

Restricting exit payments in the public sector: consultation on implementation of regulations

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Contents

1. [1. Introduction](#)
2. [2. Proposed scope of draft regulations](#)
3. [3. Guidance and directions](#)
4. [4. Devolution summary and equalities impacts](#)
5. [5. Summary of questions](#)

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0.1 Executive summary

Exit payments to employees leaving the public sector workforce in 2016-2017 cost the taxpayer £1.2 billion¹, with payments at and above £100,000 amounting to £0.2 billion. Exit payments can be important to employers' ability to reform and react to new circumstances, whilst providing support for employees as they find new employment or as a bridge until retirement age. However, public sector employers have a responsibility to demonstrate that they are using public money efficiently and responsibly, and to ensure that pay and terms are always proportionate, justifiable and fair to the taxpayers who fund them.

The government does not believe that the majority of six figure exit payments, which are far in excess of those available to most workers in the public sector or wider economy, are proportionate or provide value for money for taxpayers.

The government therefore introduced powers to cap exit payments in the public sector at £95,000 in the Small Business, Enterprise and Employment Act 2015. This consultation sets out the proposed method of implementing that cap, including which bodies should be in scope.

These regulations will help public sector employers to ensure exit payments represent value for money to the taxpayer who funds them.

1. Introduction

1.1 Policy background

Exit payments associated with loss of employment, including redundancy, are important to employers' ability to reform, and an important source of support for employees as they find new employment, or as a bridge until retirement age. However, it is also important that exit payments are proportionate and fair to the taxpayer and the government is concerned about the number of exit payments made to public sector workers that exceed or come close to £100,000.

Such payments can exceed three times the average annual earnings in the public sector², and are far higher than the value of exit payments made to the majority of public sector workers³. The government does not believe that such payments often provide value for money or are fair to the taxpayers who fund them.

The government legislated for a cap of £95,000 on exit payments (the cap) in the public sector in the Small Business Enterprise and Employment Act 2015 (the 2015 act) as amended by the Enterprise Act 2016 (the 2016 act). The 2015 act sets out the duty to implement the cap through secondary legislation.

This consultation sets out the proposed draft regulations, schedule to the regulations, accompanying guidance and directions. The government welcomes comments on the draft regulations.

The draft schedule 1 sets out in detail the proposed scope of the regulations for this first stage of implementation. The government will expand the bodies in scope to the whole of the public sector in due course, with exemptions for certain bodies. Exemptions will be considered on a case by case basis, taking into account the nature of and functions undertaken by the employer.

1.2 Policy intention

Sections 153A to 153C of the 2015 act enable HM Treasury to make regulations restricting public sector exit payments to a maximum of £95,000. The draft regulations define the types of payments intended to be subject to the cap, how the proposed cap is intended to operate, and the scope of the regulations. The bodies in scope of the draft regulations are set out in schedule 1 of the draft regulations. It is the government's intention to extend the scope of the regulations to the whole public sector in due course.

1.3 Aim and scope of the consultation

The government will consider the consultation responses and decide on how best to achieve its aims in relation to the questions and proposals set out in this document. Responses are particularly welcomed from:

- employing bodies within the scope of the draft regulations as well as employing bodies within the wider public sector but not included in schedule 1 at present
- bodies representing public sector employers
- employees and their representative bodies
- members of the academic community with expertise in this area
- pay, pension, remuneration and HR professionals in both the private and public sectors
- anyone else who may be impacted by this consultation

1.4 How to respond

This consultation will run for twelve weeks and will close on 3 July. Responses can be [submitted online](#) or sent by email to: ExitPaymentCap@hmtreasury.gov.uk with the subject heading 'Consultation on Exit Payment Cap'.

Alternatively please send responses by post to:

Workforce, Pay & Pensions Team,
HM Treasury,
1 Horse Guards Road,
London
SW1A 2HQ

When responding please say if you are a business, individual or representative body. In the case of representative bodies, please provide information on the number and nature of people you represent.

1.5 Consultation principles

This consultation is being run in accordance with the government's [consultation principles](#).

1.6 Privacy notice

This notice sets out how HM Treasury will use your personal data for the purposes of the 'public sector exit payment' and explains how your rights under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA).

Your data (data subject categories)

The personal information relates to you as either a member of the public, parliamentarians, and representatives of organisations or companies.

The data we collect (data categories)

Information may include your name, address, email address, job title, and employer of the correspondent, as well as your opinions. It is possible that you will volunteer additional identifying information about themselves or third parties.

Legal basis of processing

The processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in HM Treasury. For the purpose of this consultation the task is consulting on departmental policies or proposals or obtaining opinion data in order to develop good effective government policies.

Special categories data

Any of the categories of special category data may be processed if such data is volunteered by the respondent.

Legal basis for processing special category data

Where special category data is volunteered by you (the data subject), the legal basis relied upon for processing it is: the processing is necessary for reasons of substantial public interest for the exercise of a function of the Crown, a Minister of the Crown, or a government department.

This function is consulting on departmental policies or proposals, or obtaining opinion data, to develop good effective policies.

Purpose

The personal information is processed for the purpose of obtaining the opinions of members of the public and representatives of organisations and companies, about departmental policies, proposals, or generally to obtain public opinion data on an issue of public interest.

Who we share your responses with

Information provided in response to a consultation may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004 (EIR).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an

assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Treasury. Where someone submits special category personal data or personal data about third parties, we will endeavour to delete that data before publication takes place.

Where information about respondents is not published, it may be shared with officials within other public bodies involved in this consultation process to assist us in developing the policies to which it relates. [Examples of these public bodies](#).

As the personal information is stored on our IT infrastructure, it will be accessible to our IT contractor, NTT. NTT will only process this data for our purposes and in fulfilment with the contractual obligations they have with us.

How long we will hold your data (Retention)

Personal information in responses to consultations will generally be published and therefore retained indefinitely as a historic record under the Public Records Act 1958.

Personal information in responses that is not published will be retained for three calendar years after the consultation has concluded.

Your rights

- you have the right to request information about how your personal data are processed and to request a copy of that personal data
- you have the right to request that any inaccuracies in your personal data are rectified without delay
- you have the right to request that your personal data are erased if there is no longer a justification for them to be processed
- you have the right, in certain circumstances (for example, where accuracy is contested), to request that the processing of your personal data is restricted
- you have the right to object to the processing of your personal data where it is processed for direct marketing purposes
- you have the right to data portability, which allows your data to be copied or transferred from one IT environment to another

How to submit a Data Subject Access Request (DSAR)

To request access to personal data that HM Treasury holds about you, contact:

HM Treasury Data Protection Unit
G11 Orange
1 Horse Guards Road
London
SW1A 2HQ

dsar@hmtreasury.gov.uk

Complaints

If you have any concerns about the use of your personal data, please contact us via this mailbox: privacy@hmtreasury.gov.uk.

If we are unable to address your concerns to your satisfaction, you can make a complaint to the Information Commissioner, the UK's independent regulator for data protection. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

0303 123 1113

casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

Contact details

The data controller for any personal data collected as part of this consultation is HM Treasury, the contact details for which are:

HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

020 7270 5000

public.enquiries@hmtreasury.gov.uk

The contact details for HM Treasury's Data Protection Officer (DPO) are:

The Data Protection Officer
Corporate Governance and Risk Assurance Team
Area 2/15
1 Horse Guards Road
London
SW1A 2HQ

privacy@hmtreasury.gov.uk

2. Proposed scope of draft regulations

Employers in the whole of the public sector have a responsibility to demonstrate that they are using public money efficiently and responsibly, and to ensure that pay and terms are always proportionate, justifiable and fair to taxpayers.

