

Local Government Association

Statutory guidance on the making and disclosure of Special Severance Payments by local authorities

Comments and questions on the guidance

The Local Government Association (LGA) is a politically led, cross-party membership organisation that works on behalf of councils to ensure local government has a strong, credible voice with national government.

The LGA wishes to make the following comments and raise the following questions in relation to the guidance published for consultation. In order to provide references for our comments we have included, from page seven of this document onwards, a paragraph numbered version of the guidance. The comments below include those provided by individual local authorities following a request from ourselves.

Please address any questions on this response to Jeff Houston, Head of Pensions jeff.houston@local.gov.uk

1. Para 1 and onwards - where reference is made to 'redundancy' terms or payments we suggest this would be clearer as 'redundancy and severance'.
2. Para 1 – we would suggest special severance payments has capitals.
3. Para 2 – we would question that the guidance fits within a regime of continuous improvement.
4. Para 5 third bullet – the word truly is superfluous and should be removed.
5. Para 5 last bullet – there already exist requirements to publish some payments so could this say 'further clarify'.
6. Para 9 - contractual entitlements to severance payments are rare as councils must not fetter their discretion within policies made under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (the 2006 Regulations). Where a contractual entitlement does exist, it will normally be due to it being protected under the TUPE Regulations. The guidance should reflect this fact.

7. Para 10 - we are not sure that 'where in accordance with legislation' is necessary in this context as all such payments must be legal for the council to make.
8. Para 10 – the decision may be delegated (e.g. elected member may only be involved in payments above £100,000) so suggest 'elected members' is replaced with 'employers'.
9. Para 11(a) – we suggest 'Any' is removed as settlement agreement payments can also include payments which would not count as Special Severance Payments (SSP). Also, payments may be made not only to 'discontinue' legal proceedings but also to prevent legal proceedings. Therefore 'prevent or' should be added before 'discontinue'.
10. Para 11(e) - There should be no possibility of gifts – there is case law on the circumstances when gifts would be illegal and a local authority would never describe a payment as a 'gift'.
11. Para 11(f) – Please clarify what these could be.
12. Para 12(a) – the statement in brackets will need further clarification. For example, will a payment pursuant to a pay in lieu of notice clause be counted as a contractual entitlement? Further in what sense is 'compensation' being used in this para?
13. Para 12(b) – we would suggest this needs to be clarified to include strain costs made under reg 30(8) in respect of benefits under 30(5) and as a result of additional benefits granted under reg 31(b).
14. Para 12(b) - would a reg 31(a) additional pension or a Reg 16 employer funded Additional Pension Contribution (APC) be considered to be a SSP if the member left within a certain time period?
15. Para 13(b) -see earlier comment about contractual entitlements being rare.
16. Para 13(c) - this should probably refer to 'the employer's policy under the' rather than 'the requirements of'. Also, could you clarify the position of payments made under any 'exceptional clause' in a severance policy?
17. Para 13(c) - clarifies (as we understand it) that payments made in accordance with a council's redundancy policy under the 2006 Regulations will not constitute a Special Severance Payment. Again (as with 12(b) above it would be helpful, for absolute clarity, if the wording was extended to make clear that

this includes any “standard” pension strain costs arising from redundancy/efficiency retirements, under regulation 30(7) of the LGPS 2013 regulations as well as the 2006 Regulations actual pay and additional multiplier under the redundancy policy.

