



BRIEFING PAPER

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Public Sector Exit Payment Cap

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Summary

In 2016, the *Small Business, Enterprise and Employment Act 2015* was amended to give the Treasury the power to make regulations to prohibit prescribed public sector bodies from making exit payments in excess of a £95,000 cap. The Government said that the measure was designed to prevent large exit payments to “public sector fat cats”, although bodies representing public sector workers expressed concerns that it could hurt lower-paid staff, especially those with long service.

Following a consultation in 2019 the Government laid the draft *Restriction of Public Sector Exit Payment Regulations 2020* before Parliament in July 2020. The Regulations were approved by both Houses of Parliament in September and were made (signed into law) on 14 October. They come into force on 4 November 2020.

The Regulations will prevent relevant authorities from making exit payments in excess of the £95,000 cap. “Relevant authorities” are defined as public sector bodies listed in the legislation. It captures the majority of the public sector. “Exit payments” are payments made to employees on termination of employment or office holders who leave office.

Under the Regulations various payments count towards the exit payment cap. These include redundancy payments, severance payments, settlement agreements and ‘pension strain’ payments (i.e. additional employer pension contribution to enable an individual to take early retirement on an unreduced pension). It is the total of all exit payments that cannot exceed £95,000.

There are a number of payments that do not count towards the exit payment cap. These include payments for death in service, payments for accidents or injuries, certain payments relating to firemen and judicial pension schemes and payments pursuant to a court order.

Crucially, while the regulations prohibit the relevant authority from *making* the payment, they do not alter the employee’s *entitlement* to those payments. Some stakeholders, like the Employment Lawyers Association, have suggested that this could lead to legal disputes. The British Medical Association has sought permission to judicially review the Regulations on the basis that they unlawfully interfere with workers’ legal entitlements.

A number of stakeholders, particularly local government employers and staff representatives, expressed concern about the inclusion of ‘pension strain’ payments in the cap and how this would affect long-serving lower earning employees.

Concern has also been expressed that payments under settlement agreements – contracts that end a legal dispute – count as exit payments. Stakeholders and a number of MPs and peers suggested that this could encourage parties to litigate rather than settle.

Under the 2015 Act, Ministers have the power to relax the cap in certain cases. The Regulations also give this power to local authorities, provided they act in accordance with Treasury Directions or otherwise with the consent of the Treasury.

The Government has said it will publish guidance and Directions before the legislation comes into force. Draft guidance and Directions that accompanied the 2019 consultation said that in certain ‘mandatory cases’ local authorities have to waive the cap. This included settlement agreements relating to whistleblowing or discrimination cases. In addition, in certain ‘discretionary cases’ local authorities could seek permission from the Treasury to waive the cap. This included cases where the cap could cause undue hardship or inhibited workplace reforms.

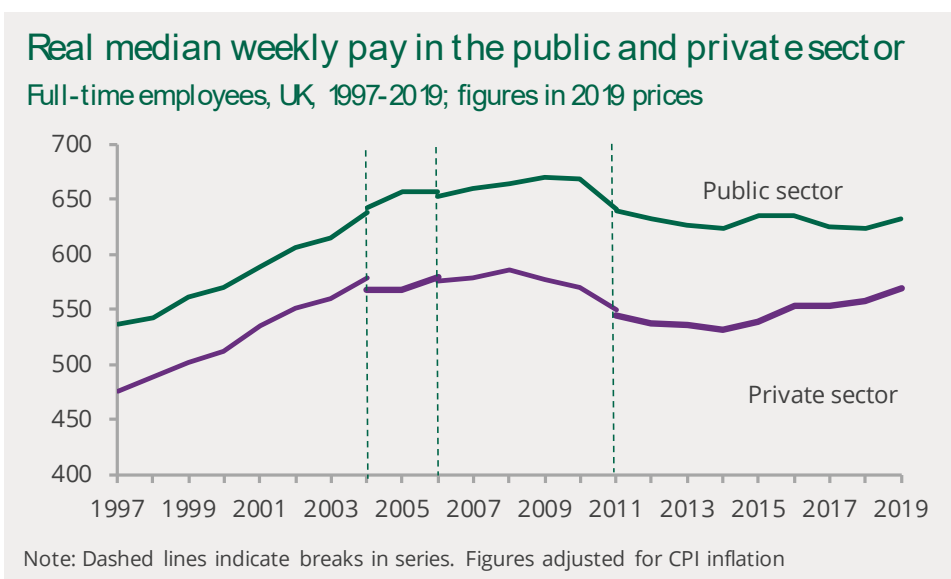
1. Background

1.1 Public sector pay

The pay for many public sector workers is set in light of recommendations from Pay Review Bodies, covering pay in the armed forces, NHS; the Prison Service; teachers; senior public sector workers; the police; and the National Crime Agency. The Pay Review Bodies are issued with remits from the Government and report annually. The remits restate current Government pay policy, and it is within these constraints that the Pay Review Bodies issue their recommendations.