In order to determine the scope of the cap, HM Treasury will be guided by the Office for National Statistics (for National Account purposes) classification of bodies within the central and local government, and non-financial public corporation sectors. There will be a limited number of exemptions.

The government is proposing a staged process of implementation across the public sector. The first stage will capture most public sector employees, before extending the cap to the rest of the public sector in the second stage. Prioritising in this way will ensure most exit payments in the public sector are limited to £95,000 without further delay, while work continues on expanding the scope of the regulations.

2.1 Bodies in scope of the current draft regulations

The draft regulations apply to payments made by public sector authorities to employees and by public sector offices to office holders. However, they do not apply to the following payments:

A. Payments made by a relevant Scottish authority, as defined in s 153B(5) of the 2015 act (see section 4.1 below)

B. A relevant Welsh exit payment, as defined in s 153B(6) of the 2015 act

C. Payments made by Northern Irish authorities which wholly or mainly exercise devolved functions

The following categories of public sector employer are within scope of these regulations where they fall within the responsibility of the UK government, regarding their employment:

- the UK Civil Service, its executive agencies, non-ministerial departments and non-departmental public bodies (including Crown non-departmental public bodies and Her Majesty's Prison and Probation Service)
- the NHS in England and Wales⁴
- academy schools
- local government including fire authorities' employees and maintained schools
- police forces, including civilian and uniformed officers

Some bodies have more than one classification. For example, if an executive agency is also classified as a type of body not currently in scope of the cap, such as a trading fund, it should not be captured during this round of implementation.

The full list of proposed public sector bodies in scope of the draft regulations are listed in draft schedule 1. The categories of final employers which will be included in schedule 1 is subject to responses to the consultation.

All public sector employers should make value for money decisions on exit payments, and spend public money responsibly. It is the government's strong expectation that bodies not in the proposed scope of these regulations will come forward with their own, commensurate cap on exit payments.

2.2 Bodies and payments exempt in the draft regulations

The government proposes that the Secret Intelligence Service, the Security Service, the Government Communications Headquarters and the Armed Forces should be exempt from the cap. Therefore, these employers are not listed in draft schedule 1 to the regulations.

Careers in these organisations have unique features, and the special requirements made of individuals – including the transition to civilian life – are reflected in the range and level of compensation payments for these workforces. Compensation and resettlement payments make up a core part of the overall remuneration and reward package for those working in these fields, and payments are sometimes required in order to ensure that individuals are properly compensated for what can be lifelong impacts, felt at relatively early ages. The government believes it is right that – in general – these employers have flexible and responsive remuneration practices which may fall outside of the scope of the draft regulations.

As a general rule accrued pension rights, including rights to pension commutation lump sums, are not within scope of the draft regulations because they do not normally involve any cost to the employer. However, in some cases pension payments do involve an additional employer cost relating to an exit and often represent a significant amount of an individual's exit payment. For this reason they are within scope of the draft regulations unless an exemption applies. These payments arise when an employer has to make a 'pension strain' payment, for example to provide the pension scheme member with an immediate unreduced pension before the member's Normal Pension Age or when an employer has to make a pension commutation related payment.

Fire and Rescue Authorities (FRAs) have discretion to remove the current commutation lump sum restriction (of 2.25 x pension) that applies to firefighter members of the 1992 Firefighters' Pension Scheme who are under age 55 and have less than 30 years' service. Where a FRA exercises this discretion, this results in an employer related cost because it is required to make a payment equivalent to the additional amount to the member's pension fund account. It is proposed that these payments should be exempt from the scope of the regulations as they do not fund an increase in the actuarial value of the firefighter's pension.

Therefore, regulation 7(c)(i) exempts payments made by a FRA to their pension fund account, where the FRA exercises its discretion to allow a firefighter (who is subject to the above 2.25 times pension commutation lump sum restriction) to commute up to a maximum of 25% of their annual pension for a pension lump sum. Effectively, this discretion aligns with the commutation entitlement available to firefighters who are aged 55 or over, or who have accrued the maximum 30 years' service.

The government is also considering an exemption for payments made by FRAs to their pension fund account in respect of firefighters who are unable to maintain operational fitness through no fault of their own and where the FRA has agreed to put into payment an authority initiated early retirement pension. This will honour the government's [previous commitment](#) that firefighter members of the 2006 and 2015 Firefighters' Pension Schemes in these circumstances should be awarded an unreduced pension if they cannot be redeployed.

Question 1

Does draft schedule 1 to the regulations capture the bodies intended (described in section 2.1 above)? If not, please provide details.

Question 2

Do you agree with the current list of bodies in scope, for the first round of implementation? If not, please provide reasons.

Question 3

Do you agree with the exemptions outlined? If not, please provide evidence.

3. Guidance and directions

The government welcomes comment on the attached guidance and directions.

The guidance aims to explain, in plain English, how the draft regulations should be applied. In particular, the guidance details the circumstances in which the cap may and must be relaxed, and which actors have the power to relax the cap.

Section 5 of the guidance and the separate mandatory HMT directions are intended to ensure that the cap must be relaxed in specific mandatory cases, for example where a settlement agreement is entered into following a whistleblowing or discrimination complaint, and where it may be relaxed in specific discretionary cases, for example where imposing the cap would cause undue hardship.

This reflects the government's position – and the position reflected in the draft regulations – that the public sector exit payment cap is not designed to discourage workers from making disclosures covered by whistleblowing law or to prevent such people from receiving an appropriate remedy from an employment tribunal.

Question 4

Does the guidance adequately support employers and individuals to apply the draft regulations as they stand? If not, please provide information on how the guidance could be enhanced.

Question 5

Is the guidance sufficiently clear on how to apply the mandatory and discretionary relaxation of the regulations, especially in the case of whistleblowers?

Question 6

Is there further information or explanation of how the regulations should be applied which you consider should be included in the guidance? If so, please provide details.

4. Devolution summary and equalities impacts

4.1 Devolution

The cap policy extends to all the bodies where employment terms are subject to approval by the UK government (subject to exemptions set out in the remaining paragraphs of section 4.1).

Payments made by authorities which wholly or mainly exercise functions that could be devolved to Northern Ireland are not covered by the draft regulations.

Payments made by a relevant Scottish authority, namely the Scottish Parliamentary Corporate authority or any authority which wholly or mainly exercises functions devolved to Scotland are also not covered by these regulations, with the exception of payments made by the Scottish Administration to holders of non-ministerial offices in the administration or to staff of the administration, which are covered by these regulations.

Relevant Welsh exit payments, namely payments made to the holders of the offices specified in s 153B(6) of the Enterprise Act 2016 are not covered by these regulations.

The regulations contain a power in regulation 12 to relax the exit payment cap following compliance with HMT directions or with consent of HMT, however this power does not apply to exit payments made by a devolved Welsh authority.

4.2 Equalities

An [equalities impact assessment of the cap](#) was conducted in the previous consultation, ahead of legislation on the policy.

