

Insights

“EMPLOYMENT PRENUPS” – WHAT ARE THEY AND DO THEY ALLOW EMPLOYERS TO COMBAT THE IMMINENT REMOVAL OF THE CAP ON COMPENSATION AWARDS FOR UNFAIR DISMISSAL CLAIMS?

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Summary

The removal of the unfair dismissal cap is pushing employers to think of novel ways to protect themselves against the risk of high value unfair dismissal claims at the hands of their highest paid employees (such as C-suite Employees, Senior Executives in the Banking Sector or professional sports players and managers). One such solution which is starting to emerge is this notion of an “Employment Prenup”. Essentially, a settlement agreement, entered into before the commencement of employment, which waives any future claim of ordinary unfair dismissal in exchange for a guaranteed lump sum payment on exit. But would it work?

For decades, the right not to be unfairly dismissed, has represented a relatively toothless form of protection, for the highest paid employees across society.

With the application of the statutory cap on compensation for unfair dismissal claims (currently sitting at £123,543 or 52 weeks’ pay, whichever is the lower), together with the eye-wateringly-long wait times for ET cases to get to final hearings, the losses suffered by highly paid employees will often far exceed any compensation they could reasonably expect to recover...and that’s assuming they win.

This relatively impotent right for the super-high earners has, in contrast, been something of a comfort blanket for the Employers in those cases. However, from 2027 the tables will be well and truly turned.

Some employers are therefore considering this notion of an Employment Prenup to reinstate those previously enjoyed levels of certainty regarding potential claims.

So, let’s cut to the chase... yes it can be done; no it isn’t watertight; and yes it will likely be costly.

Believe it or not, case law does support the idea of waiving future unfair dismissal claims which haven't yet arisen, provided the settlement agreement is explicitly clear what claims are being waived. Any ambiguity could result in the waiver being void (risk 1). Further, all previous case law relates to situations where the employment relationship has already commenced. It is unclear whether a waiver of claims could be validly entered into before the employment relationship starts, although there is nothing to suggest not (risk no.2). To ensure the settlement agreement is binding, the employee would also need to take legal advice on the terms and effect of the settlement agreement (risk no.3).

Employers who adopt this novel practice may also develop a reputation within the senior executives communities as being "one to avoid" (risk no.4).

It is also anticipated that many employers will voluntarily place themselves on the hook for a hefty exit payment when ultimately a perfectly fair and lawful dismissal is available. Such is the nature of insurance.

These sorts of prenups will not prevent an employee from pursuing other types of claims, for example automatic unfair dismissal, whistleblowing detriment, or discrimination. It does therefore make you wonder what alternative claims these prenups may start to drive forward.

What to do now

Any employers considering venturing into these uncharted waters should be careful to ensure the following:

- that any proposed employment prenups are formalised under the terms of a legally compliant settlement agreement;
- that the relevant claims are clearly identified and that it makes clear that future claims of unfair dismissal which have not yet arisen are also waived;
- the employee takes independent legal advice on the agreement; and
- the agreement makes clear that, should any other claims be presented, the Exit Payment will be offset against any sums claimed.

What do you think? Will Employment Prenups find their place in society, and would you enter into one?

If you have any questions about this development or its implications for your business, please contact [Paul Sands](#), Counsel, or another member of [BCLP's UK Employment team](#).

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Meet the team



Paul Sands

Counsel, London

paul.sands@bclplaw.com

[+44 \(0\) 20 3400 4084](tel:+442034004084)

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