18. Para 13(e) - Payments made as part of the ACAS Early Conciliation process should be included and added to this paragraph. The ACAS Early Conciliation process is mandatory for a claimant in employment tribunal proceedings; they must go through the process and be issued with an Early Conciliation certificate before lodging a claim. The process gives an ACAS Early Conciliation Officer a window of opportunity (6 weeks maximum) to broker a settlement between the parties. A payment made under ACAS Early Conciliation should not be treated differently to a payment made under judicial or non-judicial mediation. Both are processes involving an independent party with a view to resolving and settling an actual or potential claim.
19. Para 13(f) - The guidance refers to payments in compensation for ill health as being exempt from the process. Further clarity is needed on what this actually means? If an employee is off long-term sick and asks to discuss an exit, would any payment over and above their statutory entitlement trigger the need to use the guidance? Similarly, would payments made to resolve a personal injury claim involving the exit of an employee on ill health grounds be counted as an SSP, or is any payment relating to ill health exits exempt?
20. Para 16 bullet points- there are also equalities issues which need to be included in the list.
21. Para 17 first bullet - suggest adding ‘or other’ after tribunal.
22. Para 17 second bullet - presumably this refers to payments made ‘solely’ to avoid the actions listed?
23. Para 17 third bullet - private sector practice is significantly varied and will include examples of much higher payments as well as lower. This would be difficult to achieve in any meaningful way.
24. Para 17 fourth bullet – we would suggest ‘concerning those complaints’ is added after ‘whether cases’. Also ‘so far as able’ should be added before ‘Manage conflicts’.
25. Para 19 – This point also relates to practice in respect of public health functions where local authority employers have been asked to consider amending their 2006 Regulations discretionary compensation policies to

recognise past service with an NHS employer, in order to aid recruitment and retention. Depending on what the view is on whether a SSP includes non-standard payments under those policies, we suggest that something like the following could be added to para 19: ‘Authorities may also consider that a Special Severance Payment is appropriate in circumstances where to help recruitment and retention an employee had been told that a higher severance payment might be available, which would be based on past service with another non-Modification Order employer’. In all cases though where a local authority chooses to recognise past service with another employer, or to overlook a break and service, for the purposes of calculating a severance/redundancy payment, provision for that would have to be set out in the authority’s policy under the 2006 Regulations. If not the payment in respect of that would be ultra vires.

26. Para 21 – we would suggest you replace ‘winning’ with ‘successfully defending’.
27. Para 22 –the proposed wording is too specific and does not allow for the particular circumstances and local arrangements. Further, the wording appears to now require the approval of both the Chief Executive and the Leader. Local authorities have expressed concerns with this proposal, and in particular the Leader’s involvement. This is because under s.101 of the Local Government Act 1972 functions can be delegated to a committee, sub-committee or officer. The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 provide that s.112 of the Local Government Act 1972 (appointment of staff) is a council-side function which is interpreted to include all staff matters. That means it is governed by s.101 and cannot be dealt with by a member of the executive. Therefore, the Leader does not have the power to make such staffing decisions.
28. In any event, other considerations in regard to the process currently set out in para 22 are:
- The process may take longer with the additional approval stages
 - Payments may be rejected due to lack of understanding of some of the complex HR/legal implications.
 - The Leader isn’t an employee and councillors are not normally involved in such detailed operational decision making. A further consideration with regard to the Leader approval is potential concerns around confidentiality and data protection.

- Severance payments, mainly settlement agreements, will become more high profile due to the nature of the proposed approval process.
- Difficult and prolonged processes will potentially take longer, firstly if approval is required at Chief Executive and Leader level and, secondly, if approval at these levels is not given which then has the potential consequence of more costs being incurred through employees remaining on suspension or sick pay.
- Managers and colleagues may be adversely impacted if difficult cases become more high profile, prolonged and increased time is spent managing individual situations. In the event that a resolution through settlement becomes less likely, then any current processes, e.g disciplinary or performance will need to continue and this also has the possibility of adversely impacting on the ability to recruit to a role currently held by an employee. That may adversely impact service delivery.
- It is likely that the number of claims going to employment tribunal will increase if they're not able to be settled due to protracted and inappropriate approval processes.

29. Para 24 – capitals for Monitoring Officer (consistency with para 25).

30. Para 25 – ‘close interest’ needs further clarification – should they be part of the sign off process?

31. Para 26 – disclosure requirements are vague – e.g. should these be itemised or totalled?

32. The guidance references the CIPFA guidance – In many cases councils will already have a robust protocol in place based on the CIPFA guidance on staff severance agreements. This guidance is designed to ensure there is a consideration of value for money (and all other relevant matters) before any payments are made. The detailed reasoning and record of amounts is appropriately documented should the need arise for later scrutiny. Currently, this may be via prior approvals of several senior employees (or their trusted delegates).

