

RIBBLE VALLEY BOROUGH COUNCIL REPORT TO PERSONNEL COMMITTEE

meeting date: WEDNESDAY, 13 JANUARY 2021
title: PUBLIC SECTOR EXIT PAYMENT REGULATIONS 2020
submitted by: JANE PEARSON - DIRECTOR OF RESOURCES
principal author: MICHELLE SMITH – HEAD OF HR

1 PURPOSE

1.1 To inform Members of the enactment of the Public Sector Exit Payment Recovery Regulations.

1.2 Relevance to the Council's ambitions and priorities:

- Council Ambitions – A well-managed Council must ensure that all aspects of pay and remuneration for staff are well managed and in accordance with legislation.
- Corporate Priorities – See above.
- Other considerations – None.

2. BACKGROUND

2.1 Members previously considered the draft regulations in 2016 and in June 2019 the Council received an email from North West Employers Organisation with details of the Local Government Association's (LGA) response to the Exit Payment cap consultation. The Employers Organisation were encouraging individual Councils to respond to add weight to the LGA response. Under delegated powers the Chief Executive duly sent a response to the consultation in support of the LGA's response on 21 June 2019.

2.2 Parliament approved 'The restriction of Public Sector Exit Payments Regulations 2020' and they came into effect on Wednesday 4 November 2020.

2.3 This means that any exit payments have to be capped at £95,000 for employees leaving employment or vacating office from the Council.

3 ISSUES

3.1 The cap applies to payments in terms of redundancy, pay in lieu of notice and compensation for loss of office or early release of an employee's pension (known as pension strain).

3.2 It excludes any payments for death in service, accident/injury or accrued/untaken holidays. It is also stated that payment in lieu of notice will not fall under the cap if it does not exceed one quarter of the employee's salary.

3.3 At present, North West Employers Organisation understand that there are 4 or 5 legal challenges to/application for judicial review of the cap. For example, the GMB Union believe that there are negative consequences for their members employed in Local Government who are aged 55 and over and are made compulsory redundant, because pension strain costs will be included in the exit calculation and they believe that will take the majority of Local Government Exit payments over the £95,000 cap. It is

possible that the legal challenges may be heard together in January. North West Employers will keep us informed of any further development. However, for the Council it is clear that we must follow our legal duty and abide by them.

- 3.4 The Ministry of Housing, Communities and Local Government (MHCLG) have also produced guidance detailing HM Treasury directions that set out circumstances where the power to relax restrictions must be exercised in either mandatory or discretionary cases, which is attached as Appendix A for information.

4 RISK ASSESSMENT

- 4.1 The approval of this report may have the following implications:

- Resources – None directly arising from this report.
- Technical, Environmental and Legal – as an employer we have a duty to abide by Public Sector legislation.
- Political – No political implications have been identified.
- Reputation – No reputational implications have been identified.
- Equality & Diversity – No equality and diversity issues have been identified.

5. **RECOMMENDATION**

- 5.1 That Members note the report.

MICHELLE SMITH
HEAD OF HR

JANE PEARSON
DIRECTOR OF RESOURCES

For further information please ask for Michelle Smith, ext 4402.



HM Treasury

Restriction of Public Sector Exit

Payments:

Guidance on the 2020 Regulations

December 2020

Restriction of Public Sector Exit Payments: Guidance on the 2020 Regulations



© Crown copyright 2020

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at: www.gov.uk/official-documents.

Any enquiries regarding this publication should be sent to us at public.enquiries@hmtreasury.gov.uk

ISBN 978-1-913635-92-3 PU3033

Contents

Chapter 1	Introduction	2
Chapter 2	Public sector bodies in scope of the Regulations	4
Chapter 3	Payments	6
Chapter 4	Employers' and employees' responsibilities	9
Chapter 5	Relaxation of the Cap	13
Annex A	Proforma for Discretionary Waivers	21

Chapter 1

Introduction

- 1.1 This document (the guidance) should be read alongside [‘The Restriction of Public Sector Exit Payments Regulations 2020’](#) (the Regulations).
- 1.2 Section 153A of the Business, Enterprise and Employment Act 2015 provides the power for the Regulations to impose the cap. During the relevant s 153A Parliamentary debates, it was made clear that the cap applies to existing contractual terms even if agreed before the 4 November 2020, the date when the Regulations came into force. It is envisioned such existing contractual terms will, by implication, be unenforceable to the extent they contravene the relevant legislative provisions.
- 1.3 The Regulations take precedence over existing contractual agreements in addition to earlier regulations and other exit schemes which make more generous provisions when compared to the Regulations, unless these arrangements are exempt as a result of the Regulations. The guidance and Regulations do not replace existing regulations applying to an organisation’s exit payments where the existing regulations are more stringent.
- 1.4 Definitions of relevant terms are set out in the [Small Business, Enterprise and Employment Act 2015](#) (‘the 2015 Act’), as amended by the [Enterprise Act 2016](#) (‘the 2016 Act’) and in regulation 2 of the Regulations.
- 1.5 The guidance sets out how public sector authorities listed in the schedule to the regulations should implement the legislation and must be used in conjunction with the separate, mandatory HM Treasury Directions when relaxing the £95,000 cap on exit payments (the cap). In the event of any perceived discrepancies, the Regulations will prevail.