If, following consultation, the government decides to implement a two stage implementation process, it will do so on the basis of a further assessment of the equalities impact.

Question 7

Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?

Question 8

Are you able to provide information and data in relation to the impacts set out above?

5. Summary of questions

Question 1

Does draft schedule 1 to the regulations capture the bodies intended (described in section 2.1 above)? If not, please provide details.

Question 2

Do you agree with the current list of bodies in scope, for the first round of implementation? If not, please provide reasons.

Question 3

Do you agree with the exemptions outlined? If not, please provide evidence.

Question 4

Does the guidance adequately support employers and individuals to apply the draft regulations as they stand? If not, please provide information on how the guidance could be enhanced.

Question 5

Is the guidance sufficiently clear on how to apply the mandatory and discretionary relaxation of the regulations, especially in the case of whistleblowers?

Question 6

Is there further information or explanation of how the regulations should be applied which you consider should be included in the guidance? If so, please provide details.

Question 7

Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?

Question 8

Are you able to provide information and data in relation to the impacts set out above?

Draft Regulations laid before Parliament under section 161(4) of the Small Business, Enterprise and Employment Act 2015, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2019 No. 000

EMPLOYMENT

The Restriction of Public Sector Exit Payments Regulations 2019

Made - - - -

Coming into force in accordance with regulation 1(2)

The Treasury makes the following Regulations in exercise of the powers conferred by sections 153A(1), (2), (4) and (8)(a), 153B(1)(c) and (4)(a), 153C(1), (5) and 8(a) and 161(2) of the Small Business, Enterprise and Employment Act 2015(a).

(a) 2015 c.26. Sections 153A, 153B and 153C were inserted by section 41(1) of the Enterprise Act 2016 (c.12).

(b) For the definition of “an exit payment” see regulation 3.

(c) S.I. 2004/753.

A draft of these Regulations has been laid before Parliament and has been approved by a resolution of each House of Parliament in accordance with section 161(4) of that Act.

Citation and commencement

1. These Regulations may be cited as the Restriction of Public Sector Exit Payments Regulations 2019. (1) These Regulations come into force on the day after the day on which they are made.

Application

2. These Regulations apply where an exit payment(b) is made– (a) by a public sector authority listed in Part 1 of the Schedule; or

(b) to a holder or former holder of an office listed in Part 2 of the Schedule.

Interpretation

3. In these Regulations–

“the Act” means the Small Business, Enterprise and Employment Act 2015;

“ACAS” means the Advisory, Conciliation and Arbitration Service;

“ACAS arbitration scheme” means the arbitration scheme set out in the Schedule to the ACAS Arbitration (Great Britain) Order 2004(c); 2

“Conciliation agreement” means any agreement to refrain from instituting or continuing legal proceedings where an ACAS conciliation officer has taken any action under any of sections 18A to 18C of the Employment Tribunals Act 1996(a);

(a) 1996 c.17. Sections 18A to 18C were added by the Enterprise and Regulatory Reform Act 2013 c.24 Pt 2s.7(1).

(b) **2006 c.31. Section 157A was added by the Wales Act 2017 c.4 Pt. 1 s. 4(1).**

(c) 2004 c.21. S.1 is moved under a new heading entitled “Fire and rescue authorities” by Policing and Crime Act 2017 c.3 Sch.1(1) para 2.

(d) S.I. 2002/2034;

(e) 1996 c.18. Section 139 was amended by paragraph 31 of Schedule 21 to the Education Act 2002 (c.32) and paragraph 41(4) of Schedule 2(2) to the Local Education Authorities and Children’s Service Authorities (Integration of Functions) Order 2010 S.I. 2010/1158.

(f) 1996 c.18.

(a) a county council;

(b) in relation to Wales only, a county borough council;

(c) a district council;

(d) a London borough council;

(e) the Common Council of the City of London in its capacity as a local authority; or

(f) the Council of the Isles of Scilly; (a) a Minister of the Crown; or

(b) in relation to a relevant Welsh exit payment, the Welsh Ministers;

(a) a body listed in Part 1 of the Schedule; or

(b) a body responsible for determining the level of remuneration payable to the holder of a public sector office listed in Part 2 of the Schedule;

(a) an employee leaves the employment of a public sector authority listed in Part 1 of the Schedule; or

(b) a holder of a public sector office listed in Part 2 of the Schedule leaves office;

(a) a payment to a person of statutory redundancy pay to which the person is entitled under section 135 of the Employment Rights Act 1996(f); or

(b) in a case where a person is not, solely as a result of section 159 of that Act, entitled to statutory redundancy pay, a payment to the person of an amount equivalent to the statutory redundancy pay to which the person would have been entitled but for section 159 of that Act;

“Devolved Welsh authority” has the meaning in section 157A of the Government of Wales Act 2006 (b);

“exit payment” means a payment of a description prescribed in regulation 6(1);

“exit payment cap” means either the amount specified in section 153A(1) of the Act or the substituted amount referred to in section 153A(9) of that Act;

“fire and rescue authority” has the meaning in section 1 of the Fire and Rescue Services Act 2004(c);

“fixed term contract” has the meaning in regulation 1(2) of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002(d);

“hours worked” by a person means the basic hours the person is required to work under the terms of a contract in respect of their employment or office;

“local authority” means—

“redundancy” has the meaning in section 139 of the Employment Rights Act 1996(e);

“relevant Minister” means either—

“relevant public sector authority” means—

“relevant public sector exit” occurs when—

“relevant redundancy payment” means— 3

“relevant Welsh exit payment” has the meaning in section 153B(6) of the Act;

“salary” in respect of any employment or service in an office means the annual value of remuneration, including any benefit in kind, a person was entitled to receive under the terms of a contract in respect of the employment or office on the date that the person left the employment or ceased to hold the office;

“settlement agreement” means any agreement to refrain from instituting or continuing legal proceedings which satisfies the conditions in section 203(3) of the Employment Rights Act 1996(a);

(a) 1996 c 18.

(b) 1996 c. 18. Section 162 was amended by section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c.8), paragraph 1 of Schedule 9 to the Employment Relations Act 1999 (c.26) and S.I. 2006/1031.

“statutory redundancy pay” means an amount calculated in accordance with section 162 of the Employment Rights Act 1996(b);

“the Schedule” means the schedule to these Regulations.

Restrictions on exit payments

4. Subject to regulations 6, 7 and 8— (a) a relevant public sector authority must not make an exit payment exceeding the exit payment cap in respect of a relevant public sector exit;

(b) where two or more relevant public sector exits occur in respect of the same person within any period of 28 consecutive days, the total amount of the exit payments made to that person in respect of those exits shall not exceed the exit payment cap.

5. For the purposes of regulation 4(b), the exit payments will be treated as having been paid in the following sequence— (a) where the relevant public sector exits do not occur on the same day, in chronological order;

☐ (b) in any other case, in the following order— (i) in descending order of salary;

☐ (ii) where the salaries are equal, in the descending order of hours worked;

☐ (iii) where the salaries and hours worked are equal, in descending order of the person’s length of the service in the employment or as holder of the office; or

☐ (iv) where the salaries, hours worked and length of service in the employment or as holder of the office are equal, in the order determined by the relevant Minister.

