Exit Pay Cap Consultation (April to July 2019) – Overview and FAQs

Changes from the Previous Proposal

1. Since the last consultation exercise, some payments are no longer covered within the scope of the exit pay cap. In particular:-
   - Outstanding contractual holiday pay
   - Contractual pay in lieu of notice (as long as this is no more than 25% of annual salary)
   - Certain payments to retiring firefighters

2. The proposals now include situations where the exit pay restrictions must be relaxed:-
   - Where the payment arises as a result of TUPE, eg where the entitlement was part of a term or condition of employment that was protected under a TUPE transfer
   - Where the payment relates to a complaint that falls within the remit of an Employment Tribunal (ET) and relates to whistleblowing or discrimination legislation and where the employer believes that it is likely to lose the case if heard by ET.

3. There is also provision for the restrictions on exit pay to be relaxed on a discretionary basis. For local authorities, Full Council has the delegated authority to make such decisions in cases where it is satisfied that by not doing so, either of the following would result:-
   - undue hardship would be caused
   - workforce reform would be significantly inhibited
   - the exit had been already agreed to take place prior to the Regulations coming into effect but had been delayed, and the delay was not caused by the individual.
   - Organisations will be required to keep records for 3 years of any cases where the restrictions are relaxed and will also be required to publish information annually at the end of each financial year in terms of the amount and type of payment, the date and why the restriction was relaxed.

4. The proposals set out responsibilities on individuals for notifying other public sector employers if they receive an exit payment, eg where they have more than one job within the public sector. It also puts the obligation on employers to ensure that any exit payment does not exceed the cap and to put processes in place to ask individuals for information about any other exit payments he/she received before making an exit payment.

Remaining Issues

There appears to remain a disparity between the proposed regulations and the guidance in terms of whether the cap applies to aggregated exit payments or individual payments. The revised guidance reflects the policy of the cap applying to all payments received related to the exit within a 28 day period, but the regulations have not been drafted to reflect this.

There remains difficulties in terms of pension and pension strain costs and pension regulations. The LGA briefing covers these points well (see attached).

Questions Received So Far

a) Payments made under a settlement agreement when an employee leaves – are they covered by the cap?
Yes.

b) We have agreed an exit with an employee to take effect in the next couple of months – will this be caught by the legislation?
No. There are no provisions within the regulations or guidance as currently drafted to cover retrospective exits/payments.

c) Does the cap apply to housing management companies?
No.

d) If exit pay exceeds the cap, do the Regulations or guidance state how the payments are reduced to fall within the limit?
No. As they stand, the Regulations allow employers to restrict any elements that make up the exit payment (other than any statutory redundancy pay) in any order.

e) Are pension strain costs covered as an exit payment and counted towards the cap? If so, how is that amount calculated?
Yes – pension strain costs are covered and are defined as "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. How the pension strain cost is calculated is not specified within the Regulations. See the LGA's briefing note for further details and potential options.

f) Can a member of the Local Government Pension Scheme who is 55 or over and made redundant choose to defer access to their pension benefits in order to retain other exit pay and not exceed the cap?
No. The Pension Regulations as they currently stand do not give the option for the individual to defer access to their pension. To provide this would require to a change to the Pension Regulations.

The above outline is based on the current version of guidance and proposals. We will keep councils informed of any further information or guidance as soon as it becomes available.

Your initial views on the consultation document will be appreciated and will be used to inform regional and national responses to Government. You can contribute by completing the questionnaire that is being compiled on our behalf by our sister organisation, South East Employers: our authority's initial views on the areas by completing the form here by **17th May 2019**. South East Employers have provided some accompanying guidance notes that may be helpful when completing the questionnaire.