Intended Audience

- 1.6 The guidance is intended for public sector authorities listed in the schedule to the Regulations and their employees and office-holders. References to an employee in this document includes, where appropriate, a reference to an office holder.

Background

- 1.7 Exit payments are important for employers to reform and react to new circumstances. They also provide support for employees as they find new employment or as a bridge until retirement age. However, these payments must represent value for money and be fair to the taxpayers who fund them.

- 1.8 In line with other decisions on financial management and pay policy, it is the responsibility of individual employers and departments to ensure that their exit payment arrangements are fair, proportionate and lawful.
- 1.9 The government enacted [framework powers](#) in the primary legislation found in the 2015 Act (as amended by the 2016 Act) to allow for a cap of £95,000 on exit payments in the public sector.
- 1.10 The Regulations set out the detail of the obligations on individuals and employers. The Regulations also provide a list of the public sector authorities within scope of the policy, referred to as the schedule.
- 1.11 1.12 HMT Directions and Guidance will be reviewed on a regular basis. This includes a review and update, where appropriate, to the documents after the completion of any relevant statutory consultation exercise. The TUPE waiver, paragraph 3.1, in the Directions, which concerns EU derived rights TUPE rights is also subject to review pending the outcome of the ongoing post Brexit EU negotiations.

Chapter 2

Public sector bodies in scope of the Regulations

- 2.1 The intention is for the cap to apply to the whole of the public sector. We can exercise our own judgement on a case by case basis but HM Treasury will mostly be guided by the Office for National Statistics (for National Account purposes) classification of bodies to determine if a body is 'public sector' for the purposes of the cap. A full list of authorities in scope of the exit payment cap can be found in the schedule to the Regulations.
- 2.2 Where an authority is not included within the schedule, there is no legal obligation for that authority under the Regulations to apply the cap to an exit payment. The Armed Forces, the Secret Intelligence Service, the Security Service, the Government Communications Headquarters, the Natwest Group plc (formerly the Royal Bank of Scotland Group plc), NRAM Limited, and Bradford & Bingley are exempt from the Regulations. However, they should ensure exit payments represent value for money and are fair to taxpayers.
- 2.3 The Regulations cover exit payments made by the authorities listed in the schedule. The Regulations do not cover exit payments made by:
- an authority which exercises functions devolved to Northern Ireland;
 - the Scottish Parliamentary Corporate body or any authority which exercises functions devolved to Scotland, with the exception of the following which are covered by the Regulations: payments made by the Scottish Administration to non-Ministerial office holders and staff of the Scottish Administration.
- or
- "relevant Welsh exit payments" made to the office-holders specified in section 153(B)(6) of the 2015 Act.
- 2.4 Separate regulations and guidance may be issued by the appropriate devolved administration for payments not covered by the Regulations.
- 2.5 Devolved administrations and government departments can provide further guidance on the application of the cap for their responsible bodies that are in the schedule to the Regulation. Additional guidance should comply and be read in conjunction with the HM Treasury documents, except where stated in the Guidance or Directions.
- 2.6 Machinery of Government changes can involve the dissolution of a body and the transfer of its functions to a successor body or the merger of one body with another. Likewise, new bodies may be created to deliver new services or perform new functions. A newly created public sector body will not be in

scope of the Regulations until it is added to the schedule. This includes new bodies that carry out employment functions which used to be the responsibility of a body which was in scope of the Regulations. However, the Government expects all public bodies to apply their own commensurate arrangements voluntarily prior to the body being added to the schedule. It is the responsibility of government departments to inform HM Treasury of bodies which should be added to or removed from the Regulations.

Chapter 3

Payments

Payments in scope of the Regulations

- 3.1 An exit payment is subject to the cap if it is a type of payment described in [regulation 5\(2\)](#) when made in consequence of termination of employment or office.
- 3.2 Any part of a payment in lieu of notice (PILON) which represents up to a quarter of the individual's salary is exempt from the cap. This means the cap only applies to the remaining part of the PILON. As such, when calculating the total exit payment subject to the cap, only the PILON which is over a quarter of an individual's salary should be considered.
- 3.3 'Salary' is defined in the Regulations as the annual value of remuneration that the person was contractually entitled to receive for the salaried employment or office on the date they left. This includes any benefit in kind.
- 3.4 Employers and departments should seek legal advice if they have any doubt whether a payment falls within scope of the Regulations.

