



## **CONSULTATION ON PUBLIC SECTOR EXIT PAYMENT RECOVERY REGULATIONS**

### **LOCAL GOVERNMENT ASSOCIATION RESPONSE**

This response is submitted by the Local Government Association (the LGA), on behalf of local authorities. The LGA is the national voice of local government. We work with councils to support, promote and improve local government. The LGA covers every part of England and Wales and includes county and district councils, metropolitan and unitary councils, London boroughs, Welsh unitary councils (via the Welsh LGA), and fire and national park authorities. The Workforce Team of the LGA offers advice on employment issues and represents local government employer interests to central government, government agencies, trades unions and European institutions.

Our response is based on views expressed by authorities following a consultation that we carried out with councils and fire authorities. This incorporated views of authorities.

Any queries on this response should be send to [eru@local.gov.uk](mailto:eru@local.gov.uk)

#### **Section A: LGA comments on the changes from the 2014 plans**

- 1. Recovery of the exit payment will apply where the individual returns to any part of the public sector, not just a sub-sector of it (e.g. local government)**

This change clearly means that the potential for the recovery of an exit payment will apply more often. The vast majority of authorities which responded to the consultation were concerned that as well as increasing administrative burdens for public bodies in managing the clawback, more skilled public sector workers would be reluctant to seek re-employment within the public sector (at least within the period that the clawback applies) so the talent pool may decrease. This would not be in the interests of the sector, particularly at a time when more cross-public sector working is increasingly important as a way of delivering services with reduced resources. In this respect it should be noted that the repayment provisions will, as has always been planned, apply where an individual returns as an employee or 'off payroll' e.g. as an

independent self-employed contractor or where they return as the employee of another person (for a return as an agency worker see our comments on regulation 3(1)(g) below).

Concerns have also been raised about the impact this policy will have on the ability of public sector bodies to respond flexibly to changes in employment needs and in particular in the case of short-term requirements for senior officers. As in other parts of the economy, the use of 'interims' is a tool used to address temporary requirements in the workforce. Following the cuts in the workforce and fewer permanent senior posts, this has become even more of a necessity to fill gaps in expertise. In recruiting to such posts, the preference of employers is for more recent experience in the relevant service and/or at the appropriate level. Due to the level of seniority of such candidates, they are already relatively few in number, however, this policy will have the unintended consequence of reducing the supply of such candidates, thereby increasing the charges that those available will be able to command, thus increasing costs.

**2. The provisions will apply to those that earn £80,000 per annum, rather than £100,000 as was originally planned**

As with 1 above, this will increase the number of times that the repayment provisions will apply and so raises the same administrative and talent pool recruitment issues. It will also impact disproportionately on authorities in London and the south east and further exacerbate recruitment issues.

Authorities are concerned that the policy will amount to age discrimination, given that it is more likely to affect senior employees and, therefore, in many cases, those that are older as opposed to younger employees.

**3. Tapering provisions reducing the amount of the exit payment that will have to be repaid will apply from day one**

We anticipate that the impact of the tapering provisions starting from day one will be limited. However, it could result in an anomaly with the workings of the Redundancy Payments (Continuity of Employment in Local Government, etc) (Modification) Order 1999, under which entitlement can be lost to all of a redundancy payment if an individual is employed by any employer on the Order within 28 days of leaving employment.

#### **4. Strain on fund exit payments made to buy out actuarial reductions on early retirement under the LGPS will be in scope for recovery**

Putting strain on fund payments in scope raises a number of issues, as follows:

