Exit cap information for LGPS employers

This guide provides updated information for employers on the position for redundancy and business efficiency exits now that the exit cap has been disapplied. It applies to exits of LGPS members who are aged 55 or over.

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Exit cap disapplied and revoked

On 12 February 2021, HM Treasury [HMT] published the Exit Payment Cap Directions 2021 [the Directions]. The Directions disapply regulations 3, 9 and 12 of the Restriction of Public Sector Exit Payment Regulations 2020 [the 2020 Regulations] with immediate effect. This means the exit cap does not apply to exits that take place on or after 12 February 2021.

HMT has provided further information in the Restriction of Public Sector Exit Payments: Guidance on the 2020 Regulations [the Guidance]. HMT confirms in the Guidance that:

> "the Government has concluded that the Cap may have had unintended consequences and the Regulations should be revoked. HMT Directions have been published that disapply the Cap until the Regulations have been revoked."

The Welsh Government has confirmed that, in their view, the exit cap no longer applies to exit payments made by a devolved Welsh authority.

On 25 February 2021, The Restriction of Public Sector Exit Payments (Revocation) Regulations 2021 [the Revocation Regulations] were made. These regulations confirm the effect of the Directions and come into force on 19 March 2021. The Revocation Regulations are not retrospective, but they do contain an obligation for employers to make payments to, or on behalf of a former employee, that they were previously unable to pay because of the exit cap. This includes payments that would have been made to a public service pension scheme. Interest for late payment is payable in accordance with the Judgment Debts (Rate of Interest) Order 1993.

Exits between 4 November 2020 and 11 February 2021

You will need to review any redundancy and business efficiency exits that occurred between 4 November 2020 and 11 February 2021 where you were not able to meet the full strain cost because of the exit cap.

The Revocation Regulations require you to pay the difference between the amount paid to, or in respect of the employee, and the amount that would have been paid had the cap not applied. Had the cap not applied, you would have paid the full strain cost requested by the LGPS administering authority in these cases.

Actions to take now

1. **Identify any exits between 4 November 2020 and 11 February 2021** where you were not able to pay the full strain cost because of the exit cap.

2. **If you applied for a mandatory or discretionary waiver** – this is no longer needed. You must pay a full strain cost and you should notify your LGPS administering authority accordingly.

3. **You must make provision to pay a full strain cost to the LGPS administering authority** - you may wish to send a list to them to let them know which former employees are affected. You should ask them for the amount due and the date that they would have invoiced you for payment, had the cap not applied. You need this information to calculate any interest due.

4. **Other termination payments** – you may wish to review other termination payments that were restricted due to the exit cap in line with your policy, eg discretionary compensation pay. You may also be approached by employees seeking additional amounts where such termination payments were made. The LGA recommends that local authorities consider requests from employees in line with their published policies and their own legal advice. Other employers may wish to take the same approach.

How to calculate interest for late payment

The interest due on payments by employers under the Revocation Regulations is 8% per year. The cash amount of interest should be calculated as follows:

1. Work out the yearly interest: take the amount due and multiply it by 0.08 (which is 8%)
2. Work out the daily interest: divide the yearly interest from step 1 by 365 (the number of days in a year)
3. Work out the total amount of interest: multiply the daily interest from step 2 by the number of days the payment is overdue.

Payments to an employee

For exit payments payable to the employee, the due date is the date they received the original capped exit payment. This is normally the day after leaving employment.

Example

The employee would have received an additional £30,000 as a discretionary compensation payment had the cap not applied. This is calculated in line with the employer's published policy on discretionary termination payments.

The original discretionary payment was made on 5 November 2020 and the balance is paid on 5 March 2021.

