Enterprise Bill 2015

PUBLIC SECTOR EMPLOYMENTS: RESTRICTIONS ON EXIT PAYMENTS

Summary

- A £95k cap on exit payments will be introduced in summer/autumn 2016
- There are no plans for a transitional period; therefore all exits after its introduction will be subject to the cap
- The cap will include all payments in relation to all exits from relevant employments that occur within a 28 day period
- Employments or offices with the majority of employers defined as public sector by the Office of National Statistics (ONS) will be included
- A wide range of payments including pension strain costs will be covered by the cap
- There will be a limited number of exempt payments (e.g. death or injury)
- There will be a power for full council to waive the cap subject to Treasury directions (to be published)

PLEASE NOTE: This Q&A has been compiled based on the LGA's understanding of the version of the Bill as passed at the report stage in the House of Lords 30th November 2015 together with accompanying draft regulations and discussions with officials in the Department for Business Innovation and Skills (BIS), the Department for Communities and Local Government (DCLG) and Her Majesty's Treasury (HMT). This Q&A is therefore NOT a definitive guide to the exit payment cap and the information contained is subject to any changes made to the Bill and regulations after the date of its publication – 01 December 2015.

Q1: What does the Bill propose in relation to exit payments?
A1: That exit payments in the public sector be capped at a maximum of £95,000 including any pension strain costs.

Q2: When will this cap be introduced?

A2: Regulations implementing the cap cannot be put to parliament until the Enterprise Bill receives royal assent probably in late spring 2016. In a letter of 27th November, the government stated its intention 'to lay the regulations and seek their approval by affirmative resolution procedure in Parliament in summer/autumn 2016'.

Q3: Will there be any transitional arrangements for agreements that cover the period of implementation of the cap?

A3: The government does not see a case for transitional arrangements and will expect all exits after the implementation of regulations to be capped. However it does envisage circumstances where the cap could be waived in the period of implementation, for example if there was a delay to the date of exit beyond the start of the cap outside of the individual's control, and will issue guidance to cover such circumstances.

Q4: Will the cap relate to a payment, a person, or an employment?

A4: All exit payments in respect of exits from relevant employments within a period of 28 days count toward the cap. So if a person has two employments, exits both at the same time and a payment is made in relation to each then both payments must be added together and checked against the cap even if those employments are with different employers. However if one employment ends, say, three months before the other then the cap applies to each employment separately.

Q5: How will I know if a person has received an exit payment in relation to another public sector employment or office?

A5: Draft regulations place a responsibility on the individual on receipt of an exit payment to notify all other public sector employers of their date of exit, the amount of the exit payment/s made and the identity of the paying employer.

Note: we have raised the question of what order the cap should operate in a multiple employer situation – e.g. if the aggregate payment needs to be reduced, should that reduction be applied proportionally across all employments, in the order the payments are made or is some other methodology to be used?

Q6: What counts as a public sector employment?

A6: Any employee of a 'prescribed public sector authority' or holder of a 'prescribed public sector office' is deemed to have a public sector employment for the purposes of the cap. The prescription of authorities and offices will be set out in regulation. The draft indicates that all bodies defined by the Office for National Statistics as public sector will be included by default with a schedule listing exemptions. It would be safe to assume that local authorities will be prescribed authorities to which the cap would apply.

Q7: What counts as an exit payment?

A7: Any payment of a 'prescribed description' made as a consequence of the individual leaving the prescribed employment or office. Regulations will include a list of prescribed payments which will include the following:

- Redundancy payments
- Payments on voluntary exits
- Pension strain costs
- Severance or ex-gratia payments
- Payment for outstanding entitlement
- Compensation under the terms of a contract
- Pay in lieu of notice
- Shares or share options

The draft regulations also include a general cover all provision to include 'any other payment made as a consequence of, in relation to, or conditional on loss of employment whether under a contract of employment or otherwise'.