☐

Exit payments

6. In this regulation a reference to an exit payment made to a person includes a reference to an exit payment made in respect of that person to another person. (1) The following descriptions of payment are exit payments paid to a person, unless the payment falls within regulation 7— (a) subject to regulation 8, any payment on account of dismissal by reason of redundancy;

(b) any payment made to reduce or eliminate an actuarial reduction to a pension on early retirement or in respect to the cost of a pension scheme of such a reduction not being made;

(c) any payment made pursuant to an award of compensation under the ACAS arbitration scheme or a settlement or conciliation agreement;

(d) any severance payment or ex gratia payment;

(e) any payment in the form of shares or share options;

(f) any payment on voluntary exit;

(g) any payment in lieu of notice due under a contract of employment;

(h) any payment made to extinguish any liability to pay money under a fixed term contract;

(i) any other payment made, whether under a contract of employment or otherwise, in consequence of termination of employment or loss of office.

Payments exempt from restriction.

7. The following descriptions of payment are not exit payments— (a) any payment made in respect of death in service;

(b) any payment made in respect of incapacity as a result of accident, injury or illness (not including injury to feelings);

☐ (c) any payment made under— (i) rule B7(5A), Schedule 2 of the Firemen's Pension Scheme Order 1992(a) where the relevant fire and rescue authority has determined that an individual be paid a lump sum;

☐ (ii) rule 6, Part 3, Schedule 1 of the Firefighters' Pension Scheme (England) Order 2006(b) where the relevant fire and rescue authority has determined that an individual should be retired with an early retirement pension initiated by that authority in accordance with the Addendum to the Fire and Rescue National Framework for England on firefighters' fitness prepared in accordance with section 21 of the Fire and Rescue Services Act 2004(c);

☐ (iii) rule 6, Part 3, Schedule 1 of the Firefighters' Pension Scheme (Wales) Order 2007(d) where the relevant fire and rescue authority has determined that an individual should be retired with an early retirement pension;

☐ (iv) regulation 62 of the Firefighters' Pension Scheme (England) Regulations 2014(e) where the relevant fire and rescue authority has determined that an individual should be retired with an early retirement pension initiated by that authority in accordance with the Addendum to the Fire and Rescue National Framework for England on firefighters' fitness prepared in accordance with section 21 of the Fire and Rescue Services Act 2004(f);

☐ (v) regulation 71 of the Firefighters' Pension Scheme (Wales) Regulations 2015 (employer initiated retirement) (g) where the relevant fire and rescue authority has determined that an individual should be retired with an early retirement pension initiated by the authority;

☐

☐ (d) a service award paid to a member of the judiciary in accordance with the determination of the Lord Chancellor dated 31 March 2006(h);

☐ (e) a service payment made in respect of annual leave due under a contract of employment but not taken;

☐ (f) any payment made in compliance with an order of any court or tribunal;

☐ (g) a payment in lieu of notice due under a contract of employment that does not exceed one quarter of the relevant person's salary.

☐

(a) SI 1992/129. Rule B7(5A), Schedule 2 was amended by the Firefighters' Pension Scheme (Amendment) (No.2) (England) Order 2013/1392 Sch. 1 para.2(i).

(b) Order 2006/3432. Pt 3 rule 6(4) inserted by the Firefighters' Pensions Scheme (England) (Transitional and Consequential Provisions) Regulations 2015/589 Sch.2 para.3(f).

(c) 2004 c.21. Section 21 was added by the Policing and Crime Act 2017 c. 3 Sch.1(1) para.9.

(d) Order 2007/1072. Pt 3 rule 6(4) inserted by the Firefighters' Pension Scheme (Wales) (Transitional and Consequential Provisions) Regulations 2015/1016 Sch.2 para.3(f).

(e) S.I. 2014/2848. Regulation 62(3) added by the Firefighters' Pension Scheme (England) (Transitional and Consequential Provisions) Regulations 2015/589 Sch.1 para.5(b).

(f) 2004 c.21. Section 21 was added by the Policing and Crime Act 2017 c.3 Sch.1(1) para.9.

(g) S.I. 2015/622. Regulation 71(3) added by the Firefighters' Pension Scheme (Wales) (Transitional and Consequential Provisions) Regulations 2015/1016 Sch.1 para.5(b).

(h) A copy of the determination can be found at:

https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/moj_jupra_1993_scheme_guide_nov2014_web_3.pdf.

Prohibition on reduction of statutory redundancy pay or equivalent

8. A relevant public sector authority must not reduce the amount of a relevant redundancy payment in respect of a relevant public sector exit. (1) Accordingly, if— (a) a person is entitled to a relevant redundancy payment and one or more other exit payments in respect of a relevant public sector exit; and

(b) the total amount of the exit payments in respect of the exit would exceed the exit payment cap;

(2) Where this regulation applies, a payment of a relevant redundancy payment by a relevant public sector authority may cause the total amount of exit payments payable to the person to exceed the exit payment cap, but only if all other exit payments by the relevant public sector authority to which the person is entitled to have been reduced to zero.

Non-cash exit payments

9. Where these regulations prevent a relevant public sector authority from making an exit payment of the type described in regulation 6(1)(b) the relevant public sector authority must, as an alternative, make a cash payment of an amount not exceeding the amount of that exit payment. (1) This regulation is subject to regulation 4(a).

Requirement to inform

10. This regulation applies to a person— (a) who has left employment or office in circumstances amounting to a relevant public sector exit; and

(b) who is entitled to receive an exit payment in respect of that relevant public sector exit.

(2) The person must as soon as reasonably practicable on or after the day on which the exit occurs inform in writing all other relevant public sector authorities which the person is an employee of or which are responsible for determining the level of remuneration payable to the person as a holder of a public sector office listed in Part 2 of the Schedule— (a) that the person is entitled to an exit payment;

(b) the type of exit payment;

(c) the amount of the exit payment;

(d) the date that the person left the employment or office to which the exit payment relates; and

(e) the identity of the relevant public sector authority that is obliged to make the exit payment.

Relaxation of the restriction on exit payments

11. The power in section 153C(1) of the Act (relaxation of restriction) is exercisable, in relation to exit payments made by— (a) a devolved Welsh authority, by the Welsh Ministers instead of by a Minister of the Crown;

(b) a local authority in England, by the full council of that local authority;

(c) a fire and rescue authority, by the fire and rescue authority; and

(d) the Greater London Authority, by the London Assembly.

Power to relax to be exercised following compliance with Treasury directions or with consent

12. The power in section 153C(1) of the Act must not, unless it is exercised with the consent of the Treasury, be exercised without compliance with any directions given by the Treasury applicable to the exercise of the power. (1) This regulation does not apply in relation to payments made by a devolved Welsh authority.

Duties to keep records in respect of relaxation of the restriction

13.—(1) A person who exercises the power in section 153C(1) of the Act must keep a written record of— (a) the fact the power has been exercised;

- (b) the name of the person in respect of whom the power was exercised;
- (c) the amount and type of the exit payment in respect of which the power was exercised;
- (d) the date on which the power was exercised; and
- (e) the reasons why the power was exercised.

(2) A record under paragraph (1) must be kept for 3 years beginning with the day on which the decision is taken to exercise the power in section 153C(1) of the Act.

(3) At the end of each financial year in which the power in section 153C(1) of the Act was exercised, each relevant public sector authority must publish a list detailing— (a) the amounts and types of exit payments made by the relevant public sector authority in respect of which the power was exercised;

- (b) the dates on which the power was exercised; and
- (c) the reasons why the power was exercised.