- Unlike the other payments included, the strain on fund cost is not paid to the individual, but to the pension fund. Therefore, the member may not have access to the amount for repayment, for example in many cases the strain cost will be substantial (subject to the £95,000 cap on exit payments) but the amount actually paid to the member on exit may be much less. Any agreement to make repayments by installments could therefore extend over many years. This would be an administrative burden on employers, with the need to make complex calculations, maintain records and follow up collection, and would keep a link between the employer and employee that should have been broken on exit. Many councils do not support the inclusion of this cost for these reasons and due to the fact that it will act as a strong disincentive for an employee to seek re-employment in the sector with the resulting loss of skills and experience.
- Including the strain on fund payment could amount to a restraint of trade. Whereas, the repayment of an exit payment actually received by an employee, reduced according to the length of time without work, may be held to be proportionate, this is arguably not the case in relation to a payment that the employee did not receive themselves. This could act as a significant barrier to further employment.
- The draft regulations in respect of the £95,000 cap on exit payments make mention of aggregate payments however these draft recovery regulations do not. Although this inconsistency is not in itself an issue it will require different administrative processes as presumably that means that where an employee has left more than one post each exit pension strain cost caught by these regulations will need to be treated separately.
- Employers can choose to switch on the rule of 85 for members leaving between 55 and 60 and taking their pension. This would result in a strain payment and would therefore also appear to be caught by these regulations. If this is the intention of the regulations employers would need to be aware and ensure employees are given full information.
- Deferred benefits brought into payment unreduced on compassionate grounds are potentially caught by draft regulation 4(g) as a payment “made as a consequence of, in relation to, or conditional upon, loss of employment whether under a contract of employment or otherwise.” It appears that this is not the intention,

especially as what could be viewed as similar payments related to ill health are excluded, but this issue needs clarification.

## **5. Dissolved bodies**

This type of situation could occur in machinery of government changes, such as when certain NHS bodies were dissolved as part of the Health and Social Care Act 2012 reforms. The proposal will ensure that the repayment provisions are applied consistently for individuals in such cases, however, authorities are concerned that the proposed approach may further increase the administrative burdens of this legislation.

## **6. Exemption for Housing Associations and Financial Services Compensation Scheme (FSCS) from the repayment obligations**

Presumably the FSCS will be exempted as the Government has already decided that other public sector financial bodies such as the Financial Conduct Authority and Royal Bank of Scotland will be subject to the exemption. Some authorities commented that all public sector bodies should be subjected to this public policy, otherwise the perception is that the financial sector is receiving unjustified, beneficial treatment.

Finally, it is our view that for consistency purposes the list of exempted bodies should be exactly the same for the recovery regulations, as it is for the £95,000 cap on exit payments. At present it appears they are broadly the same, however, it is not clear whether Housing Associations and the FSCS will be exempted from the cap regulations. Further, the Payment Systems Regulator is exempted under the draft recovery regulations, but not the [draft cap regulations](#), and the Pension Protection Fund is exempted under the cap regulations, but not the recovery ones.

## **Section B: LGA comments on the draft regulations**

In addition to the points raised in section A above, the LGA has identified the following issues in the regulations.

### **Regulation 3(1)(f)**

The definition of “relevant arrangements” for the payment of any sum due includes a reference to “the responsible authority”. This is defined in section 154 of the Small Business, Enterprise and Employment Act 2015 as meaning “an authority by which any qualifying exit payments are made” but section 154 does not define “authority”. Should there not be a definition of “authority”? For example, an exit payment might be made by an academy and, whilst an academy would be a public sector authority listed

in Schedule 1 to the Regulations, would it naturally be thought of as being an “authority” for the purposes of section 154 of the Act?

### **Regulation 3(1)(g)**

This defines a “relevant contract for services” (which as well as direct employment by the hiring authority may trigger repayment) as,

“a contract for services under which an exit payee provides services to a hiring authority –

- (i) as the employee of another person; or
- (ii) as a self-employed person”

On the face of it, this may not cover a return through a temporary employment agency or other body where the exit payee is not employed by that agency or body. Is this the Government’s intention? If so this could result in exit payees simply choosing to undertake work via an agency/body on a non-employee basis to avoid the repayment of an exit payment. This would increase costs for public sector bodies because of the fees agencies/bodies would charge, on top of what the individual is paid through the agency/body.

Authorities have also asked for clarification over whether or not a former local authority employee who obtained employment with a consultancy firm would be required to repay their exit payment if the consultancy firm chose to deploy their expertise in a local authority, or any other part of the public sector in accordance with the new version of the regulations.