Q8: What is the impact of including pension strain costs for the Local Government Pension Scheme (LGPS)?

A8: Currently a redundancy pension in the LGPS is paid unreduced to active members who are made redundant at the age of 55 or over. The cost of the member receiving an unreduced pension is typically met via a pension strain cost that has to be paid into the pension fund from the individual's employer. The Bill includes changes to the LGPS which would limit the pension payable on redundancy by applying the actuarial reduction necessary to bring the cost within the cap. There are also provisions to allow the individual to pay all or part of the strain cost themselves in order to receive an unreduced pension.

Note: we have raised a number of questions with regard to the inclusion of strain costs – e.g. will the cap apply to all strain costs (e.g. flexible retirement) or only those relating to an exit from a public sector employment, will the cost be calculated on a central set of assumptions, whether 85 year rule protections and/ or payment of pension on compassionate grounds will be included, what order the payments have to be set against the cap, etc. We await answers to these questions from the government.

Q9: How will the cap apply to the Teachers' Pension Scheme (TPS)?
A9: It is an employer discretion to pay 'unreduced' premature benefits to teachers aged 55 and over on redundancy. The Bill contains provisions to amend the TPS regulations to limit the amount of strain cost to ensure that when added to other exit costs the total remains within the £95k cap.

Q10: How will the cap apply to the Firefighters' Pension Schemes (FPS)?
A10: The Firefighters' Pension Schemes allow for employer discretionary uplifts to the pension on exit. These include a raised commutation limit in the 1992 scheme and payment of an unreduced pension in the 2006 and 2015 schemes. As the costs of unreduced pension are met annually a capital cost will need to be calculated for use in the cap. FPS regulations will require amendment to limit these discretions in order to ensure that when added to other exit costs the total remains within the £95k cap.

Q11: Will any payments be excluded from the cap?
A11: The Bill provides for regulations to exempt payments of prescribed description and draft regulations currently exclude payments made in relation to:

- Incapacity or death, as a result of accident, injury of illness
- Firefighter fitness provisions
- Contractual leave not taken
- Contractual bonuses

- Court orders

Q12: Will there be any power to waive the cap?
A12: The Bill provides for a Minister of the Crown to relax the cap in respect of an employee or office holder or a description of such in relation to all or part of an exit payment. It also provides for regulations to enable specified persons to exercise the same power on behalf of the minister (in accordance with Treasury direction). The draft regulations include a provision to enable a full council of a local authority to exercise that power in relation to payments made by itself.

Note: we have raised the question of who may be able to waive the cap for other employers such as schools.

LGA Workforce team
01.12.2015

PART 8

PUBLIC SECTOR EMPLOYMENT: RESTRICTIONS ON EXIT PAYMENTS

Restriction on public sector exit payments

(1) Before section 154 of the Small Business, Enterprise and Employment Act 2015 (but after the italic heading preceding that section) insert—

"153A Regulations to restrict public sector exit payments

(1) Regulations may make provision to secure that the total amount of exit payments made to a person in respect of a relevant public sector exit does not exceed £95,000.

(2) Where provision is made under subsection (1) it must also secure that if, in any period of 28 consecutive days, two or more relevant public sector exits occur in respect of the same person, the total amount of exit payments made to the person in respect of those exits does not exceed the amount provided for in subsection (1).

(3) An exit payment is in respect of a relevant public sector exit if it is made—

(a) to an employee of a prescribed public sector authority in consequence of the employee leaving employment, or

(b) to a holder of a prescribed public sector office in consequence of the office-holder leaving office.

(4) An exit payment is a payment of a prescribed description.

(5) The descriptions of payment which may be prescribed include—

(a) any payment on account of dismissal by reason of redundancy (read in accordance with section 139 of the Employment Rights Act 1996);

(b) any payment on voluntary exit;

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

(d) any severance payment or other ex gratia payment;

(e) any payment in respect of an outstanding entitlement;

(f) any payment of compensation under the terms of a contract;

(g) any payment in lieu of notice;

(h) any payment in the form of shares or share options.

