Restriction of Public Sector Exit Payments Regulations 2020

September 2020

Key messages

- The Restriction of Public Sector Exit Payments Regulations 2020 brings into force the exit payment cap legislated for in the Small Business, Enterprise and Employment Act 2015. The Local Government Association (LGA) has been working with the Government to raise the concerns of councils with the operation of the cap.

- The timing of these regulations presents a major issue both for councils and for employees. The cap will come into force ahead of the Ministry of Housing, Communities and Local Government (MHCLG) changing the rules of the Local Government Pension Scheme inhibiting councils' capacity to complete reorganisations or redundancy exercises. This situation could last for months meaning councils will have to keep staff on the payroll that they would otherwise have exited or they are at significant risk of legal challenge from individuals made redundant.

- Without the complementary MHCLG regulations the timing could lead to employees continuing to receive full pensions despite the cap.

Democratic decision-making

- COVID-19 has demonstrated that, to achieve the best outcomes, we need an approach that enables councils to innovate and create services that are tailored to their communities and localities, with government departments supporting councils. Local democratic control and decision-making achieves better outcomes.

- The discretionary exemptions process outlined in the regulations will prevent councillors taking the necessary decisions to reform and manage the local government workforce. The regulations introduce additional bureaucracy which potentially requires three central government post holders (two civil servants and one Minister) to ratify a full council decision will frustrate employer engagement with employees and inhibit the responsiveness of local authorities to changing situations.

Scope

- We have significant concerns with the regulations as drafted as we believe the employees who are within scope of them could be earning far less than the Government has suggested. From our analysis, the scope of the cap as set out in this consultation could cover local government workers who have decades of public service and earn less than £30,000 a year, but have built up their pension entitlements.

Legal issues and pensions

- Currently exit payments in local government are predominantly related to unreduced pension access for those aged 55 or over. Severance payments in local government, when compared with the wider public sector, are low: generally using the statutory method of calculation, but on the basis of actual

Local Government Association

Briefing

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weekly pay, rather than the statutory cap of £538. These regulations will inhibit pension access for some individuals earning considerably below UK average earnings and this may lead to calls to improve the severance framework.

- The regulations present a range of potential legal risks that could increase costs to councils. Our concerns are that:

    - There are several changes to other legislation – most notably the Regulations governing the Local Government Pension Scheme – that are required before these Regulations can reasonably be applied and these will not be in place; and,

    - The processes outlined to secure exemptions to the cap are overly bureaucratic and challenge the capacity of local government to make decisions in the interests of local taxpayers.

    - The Government has not yet provided an equality impact assessment of the changes, meaning we are not satisfied that the risks of any discrimination claims have been properly considered.

Whistleblowing

- We are pleased the Government listened to us on the mandatory exemption for those with whistleblowing and discrimination cases. We had recommend that this provision be extended to those with health and safety duties as this would make the approach consistent given that tribunal awards on health and safety grounds are unlimited. It is good that the regulations now cover this point.

Outsourcing

- The regulations do not apply to non-public sector bodies and so will exclude employees outsourced to those bodies. Excluding such outsourced employees from these regulations, as well as other areas of local government related employment, creates a two-tier workforce that will be exacerbated by the inclusion of an exemption for exit payment rights protected by the TUPE Regulations, but not 'TUPE-like' transfer cases resulting, for example, from national government mandated reorganisations.

Timing

- The timing of these regulations presents a major issue both for councils and for employees. The cap will come into force ahead of the Ministry of Housing, Communities and Local Government (MHCLG) changing the rules of the Local Government Pension Scheme.

- Unfortunately, the number of councils announcing and preparing for job losses is growing. Should this legislation come in before MHCLG change the rules of the pension scheme, there will be chaos as councils will need to increase their expenditure on legal advice to ensure they can make any redundancy payments when the scheme rules and exit cap legislation conflict.

- This situation could last for many months meaning councils will have to keep staff on the payroll that they would otherwise have exited or they are at significant risk of legal challenge from individuals made redundant. This is likely to result in additional costs for councils that will be challenging to accommodate. All of this is happening at a time when local government is leading the response to COVID-19 in their communities, preparing for the end of the EU transition period and contending with significant pressures associated with the winter.

- Due to the interaction between the cap regulations and the existing local government pension regulations the early introduction of these (HMT) regulations could result in the counter-intuitive situation of employees continuing to receive full pension despite the employer not being able to reimburse the pension fund in full due to the cap.

FURTHER INFORMATION

LGA consultation response

The LGA has provided a comprehensive response to the Government's consultation on the regulations. The Executive summary and full responses are available to parliamentarians on request.

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According to the Government's explanatory note, these Regulations restrict a body listed in the Schedule from making a payment of a prescribed description ("exit payment") exceeding the amount specified in section 153A Small Business, Enterprise and Employment Act 2015 (2015 c.26) ("the cap") to an employee or office holder in consequence of leaving employment or office ("an exit") except in the circumstances set out in these Regulations. The cap amount is currently £95,000. In addition:

- Regulation 3 sets out when the restriction applies in relation to an exit payment, or exit payments arising from multiple exits occurring in a period of 28 consecutive days.
- Regulation 4 sets out the sequence in which multiple exit payments are treated as having been paid.
- Regulation 5 sets out the types of exit payments that are subject to the restriction and regulation 6 sets out the description of payments that are exempt from the restriction.
- Regulation 7 imposes an obligation not to reduce the amount of a statutory redundancy payment or the equivalent payment paid to civil servants or employees of certain prescribed public offices.
- Regulation 8 imposes an obligation on a prescribed body to make an alternative type of payment in the event it is prevented from making a payment relating to early retirement by these Regulations.
- Regulation 9 imposes an obligation on a person entitled to receive an exit payment to inform other employers or specified bodies in relation to holder of an office of prescribed matters.
- Regulations 10 and 11 set the circumstances in which the restriction to make an exit payment in excess of the cap amount may be relaxed and regulation 12 imposes a duty on the body relaxing the restriction to keep records and publish details of prescribed matters.