33. Any severance payments would therefore already be carefully scrutinised against a set of criteria from CIPFA and as such these additional proposals appear to be an unnecessary further burden for compliant local authorities. We would also suggest it adds to the misconception that public sector ‘pay offs’ are always large, and so need further scrutiny and restriction, which is not the case in our experience.

34. If the guidance does go ahead, clarity around the status or revocation of the current [CIPFA guidance on accounting for severance payments](#) would be very welcome so that local authorities are acting and recording in accordance with the correct set of rules. At a time when local authorities are under ever increasing financial pressures, it would be a backwards step to further delay and bind settlement agreements with more processes involving ever more senior employees without the necessary background/training as there is with the current system (i.e. professional legal advice). Ultimately, it can be in the best interests of all parties, and the taxpayer, to reach an agreement with an employee to exit, thereby allowing the council's managers and operational employees to do the important work that needs to be done, and to recruit and fill job roles.

Statutory guidance on the making and disclosure of Special Severance Payments by local authorities

Introduction

1. Most public sector workers enjoy statutory and contractual redundancy terms that are significantly better than the minimum statutory redundancy entitlement and are often higher than the value of redundancy payments made in the private sector. The Government is of the view that paying additional, discretionary sums on top of these entitlements (“special severance payments”) do not usually provide good value for money or offer fairness to the taxpayers who fund them and so, should only be considered in exceptional cases.
2. This guidance forms part of the best value regime. The best value duty, as set out in section 3 of the Local Government Act 1999 (“the 1999 Act”), provides that “A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”. The best value duty is relevant to local authority duties to deliver a balanced budget (Part 1 of the Local Government Finance Act 1992), provide statutory services (including adult social care and children’s services) and secure value for money in spending decisions. This will include decisions to make Special Severance Payments.
3. Authorities subject to the best value duty (termed “best value authorities”) are defined in section 1 of the 1999 Act. A list of these bodies can be found on page 6 of this guidance.
4. This guidance also sets out the Government’s position on the use of Special Severance Payments made by local authorities.
5. The purpose of this guidance is to:
 - Set out the Government’s view that Special Severance Payments do not usually represent value for money and should only be considered in truly exceptional circumstances
 - Set out the criteria employers should consider in the exceptional circumstances in which it may be appropriate to make a Special Severance Payment
 - Give examples of the truly exceptional circumstances in which Special Severance Payments may be appropriate

- Clarify the disclosure and reporting requirements for Special Severance Payments.
6. Redundancy payments can be an important mechanism to allow employers to reform and react to new circumstances in the workplace, but employers have a responsibility to ensure that Special Severance Payments are only made when there is a clear, evidenced justification for doing so.
 7. They should also ensure that all relevant internal policies and procedures have been followed and all alternative actions have been fully explored and documented.
 8. In the exceptional circumstances where it is decided that a Special Severance Payment should be paid, it is the responsibility of both individual employers and sponsoring departments to ensure their Special Severance Payments arrangements are fair, proportionate, lawful and provide value for money for the taxpayer.

Chapter 1 – What is a special severance payment?

9. In the context of this guidance, Special Severance Payments are payments made to employees, officeholders, workers, contractors, and others outside of statutory, contractual or other requirements when leaving employment in public service. Employers may sometimes consider making such a payment in situations where the individual concerned resigns, is dismissed, or agrees a termination of contract. Which types of payments are Special Severance Payments will vary according to an employees' particular circumstances, and therefore the examples below are illustrative only.
10. It is established case-law¹ that such payments, where in accordance with legislation, may only be made where there is a convincing case that they are in the interests of taxpayers. Local authorities may not be generous at the expense of taxpayers and must genuinely consider payments to be in the public interest. In taking decisions elected members must make all proper enquiries and consider all available material that can help in coming to a decision.