5 November 2020 to 4 March 2021 = 120 days

1. £30,000 × 0.08 = £2,400
2. £2,400 ÷ 365 = £6.58
3. £6.58 × 120 = £789.60

Interest due is £789.60

Payments to the pension fund

Interest on strain cost payments is payable from the date the LGPS administering authority would normally have invoiced you for payment had the cap not applied. This will vary depending on how frequently your LGPS administering authority invoices for strain cost payments. Your LGPS administering authority should provide you with the date interest is payable from when it notifies you of the strain cost payable.

Example

The employee was made redundant on 5 November 2020. Had the cap not applied, a strain cost of £150,000 would have been payable. The LGPS administering authority normally invoices for strain cost payments at the end of each quarter, so would have issued an invoice on 31 December 2020. The employer pays the strain cost on 5 March 2021.

31 December 2020 to 4 March 2021 = 64 days

1. £150,000 × 0.08 = £12,000
2. £12,000 ÷ 365 = £32.88
3. £32.88 × 64 = £2,104.32

Interest due is £2,104.32.

If you paid a cash alternative payment

The Scheme Advisory Board (SAB) recommends that you seek to recover the cash alternative payment made to the employee. This view is based on legal advice provided by Eversheds Sutherland. SAB accepts that it may not be possible, in all circumstances, to recover the cash alternative. This risk was highlighted in SAB's commentary of 30 October 2020 and earlier versions of this information note – it was the reason for recommending that you delay payment of the cash alternative.

Local authorities may also wish to refer to the LGA's guidance on the exit cap. The LGA has stated that, in the interests of effective use of public money and the reputation of the sector, it expects councils that have made cash alternative payments to seek recovery of the amounts paid.

You can read SAB's commentary on the legal advice provided by Eversheds Sutherland and the commentary of 30 October 2020 on the Public Sector Exit Payments page of the SAB website.

Background to the cash alternative payment

We previously advised you of the conflict between the 2020 Regulations and the LGPS regulations. The LGPS regulations require that an employee age 55 or over, who is made redundant or leaves due to business efficiency, must take payment of an unreduced pension. Before they were disapplied, the 2020 Regulations prevented the employer from paying the full strain cost where the total exit payment was over £95,000.

In a letter from MHCLG to councils and LGPS administering authorities dated 28 October 2020, MHCLG recommended that LGPS administering authorities should not pay unreduced benefits and that employers should pay the cash alternative to the member in accordance with regulation 8 of the 2020 Regulations. The cash alternative was equal to the amount of capped strain cost the employer could pay.

The SAB sought legal advice on the conflict between the 2020 Regulations and the LGPS Regulations. The SAB recommended that administering authorities offer a deferred or fully reduced pension and that employers delay paying a cash alternative payment until the legal uncertainty was resolved.

On 4 March 2021, MHCLG issued a further letter to councils and LGPS administering authorities withdrawing the letter of 28 October 2020.

Exits from 12 February 2021

The exit cap does not apply to exits that take place on or after 12 February 2021; however, the Government has confirmed it remains committed to the policy and will introduce legislation to tackle unjustified exit payments.

In addition, we understand that MHCLG plans to introduce further changes to exit payments, following the recent MHCLG consultation on reforming local government exit pay, at the same time as the exit cap is re-introduced. MHCLG confirmed in the letter dated 4 March 2021 that this consultation is considered closed. They will consult again on further reforms to exit payments before any changes are made.

The Government has not confirmed when the exit cap or further reforms will be introduced, although we think it is unlikely to happen in the next few months due to the time it will take to consult and make changes to legislation. You will need to consider both when undertaking future workforce reforms. We advise that you include appropriate warnings when providing employees with information on their potential exit packages.

However, for the time being if an LGPS member exits due to redundancy or business efficiency at age 55 or over on or after 12 February 2021:

- the member is entitled to and must take an unreduced pension under regulation 30(7) of the LGPS Regulations 2013
- you must pay the strain cost associated with the early payment of that pension to the administering authority
- you must not make a cash alternative payment to the member nor to the administering authority on behalf of the member.

You must not make a cash alternative payment in respect of any redundancy or business efficiency exits that take place on or after 12 February 2021.

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