(6) In this section a reference to a payment made to a person includes a reference to a payment made in respect of that person to another person.

(7) For the purposes of subsection (2), a public sector exit occurs when the person leaves the employment or office in question (regardless of when any exit payment is made).

(8) Regulations may include—

(a) provision which exempts from any provision made under subsection (1) exit payments, or exit payments of a prescribed description, made in prescribed circumstances;

(b) provision which, in consequence of provision made under subsection (1), amends a relevant public sector scheme so as to make any duty or power under the scheme to make exit payments subject to any restriction imposed by regulations under subsection (1) (taking account of any relaxation of such a restriction which may be made under section 153C);

(c) provision which makes an amendment of any provision made by or under an enactment (whenever passed or made) which is necessary or expedient in consequence of any provision made by or under this section.

(9) Regulations may substitute a different amount for the amount for the time being specified in subsection (1).

(10) Nothing in this section applies in relation to payments made by authorities who wholly or mainly exercise functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998).

(11) In this section—

"enactment" includes an Act of the Scottish Parliament, a Measure or Act of the National Assembly for Wales and Northern Ireland legislation;

"prescribed" means prescribed by regulations under this section;

"relevant public sector scheme" means—

(a) a scheme under section 1 of the Superannuation Act 1972 (civil servants);
(b) a scheme under section 7 of that Act (local government workers);
(c) a scheme under section 9 of that Act (teachers);
(d) a scheme under section 10 of that Act (health service workers);
(e) a scheme under section 1 of the Public Service Pensions Act 2013 (schemes for persons in public service);
(f) a scheme under section 26 of the Fire Services Act 1947 or section 34 of the Fire and Rescue Services Act 2004 (fire and rescue workers);

(g) a scheme under section 1 of the Police Pensions Act 1976 or section 48 of the Police and Fire Reform (Scotland) Act 2012 (members of police forces);
(h) any other prescribed scheme (whether established by or under an enactment or otherwise).

153B Supplementary provision about regulations under section 153A

(1) Subject to subsection (2), the power to make regulations under section 153A is exercisable—

(a) by the Scottish Ministers, in relation to payments made by a relevant Scottish authority;

(b) by the Treasury, in relation to any other payments.

(2) Where the relevant Scottish authority is the Scottish Administration (or a part of it) the power to make regulations under section 153A is exercisable by the Treasury (instead of the Scottish Ministers)—

(a) in relation to payments made to the holders of offices in the Scottish Administration which are not ministerial offices (read in accordance with section 126(8) of the Scotland Act 1998), and

(b) in relation to payments made to members of the staff of the Scottish Administration (read in accordance with section 126(7)(b) of that Act).

(3) The power to make provision of the kind mentioned in section 153A(8)(b) (power to amend public sector schemes), so far as exercisable by the Treasury, is also exercisable concurrently by any other Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975) with the consent of the Treasury.

(4) Regulations to which subsection (5) applies—

(a) if made by the Treasury, are subject to the affirmative resolution procedure;

(b) if made by the Scottish Ministers, are subject to the affirmative procedure.

(5) The regulations mentioned in subsection (4) are—

(a) the first regulations under section 153A(1) made by the Scottish Ministers,

(b) the first regulations under section 153A(1) made by the Treasury,

(c) any regulations under section 153A(8)(c) (power to make consequential amendments of Acts) which amend primary legislation,

(d) any regulations under section 153A(9) (power to change the specified amount), and

(e) any regulations under paragraph (h) of the definition of "relevant public sector scheme" in section 153A(11).

(6) Any other regulations under section 153A—

(a) if made by the Treasury or a Minister of the Crown, are subject to the negative resolution procedure;

(b) if made by the Scottish Ministers, are subject to the negative procedure.