A further requirement of the “relevant contract for services” is that the time spent by the individual providing the service to the hiring authority accounts for more than 50% of the exit payee’s employment or self-employment. This raises a number of questions, such as:

- although the use of the word “time” in the definition appears to mean that the actual time spent has to be more than 50%, the use of the words “employment or self-employment” could potentially lead to a different interpretation i.e. more than 50% of the income. It might be sensible to make the meaning clearer in the definition.
- if the definition does mean “time” then over what period should this be assessed? While repayment might be considered equitable if the individual has a contract for, say, at least a year, it would not be so if they only have a contract to undertake a day’s work (say, as a supply teacher).
- if the definition does mean “time”, then what if the employment is on a fee basis i.e. the person is paid a fixed fee for undertaking a piece of work or a project, no matter how long that work takes. How would

you measure whether or not the person spends more than 50% of his/her time giving service under the contract?

**Regulation 3(1)(i)**

This defines “remuneration” (when calculating whether the employee earns £80,000 or more) as meaning any salary, wages or fees for services provided. What about the money value of any benefits in kind (excluding employer contributions to a pension scheme)? For example, what about the money value of a lease car, or of child care vouchers, etc?

**Regulation 3(1)(j)**

This regulation defines the meaning of “standard weekly hours”, for the purposes of whether the repayment will be reduced in the case of a ‘part-time’ return. However, what about cases where there are no standard weekly hours because the person is employed on a fee basis i.e. the person is paid a fixed fee for undertaking a piece of work or a project, no matter how long that work takes?

Further, where this regulation requires the weekly hours to be calculated over a four-week period in cases where weekly hours vary, what four-week period should that be? Is it the last four weeks before employment terminates?

**Regulation 3(3)(b)**

This deals with a return to the public sector as an office holder and in a local government context would appear to cover coroners as they are appointed by a local authority but are not employed by the local authority. Is this intended?

**Regulation 3(4)(e)**

This regulation provides that settlement or conciliation agreement payments are in scope for recovery. In the case of an agreement connected to a potential or actual discrimination claim, these payments could include sums for a potential injury to feelings award, rather than loss of earnings. In our view such injury to feelings sums should be out of scope for recovery, as to include them is inequitable, the payments being made to compensate for discriminatory treatment that has already occurred, not future loss of earnings.

The fact that settlement agreement payments are covered means that the costs associated with employment disputes will increase as it will be less likely that an employee will settle a claim.

### **Regulation 3(4)(g)**

Again this regulation deals with what is in scope for repayment and it covers any payment “made as a consequence of, or in relation to, or conditional upon, loss of employment whether under a contract of employment or otherwise”. We assume this would include the value of Compensatory Added Years (CAY) awarded in Scotland. If so, how would the cost of the exit payment be valued? It is easy to value the lump sum CAY, but what about the annual CAY payments? How would these be turned into a capital value?

### **Regulation 3(5)(c)**

Under this regulation pay in lieu of notice payments are out of scope for repayment. However, they are included for the purposes of the £95,000 cap on exit payments. It appears inconsistent to treat them differently. If though pay in lieu payments remain out of scope for repayment, but subject to the cap, this reinforces the need for the regulations and/or associated guidance implementing the cap to make it clear that when an exit payment is made, the order of priority of the various payments is set out (e.g. 1. statutory redundancy 2. pay in lieu of notice 3. strain on fund costs). If not, where the £95,000 cap is applied, there could be some debate over whether the cap was applied to reduce or extinguish a payment out of scope for recovery e.g. pay in lieu of notice, meaning it is not clear how much of the exit payment is subject to recovery.

Related to the inconsistency point, payments 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 are excluded from the exit payments cap. In our view these payments should also be excluded from these recovery regulations.

### **Regulation 3(5)(f)**

This regulation provides that an exit payment is out of scope for recovery if the individual earned remuneration of under £80,000 in the period of 12 months prior to the end of their employment/office holding. However, it does not say from whom the individual had to have earned under £80,000. For example a person who, over the 12-month period, earned £70,000 from the body making the exit payment and £30,000 from some other non-public sector employment should in our view be excluded, but the definition does not make this clear. Also, what if the person, in the 12-month period, earned £70,000 from the body making the exit payment and £30,000 from another public sector body? Should the person be excluded? Would the answer be different if the employment in which the £30,000 had been earned had or had not ceased at the same time as the employment in which the £70,000 had been earned?

