.
17. **Departments must not deviate from the standard wording in Annex A without approval of both the department Minister and the Minister for the Cabinet Office.**

## Approvals process

18. 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.
19. From 18 July 2019, departments and their ALBs 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);
  - e. where a staff member has made allegations of bullying, harassment or discrimination (at any grade); or

- f. where a decision to dismiss a staff member based on disciplinary, performance or attendance issues have been overturned on appeal, but the employer wishes to terminate the employment contract (at any grade).

## Reporting to Cabinet Office

20. From 1 April 2020 departments and their ALBs are required to report to the Minister for the Cabinet Office on an annual basis the use of any special severance payment made in connection with the termination of employment and any confidentiality clauses. These returns will enable the Cabinet Office to provide assurance on whether the use of settlement agreements, special severance payments and confidentiality clauses across the Civil Service is both appropriate and proportionate. The proforma for returns and supporting guidance for completing the proforma is provided alongside this guidance. The supporting guidance is also attached at **Annex D**.

## 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.

Employers must also provide the individual with an express provision clarifying their rights under PIDA. Details can be found at paragraph 12 above.

### **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 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 whistleblower's 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. These include Ministerial Departments, Non-Ministerial Departments, Executive Agencies, Crown Non-Departmental Bodies and Non-Departmental Public Bodies (NDPBs). 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 Scheme<sup>3</sup>.

Unless a confidentiality clause has been used, this guidance does not apply to the use of settlement agreements where the staff member 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.

A staff member 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**<sup>4</sup>. 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.

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<sup>3</sup> <http://www.civilservice.gov.uk/pensions/latest-news/compensation-scheme>

<sup>4</sup> <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 the employer and employee<sup>5</sup> 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 the 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. As non-derogatory statements are a species of restrictive covenant which may form part of the confidentiality clause or accompany it, they are covered by this guidance.

**Arm's-Length Bodies:** For the purpose of this guidance Arm's-Length Bodies (ALBs) include Ministerial Departments, Non-Ministerial Departments, Executive Agencies, Crown Non-Departmental Bodies and Non-Departmental Public Bodies (NDPBs).

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<sup>5</sup> For the purpose of this guidance this would include settlements for non-employees such as agency workers or contractors working in a Civil Service organisations or their ALBs

## Annex D: Supporting guidance for Cabinet Office data capture

Set out below are notes to help you complete the proforma provided with this guidance. You should read the notes to each section carefully before you begin to complete that particular section. You may also find it helpful to liaise with the relevant contacts in your legal team and HM Treasury's spending team.

**Please do not send us personally identifiable information (other than the contact details of the person completing the proforma).**

### Section A - Organisation and Contact Details

**Name of organisation** - provide full name of organisation.

**Sponsoring department** - if applicable, for example, if your organisation is an Arm's-Length Body or an Executive Agency.

**Contact name & email address** - please supply name and contact email address in case of a query.

How Cabinet Office uses your contact details is set out in our Privacy Notice: <https://www.gov.uk/government/publications/external-contact-information-privacy-notice/external-contact-information-privacy-notice>

### Section B - Case details and individual details

#### **Type of agreements**

**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.

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 the 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.

**Date of Agreement** - this should be the date the agreement was signed.

**Confidentiality clause included (yes/no)** - A confidentiality clause also known as a non-disclosure agreement (NDA). 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.

**If yes, was a standard whistleblowing clause used?** - 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). 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. Further information about standard whistleblowing clauses can be found in **Annex A** of the Civil Service Guidance on settlement agreements.

**If yes, has this agreement been used in a discrimination case?** - Discrimination cases may include, for example, pregnancy or maternity discrimination, sexual harassment or racist abuse.

**If yes, please provide the following answers to the following questions:**

Why a confidentiality clause was deemed necessary in this case? What this clause just relating to the terms of the agreement or something wider?

Was approval from your departmental minister obtained? If not, why was this not deemed necessary?

Was approval from a Cabinet Officer minister obtained? If not, why was this not deemed necessary?

Was standard clause protecting whistleblowing disclosures included?

What support was given to individuals involved?

**Special severance amount requested** - this will be the amount requested in the business case to HM Treasury.

**HMT approval (yes/no)** - Organisations should ensure HM Treasury approval is obtained in all cases prior to the department offering any payment, either orally or in writing.

**Special severance amount** - Actual special severance paid to the individual.

We would like some high level information about the kinds of people with whom settlements etc have been reached, but please do not identify them.

**Business area** - this may be the individual's Directorate or Group name. Please do not provide information at a more granular level.

**Professional group** - provide information if the individual belongs to any particular professional group, for example, a legal, accountancy or analytical professional group. Please do not provide their job title.

**Is the individual a member of the Senior Civil Service (yes/no)?** Please do not provide their exact grade.