

Government resurrects plans for a cap on public sector exit payments

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The government has launched a consultation on draft regulations and associated guidance which resurrects plans to introduce a £95,000 cap on exit payments in the public sector.

The Facts

In 2015, following response to consultation, the government published draft regulations imposing a cap of £95,000 on the total aggregate value of exit payments made to most public sector workers. These regulations were not progressed, and the government has now resurrected its plans for a cap and has published draft regulations and guidance for consultation.

There are key differences between these draft regulations and those published in 2015. These are:

- An exemption for payments in lieu of notice that do not exceed one quarter of the relevant person's annual salary.
- No provision that makes entitlement to an exit payment exceeding the cap unenforceable. A public sector employee might therefore be able to enforce a contractually agreed settlement payment in full, even if it exceeds the cap.

We are not aware of any plans to impose new requirements allowing the clawback of public sector exit payments where an employee returns to employment in the public sector within 12 months.

The key points to note are:

- **The cap remains £95,000.** There is also scope in the regulations to limit the total amount of exit payments to £95,000. However, the drafting is not currently clear on this point, and we expect this to be clarified in future drafts.
- **Proposed exit payments that will be subject to the cap are:**
 - Any payment on account of dismissal by reason of redundancy. The regulations exclude statutory redundancy payments from the calculation of exit payments included under the cap.
 - Any payment (i.e. a top up) 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.
 - Any payment made pursuant to an award of compensation under the ACAS arbitration scheme or a settlement or conciliation agreement. However, the cap can be relaxed for discrimination and whistleblowing claims where the minister (or person acting on delegated authority) is satisfied on the balance of probabilities that an employment tribunal would uphold the claim and award compensation. Under these circumstances, the employer would be likely to make legal advice available to the person relaxing the cap confirming the likelihood of a claim.
 - Any severance payment or ex gratia payment.
 - Any payment in the form of shares or share options.
 - Any payment on voluntary exit.
 - Any payment in lieu of notice due under a contract of employment that exceeds one quarter of the employee's annual salary.
- **Some types of payment will not be treated as exit payments.** These are:
 - Payments made in respect of death in service;
 - Payments made in respect of incapacity as a result of accident, injury or illness, but not including injury to feelings;
 - Certain payments made under various firefighter pensions rules.
 - Certain payments in the judiciary.
 - A service payment made in respect of annual leave due under a contract of employment but not taken. (It is likely that the word "service" is a typo and should not have been included in the draft regulations.)
 - Any payment made in compliance with a court or tribunal order.
 - A payment in lieu of notice due under a contract of employment that does not exceed one quarter of the relevant person's annual salary.
- **Payments pursuant to TUPE:** the cap will be relaxed where the employer's obligation to make the payment arises

under TUPE.

- **Discretion to relax the cap:** the minister (or person with delegated authority) has a discretion to relax the cap where they are satisfied about one of the below factors. This would be under exceptional circumstances and, if the decision maker is acting on delegated authority, with the consent of HM Treasury.
 - Not exercising the power would cause undue hardship;
 - Not exercising the power would significantly inhibit workplace reform;
 - An agreement to exit was made before the coming into force of the regulations and:
 - It was the intention of both parties that the exit would occur before that date; and
 - Any delay to the date of exit was not attributable to the employee.

What does this mean for the employers?

It seems likely that the government will press ahead with implementing the draft regulations, but there is no timetable yet fixed. There is an opportunity for employers to respond to the consultation on the draft regulations before 3 July 2019 and the link is available [here](#).

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