Calculating the capped amount

- 3.5 The Regulations provide a standard legal underpin in respect of exit payments made by relevant authorities. However, authorities can apply alternative contractual capping arrangements where those provisions are stricter than the Regulations.
- 3.6 The exit payment cap applies to the total cost for the public sector authority, as calculated under normal processes. For example, in the case of a pension strain payment, the capped amount should be the amount as calculated by the scheme actuary.

Payments out of scope of the Regulations

- 3.7 Types of exit payments which are specifically exempt from the scope of the public sector exit payment cap are set out in regulation 6. Also regulation 7 sets out a prohibition on reducing a statutory redundancy payment or its equivalent.

Regulation 6 exclusions

- 3.8 The exit payment cap only applies where there is an extra cost to the authority in relation to that exit. Payments - or elements within payments - that result from an individual's accrued right to a pension, including additional pension purchased with the individual's own monies, are not exit

payments for the purpose of the cap. For example, if an individual retires and receives a lump sum from their pension scheme, that lump sum is outside the scope of the cap if it is based on the pension entitlement that the individual had accrued in respect of their employment up to the time of their exit or that had otherwise been paid for by the individual.

- 3.9 However, employer funded early access to pension payments are within scope of the cap. These payments are also referred to as pension 'strain' or pension top up payments. These are payments made by an employer as an additional contribution to a pension scheme in respect of an individual's exit upon retirement before reaching the scheme's normal pension age, so that the individual receives a greater pension than they would otherwise be entitled to.
- 3.10 Fire and Rescue Authorities (FRA) can remove the current commutation lump sum scheme restriction which limits the lump sum to the value of 2.25 x annual pension. This discretion applies to firefighter members of the 1992 Firefighters' Pension Scheme who are under 55 years of age and have less than 30 years' service. Ordinarily commutation payments are of no cost to the employer as the arrangement is between the scheme member and pension scheme. However, where the FRA exercises this discretion, it is required to make a payment equivalent to the additional amount to their pension fund account. These payments are to be exempt from the scope of the Regulations as they do not fund an increase in the actuarial value of the firefighter's pension.
- 3.11 Therefore, regulation 6(c) exempts payments made by a FRA to their pension fund account, where the FRA exercises its discretion to allow a firefighter (who is subject to the above 2.25 times pension commutation lump sum restriction) to commute up to a maximum of 25% of their annual pension for a pension lump sum. Effectively, this discretion aligns the commutation entitlement available to firefighters who are aged 55 or over, or who have accrued the maximum 30 years' service.
- 3.12 Payments made by a FRA to their pension fund account in respect of firefighters who are unable to maintain operational fitness through no fault of their own, and where the FRA has agreed to put into payment an authority initiated early retirement pension, are also exempt. This will honour the government's previous commitment that firefighter members of the 2006 and 2015 Firefighters' Pension Schemes in these circumstances should be awarded an unreduced pension if they cannot be redeployed.

Regulation 7 prohibition

- 3.13 Relevant authorities must ensure that an individual receives a redundancy payment that is at least equal to their minimum statutory entitlement under section 135 of the Employment Rights Act 1996 (ERA 1996). Employees of certain public offices are not eligible for statutory redundancy pay as a result of s159 ERA 1996 and in this scenario the relevant authorities must ensure the employee receives the equivalent of that minimum statutory entitlement.
- 3.14 In respect of an exit, an individual may receive a statutory redundancy payment or, where appropriate, its equivalent in addition to other exit

payments. In this scenario, where the total of these payments exceeds the cap, the other exit payments must be reduced, if necessary to zero, so the total sum does not to exceed the cap amount. The amount of the statutory redundancy payment or its equivalent cannot be reduced even if this causes the payment to exceed the cap.