¹ *In Re Hurlle-Hobbs's Decision (1944) 1 All E.R. 249*

11. The following types of payments are likely to constitute Special Severance Payments:

- a) Any payments reached under a settlement agreement between the employer and employee to discontinue legal proceedings without admission of fault;
- b) The value of any employee benefits or allowances which are allowed to continue beyond the employee's agreed exit date;
- c) Write-offs of any outstanding loans;
- d) Any paid special leave, such as gardening leave;
- e) Any honorarium payments or gifts;
- f) Any hardship payments;
- g) Any payments to employees for retraining related to their termination of employment

12. The following types of payments may constitute Special Severance Payments, depending on the terms of the individual's contract, relevant statutory provisions, any non-statutory applicable schemes and other relevant terms and conditions:

- a) Pay or compensation in lieu of notice (depending on the contractual basis for its payment);
- b) Pension strain payments arising from employer discretions to enhance standard pension benefits;

13. The following do not constitute Special Severance Payments:

- a) Statutory redundancy payments;
- b) Contractual redundancy payments, whether applicable to voluntary or compulsory redundancy, and whether agreed by collective agreement or otherwise
- c) Redundancy payments made in line with the requirements of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006;
- d) Payment for untaken annual leave;

e) Payments ordered by a court or tribunal or agreed as part of a judicial or non-judicial mediation;

f) Payments made to compensate for ill-health, injury or death of the worker.

Chapter 2 - Considerations for councils on potential Special Severance Payments

14. This Chapter provides guidance on relevant considerations for English local authorities in relation to making Special Severance Payments.

15. Local authorities must comply with the duty of Best Value explained in the introduction. In considering whether it is appropriate to make a Special Severance Payment, the Government expects local authorities to consider whether such a payment would be a proper use of public money.

Economy

16. Councils should be able to demonstrate their economic rationale behind proposed Special Severance Payments including consideration of:

- whether there is any feasible possibility of exiting the individual at a lower cost. Only where there is no such possibility should a Special Severance Payment be considered;
- how the exit payment will be perceived by the public and whether it is in line with the duty to manage taxpayers money appropriately;
- what alternative use could be made of that expenditure. All Special Severance Payments necessarily reduce the funds that would otherwise be available to deliver important public services;
- the setting of any potential precedent (e.g. where a Special Severance Payment is made to certain employees and not others);
- evidence for additionality, i.e. that those offered Special Severance Payments would not have, under any circumstances, been willing to leave with their statutory and contractual benefits alone.

Efficiency and effectiveness

17. In considering the impact of Special Severance Payments on efficiency and effectiveness, local authorities should:

- Seek legal advice on the prospects of successfully defending an employment tribunal claim, if an employee were to take a legal route to appeal any grounds of their employment being terminated. The chance of success and the costs likely to be incurred should be noted and weighed up against the costs of making a Special Severance Payments;

- Ensure that these payments are not used to avoid management action, disciplinary processes, unwelcome publicity or avoidance of embarrassment;
- Consider aligning with private sector practice, where payments are typically less generous. This is important given the added duty in the public sector to prudently manage taxpayers' money;
- Manage conflicts of interest to ensure that individuals who are the subject of complaints play absolutely no role in deciding whether cases should be settled from public funds.

Chapter 3 - Exceptional circumstances in which it may be appropriate to consider making Special Severance Payments

18. There may be exceptional circumstances where the existing statutory or contractual entitlements, or both, are insufficient to facilitate an exit or to offer sufficient compensation for loss of employment or office. This can apply to office holders as well as staff. These circumstances, which we expect to be truly exceptional and provide value for money, may be taken into account by local authorities in deciding whether or not to make a Special Severance Payment.
19. Authorities may consider a Special Severance Payment in order to set aside what would otherwise be a reduction in entitlement caused by a break in continuity of service (e.g. where a member of staff has taken a break in service to accompany their spouse on military service overseas).
20. Authorities may also consider a Special Severance Payment in order to settle disputes, where it can be properly demonstrated that other routes have been thoroughly explored and excluded. After receiving appropriate professional advice, it may then possibly be concluded that a special severance payment is the most suitable option and prudent use of public money.
21. Those approving a Special Severance Payment related to a settlement agreement should be provided with appropriate evidence that attempts were made to resolve disputes before they escalated to a legal claim. They should also bear in mind that even if the cost of defeating an apparently frivolous or vexatious claims will exceed the likely cost of that settlement to the employer, it may still be desirable to take the case to formal proceedings. This is because winning such cases will discourage future frivolous or vexatious claims and demonstrate that the council does not reward such claims.