(7) In this section—

"primary legislation" means—

(a) an Act of Parliament;
(b) an Act of the Scottish Parliament;

"relevant Scottish authority" means—

(a) the Scottish Parliamentary Corporate Body, or (b) any authority which wholly or mainly exercises functions within devolved competence (within the meaning of section 54 of the Scotland Act 1998).

153C Power to relax restriction on public sector exit Payments

(1) A Minister of the Crown may relax any restriction imposed by regulations made by the Treasury under section 153A.

(2) The Scottish Ministers may relax any restriction imposed by regulations made by the Scottish Ministers under section 153A.

(3) A requirement may be relaxed—

(a) in respect of a particular employee or office-holder or a description of employees or office-holders;

(b) in relation to the whole or any part of an exit payment, or a description of exit payments.

(4) Regulations under section 153A made by the Treasury may—

(a) make provision for the power under subsection (1) to be exercisable on behalf of a Minister of the Crown by a person specified in the regulations;

(b) make provision for a requirement to be relaxed only—

(i) with the consent of the Treasury, or

(ii) following compliance with any directions given by the Treasury;

(c) make provision as to the publication of information about any relaxation of a requirement granted.

(5) Regulations under section 153A made by the Scottish Ministers may—

(a) make provision for the power under subsection (2) to be exercisable on behalf of the Scottish Ministers by a person specified in the regulations;

(b) where provision is made by virtue of paragraph (a), make provision for a requirement to be relaxed only—

(i) with the consent of the Scottish Ministers, or

(ii) following compliance with any directions given by the Scottish Ministers;

(c) make provision as to the publication of information about any relaxation of a requirement granted.

(6) Regulations under section 153A(1) made by the Treasury may make provision for the power conferred on a Minister of the Crown by subsection (1) to be exercised instead by the Welsh Ministers, in relation to exit payments made by an authority who wholly or mainly exercises functions which could be conferred by provision falling within the legislative competence of the National Assembly for Wales (as defined in section 108 of the Government of Wales Act 2006).

(7) In this section "Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975.""

(2) Schedule 4 makes amendments consequential on subsection (1), and related provision.

EXTRACT FROM SCHEDULE 4 OF THE ENTERPRISE BILL

Local Government Pension Scheme Regulations 2013 (S.I. 2013/2356S.I. 2013/2356)

(1) In the Local Government Pension Scheme Regulations 2013 (S.I. 2013/2356)—

(a) in regulation 30 (which provides for active members aged 55 or over, on redundancy, to take immediate payment of certain pension amounts without an actuarial reduction), at the end insert—

"(13) This regulation is subject to regulation 68A (effect of restrictions on public sector exit payments).", and"

(b) after regulation 68 insert—

"68A Effect of restrictions on public sector exit payments

(1) This regulation applies where the effect of the Exit Payment Regulations is to prevent all or part of a payment being required to be made under regulation 68(2) in respect of any extra charge on the fund resulting from retirement benefits which, in the absence of this regulation, would become immediately payable, without reduction, under regulation 30(7)(b) or as a result of a waiver under regulation 30(8).

(2) The member may elect to pay to the appropriate fund an amount in respect of all or part of that extra charge.

(3) Regulation 30(7) (which provides for active members aged 55 or over, on redundancy, to take immediate payment of certain pension amounts) has effect as if for paragraph (b) there were substituted—

(b) any other retirement pension relating to that employment payable under these Regulations, adjusted by so much of the amount shown as appropriate in actuarial guidance issued by the Secretary of State as does not represent an adjustment relating to an extra charge on the appropriate fund—

(i) in respect of which the Scheme employer may be required to make an additional payment under regulation 68(2), or

(ii)in respect of which the member has made a payment under regulation 68A(2)."

(4) Regulation 30(8) does not authorise the waiver of any reduction except to the extent that an additional payment may be required under regulation 68(2), or a payment has been made to the appropriate fund by the member under paragraph (2), in respect of any extra charge on the fund resulting from not making the reduction.