Chapter 4

Employers' and employees' responsibilities

Public sector employers' responsibilities

- 4.1 A public sector authority subject to the Regulations has a legal obligation to cap public sector exit payments in the sum of the exit payment cap, £95,000. However, as noted above, there are some payments outside the scope of the cap and there are certain circumstances where the cap may be relaxed to allow payments that would otherwise be within scope.
- 4.2 Exit payments often comprise a variety of payments, including elements such as PILON and pension strain payments. The total value of the exit payments needs to be calculated (measured in terms of current costs, for example when considering the value of extra continuing pension). Where two or more exits take place within 28 days (multiple exit payments) and as a result the total would exceed the exit payment cap, the Regulations prescribe the sequence in which exit payments will have been paid for the purpose of applying the cap.
- 4.3 The government's expectation is that compensation scheme rules and pension scheme rules will be amended to reflect the introduction of the cap. For example, where an employee receives a partially reduced pension as a result of retiring early before normal pension age, (see 3.3 above), the employer can meet the cost of that reduction to ensure that, in these circumstances the employee receives a pension that is not actuarially reduced. This cost is referred to as a pension strain cost and is subject to the cap. In the event the pension strain cost is capped, the expectation is that pension schemes will provide members with options to use their own monies to make up any shortfall or to take a partially reduced pension.
- 4.4 Where the application of the cap would result in a relevant authority being unable to make a pension strain payment because of pension scheme rules (for example, the scheme has not yet been amended to allow for partially reduced pensions), it must as an alternative pay the pension scheme member an equivalent capped sum (regulation 8). For the avoidance of doubt, the reference to another person includes pension schemes and/or administrators. The aggregate of that cash sum and any other exit payments must not exceed the cap.
- 4.5 Employers must keep a record of exit payments made to an employee or office holder.

Multiple exit payments

- 4.6 When calculating whether an individual's exit payment should be subject to the £95,000 cap, authorities must take into account all payments (i.e. the aggregate amount) received by the individual related to two or more public sector exits which occur within a 28-day period. In this scenario, and where the exits do not occur on the same day, the exit payments are treated as having been paid in chronological order for the purpose of calculating the cap. For example, where an individual leaves employment with authority A with an exit payment of £50,000, then leaves employment with authority B within the next 28 days, authority B should not make an exit payment in excess of £45,000. Section 4.6 sets out the individuals' responsibilities for informing employers of the fact they have left employment and are entitled an exit payment from another employer.
- 4.7 Regulation 4(b) sets out the order in which exit payments will be treated as having been paid for the purpose of calculating the cap, where an individual leaves the employment or office of two or more qualifying public sector authorities on the same day and the total sum of exit payments exceed the cap.
- 4.8 Where, in relation to an exit, a capped exit payment comprises several elements such as a contractual redundancy lump sum and a pension strain payment, it is for the responsible authority to establish if and how the cap applies to each element. Subject to the provisions in regulation 7 on prohibiting the reduction of statutory redundancy pay or its equivalent, HM Treasury has not prescribed an order for prioritising elements that make up a total exit payment to ensure employers have flexibility. However, the pension strain payment must be reduced if otherwise the total exit payment would be over £95,000.

Records and reporting

- 4.9 Whole of Government Accounts returns may request information relating to the exit payment cap, or any exit payments made by the relevant authority, for publication purposes. Public sector employers are expected to cooperate in providing such information.
- 4.10 When a responsible authority caps an exit payment, it may wish to keep a record of that payment for public accountability purposes, however, this is not required by the Regulations. The Regulations require records on relaxation of the cap (see below) to be maintained for public accountability purposes, and to provide the government or auditors with the information required to evaluate the operation of the policy.
- 4.11 Where the cap is relaxed in accordance with the separate HM Treasury Directions, the responsible body must keep a separate record of the exercise of the power. This record must be kept for a minimum of three years from the date the power is exercised, showing:
- the name of the payee in respect of whom the cap was relaxed
 - the amount and type of the qualifying exit payment for which the cap was relaxed

- the date on which the power to relax the cap was exercised
- and the reason why the power was exercised (this should refer to the guidance and be sufficiently detailed to enable HM Treasury to assess if it has been appropriately applied)

Compliance

- 4.12 The relevant authority is responsible for ensuring any exit payment it makes does not exceed the public sector exit payment cap. Any payment that exceeds the cap and is not compliant with the Regulations or Directions is considered a payment beyond the organisation's legal competence, which may result in sanctions on the organisation or, if appropriate, on the sponsoring department by HM Treasury.
- 4.13 Authorities that make payments in excess of the cap which are not compliant with the provisions in the Regulations or Directions must make a value for money assessment on whether to pursue civil repayment through the courts. This assessment must be agreed by the relevant Accounting Officer in line with their Accounting Officer responsibilities.

