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Public Sector Exit Payment Cap

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Agenda

- Legal Framework
- Application of the cap
- Waivers
- Record Keeping and Reporting
- Pension/Pension Strain
- Case in point - LGPS

Exit Payment Cap Legal Framework

- Small Business, Enterprise and Employment Act 2015
  - Sections 153A-C
- The Restriction of Public Sector Exit Payments Regulations 2020
  - Came into force on 4 November 2020
- Restriction of Public Sector Exit Payments: Guidance
- HM Treasury Directions
- draft Local Government Pension Scheme (Restriction of Exit Payments) (Early Termination of Employment) (Discretionary Compensation and Exit Payments) (England and Wales) Regulations 2020

The Cap

- Limit an exit payment that a public sector employee or office holder can receive in connection with the loss of employment to a maximum of £95K
- Cap takes precedence over existing contractual agreements and other exit schemes
- Cap does not replace more stringent regulations applying to exit payments
- Cap does not alter an individual's legal entitlement to the various payments subject to the cap

Relevant authorities

- A body listed in the Schedule to the Regulations
- A body responsible for determining the level of remuneration payable to the holder of any public offices listed in Part 2 of the Schedule

Exit Payments Where the Cap Applies

- Redundancy payment (statutory redundancy cannot be reduced)
- Pension strain payment
- Compensation payment
- Severance or ex gratia payment
- Payment in the form of shares or share options
- Payment on voluntary exit
- Payment in lieu of notice due under contract (that exceeds one-quarter of the individual's salary)
- Payment to extinguish liability under a fixed term contract
- Any other payment (contractual or otherwise) made in consequence of termination of employment or loss of office

Exit Payments Excluded from the Cap

- Any payment in respect of death in service
- Any payment in respect of incapacity as a result of accident, injury or illness (including injury to feelings)
- Any payment in respect of accrued but untaken annual leave
- Any payment in compliance with an order of a court or tribunal
- Any contractual payment in lieu of notice (that doesn't exceed one-quarter of the individual's salary)

Effect of the Cap

- Relevant authority is responsible for ensuring exit payments to do exceed the cap
- Payments that exceed the cap are beyond the relevant authority’s legal competence
- Sanctions by HM Treasury
- Value for money assessment on whether to pursue repayment through civil court

Relaxation of the Cap

- Wales – Welsh Ministers approval
  - This power is not subject to HM Treasury Directions or HM Treasury consent
- England
  - Minister of the Crown
  - Delegated authority (local authority – full Council, London Assembly, Fire and rescue authority)
  - Consent from HM Treasury & in accordance with HM Treasury Directions
- Exceptional circumstances
- Appropriate evidence, explanation of business interest and value for money assessment

Mandatory Relaxation of the Cap (Treasury Directions)

- Obligations arising as a result of a TUPE transfer
- Certain employment tribunal claims where on the balance of probabilities an employment tribunal would make an order of compensation :
  - Health & safety
  - Whistleblowing
  - Discrimination

Discretionary Relaxation of the Cap (Treasury Directions)

- Not exercising the power would cause undue hardship
- Not exercising the power would significantly inhibit workforce reform
- A written agreement to exit was made before the Cap Regulations came into force (4 November 2020) and:
  - that it was the intention of both parties that the exit would occur before that date; and
  - that any delay to the date of exit was not attributable to the employee or office holder

Record Keeping - Waiver

- Written record for 3 years
- Publish at the end of each financial year
  - The fact that the power has been exercised
  - The date on which the power was exercised
  - The reasons why the power was exercised e.g. hardship
  - The amount and type of the exit payment in respect of which the power was exercised
- Government “strongly recommends” authorities publish this information in their annual accounts

The Exit Cap & Pension Strain

- Potentially most problematic and controversial aspect of the exit payment cap
- Can result in relatively low paid but long serving employees receiving a reduced pension
- Pension schemes and compensation schemes need to be amended to reflect the introduction of the cap

LGPS - Amendments

- MHCLG consultation open from 7 September to 9 November, expected implementation in early 2020
- Proposes changes to the LGPS and compensation regulations
- Changes will accommodate the £95k cap and introduce wider exit payment reform

LGPS - Amendments

Discretionary payment

- Maximum tariff for calculating redundancy pay of 3 weeks' per year of service
- A ceiling of 15 months (66 weeks) on the maximum salary paid as a redundancy compensation payment
- Maximum salary of £80K on which redundancy can be paid
- Capped at £95K

LGPS – Pension strain proposed amendments

- Regulation 30(7) of the LGPS Regulations entitles an individual to receive an immediate unreduced pension if made redundant over 55
- For members of the LGPS who are made redundant over 55 the key points are:
  - Pension strain cannot exceed £95K
  - Pension strain cost will be reduced by the value of any statutory redundancy payment
  - Further reduction made to reflect voluntary payments to cover a grant of additional pension
  - Member can make up any reduction in pension strain from their own resources
  - Member will receive an actuarily adjusted pension benefit in line with the revised pension strain cost

Case in Point - LGPS

- LGPS amendments not likely until early 2021
- What happens in relation to Reg 30 LGPS in the meantime?
- Government Position - Reg 30 LGPS amended by “implied repeal”
- Question is - will entitlement continue until the MHCLG’s amending regulations come into force amending Reg 30 LGPS?

The imperfect solutions

- Option 1
  - Delay exists pending amendment to the LGPS Regulations
- Option 2 (the Government's View)
  - Assume LGPS have been "impliedly repealed"
  - Member gets access to deferred benefit or reduced pension
  - Employer makes a pension strain payment subject to the £95K cap

Imperfect solutions

- Option 3
- Administering authority offers unreduced pension, a deferred benefit or access to reduced pension
- Employer must decide whether to make a cash equivalent payment under Regulation 8
  - LGPSAB advice - Employer should delay the cash equivalent payment
    - Could end up paying twice cash alternative and pension strain
    - Tax and NI implications of cash alternative payment over £30K

The Perfect Solution?

- Welsh Government waiver in relation to pension strain???
- Successful judicial review declaring the Exit Payment Regulations irrational in so far as purport to impliedly repeal Reg 30 LGPS thereby making the cap unenforceable against employers until the position is regularise by express repeal

Resources

Regulations

- https://www.legislation.gov.uk/uksi/2020/1122/contents/made

Guidance

- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/930246/Restriction_of_Public_Sector_Exit_Payments_Guidance_Document.pdf

HM Treasury Directions

- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929760/Restriction_of_Public_Sector_Exit_Payments_HM_Treasury_Directions.pdf

LGPS Advisory Board website

- https://lgpsboard.org/index.php/structure-reform/public-sector-exit-payments

Any questions

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