Chapter 4 - Accountability and disclosure

Accountability

22. The Government expects that any Special Severance payments should be personally approved and signed off by the Chief Executive Officer (CEX), with a clear record of the Leader's approval and that of any others who have signed off the payment.
23. A system of legal duties also requires councillors to spend public money with regularity and propriety. Under section 151 of the Local Government Act 1972, "every local authority shall make arrangements for the proper administration of their financial affairs and shall secure that one of their officers [the section 151 officer or Chief Finance Officer] has responsibility for the administration of those affairs". The section 151 officer has an important role in holding councils to account and has duties to alert councillors and the auditor in the case of unlawful expenditure.
24. This role is complemented and reinforced by authorities' duty under section 5 of the Local Government and Housing Act 1989 to appoint a monitoring officer, who must report to the council when any proposal, decision or omission is likely to lead to contravention of any enactment, rule of law or statutory code.
25. As part of their duties, an authority's s151 Officer, and where appropriate, the Monitoring Officer, should take a close interest in and be able to justify any special severance payments that are made by that authority and in particular any payments made that are not consistent with the content of this guidance.

Disclosure

26. Clear and transparent reporting on exit payments is essential to make available better data on the number and level of exit payments made in local government. The availability of data on exit payments in the public domain by local authorities enables local accountability as well as effective management of public money and public confidence. In 2015, the Local Government Transparency Code was issued to increase democratic accountability through open access to information².

² Local Government Transparency Code 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408386/150227_PUBLICATION_Final_LGTC_2015.pdf

27. MHCLG have initiated a new annual collection of data on exit payments (initially collecting data from 2014 – 2021) and the results will be published into official

statistics and made available on the gov.uk website, subject to any necessary anonymisation or redaction to comply with data protection law. This data will help others to assess the number and level of exit payments made in local government.

28. Section 38 of the Localism Act 2011 requires the council to produce and publish a pay policy statement, which must include the authority's policies on termination payments. Further information on what the Localism Act 2011 requires can be found in existing guidance³.

3 Openness and accountability in Local Pay: Guidance under Section 40 of the Localism Act 2011
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85886/Final_Supplementary_Pay_Accountability_Guidance_20_Feb.pdf

29. In addition, Regulation 60 of the Local Government Pension Scheme Regulations 2013 requires local authorities to prepare a statement of its policy in relation to the exercise of the discretion to enhance pension benefits under Regulations 16(2)(e) and 16(4)(d) (funding of additional pension), Regulation 30(6) (flexible retirement), Regulation 30(8) (waiving of actuarial reduction); and Regulations 31 (award of additional pension)

30. As well as following existing guidance⁴ on reporting exit payments councils should also disclose in their annual reports all redundancy payments, pension fund strain costs and other special severance payments made in consequence of termination of employment or loss of office (but excluding payments on death or ill-health retirement). All reporting should be anonymised and comply with data protection law.

4 CIPFA, Code of Practice on Local Authority Accounting in the United Kingdom 2020/21

List of bodies this guidance applies to

- an English local authority, including
 - a county council in England, a district council or a London borough council
 - the Council of the Isles of Scilly;
 - the Common Council of the City of London in its capacity as a local authority;
 - the Greater London Authority so far as it exercises its functions through the Mayor.
- a National Park authority [for a National Park in England]
- the Broads Authority
- the Common Council of the City of London in its capacity as a police authority;

- a fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies, and a [metropolitan county fire and rescue authority in England]
- the London Fire Commissioner
- an authority established under section 10 of the Local Government Act 1985 (waste disposal authorities);
- an Integrated Transport Authority for an integrated transport area in England;
- an economic prosperity board established under section 88 of the Local Democracy, Economic Development and Construction Act 2009;
- a combined authority established under section 103 of that Act;
- a sub-national transport body established under section 102E of the Local Transport Act 2008;
- Transport for London