Transparency

- 4.14 Public sector authorities must publish information about any decisions to relax the cap. The government strongly recommends that public sector authorities publish such information in their annual accounts. At the end of the financial year, the responsible authority must publish a list of:
- the amounts and types of qualifying exit payments made by the responsible authority in respect of which the relaxation power was exercised in that financial year
 - the dates on which that power was exercised
 - and the reasons why that power was exercised
- 4.15 The reasons for exercising a power to relax the cap should relate directly to a relaxation category (see section 5 and the separate HM Treasury Directions). For example, 'genuine hardship' would be considered a sufficient explanation for this purpose.
- 4.16 As in previous years, employers will be required to disclose in their annual accounts information about exit payments paid during the financial year. This disclosure includes details about the number of exit payments paid in bands from £0 to over £100,000.
- 4.17 Departments are expected to assure themselves that their arm's length bodies (ALBs) and non-departmental public bodies (NDPBs) are properly recording and holding information according to the requirements set out in this guidance.

Individuals' responsibilities

- 4.18 When an individual is entitled to receive a payment in relation to an exit that has occurred and that individual is also employed by or is an office holder in respect of one or more other prescribed authorities, that individual must

provide the following information in writing to the authorities set out in regulation 9(2):

- that they are entitled to receive an exit payment
- the amount and type of that exit payment
- the date that they left employment or office
- the identity of the relevant authority that made the exit payment

Chapter 5

Relaxation of the Cap

- 5.1 The Government understands that it may be necessary or desirable to relax the restrictions imposed by the Regulations. Therefore, the Regulations allow for relaxation of the cap in appropriate circumstances. This safeguard is for use in exceptional situations, including where imposing the cap would cause genuine hardship.
- 5.2 The power to relax restrictions in relation to exit payments may be exercised by a Minister of the Crown¹ unless the payment is -
- a) a relevant Welsh exit payment
 - b) made by a relevant Scottish authority with the exception of certain payments made by the Scottish Administration
 - c) made by a devolved Welsh authority²
 - d) made by a local authority in England or the Greater London Authority
 - e) made by a fire and rescue authority in England
- 5.3 The Regulations do not cover relevant Welsh exit payments, meaning payments to the offices specified in section 153B(6) of the Act³. Therefore, any power to relax restrictions in relation to these payments may only be made by Welsh Ministers.
- 5.4 The Regulations do not cover payments made by a relevant Scottish authority, namely the Scottish Parliamentary Corporate authority or any authority which exercises functions devolved to Scotland, with exception of certain payments mentioned in this paragraph. Therefore, any power to relax restrictions in relation to these payments may only be made by Scottish Ministers. However, the Regulations do cover payments made by the Scottish Administration to non-Ministerial office holders and staff of the Scottish Administration, and any power to relax the restriction in relation to these payments may be exercised by a Minister of the Crown.

¹ The definition of a Minister includes Secretaries of State, the Lord Chancellor, Ministers of State, Parliamentary Under Secretaries of State and Parliamentary Secretaries: section 8(1) of the Ministers of the Crown Act 1975

² As defined in section 157A of the Government of Wales Act 2006

³ The offices are: member of the National Assembly for Wales; the First Minister for Wales; Welsh Minister appointed under [section 48](#) of the [Government of Wales Act 2006](#); Counsel General to the Welsh Government; Deputy Welsh Minister; member of a county council or a county borough council in Wales; member of a National Park Authority in Wales; member of a Fire and Rescue Authority in Wales.

Process for relaxation of the cap under the Regulations

- 5.5 The Minister of the Crown's power to relax a restriction in respect of certain payments is delegated to the following authorities –
- a) The full council of a local authority in England in respect of exit payments made by local government bodies for which it has responsibility;
 - b) The London Assembly in respect of exit payments made by the Greater London Authority, and
 - c) The fire and rescue authority in England in respect of exit payments made by that authority.
- 5.6 The Minister of the Crown's power to relax restrictions including where that power has been delegated can be only be exercised either in compliance with the conditions set out in HM Treasury Directions or with the consent of HM Treasury, with the exception of payments made by a devolved Welsh authority. Where the exit payment is made by a devolved Welsh authority, the power to relax restrictions is conferred upon Welsh Ministers.
- 5.7 HM Treasury Directions set out circumstances where the power to relax restrictions must be exercised ("mandatory cases") and may be exercised ("discretionary cases").
- 5.8 In respect of discretionary cases, the relevant delegated authority or employer must submit a business case to their sponsoring department for approval by the Principal Accounting Officer and the relevant minister before submitting the business case to HM Treasury for approval. The power of the relevant minister to approve the business case may be exercised by a junior minister or a responsible departmental official under the Carltona principle.
- 5.9 In mandatory cases, the relevant delegated authority or employer must submit a business case to their sponsoring department for final approval from the Principal Accounting Officer and relevant minister.
- 5.10 Where the employee is a civil servant, approval should be sought from the Cabinet Office Principal Accounting Officer and relevant Cabinet Office Minister rather than the employing department. In respect of a discretionary case, a business case should be submitted to HM Treasury for approval after the payment has been approved by the Cabinet Office.
- 5.11 The National Audit Office (NAO) must first seek approval from the Public Accounts Commission as the body responsible for NAO oversight before submitting to HM Treasury for approval. This process must be followed for mandatory and discretionary waivers.
- 5.12 The Minister of the Crown or a delegated authority can relax the cap outside of the circumstances outlined in HM Treasury Directions only with HM Treasury consent. In these exceptional cases, the relevant delegated authority or employer must submit a business case to the sponsoring department for approval of the Principal Accounting Officer and the relevant Minister before submitting the business case to HM Treasury for approval.