Also, what if the person's salary for the 12 months prior to exit was £82,000 but, due to long-term sickness absence, the actual pay paid to the person was less than £80,000? Would a termination payment not be a qualifying exit payment because the actual pay was less than £80,000 even though the notional full salary would have exceeded £80,000? This should be made clear.

It is also important to note that regulation 3(5)(f) refers to "earned remuneration" as opposed to remuneration received in the 12 months prior to the exit of employment. This is important because it excludes payments made in the last 12 months that relate to an earlier period e.g. back pay, but would include a payment made after leaving that was earned in the last 12 months. Related to this please see our comments below on regulations 4(g) and 7(5)(b).

### **Regulation 4(g)**

This deals with an authority's duty to keep certain records related to exit payments and unlike regulation 3(5)(f) this regulation refers to remuneration "received" in the last 12 months. In our view this should, like regulation 3(5)(f) (and for the same reasons given in our comments on that regulation) refer to remuneration "earned" in the last 12 months.

### **Regulation 4(i)**

This covers an authority's duty to keep records of working hours for those that received a qualifying exit payment. We suggest that at the end should be added "(if any)" as not all those receiving an exit payment will have standard weekly hours e.g. fee earners.

### **Regulation 5**

This says the exit payee must inform both the hiring and responsible authority if they accept an offer to return to the public sector where the employment would commence within 12 months of the person "receiving a qualifying exit payment". In the case of a strain on fund pension payment the person would not have "received" it as the payment was made to the pension fund, not to the individual. You could perhaps rely on regulation 3(6) to argue that the person is, nevertheless, deemed to have received the exit payment but, even so, it might be better if, in regulation 5, the words "(or being deemed to have received)" were added after the word "receiving".

### **Regulation 6(1)**

The same comment made in respect of regulation 5 above applies equally to regulation 6(1) i.e. it might be better if, in regulation 6(1), the words "(or being deemed to have received)" were added after the word "receiving".



## **Regulation 6(5)**

This places an obligation on the authority who pays the exit payment to “take all reasonable steps to recover the repayment amount from the exit payee”. In our view such reasonable steps could include informing the exit payee in writing about the requirements of these regulations, before or when the exit payment is made. This is a point that could usefully be set out in guidance accompanying the regulations.

## **Regulation 7(1)**

Regulation 7 sets out the method for calculating the repayment amount. The calculation is partly dependent on the individual’s final net pay, but because of this it means the more the employee earns in the first job the less they would end up repaying (see examples in attached spreadsheet). While we can see some logic in this approach for cash lump sums that are paid to the exiting employee (as they benefit immediately from a cash payment in compensation for the loss of earnings and the more they earn the bigger the financial loss for the period in question) is this approach fair for the strain of fund pension cost? Many authorities have expressed strong concerns that it is not and an alternative, fairer approach should be taken. In the example the member earning £150,000 has to pay back £33,000 less than the employee earning £85,000 if they both received the same exit payment and returned after 364 days. The repayment is calculated using just the final pay from the first job whereas the strain cost is calculated with reference to the length of membership, age and salary of the individual.

## **Regulation 7(2)**

For the purposes of the definitions of E and F, which deals with weekly hours when calculating the repayment amount, what if the person did not have and / or does not have standard weekly hours e.g. the person was / is a fee based earner?

## **Regulation 7(5)(b)**

Unlike regulation 3(5)(f) both sub-paragraph (i) and the definition of G refer to remuneration “received”. We think this should, like regulation 3(5)(f) (and for the same reasons given in our comments on that regulation) refer to remuneration “earned”.

## **Regulations 8(1) and 8(1)(a)**

The same comment made in respect of regulation 5 applies equally to regulations 8(1) and 8(1)(a) i.e. it might be better if the words “(or being deemed to have received)” were added after the word “received”.