Name

Name

Date Two of the Lords Commissioners of Her Majesty's Treasury

Annex C: Restriction of public sector exit payments: guidance on the 2019 regulations

Published 10 April 2019

Contents

1. Introduction
2. Public sector bodies in scope of the regulations
3. Payments
4. Employers' and employees' responsibilities
5. Relaxation of the cap

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1. Introduction

This document (the guidance) is designed to be read alongside the 'Public Sector Exit Payment Cap Regulations 2019' (the regulations). The guidance sets out how relevant public sector employers are expected to implement the legislation, and should be used in conjunction with the separate mandatory HM Treasury directions which must be followed if relaxing the £95,000 cap on exit payments (the cap). Where there is any discrepancy between the regulations and the guidance, the regulations prevail.

The guidance and regulations do not replace existing regulations applying to the organisation's exit payments where these apply more stringent conditions than the regulations. However, the regulations do take precedence over existing contractual agreements, regulations and other exit schemes where they make more generous provision than allowed by these regulations, unless these arrangements are exempt in the regulations.

Definitions of relevant terms are set out in the Small Business, Enterprise and Employment Act 2015 (the 2015 act), as amended by the Enterprise Act 2016 (the 2016 act) and in regulation 3 of the regulations.

1.1 Intended audience

The main audience for this guidance are public sector employers in scope of the regulations and their employees.

1.2 Background

Exit payments are important to an employer's ability to reform and react to new circumstances. They are also an important source of support for employees as they find new employment or as a bridge until retirement age. However, these payments must be value for money and fair to the taxpayer.

In line with other decisions on financial management and pay policy, it is the responsibility of individual employers and departments to ensure that their exit payment arrangements are fair, proportionate and lawful.

The government enacted framework powers in the 2015 act (as amended by the 2016 act) to allow for a cap of £95,000 on exit payments in the public sector. Read the primary legislation in full (<http://www.legislation.gov.uk/ukpga/2016/12/contents/enacted/data.htm>).

The regulations set out the detail of the obligations on individuals and employers. The regulations also provide a list of the public sector authorities currently in scope of the policy.

This guidance may be updated from time to time, including if there are any amendments to the policy and legislation.

1.3 How to respond

This consultation will run for twelve weeks and will close on 3 July. Responses can be submitted online or sent by email to: ExitPaymentCap@hmtreasury.gov.uk with the subject heading 'Consultation on Exit Payment Cap'. Alternatively please send responses by post to:

Workforce, Pay and Pensions
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

2. Public sector bodies in scope of the regulations

The cap will apply to the whole of the public sector. In order to determine whether a body is 'public sector' for the purposes of the cap, HM Treasury will be guided by the Office for National Statistics (for National Account purposes) classification of bodies.

The government is undertaking a staged process of implementation across the public sector. The regulations are the first stage, capturing the majority of public sector employees. The regulations will be extended to the whole public sector in due course, subject to a limited number of exemptions.

The full list of bodies in scope of the regulations can be found in Schedule 1 to the regulations.

The following categories of public sector employer are within scope of the regulations where they fall within the responsibility of the UK government regarding their employment:

- the UK Civil Service, its executive agencies, non-ministerial departments and non-departmental public bodies (including Crown non-departmental public bodies and Her Majesty's Prison and Probation Service)
- the NHS in England and Wales¹
- academy schools
- local government including fire authorities' employees and maintained schools
- police forces including civilian and uniformed officers

Some bodies have more than one classification. For example, if an executive agency is also classified as a type of body not currently in scope of the cap such as a trading fund, it should not be captured during this round of implementation.

Where a body or office is not included in the schedule, there will be no legal obligation under the regulations to apply the cap to an exit payment. However, the government expects public sector authorities which are not currently listed to apply commensurate arrangements voluntarily, including relevant aspects of this guidance. The Armed Forces, the Secret Intelligence Service, the Security Service and the Government Communications Headquarters are exempt from this expectation, but must continue to make exit payments that are value for money and fair to the taxpayer.

The regulations cover exit payments made by English, Welsh and Scottish bodies except for payments made by a relevant Scottish authority as defined in section 153B(5) of the act (excluding payments made to non-Ministerial office holders and staff of the Scottish Administration, which are covered by the regulations) and relevant Welsh exit payments as defined in section 153B(6) of the 2015 act. Separate regulations and guidance may be issued by the appropriate devolved administration.

Machinery of Government changes sometimes involve the dissolution of a body and the transfer of its functions to a successor body or the merger of one body with another. At times new bodies may be created to deliver new services or perform new functions.

A newly created public sector body will not be in scope of the regulations until it is added to schedule 1. This is the case even where the new body is carrying out employment functions which used to be the responsibility of a body which was in scope of the regulations. However, it is the government's expectation that such bodies will apply their own commensurate arrangements voluntarily. It is the responsibility of government departments to inform HM Treasury of bodies which should be added to or removed from the regulations.

3. Payments

3.1 Payments in scope of the regulations

An exit payment is subject to the cap if it is the type of payment described in regulation 6(1) which is made in consequence of termination of employment or office whether or not a contract of employment applied. Regulation 6(1) lists the types of specific payment which are in scope of the regulations.

Under the regulations, 'salary' means the annual value of remuneration that the person was contractually entitled to receive for the salaried employment or office on the date they left. This includes any benefit in kind.

If there is any doubt about whether a payment falls within scope of the regulations, departments should consult their legal advisers.

HM Treasury's expectation is that an exit payment should be considered to have been received in full on the date the recipient's employment ended, or that person ceased to hold the office.

3.2 Calculating the capped amount

The regulations provide a standard legal underpin in respect of exit payments made by relevant authorities. However, they do not prevent those authorities from applying alternative contractual capping arrangements where those provisions go further than the regulations.

The exit payment cap applies to the total cost for the public sector employer, as calculated under normal processes. For example, in the case of a pension top-up payment, the capped amount may be the amount as calculated by the scheme actuary.

3.3 Payments out of scope of the regulations

Types of exit payments which are specifically excluded from the scope of the public sector exit payment cap are set out in regulation 7.

The exit payment cap only applies where there is an extra cost to the employer in relation to that exit. As such, payments – or elements within payments - that result from an individual's accrued right to a pension, including additional pension purchased with the individual's own monies, are not exit payments for purposes of the cap. For example, if an individual retires and receives a lump sum from their pension scheme, that lump sum is outside the scope of the cap if it is based on the pension entitlement that the individual had accrued in respect of their employment up to the time of their exit or that had otherwise been paid for by the individual.

However, pension 'strain' payments are within the scope of the cap. These are payments made by an employer as an additional contribution to a pension scheme in respect of an individual's exit, so that the individual receives a greater pension than they would otherwise be entitled to, that payment (sometimes referred to as a 'pension strain' payment) is within the scope of the cap.

Fire and Rescue Authorities (FRA) have discretion that allows them to remove the current commutation lump sum restriction of 2.25 x pension, which applies to firefighter members of the 1992 Firefighters' Pension Scheme who are under 55 years of age and have less than 30 years' service. Where a FRA exercises this discretion, it is required to make a payment equivalent to the additional amount to their pension fund account. These payments are to be exempt from the scope of the regulations as they do not fund an increase in the actuarial value of the firefighter's pension.