- 5.13 A Welsh Minister has the power to relax the cap in relation to exit payments made by a devolved Welsh authority. This power is not subject to the requirement to relax only in compliance with conditions set out in HM Treasury Directions or with HM Treasury consent.
- 5.14 Departments are responsible for designing, updating and sharing their own guidance to comply with relevant processes and procedures in relation to relaxation of the cap. These processes should ensure decisions are made in a reasonable and timely fashion. Local authorities will be expected to follow any relevant guidance issued by the Ministry of Housing, Communities and Local Government which will ensure accountability and transparency.

Managing Public Money

- 5.15 Departments must still consult the HM Treasury about special payments, regardless of value, unless there are specific, agreed delegation arrangements in place. Local Government, Devolved Authorities and Public Corporations should follow their own internal processes. A department must seek HM Treasury approval, in advance, for any special payment for which it has no delegated authority, or which exceeds its authority. Similarly, ALBs should consult their sponsor departments in comparable circumstances. In turn, the department may need to consult the HM Treasury.
- 5.16 The special payments which Departments may need to consult the HM Treasury are summarised in [Managing Public Money](#). The list is not exclusive. If a department is in doubt, it is usually better to consult the HM Treasury.

Scope of relaxation powers

- 5.17 The decision to relax restrictions imposed by the Regulations must be exercised in respect of individuals on a case by case basis.
- 5.18 In exceptional circumstances, the individual will be part of a group of employees in similar circumstances, for example where redundancies occur as a result of urgent workforce reforms. Any relaxation of the cap for a group of individuals must be appropriate to the circumstances.
- 5.19 Relaxation is expected to be granted only in exceptional circumstances that meet the criteria in this guidance. All decisions should be supported by appropriate evidence, with an explanation of the business interests, a value for money assessment and should be disclosed in the organisation's annual accounts.

Mandatory relaxation

- 5.20 There are situations in which the power to relax the restrictions imposed by the Regulations must be exercised. These are set out in the separate HM Treasury Directions and are summarised as follows:
- Where a payment is made as a result of the application of TUPE Regulations or the EU Acquired Rights Directive;
 - Where a payment is made to avoid employment tribunal litigation in relation to a complaint that someone has suffered a detriment or been dismissed as a result of whistleblowing

- Where a payment is made to avoid employment tribunal litigation in relation to a complaint that someone has suffered a detriment or been dismissed as a result of carrying out activities in connection with preventing or reducing risks to health and safety at work
- Where a payment is made to avoid employment tribunal litigation in relation to a complaint of discrimination under the Equality Act 2010;
- Certain payments made by the Nuclear Decommissioning Authority

TUPE

5.21 Where an obligation to pay an exit payment arises as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the Transfer of Undertakings (Protection of Employment) Regulations 1981 or the EU Acquired Rights Directive.⁴

Payment made (for example as part of a settlement agreement) in order to settle a grievance or employment tribunal litigation involving a whistleblowing complaint.

- 5.22 [Whistleblowing](#) is the term used when a worker passes on information concerning wrongdoing. The government believes that genuine whistleblowers are carrying out a service in the public interest, and that victimisation of a whistleblower is not acceptable. The government's guidance on whistleblowing emphasises that any instances of wrongdoing must be taken seriously and managed appropriately.
- 5.23 However, the government accepts that given the number and diversity of organisations in the public sector, there may be occasions where employers do not meet the standard expected of them. In such cases the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998) provides for the right for a worker to take a case to an employment tribunal if they have been subjected to a detriment at work or they have lost their job because they have 'blown the whistle'.
- 5.24 To be covered by whistleblowing law, a worker who makes a disclosure must reasonably believe two things. The first is that they are acting in the public interest. This means that personal grievances and complaints are not usually covered by whistleblowing law. The second is that the disclosure tends to show past, present or likely future wrongdoing falling into one or more of the following categories:
- criminal offences (this may include, for example, types of financial impropriety such as fraud)
 - failure to comply with a legal obligation
 - miscarriages of justice
 - endangering someone's health and safety
 - damage to the environment