## **Regulation 9**

There appear to be some typographical errors in this regulation. In (1)(a) the word “made” should be added at the end and in (2), should the first reference to the “hiring authority” in fact be a reference to the ‘responsible authority’?

## **Regulation 10**

This regulation covers the situation where a body is dissolved, but what if there is a successor body? Shouldn't regulation 10 only apply if there is no successor body but state that if there is a successor body they become responsible for the functions of the former body?

Also, should regulation 10(a) include a reference to regulation 15 where a waiver occurs after a body has been dissolved?

## **Regulation 13**

Does this regulation, which makes provision for waiver, apply where regulation 10 applies? If it does not, then this should be made clear. However, if it does apply, where regulation 10 applies, then in subparagraphs (b) and (c) to regulation 13 the words “(or exercised)” after the word “exercise” should be added.

## **Regulation 13(1)(d)**

What about regulations 15(1)(b) and (c)? See the earlier comment in respect of regulation 10(a). If regulation 15 is not added to the list of regulations in regulation 10(1)(a) then it is not clear how regulation 15(1)(b) could operate where a waiver is made by the hiring authority after the former body had been dissolved, given that the former body (the responsible authority) would not have accounts to publish.

## **Regulation 14**

This provides that the power to waive repayment must be exercised in accordance with any written directions issued by the Treasury. It is important that they will work in practice for local authorities, and to help ensure this the LGA and local authorities should be involved in and consulted on their development.

## **Schedule 1 (List of bodies covered by the regulations)**

Are the regulations also meant to apply where a person receives an exit payment from, or obtains new employment with:

- a company under the control of a body listed in the example (where “under the control” of has the same meaning as in section 68 or, as the case may be, section 73 of the Local Government and Housing Act

1989 (except that any Direction given by the Secretary of State must be disregarded and any references to a local authority treated as references to such a body); and/or

- an entity connected with a local authority where “connected with” has the same meaning as in section 212(6) of the Local Government and Public Involvement in Health Act 2007?

It would appear that the regulations do not apply to a person who receives an exit payment from an admitted body in the LGPS and obtains a position in the public sector, nor to a person who receives an exit payment from a public sector body and obtains a position with an admitted body in the LGPS (even if, in either case, the admitted body received some, most or all of its funding from local government and / or other public sector bodies). Is that the intention?

### **Other issues:**

#### **Removal of the pro-rating of repayment due to lower salary**

The previous draft regulations and the consultation response referred to the fact that adjustments would be made where an employee returned on a reduced salary (see below):

“6.26 As outlined in the consultation document where an individual returns on a lower salary the amount of exit payment that will be recovered will be reduced proportionately by the difference in pensionable pay. The government will also reduce the portion of exit payment recoverable given the amount of tax that is paid. The government does not propose to allow the employer to recover the tax paid on the exit payment, as the complexity would likely be disproportionate and the emphasis of the policy is to ensure that the individual is not unduly compensated, not reduce the cost of exiting individuals for employers. Recovery of exit payments will not exceed an individual’s statutory entitlement.”

The fact that the repayment would be reduced if a person had reduced their working hours, but not if they had only been able to find a new job on reduced pay, appears to be an unfair approach and many authorities have expressed concerns about this.

#### **Implementation date**

It is not expressly clear from the draft regulations whether they will apply to exit payments made prior to the implementation date, thereby potentially requiring repayment of exit payments made in the previous 12 months, or whether the regulations will apply only to exit payments made after the implementation date. It is our view that they should only apply to exit payments made after the implementation date, as individuals receiving exit payments prior to then will not have been aware of the recovery regulations, or at least the exact requirements of them. Once the

regulations have been finalised, there needs to be a reasonable lead-in time to allow employers to prepare and understand the regulations and be in a position to fulfil their duty to be a “responsible employer” and inform employees who will be affected by the new policy of its requirements. This is particularly the case given its potential to have a significant financial impact on an individual’s circumstances.

**25 January 2016**  
**Workforce Team**  
**Local Government Association**