Average pay is higher in the public sector than in the private sector: at April 2019, median weekly earnings for full-time employees were £632 in the public sector compared to £570 in the private sector.¹ However, public sector workers tend to be older and more highly-educated than for the private sector as a whole, so after controlling for differences in workers' characteristics, the gap in pay is much smaller.²

The chart below shows the trend in median pay in both sectors since 1997, adjusted for inflation.



Source: ONS, [Annual Survey of Hours and Earnings](#), 2019

Changes between years may arise from changes to the composition of the public and private sector workforces, discussed further in Library paper [Public sector employment by parliamentary constituency](#).

1.2 Introducing an exit payment cap

Sections [153A-153C](#) of the *Small Business, Enterprise and Employment Act 2015* give the Treasury the power to make regulations to restrict exit payments to employees of prescribed public sector authorities, or holders of prescribed offices, to a value of £95,000. The provisions were inserted by the [Enterprise Act 2016](#) following a [public consultation](#).

¹ ONS, [Annual Survey of Hours and Earnings](#), 2019

² See [Public Sector Pay](#), Commons Library Briefing Paper CBP-8037, 3 May 2018

During the debate on Second Reading in the House of Commons, Sajid Javid, then Business Secretary, said that the purpose of the provisions were to prevent large exit payments being made to “fat cats” in the public sector:

Finally, the Bill will bring the public sector into line with private sector best practice on exit payments. Too many public sector fat cats are handed six figure pay-offs when they leave a job, which are often little more than a reward for failure. That is an insult to the hard-working taxpayers and business owners who finance them. The Enterprise Bill will end that practice.³

However, significant concern was expressed at the time that the cap would also impact lower-paid, long-serving public sector workers, particularly in the context of the ‘pension strain’ (see further below).⁴

The Government published [draft regulations](#) alongside what was then the *Enterprise Bill*. However, these regulations were never made.

Sections 153A-153C were [brought into force](#) in February 2017.

In April 2019, the Government launched another [consultation on implementing the public sector exit payment cap](#). It published another set of [draft regulations](#), a [schedule](#) of public sector bodies covered and accompanying [guidance](#).

The Government published a [response to the consultation](#) in July 2020 and laid draft regulations before Parliament.

The Explanatory Memorandum accompanying the Regulations said the Government expected the policy to lead to significant savings:

According to the annually published Whole of Government Accounts, exit packages over £100,000 amounted to £200 million in the 2017-18 financial year. The total of all exit packages in the same financial year was £900 million. Compulsory redundancies and other agreed departures such as voluntary redundancies are included within this total. This is the most recent data available. Whilst it is difficult to predict future workforce and redundancy trends, we expect the exit payment cap given effect by these Regulations to significantly reduce that amount. Any savings would fall to and remain with employers.⁵

The regulations apply to all bodies where employment and remuneration practices are the responsibility of the UK government. In relation to devolved bodies and workforces, decisions are for the relevant devolved government.⁶

³ [HC Deb 2 February 2016 vol. 605 c817](#)

⁴ See [Enterprise Bill \[HL\] 2015-16](#), Commons Library Briefing Paper CBP-7485, 26 January 2016

⁵ [Explanatory Memorandum to the Restriction of Public Sector Exit Payment Regulations 2020](#), para. 7.2

⁶ *Ibid* para 3.2.

2. Restriction of Public Sector Exit Payment Regulations 2020

The [Restriction of Public Sector Exit Payment Regulations 2020](#) were laid in draft before Parliament on 21 July 2020. The Regulations were subject to the draft affirmative procedure, meaning they had to be approved by Parliament before they could be signed into law.

The Regulations were debated in the Delegated Legislation Committee and in a Chamber debate in the House of Lords.⁷

Motions approving the Regulations were passed by the House of Lords on 23 September and by the House of Commons on 30 September.

The Regulations were made on 14 October and will come into force on 4 November 2020.

The speed at which the Regulations progressed through Parliament was a key area of concern for a number of stakeholders. In particular, stakeholders noted that there is a separate [ongoing consultation](#) on local government exit payments.⁸

The Government did not publish an equality impact assessment for the Regulations. In response to concerns expressed about this issue during the debate in the House of Lords, Treasury Minister Lord Agnew said the Government sought views on impact in the 2019 consultation:

Similarly, the noble Lord suggested that no equality impact assessment was undertaken. However, the Government did conduct and publish an assessment of the primary legislation. The previous impact assessment was linked to the 2019 consultation document. In addition, the 2019 consultation asked for comments and information related to impacts; an updated impact assessment has since been conducted based on the final regulations laid before Parliament and will be published in due course. We outlined this in the published consultation response.⁹

2.1 Cap on exit payments

The Regulations will prohibit a ‘relevant authority’ from making an exit payment in excess of the ‘exit payment cap’ to an employee leaving employment or an office-holder leaving office.¹⁰

The Regulations refer to “an exit payment” but the surrounding provisions and the guidance that accompanied the consultation make it clear that the cap is intended to apply to the total sum of exit payments.