⁴ The Directions will be reviewed after 31 December 2020

- covering up wrongdoing in the above categories
- 5.25 The cap is not intended to inhibit protected disclosures, or to prevent such people from receiving an appropriate remedy from an employment tribunal.
- 5.26 In cases where an individual makes a disclosure covered by whistleblowing law, and has subsequently made a complaint that they have been dismissed or subjected to a detriment as a result of that disclosure, an employer must consider whether the employer and complainant should avoid litigation. In such cases, it may be appropriate to enter into a settlement or conciliation agreement involving an exit payment with the complainant rather than have the matter considered by an employment tribunal. Where a settlement agreement is entered into on the basis that the employer is satisfied that an employment tribunal would find in the complainant's favour, then the power to relax the restrictions imposed by the Regulations must be exercised if the amount payable under the settlement agreement would otherwise lead to the cap being breached.
- 5.27 It is expected that an employer will make legal advice available to the person exercising the power to relax the restrictions that demonstrates that, on the balance of probabilities, the individual has made a disclosure covered by whistleblowing law and that an employment tribunal would find that they had been dismissed or subjected to a detriment as a result of that disclosure.

Payment made (for example as part of a settlement agreement) in order to settle a grievance or employment tribunal litigation relating to a complaint that an employee has been subjected to a detriment or dismissed for undertaking health and safety related activities.

- 5.28 Section 100 of the Employment Rights Act 1996 protects employees by providing that a dismissal shall be automatically unfair where the reason for the dismissal is covered by one of the matters set out in section 100. For example, where the reason for the dismissal is related to the fact the employee had been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work and the employee had carried out, or had proposed to carry out, those activities.
- 5.29 Section 44 of the Employment Rights Act 1996 protects an employee from being subjected to any detriment by their employer for reasons set out in section 44, for example by being disciplined for health and safety related reasons, such as being a health and safety representative at work or member of a safety committee.
- 5.30 These payments are subject to mandatory relaxation for reasons similar to those set out above in respect of whistleblowing cases.

Payment made (for example as part of a settlement agreement) in order to settle a grievance or employment tribunal litigation involving a discrimination complaint.

- 5.31 Discrimination occurs where an individual is treated less favourably owing to:

- age
 - gender reassignment
 - being married or in a civil partnership
 - pregnancy and maternity
 - disability
 - race including colour, nationality, ethnic or national origin
 - religion, belief or lack of religion/belief
 - sex
 - sexual orientation
- 5.32 The government is committed to avoiding discrimination, but as with whistleblowing, acknowledges that with the number of organisations and people employed in the public sector that there may be occasions when discrimination occurs.
- 5.33 In cases where an individual makes a complaint that they have been subjected to a detriment or dismissed on discriminatory grounds, an employer must consider whether in their view the complaint is valid. As above, in such cases, it may be appropriate to enter into a settlement or conciliation agreement with the complainant rather than have the matter considered by an employment tribunal. Where an agreement involving an exit payment is entered into on the basis that the employer is satisfied that an employment tribunal would find in the complainant's favour then the power to relax the restrictions imposed by the Regulations must be exercised as if the amount payable under the agreement would otherwise lead to the cap being breached.
- 5.34 It is expected that an employer will make legal advice available to the person exercising the power to relax the restrictions that demonstrates that, on the balance of probabilities, that an employment tribunal would find that they had been a victim of discrimination.

Nuclear Decommissioning Authority (NDA): pension related payments paid upon redundancy

- 5.35 There are provisions within the NDA group pension arrangements which give individuals an entitlement to enhanced pension benefits where they leave service on grounds of redundancy. Such enhancements include the payment of an unreduced early retirement pension from age 50 and, in some instances, an increase to the member's pensionable service of up to 6 2/3 years. As well as applying to individuals who have already reached their relevant minimum pension age, the enhancements are also applicable to certain individuals who leave on grounds of redundancy before age 50 but who will then have a right to an enhanced pension when they reach age 50.
- 5.36 The form and level of the enhancements is determined by the arrangement and the status of the individual.

- 5.37 The cost of the funding strain attributable to the enhancements on redundancy is within the scope of the cap as these are payments made by the employer in respect of the individual's exit, such that the individual receives a higher pension than they would otherwise be entitled to on leaving service.
- 5.38 Payments in respect of an unreduced early retirement and, where applicable, to provide additional years of pensionable service, as well as any payments made in lieu of such enhancements, will be covered by the relaxation and so not subject to the cap where: (a) the individual's employer holds a site licence under the Nuclear Installations Act 1965 and they are employed on a site which is the subject of a decommissioning programme agreed by the NDA and BEIS Secretary of State; and (b) the individual's employment is terminated on grounds of redundancy as a result of a decommissioning programme and where there is no relevant suitable alternative employment for that individual.
- 5.39 Unless the specific criteria for the relaxation are met, the cost of any funding strain which arises on exit and therefore the level of pension benefits payable from the NDA group pension schemes will in all cases be subject to the cap."