Therefore, regulation 7(c)(i) exempts payments made by a FRA to their pension fund account, where the FRA exercises its discretion to allow a firefighter (who is subject to the above 2.25 times pension commutation lump sum restriction) to commute up to a maximum of 25% of their annual pension for a pension lump sum. Effectively, this discretion aligns the commutation entitlement available to firefighters who are aged 55 or over, or who have accrued the maximum 30 years' service.

Payments made by FRAs to their pension fund account in respect of firefighters who are unable to maintain operational fitness through no fault of their own, and where the FRA has agreed to put into payment an authority initiated early retirement pension are also exempt. This will honour the government's previous commitment that firefighter members of the 2006 and 2015 Firefighters' Pension Schemes in these circumstances should be awarded an unreduced pension if they cannot be redeployed.

4. Employers' and employees' responsibilities

4.1 Public sector employers' responsibilities

A public sector employer subject to the regulations has a legal obligation to cap public sector exit payments at £95,000. However, as noted above, there are some payments outside the scope of the cap and there are some circumstances where the cap may be relaxed to allow payments that would otherwise be within scope. Further details on relaxing the cap are at section 5.

Exit payments often comprise a variety of payments, including elements such as payment in lieu of notice and pension top-up payments. The total value of the exit payments need to be calculated (measured in terms of current costs, for example when considering the value of extra continuing pension). Where the total would exceed the exit payment cap, the regulations prescribe the sequence in which exit payments will have been paid for the purpose of applying the cap (reg 5) - see 'Multiple exit payments' in section 4.2 below.

The government's expectation is that employment contracts, compensation schemes and pension schemes will be amended to reflect the introduction of the cap. For example, the pension strain cost for an employer required to fully buy out an actuarial reduction (that normally arises when a pension is taken before normal pension age, see section 3.3 above) may be capped. In such circumstances, the expectation is that pension schemes will provide members with options to use their own monies to make up any shortfall or to take a partially reduced pension.

Where the application of the cap would result in a relevant authority being unable to make a pension strain payment because of pension scheme rules (for example, the scheme has not yet been amended to allow for partial buyouts), it may instead pay the pension scheme member an equivalent cash sum. The aggregate of that cash sum and any other exit payments must not exceed the cap.

Employers must keep a record of exit payments made to an employee or office holder. Further detail on this is set out in section 4.3 below.

4.2 Multiple exit payments

When calculating whether an individual's exit payment should be subject to the £95,000 cap, employers must take into account all payments related to exit received by the individual within a 28 day period.

Where two or more relevant exits take place on separate days in any period of 28 consecutive days, the exit payments are treated as having been paid in chronological order for the purpose of calculating the cap. For example, where an individual leaves employment with authority A with an exit payment of £50,000, then leaves employment with authority B within 28 days, authority B should not make an exit payment in excess of £45,000. Section 4.6 sets out the individuals' responsibilities for informing employers.

Relevant authorities must ensure that an individual receives a redundancy payment that is at least equal to their minimum statutory entitlement under the Employment Rights Act 1996 (ERA 1996).

Alternatively, if they are not eligible for statutory redundancy, then in certain circumstances, the relevant authorities must ensure an individual receives the equivalent of that entitlement as if the ERA 1996 provisions had applied.

As such, the regulations provide that an individual can receive a statutory redundancy payment or, where appropriate, its equivalent from a second relevant authority. This is even where the total received by the individual from the first and second authority exceeds £95,000.

Regulation 5 sets out the order in which exit payments will be treated as having been paid for the purpose of calculating the cap, where an individual leaves the employment or office of two or more qualifying public sector authorities simultaneously and the total employer funded exit payments exceed the cap.

Where a capped exit payment comprises several elements such as a contractual redundancy lump sum and a pension top up payment, it is for the responsible authority to establish how the elements are subject to the cap. However, individuals are entitled to receive the full sum of their statutory redundancy entitlement. HM Treasury's general assumption is that, where possible, employers will cap the contractual redundancy lump-sum, and allow individuals to receive the pension top up payment in full. However, the pension top up payment must be reduced if otherwise the total exit payment would be over £95,000.

4.3 Records and reporting

Whole of Government Accounts returns may request information relating to the exit payment cap, or any exit payments made by the relevant body, for later publication. Public sector employers are expected to cooperate in providing such information.

When a responsible authority caps an exit payment, it may wish to keep a record of that payment for public accountability purposes, however this is not required by the regulations. The regulations require records on relaxation of the cap to be maintained for public accountability purposes, and to provide the government or auditors with the information required to evaluate the operation of the policy.

Where the cap is relaxed in accordance with the separate HMT directions, the responsible body must keep a separate record of the exercise of the power. This record must be kept for a minimum of three years from the date the power is exercised, showing:

- the name of the payee in respect of whom the cap was relaxed
- the amount and type of the qualifying exit payment for which the cap was relaxed
- the date on which the power to relax the cap was exercised
- and the reason why the power was exercised (this should refer to the guidance and be sufficiently detailed to enable HM Treasury to assess if it has been appropriately applied)

4.4 Compliance

The relevant public sector employer is responsible for ensuring any exit payment made by their authority does not exceed the public sector exit payment cap. Any payment that exceeds the cap and is not compliant with the relaxation directions is considered to be a payment beyond the organisation's legal competence, which may result in sanctions on the organisation or, if appropriate, sponsoring department by HM Treasury.

Authorities that make payments in excess of the cap which are not compliant with the provisions in the direction must make a value for money assessment on whether to pursue civil repayment through the courts. This assessment must be agreed by the relevant Accounting Officer in line with their Accounting Officer responsibilities.

4.5 Transparency

Public sector bodies must publish information about any decisions to relax the cap. The government strongly recommends that public sector authorities publish such information in their annual accounts. At the end of the financial year, the responsible authority must publish a list of:

- the amounts and types of qualifying exit payments made by the responsible authority in respect of which the relaxation power was exercised in that financial year
- the dates on which that power was exercised
- and the reasons why that power was exercised

The reasons for exercising a power to relax the cap should relate directly to a relaxation category (see section 5 and the separate mandatory HMT directions). For example, 'personal hardship' would be considered a sufficient explanation for this purpose.

As in previous years, employers will be required to disclose in their annual accounts information about exit payments paid during the financial year. This disclosure includes details about the number of exit payments paid in bands from £0 to over £100,000.

Departments are expected to assure themselves that their arm's length bodies (ALBs) and non-departmental public bodies (NDPBs) are properly recording and holding information according to the requirements set out in this guidance.

4.6 Individuals' responsibilities

When an individual has two or more public sector employments or offices that are in scope of the exit payment cap they must inform all other relevant authorities:

- that they are entitled to receive an exit payment
- the amount and type of that exit payment
- the date that they left employment or office
- the identity of the relevant authority that made the exit payment

5. Relaxation of the cap

The government accepts that there will be some circumstances where it is necessary or desirable to relax the restrictions imposed by the regulations. Therefore, the regulations allow for relaxation of the cap in appropriate circumstances. This safeguard is in place for use in exceptional situations, including where imposing the cap would cause genuine hardship.