(5) In determining the effect of the Exit Payment Regulations for the purposes of paragraph (1) account is to be taken of any provision made under section 153C of the Small Business, Enterprise and Employment Act 2015 (power to relax exit payment restrictions in certain cases).

(6) The restriction specified in paragraph (4) applies to Scheme employers which have power under section 1 of the Localism Act 2011 (local authority's general power of competence) or section 5A(1) of the Fire and Rescue Services Act 2004 (powers of fire and rescue authorities) in the exercise of those powers.

(7) In this regulation "Exit Payment Regulations" means regulations under section 153A(1) of the Small Business, Enterprise and Employment Act 2015 (regulations to restrict public sector exit payments).""

(2) The provision made by sub-paragraph (1) may be amended or revoked as if it had been made under section 1 of the Public Service Pensions Act 2013.

(3) The provision made by this paragraph is without prejudice to the generality of the powers conferred by paragraph 4.

STATUTORY INSTRUMENTS

2016 No. XXX

EMPLOYMENT

DRAFT The Public Sector Exit Payment Regulations 2016

Made - - - -	***
Laid before Parliament	***
Coming into force - -	***

The Treasury make the following Regulations in exercise of the power conferred upon them by section 153A(1) of the Small Business, Enterprise and Employment Act 2015.

PART 1

General

Citation, commencement, extent and interpretation

1.—(1) These Regulations may be cited as The Public Sector Exit Payment Regulations 2016.

(2) These Regulations come into force on XXX.

(3) These Regulations extend to the whole of the United Kingdom.

Interpretation

2. In these Regulations—

"the Act" means the Small Business, Employment and Enterprise Act 2015;

"additional public sector authority" means—

any prescribed public sector authority with which an individual continues to be employed; and

any prescribed public sector authority responsible for the appointment of a prescribed public sector office which an individual continues to hold

when he leaves employment with a prescribed public sector authority or leaves a prescribed public sector office;

"aggregate exit payment" means the total exit payments received by an exit payee from one or more prescribed public sector authorities in respect of a public sector exits in a period of 28 days;

"the fitness provisions" means the Addendum to the Fire and Rescue National Framework for England on firefighters fitness prepared by the Department for Communities and Local Government in accordance with section 21 of the Fire and Rescue Services Act 2004;

"exit payee" means an individual who receives an exit payment or payments;

"exit payment" means a payment of a type prescribed in regulation 3;

"exit payment threshold" means £95,000 or an amount specified in further regulations under section 153A(1) of Act coming into force after these Regulations take effect;

"prescribed public sector authority" means a public sector authority listed in part 1 of schedule 1 or a public sector authority responsible for the appointment of the public sector office listed in part 2 of schedule 1;

"redundancy" has the meaning set out in section 139 of the Employment Rights Act 1996;

PART 2

Restriction on Exit Payments

3.—(1) Subject to paragraph 2, these Regulations apply to the following payments made by a prescribed public sector authority in connection with loss of employments or offices—

(a) A payment on account of dismissal by reason of redundancy;

(b) A payment made consequently upon a voluntary exit from employment;

(c) A payment to reduce or eliminate an actuarial reduction to a pension upon early retirement;

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

(e) A payment made by way of shares consequent upon a loss of employment;

(f) Any other payment made as a consequence of, in relation to, or conditional upon, loss of employment whether under a contract of employment or otherwise.

(2) Regulation 3(1) does not include payments that are—

(a) made in respect of incapacity or death as a result of accident, injury or illness;

(b) made under regulation 62 of the Firefighters' Pension Scheme (England) Regulations 2014 where the relevant Fire and Rescue Authority has determined that an individual should be retired with an authority initiated early retirement pension in accordance with the fitness provisions;

(c) made in respect of leave due under a contract of employment but not taken;

(d) bonus payments otherwise determined to be due under a contract of employment;

(e) made in compliance with an order of any court.