Discretionary relaxation

- 5.40 The power to relax the restrictions imposed by the Regulations may be exercised at the discretion of the Minister or delegated authority where they are satisfied that it is appropriate to exercise the power on the basis of one or more of the following conditions:
- there are compassionate grounds owing to genuine hardship
 - it is necessary to exit an individual to give effect to urgent workplace reforms, or
 - an arrangement to exit was entered into with anticipated exit taking place before the date the Regulations came into force, but the exit was delayed until after that date and the reason for the delay was not attributable to the employee or office holder concerned.
- 5.41 Where the minister or a delegated authority wishes to exercise this discretionary power, it must submit to HM Treasury for approval a business case approved by the relevant Minister and/or the delegated authority. Whilst HM Treasury may request supplementary information, cases should be submitted in the format detailed below.

Compassionate grounds owing to genuine hardship

- 5.42 The government believes that an exit payment of £95,000 should mean that there are few, if any, circumstances where the operation of the cap should lead to genuine hardship. However, where the person exercising the power to relax the cap is satisfied that there are exceptional circumstances, then it may be appropriate for the restrictions to be relaxed.
- 5.43 The circumstances that may be considered are not limited to the employee's own circumstances, and it may be appropriate to consider the position of

family members. For example, where an individual is exiting the workforce and is not able to seek re-employment due to caring responsibilities.

To give effect to urgent workplace reforms

- 5.44 The government accepts that there may be instances where it is in the interests of urgent workforce reform to relax the restrictions imposed by the Regulations. However, cases where it is appropriate to use the power in this way will be exceptional and a detailed business case will need to be prepared in support of any request for a relaxation on this basis.

A written agreement to exit made before the Regulations came into force

- 5.45 The Regulations apply to any exit after the date that the Regulations come into force. However, where an agreement between an employer and an employee was entered into in good faith with the intention that the employee/office holder would exit before the Regulations came into force, and the exit is delayed for reasons outside the employee/office holder's control, it may be appropriate for the restrictions imposed by the Regulations to be relaxed. Circumstances where this is may be appropriate include where the employer asks the employee/office holder to remain in post for a longer period in order to complete a business critical project.

Discretionary Waiver Business Case

- 5.46 Before completing a HM Treasury Discretionary Waiver Business Case, the relevant delegated authority or employer must submit a business case to their sponsoring department for approval by the Principal Accounting Officer and the relevant Minister.
- 5.47 Where the employee is a civil servant, approval should be sought from the Cabinet Office Principal Accounting Officer and relevant Cabinet Office Minister rather than the employing department.
- 5.48 All business cases will be judged based on their merits in line with the relevant reason for the relaxation of the cap. Any discretionary waiver of an exit payment must be affordable within current budgets and additional funding will not be provided by HM Treasury to cover the cost of exit packages.
- 5.49 Please submit the completed business case to the relevant HM Treasury spending team. Decisions may take up to 4 weeks.

Annex A

Proforma for Discretionary Waivers

Table A.1: Proforma for Discretionary Waivers

Proforma for Discretionary Waivers	
Employer or Relevant Authority	
Reason for proposed relaxation of cap	<p>[Delete as necessary]</p> <ul style="list-style-type: none"> • there are compassionate grounds owing to genuine hardship • it is necessary to exit an individual to give effect to urgent workplace reforms, or • an arrangement to exit was entered into before the Regulations came into force, but the exit was delayed until after that date and the reason for the delay was not attributable to the employee or office holder concerned.
Breakdown of proposed exit payment, please list each payment separately	
Waiver Considerations	
Please provide relevant details	
The circumstances of the case	
The view of the principal accounting officer and relevant minister	
The value for money offered by the proposed exit payment	
Any non-financial considerations	
Whether the case could have a wider impact, e.g setting a precedent	
Impact of the waiver not being agreed	

Name of Principal Account Officer supporting this application	
Name of Departmental Minister	
Name and post of person submitting this application	
Contact telephone and email	
Date of application	
<i>Source:</i>	

HM Treasury contacts

This document can be downloaded from www.gov.uk

If you require this information in an alternative format or have general enquiries about HM Treasury and its work, contact:

Correspondence Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 5000

Email: public.enquiries@hmtreasury.gov.uk