The power to relax restrictions in relation to exit payments may be exercised by a Minister of the Crown² unless the payment is:

- (a) a relevant Welsh exit payment (see below)
- (b) made by a relevant Scottish authority (see below)
- (c) made by a devolved Welsh authority³ (see section 5.1 below)
- (d) made by a local authority in England or the Greater London Council (see section 5.1 below)
- (e) made by a FRA

The regulations do not cover relevant Welsh exit payments, meaning payments to the offices listed in section 153B of the act⁴. Any power to relax restrictions in relation to these payments may only be made by Welsh ministers.

The regulations do not cover payments made by a relevant Scottish authority, namely the Scottish Parliamentary Corporate authority or any authority which exercises functions devolved to Scotland. Scottish Ministers may relax restrictions in relation to these payments except where payments are made to non-ministerial office holders and staff of the Scottish Administration, which will be covered by the regulations.

This section sets out the circumstances under the regulations where the cap can and must be relaxed, and explains the process for doing so. The separate mandatory HMT directions set down the legal framework for relaxation.

5.1 Process for relaxation of the cap under the regulations

Where the exit payment is made by a devolved Welsh authority, the power to relax restrictions is conferred upon Welsh ministers.

The Minister of the Crown's power to relax a restriction is delegated to the following delegated authorities:

- (a) The full council of a local authority in respect of exit payments made by local government bodies for which it has responsibility,
- (b) The London Assembly in respect of exit payments made by the Greater London Authority
- (c) The FRA in respect of exit payments made by that authority

The Minister of the Crown's power referred to in the second paragraph of this section including where that power has been delegated can be only be exercised either in compliance with the conditions set out in HMT directions (see below and separate HMT directions) or with the consent of HM Treasury (see below) with the exception of payments made by a devolved Welsh authority (see below).

HMT directions set out circumstances where the power to relax restrictions must be exercised ("mandatory cases") and may be exercised ("discretionary cases"). In discretionary cases, the relevant delegated authority must submit a business case to the sponsoring department for approval of the Principal Accounting Officer and the relevant minister before submitting the business case to HMT for approval. In mandatory cases, there is no requirement to send a business case to HMT for approval.

The Minister of the Crown or a delegated authority can relax the cap outside of the circumstances outlined in HMT directions only with HMT consent. In these exceptional cases, the relevant delegated authority must submit a business case to the sponsoring department for approval of the Principal Accounting Officer and the relevant minister before submitting the business case to HMT for approval.

As explained above, a Welsh minister has the power to relax the cap in relation to exit payments made by a devolved Welsh authority. This power is not subject to the requirement to relax only in compliance with conditions set out in HMT directions or with HMT consent.

Departments are expected to put in place and comply with relevant processes and procedures in relation to relaxation of the cap. These processes are expected to ensure decisions are made in a reasonable and timely fashion. Local authorities will be expected to follow any relevant guidance issued by the Ministry of Housing, Communities and Local Government which puts in place such processes and procedures, and which will ensure accountability and transparency.

5.2 Scope of relaxation powers

The power to relax restrictions imposed by the regulations may be exercised in respect of individuals, or in very exceptional circumstances, in respect of a group of employees for example, where redundancies occur as a result of specific workforce reforms. This could include a relaxation to cover an entire organisation where, for example, that organisation is dissolved and an exit package is offered to its employees to incentivise individuals to stay with the organisation during the wind-down period.

Any relaxation of the cap for a group of individuals must be appropriate to the circumstances, in line with Managing Public Money requirements and follow the process set out above.

Relaxation is expected to be granted only in exceptional circumstances which meet the criteria in this guidance. All decisions should be supported by appropriate evidence, with an explanation of the business interests and a value for money

assessment, and should be disclosed in the organisation's annual accounts as in section 4 of this guidance.

5.3 Mandatory relaxation

There are situations in which the power to relax the restrictions imposed by the regulations must be exercised. These are set out in the separate HMT directions.

- (a) Where a payment is made as a result of TUPE applying
- (b) Where a payment is made to avoid employment tribunal litigation in relation to a complaint that someone has suffered a detriment or been dismissed as a result of whistleblowing
- (c) Where a payment is made to avoid employment tribunal litigation in relation to a complaint of discrimination under the Equality Act 2010
- (d) Certain payments made by the Nuclear Decommissioning Authority

A. TUPE

Where an obligation to pay an exit payment arises as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

B. Payment made (for example as part of a settlement agreement) in order to settle a grievance or employment tribunal litigation involving a whistleblowing complaint.

Whistleblowing is the term used when a worker passes on information concerning wrongdoing. The government believes that genuine whistleblowers are carrying out a service in the public interest, and that victimisation of a whistleblower is not acceptable. The government's guidance on whistleblowing emphasises that any instances of wrongdoing must be taken seriously and managed appropriately.

However, the government accepts that given the number and diversity of organisations in the public sector, there may be occasions where employers do not meet the standard expected of them. In such cases the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998) provides for the right for a worker to take a case to an employment tribunal if they have been subjected to a detriment at work or they have lost their job because they have 'blown the whistle'.

To be covered by whistleblowing law, a worker who makes a disclosure must reasonably believe two things. The first is that they are acting in the public interest. This means that personal grievances and complaints are not usually covered by whistleblowing law. The second is that the disclosure tends to show past, present or likely future wrongdoing falling into one or more of the following categories:

- criminal offences (this may include, for example, types of financial impropriety such as fraud)
- failure to comply with a legal obligation
- miscarriages of justice

- endangering someone's health and safety
- damage to the environment
- covering up wrongdoing in the above categories

The cap is not intended to inhibit protected disclosures, or to prevent such people from receiving an appropriate remedy from an employment tribunal; that is why awards from courts and tribunals are outside the scope of the cap.

In cases where an individual makes a disclosure covered by whistleblowing law, and has subsequently made a complaint that they have been dismissed or subjected to a detriment as a result of that disclosure, an employer must consider whether the employer and complainant should avoid litigation. In such cases, it may be appropriate to enter into a settlement or conciliation agreement involving an exit payment with the complainant rather than have the matter considered by an employment tribunal. Where a settlement agreement is entered into on the basis that the employer is satisfied that an employment tribunal would find in the complainant's favour, then the power to relax the restrictions imposed by the regulations must be exercised if the amount payable under the settlement agreement would otherwise lead to the cap being breached.

It is expected that an employer will make legal advice available to the person exercising the power to relax the restrictions that demonstrates that, on the balance of probabilities, the individual has made a disclosure covered by whistleblowing law and that an employment tribunal would find that they had been dismissed or subjected to a detriment as a result of that disclosure.

Read further information about whistleblowing

(<https://www.gov.uk/government/publications/whistleblowing-guidance-and-code-of-practice-for-employers>).

C. Payment made (for example as part of a settlement agreement) in order to settle a grievance or employment tribunal litigation involving a discrimination complaint.

Discrimination occurs where an individual is treated less favourably owing to:

- age
- gender reassignment
- being married or in a civil partnership
- pregnancy and maternity
- disability
- race including colour, nationality, ethnic or national origin
- religion, belief or lack of religion/belief
- sex
- sexual orientation

The government is committed to avoiding discrimination, but as with whistleblowing, acknowledges that with the number of organisations and people employed in the public sector that there may be occasions when discrimination occurs.