4.—(1) Where this regulation applies—

(a) a prescribed public sector authority may not make a payment to the exit payee of an amount that would result in the aggregate exit payment to the exit payee exceeding the exit payment threshold;

(b) an exit payee's entitlement to an exit payment is not enforceable other than to the extent that the payment is permitted by regulation 4(1)(a);

(2) Subject to regulations 5 and 9, this regulation applies where an exit payment to an exit payee would mean that the exit payee's aggregate exit payment would exceed the exit payment threshold.

5.Regulation 4 does not apply to an exit payment where an exit payee has an entitlement to that exit payment as a result of regulation 5 of The Transfer of Undertakings (Protection of Employment) Regulations 1981.

6.Where the restriction imposed by regulation 4(1) would result in a prescribed public sector authority making exit payments to an exit payee which total less than—

(a) the amount of statutory redundancy pay due under section 162 of the Employment Rights Act 1996, or

(b) where the exit payee did not have an entitlement to statutory redundancy pay calculated under that section, the amount of statutory redundancy pay that would have been due under that section if it had applied;

the prescribed public sector authority may make an exit payment to the exit payee of or equivalent to that amount.

7.Where the restriction imposed by regulation 4(1) would result in a public sector authority being unable to make a non-cash exit payment, the public sector authority may substitute an exit payment of a cash sum of an amount that means the aggregate exit payment to the exit payee does not exceed the exit payment threshold.

8.When an individual leaves employment with a prescribed public sector authority or leaves a prescribed public sector office he must inform all additional public sector authorities—

(a) that he has received an exit payment;

(b) the amount of any exit payment;

(c) the date that he left employment or office;

(d) the identity of the prescribed public sector authority that made the exit payment.

PART 3

Relaxation of the Cap on Exit Payments

9. Where the power under section 153C(1) of the Act to relax the restriction on payment of exit payments under these Regulations is exercised then regulation 4(1) does not apply to the extent of the relaxation.

10. The power under section 153C(1) of the Act is exercisable—

(1) by the Welsh Ministers, in relation to payments made by a relevant Welsh authority;

(2) by the full council of a local authority, in relation to payments made by that local authority.

(3) [any further delegation of the power to relax the restriction to be included here]

11. The power under section 153C(1) of the Act must be exercised in accordance with any guidance issued by the Treasury on how that power is to be exercised.

12. Where a person exercises the power to relax the restrictions on payment of exit payments under these Regulations, they shall—

(a) Keep a record of the exercise of that power and the reasons for it for at least 36 months; and

(b) Publish, as part of annual accounts or in a list published at the start of the financial year, a list of all the times in the preceding twelve months that they have exercised that power and the reasons for it.

SCHEDULES

SCHEDULE 1

[This schedule will set out the public sector authorities to which the regulations will apply. It is proposed that the list will include all bodies within the public sector (as set out on the list prepared by the Officer of National Statistics) save that payments from the following authorities were identified as being potentially exempt in the Government's response to the consultation on these proposals:

(i) The following public financial corporations and subsidiaries:

1. The Royal Bank of Scotland
2. UK Asset Resolution
3. Northern Rock
4. Bradford and Bingley
5. Pension Protection Fund
6. The London Authorities Mutual Limited
7. National Employment Savings Trust Corporation (NEST)
8. Financial Conduct Authority
9. Financial Ombudsman Service Ltd.
10. First Rate Exchange Services Holdings Limited
11. First Rate Exchange Services Limited
12. Guaranteed Export Finance Corporation PLC (GEFCo)
13. Northern Ireland Central Investment Fund for Charities
14. Prudential Regulation Authority

(ii) Armed Forces

(iii) National Museums

(iv) The Commissioners for Irish Lights

(v) Public broadcasters: BBC, Ch4 and S4C

(vi) Bank of England]