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

Response from South East Employers, Regional Employers Organisation for the South East of England

Representing councils, as employing bodies, across the region from whom we have sought input.

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

There is a general feeling that the majority of councils exercise sound financial judgement in determining the exit pay of their workforce and so an artificially determined cap, with no index linking, fetters the devolved powers.

However, the list of bodies does not reference Unitary Councils

Question 2
Do you agree with the current list of bodies in scope, for the first round of implementation? If not, please provide reasons.

The majority of councils agreed. However there is a clear voice that as the Enterprise Act received royal Assent on 4 May 2016, HM Treasury has had three years to bring forward an approach that applies across the Public Sector. It is unacceptable and unfair that the regulations might apply to many parts of the public sector before they are brought into force for other public bodies.

Question 3
Do you agree with the exemptions outlined? If not, please provide evidence.

The majority of councils agreed. However, there is a clear voice questioning the exemption for armed forces and security service. Very senior officers such as

Generals, Admirals etc or Director of MI5 and GCHQ work until their mid 50's or beyond and earn relatively high salaries with good pensions. MOD salary data (March 2018) indicated Major Generals earn up to £115k - £125k, Lieutenant Generals up to £135k - £150k and the Chief of General Staff up to £185k, so not too dissimilar to Local Authority senior pay levels.

There is also a question regarding what payments should be in scope. There is a clear view from councils that payments in scope should be limited to those applicable to genuine exit payments such as redundancy payments.

Pension strain costs should not be included as these are not payments to the individual but rather to a pension fund to ensure the individual gains access to the pension they have earned. The inclusion of pension strain costs will not only affect the 'high earners' that are the target group but will also impact on mid-level staff with long service e.g. frontline senior practitioner and team leader roles where the post holders have 25 plus years service.

This will be compounded in the future by the failure of the cap to be index linked at the very least and is highly likely to lead to future recruitment and retention problems in many areas where there are already national shortages, such as social workers.

If the pension strain cost remains in scope, the Local Government Pension Scheme Regulations will need to be amended to:

- remove the legal requirement for councils to pay the cost of pension strain, and
- allow the employee to choose to defer access to pension so as to avoid their employer incurring pension strain costs, or
- allow the employee to take a reduce pension so there is no strain.

Until these amendments are in place the exit pay cap should not be applied to Local Government.

In addition, bearing in mind the recent changes to the Tax and National Insurance treatment of payments in lieu of notice to simplify the system, the exemption for payments in lieu of notice, where notice is three months or less, should be extended to all payments in lieu of notice to provide clarity and simplify calculations on exit.

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.

A small majority of councils disagreed. Suggested areas for improvement are:

- More clarity on the detail,
- A centrally produced reporting template to ensure all details are captured in the same format for consistency,
- Greater clarity on the order of priority for different payments e.g. redundancy pay, outstanding annual leave, pension strain costs, other payments.
- Clarification regarding data sharing between employers particularly with regard to GDPR,
- Clarity regarding pension strain costs in Local Government as these are incurred locally by the employing authority which is not the case with NHS and Central Government where costs are centralised. This could unfairly impact on the Local Government workforce,
- Should there be differentiation between voluntary and compulsory severance packages, e.g. inclusion of pension strain in voluntary cases but not in compulsory severance.
- It is currently too focused on Central Government which doesn’t easily translate to Local Government, LGPS and the autonomous role of directly elected councils,
- Clear date of when coming into force needed with sufficient lead-in time to make necessary adjustments, policy changes and communications.

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?

The majority of councils agreed that it was sufficiently clear.

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.

The majority of councils said no. However, there is a clear message that more information and explanation is required regarding the pension strain costs for the Local Government sector. Specifically:

- the interaction of LGPS for those over 55 who are provided with automatic access to an unreduced pension on being made redundant. The fact that this is not cash in the pocket of an employee but rather the amount that would have been paid into the pot by the employer had the employee continued to work, it does not give an entitlement to a better pension than that they have earned.

- Pension strain costs in Local Government are dependent on the Local Authorities pension liabilities rather than the employee's circumstances in redundancy cases. The inclusion of pension strain costs in the cap could, therefore, result in identical employees who happen to work for different councils being treated differently. This isn't an issue in an unfunded pension scheme such as the NHS's.

Question 7
Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?

Other impacts that had not been covered in the proposals have been raised. These include:

The cap doesn't just impact on senior management and 'fat cats'. If this is to include pension strain costs, the cap will impact on middle manager level and below who have long lengths of service and reached the age of 55. Current LGPS Regulations require those who are made redundant, who are aged 55 or over, to take their pension and the employer must meet the financial strain costs.

An impact of the inclusion of pension strain costs is that men are more likely to suffer a detriment compared to women. Gender Pay Gap reports indicate that men earn more than women, and are likely to have the longer lengths of service so are more likely to have this provision limit their exit pay. This is potentially discriminatory on the grounds of sex.

The inclusion of the pension strain costs is likely to significantly impact on those working in Local Government who have reached the age of 55. This creates a potential for age discrimination either because this group has had their exit pay capped or from a younger age group who have been selected for redundancy because there will be no liability for pension strain costs.

If the LGPS Regulations are changed to allow the employee to take an actuarially reduce pension, rather than have the pension strain costs included in their exit pay, then this could cause significant financial hardship in the future.

The inclusion of pension strain costs is likely to detrimentally impact those with disability conditions that limit the length of working life of the employee.

Due to changes to the Local Government Pension Scheme Regulations in 2014, there has been an increase in the cost of pension strain for all funds.

Those at risk of significant administrative restructures e.g. unitarization, move to joint authorities should be excluded.

The cap will impact on a council's ability to effectively manage workforce change and exits.

The cap will significantly reduce a council's ability to achieve the necessary workforce reductions and savings targets through voluntary means and will therefore lead to more contentious negotiations with the attendant increase in costs and time associated with that, as well as the likely negative impact on the workforce in terms of morale and motivation.

In order to avoid the cap, many valued and skilled workers may look to exit prior to its implementation.

The impact of the cap on the lower paid, long service members of the workforce is likely to have a negative impact on the image of Local Government as a trusted employer of choice as workers will no longer be able to access all the benefits that they have earned.

The cap amount has not risen since the £95k figure was first proposed three years ago. Meanwhile salaries have increased and ONS indicates living costs have risen by 9.4%. The cap figure needs to be linked to average pay increases or indexed linked or have a clear timescale for regular review.

Question 8
Are you able to provide information and data in relation to the impacts set out above?

Most council's indicated that they do not have data available at this time. However, one County Council provided the following illustrative calculations:

The Council's calculations show that an employee on a salary of £40,000 with 37 years' service will be caught by the cap just on early retirement costs. In such a case the County Council would pay to the fund £96,250. That is without any redundancy pay, holiday pay or notice pay. The County Council would have to pay £67,375 to the Pension Fund for an employee on £28,000 with 37 years' service. Therefore even with a very low redundancy payment the cap would be hit.