In cases where an individual makes a complaint that they have been subjected to a detriment or dismissed on discriminatory grounds, an employer must consider whether in their view the complaint is valid. As above, in such cases, it may be appropriate to enter into a settlement or conciliation agreement with the complainant rather than have the matter considered by an employment tribunal. Where a settlement agreement involving an exit payment is entered into on the basis that the employer is satisfied that an employment tribunal would find in the complainant's favour then the power to relax the restrictions imposed by the regulations must be exercised as if the amount payable under the settlement agreement would otherwise lead to the cap being breached.

It is expected that an employer will make legal advice available to the person exercising the power to relax the restrictions that demonstrates that, on the balance of probabilities, that an employment tribunal would find that they had been a victim of discrimination.

D. Nuclear Decommissioning Authority (NDA): pension related payments paid upon redundancy

These payments arise from an obligation arising from a NDA group pension scheme and which satisfy the conditions outlined in paragraph 3.3 of HMT directions.

5.4 Discretionary relaxation

There are also situations where the power to relax the restrictions imposed by the regulations may be exercised at the discretion of the minister or delegated authority referred to above (in the second paragraph of section 5) where he/she is satisfied that it is appropriate to exercise the power on the basis of one or more of the following conditions:

- (a) there are compassionate grounds owing to genuine hardship
- (b) it is necessary to exit an individual to give effect to urgent workplace reforms
- (c) an arrangement to exit was entered into before the regulations came into force, but the exit was delayed until after that date and the delay was not attributable to the employee or office holder concerned

Where the Minister of the Crown or a delegated authority wishes to exercise this discretionary power, it must submit to HM Treasury for approval a business case approved by the relevant minister or the delegated authority.

A. Compassionate grounds owing to genuine hardship

The government believes that an exit payment of £95,000 should mean that there are few, if any, circumstances where the operation of the cap should lead to genuine hardship. However, where the person exercising the power to relax the cap is satisfied that there are exceptional circumstances, then it may be appropriate for the restrictions to be relaxed.

The circumstances that may be considered are not limited to the employee's own circumstances, and it may be appropriate to consider the position of family members. For example, where an individual is exiting the workforce and is not able to seek re-employment due to caring responsibilities.

B. To give effect to urgent workplace reforms

The government accepts that there may be instances where it is in the interests of urgent workforce reform to relax the restrictions imposed by the regulations. However, cases where it is appropriate to use the power in this way will be exceptional and a detailed business case will need to be prepared in support of any request for a relaxation on this basis.

C. An arrangement to exit before the regulations came into force

The regulations apply to any exit after the date that the regulations come into force, regardless of when any agreement to exit, or on the terms of an exit, were agreed. However, where an agreement between an employer and an employee was entered into in good faith with the intention that the employee would exit before the regulations came into force, and the exit is delayed for reasons outside the employee's control, it may be appropriate for the restrictions imposed by the regulations to be relaxed. Circumstances where this is may be appropriate include where the employer asks the employee to remain in post for a longer period in order to complete a business critical project.

1. The 2015 act confers power to cap exit payments in the NHS in Wales, because the compensation schemes are not devolved to Welsh ministers.
2. The definition of a Minister includes Secretaries of State, the Lord Chancellor, Ministers of State, Parliamentary Under Secretaries of State and Parliamentary Secretaries: section 8(1) of the Ministers of the Crown Act 1975.
3. As defined in section 157A of the Government of Wales Act 2006.
4. The offices are: member of the National Assembly for Wales; the First Minister for Wales; Welsh Minister appointed under section 48 of the Government of Wales Act 2006; Counsel General to the Welsh Government; Deputy Welsh Minister; member of a county council or a county borough council in Wales; member of a National Park Authority in Wales; member of a Fire and Rescue Authority in Wales.

Mandatory HM Treasury Directions

HM Treasury, in exercise of the powers conferred on them by section 153C(1) and (5) of the Small Business, Enterprise and Employment Act 2015, make the following Directions.

1. These Directions may be cited as the Exit Payment Cap Directions 2019 and come into force on the same day as the Restriction on Exit Payment Regulations 2019 (“the Regulations”).

2. In these Directions “Decision Maker” means the person who exercises the power under section 153C(1) of the Small Business, Enterprise and Employment Act or under regulation 11(b), 11(c) or 11(d) of the Regulations.

Mandatory exercise of the power

3. The Decision Maker must exercise the power to relax restrictions imposed by the Regulations on payments of a type described in regulation 6(1) of the Regulations and which are made in respect of a relevant public sector exit in the following circumstances:

Transfer of Undertakings (TUPE)

3.1 Where the obligation to make that payment arises as a result of the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

Employment tribunal claims: discrimination and whistleblowing.

3.2 Where –

(a) the payment relates to a complaint that an employment tribunal has the jurisdiction to consider under s48(1A) of the Employment Rights Act 1996 or s120(1) of the Equality Act 2010; and

(b) the Decision Maker is satisfied on the balance of probabilities that an Employment Tribunal would make an award or order of compensation under s49(1)(b) or s118(1) of the Employment Rights Act 1996 or s124(2)(b) of the Equality Act 2010 if it considered the complaint.

Nuclear Decommissioning Authority (NDA): pension related payments paid upon redundancy.

3.3 Where –

3.3.1 the obligation to make the payment arises from a NDA group pension scheme, and

3.3.2 the payment is –

(a) of a type described in para 3.3.3 below, and

(b) made to or on behalf of an employee –

(i) who is employed –

- by a company or other body holding a site licence granted under the Nuclear Installations Act 1965 for one or more nuclear-licensed sites (“the employer”), and
- on a site that is subject of a decommissioning programme agreed between the NDA and the BEIS Secretary of State, and

(ii) whose employment is terminated –

- as result of the decommissioning programme, and
- for a reason which amounts to a redundancy as defined by section 139(1) of the Employment Rights Act 1996, and
 - a. that not exercising the power would cause undue hardship;
 - b. that not exercising the power would significantly inhibit workforce reform;
 - c. (i) that an agreement to exit was made before the coming into force of the Regulations;

(iii) for whom there is no suitable alternative employment within the employer's business, business within the employer's group of companies, or any other employer with the NDA estate.

3.3.3 The following types of payments are a payment for the purposes of para 3.3.2 (a) –

(a) any payment made to reduce or eliminate an actuarial reduction to a pension on early retirement or in respect to the cost of a pension scheme of such a reduction not being made;

(b) any payment made to the pension fund for additional years' pension in lieu of service, or

(c) any payment made in lieu of an enhanced and/or unreduced pension which may be paid by means of a capitalised lump sum or continuing annual payments between the date of termination of employment and normal retirement age.

Discretionary exercise of the power

4. Subject to para 4.1, the Decision Maker may exercise the power to relax restrictions imposed by the Regulations ("the power") in relation to payments of a type described in regulation 6(1) of the Regulations and which are made in respect of a relevant public sector exit where the Decision Maker is satisfied—

(a) that it was the intention of both parties that the exit would occur before that date; and

(b) that any delay to the date of exit was not attributable to the employee or office holder as applicable.

4.1 Where the Decision Maker is exercising the power pursuant to regulations 11 (b), 11(c) or 11 (d) of the Regulations, the Decision Maker must seek consent of HM Treasury before exercising the power.

General

5. The power to relax restrictions imposed by the Regulations must only be exercised to the extent necessary to give effect to one or more of the criteria set out in sections 3 and 4 of this document.