

Public sector exits – your chance to input to HM Treasury consultation

This month, HM Treasury issued a consultation on Administrative Control Process for Public Sector Exits with draft guidance. They're proposing to introduce an expanded approvals process for employee exits and special severance payments, and additional reporting requirements. If approved, the proposals will impact public sector bodies and those that do not have a specific right to make exit payments.

26 August 2022

This month, HM Treasury issued a [consultation on Administrative Control Process for Public Sector Exits](#) with [draft guidance](#). HM Treasury are proposing to introduce an expanded approvals process for employee exits and special severance payments, and additional reporting requirements. If approved, the proposals will impact 'Central Government' public sector bodies and those that do not have a specific right to make exit payments.

As a leading legal advisor to the public sector, Browne Jacobson will be responding to the HM Treasury's consultation, and we welcome your input to ensure our responses are authoritative and compelling, and will positively influence the consultation process.

Background

Anyone who has been involved with the termination of employment and/or loss of office of employees will fully appreciate the complexities of the subject of exit payments – how they're made up and the process of approval. The challenges are not necessarily because exit payments are an intellectually difficult subject matter, but we, and our clients, find that the lack of clear statutory guidance is the first hurdle that must be overcome. As any officer in a local authority seeking the approval of the appropriate committee, Cabinet or Council, or any organisation/department/body seeking HM Treasury approval, will attest, the second hurdle to overcome is the conflict; or, should we say, the balance that must be found between being commercial, pragmatic and exercising reasonable discretion whilst ensuring that one can demonstrate that there is a clear value for money argument in exiting the employee, relative to any viable alternatives identified.

To demonstrate the lack of clarity in statutory guidance, we refer to the latest [Statutory guidance on the making and disclosure of Special Severance Payments by local authorities in England](#) (published on 12 May 2022).

We appreciate that the approval process for local authorities is different to the process for central government. However, the types of exit payments that are taken into consideration when calculating the value of an exit and whether the respective threshold for approval has been met are similar. Furthermore, given it is the public purse that funds these exits, it must be right that there is consistency in:

- thresholds;
- ensuring payments that are fair and proportionate;
- ensuring that there is appropriate and meaningful scrutiny of high value exits; and
- accountability

to ensure greater public confidence in the use of exit payments in the public sector.

The latest statutory guidance for local authorities has highlighted several anomalies in the exit payments regime and the concern is that these will be replicated in the process for central government. To bring this to life, we set out below two examples.

Example 1: Settlement agreements

The statutory guidance for local authorities provides that 'any' payments reached under a settlement agreement to 'discontinue' legal proceedings are 'likely' to constitute a Special Severance Payment, whilst payments made as part of the Advisory, Conciliation and Arbitration Service early conciliation process do not. This raises several issues including:

- the additional wording relating to settlement agreements goes beyond the public sector exit payments guidance in applying to 'any' payments;
- the use of 'discontinue' suggests that legal proceedings must in fact have been commenced and does not cover settlements before that stage is even reached; and
- it is not clear to us the logic for limiting the use of Special Severance Payments to pre-claim only. At this early stage, it is often not possible to accurately assess the risks of any claim as the details are not particularised.

The draft guidance for central government differs in that 'payments reached under a settlement agreement' are 'likely' to constitute special severance payment when they are 'in excess of contractual commitments', however, pay in lieu of notice 'may' constitute a special severance payment, and there is no reference to the ACAS Early Conciliation process.

Example 2: Pension strain costs

For local authorities under the Local Government Pension Service, once an employee, age 55 or over, is made redundant or leaves by reason of business efficiency, they have a statutory right to an unreduced pension. This statutory right is stated to 'not' constitute a special severance payment notwithstanding the fact that the pension cost may be significant and there is no definition of 'business efficiency'.

In the draft guidance for central government, 'pension top up payments' 'may' constitute a contractual or a special severance payment and therefore may need to be included when calculating whether the threshold has been met for approval.

Your feedback about the challenges (legal, commercial and practical) you have faced, or that you foresee, would be most welcome.

How to respond

Should you wish to share your opinions with us, you may do so on a confidential basis. Your name and employer will not be disclosed by us in our response to the consultation.

The consultation closes on 17 October 2022, and we ask for your input to be provided to us by email to Kerren.Daly@brownejacobson.com on or before Friday, 7 October 2022.

We will be facilitating a Chatham House roundtable discussion on 4 October to discuss the questions posed in the consultation document and provide an opportunity to discuss any other issues that you may have identified or come across that you consider is relevant to the consultation. [Click here](#) to register for this event.

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