The exit payment cap is defined as the amount specified in the 2015 Act: that is, £95,000. The Secretary of State does have the power to substitute a different cap.¹¹

⁷ [HC DL Committee 21 September 2020 c1](#) and [HL Deb 23 September 2020 c1896](#)

⁸ Local Government Association, [Briefing: Restriction of Public Sector Exit Payment Regulations 2020](#), September 2020

⁹ [HL Deb 23 September 2020 c1908](#)

¹⁰ Reg. 3, *Restriction of Public Sector Exit Payments Regulations 2020*

¹¹ Section 153A(9), *Small Business, Enterprise and Employment Act 2015*

In response to the 2019 consultation, the Local Government Association (LGA) expressed concern that the figure was not indexed or formally subject to regular review:

The LGA is also concerned that the cap will, over time, cause more and more individuals to be affected. It is evident that in the absence of indexation or any provision for review of the cap the £95,000 figure is already leading to an incremental increase in coverage. To demonstrate, the Small Business Enterprise and Employment Act set the figure for the cap: £95,000, in March 2015. To set the cap today at the equivalent to £95,000 in 2015 the limit would be around £105,000. Conversely, £95,000 today is closer to £87,000 in 2015.¹²

2.2 Meaning of 'relevant authority'

The Regulations only cover exit payments made by a 'relevant authority'. A relevant authority is any employer listed in Part 1 or any office listed in Part 2 of the Schedule.¹³

The Schedule captures a very broad range of public bodies: from government departments and local authorities to the BBC and NHS trusts. The [guidance that accompanied the 2019 consultation](#) said the Regulations are intended to cover all parts of the public sector, defined in accordance with [ONS classifications](#).

There are certain bodies which are not captured by the Regulations, including universities and further education colleges.

In the 2019 consultation the Government had proposed a "staged approach" where the Regulations would come into force for different public sector bodies at different times.¹⁴ However, in response to the consultation the Government said it had decided that the Regulations will come into force for all public sector bodies at the same time.¹⁵

The Regulations cover Scottish and Welsh bodies whose pay and terms are a reserved matter. In 2019, the Scottish Government imposed a £95,000 cap for devolved public sector bodies by [updating the Scottish Public Finance Manual](#).

2.3 Multiple exits

Where an employee receives exit payments from two or more relevant authorities within a 28-day period the cap applies to the total of those payments.¹⁶ The payments are taken to be made in chronological order. The guidance accompanying the 2019 consultation explained:

Where two or more relevant exits take place on separate days in any period of 28 consecutive days, the exit payments are treated as having been paid in chronological order for the purpose of

¹² Local Government Association, [Restricting exit payments in the public sector. HM Treasury consultation on implementation of regulations: LGA Response](#), June 2019, para. 10.3

¹³ Reg. 2, *Restriction of Public Sector Exit Payments Regulations 2020*

¹⁴ HM Treasury, [Annex C: Restriction of public sector exit payments: guidance on the 2019 regulations](#), July 2020, Section 2.

¹⁵ HM Treasury, [Public sector exit payments: Response to the consultation](#), July 2020, para. 3.11

¹⁶ Reg. 3(1)(b), *Restriction of Public Sector Exit Payments Regulations 2020*

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 28 days, authority B should not make an exit payment in excess of £45,000.¹⁷

Where a person leaves two relevant authorities on the same day, the Regulations list a number of ways in which the order of exit payments are to be determined, starting with their salary in descending order.¹⁸

Duty to of employees to inform

The Regulations require a person who receives an exit payment from a relevant authority to inform any other relevant authority they work for of this fact. They must tell the other relevant authorities when their employment ended, what type of exit payments they received and the total amount of their exit payment.¹⁹

The British Medical Association (BMA) have been particularly critical of this provision. In a briefing to MPs and peers it argued that the provision would be difficult for junior doctors:

This obligation would arise whenever a public sector worker moved employment from one public sector body to another – which, absurdly, in the case of junior doctors whose rotation system involves them moving from one NHS employer to another NHS employer (often with some frequency) would require them to report and request the money they are owed each and every time.

[...]

It is far from a straightforward exercise for a junior doctor to be able to reliably calculate the sum they are owed by their employer on exiting their employment and can often be particularly complex, e.g. because of premia payable for particular types of duties or work done at particular times – the administrative burden will be time consuming and unpaid. Indeed, Trusts have medical staffing departments with employees who are TCS specialists, using bespoke computer systems used to work out payments in accordance with the TCS rules.²⁰

2.4 Meaning of ‘exit payment’

The Regulations list a range of payments that will count towards the exit payment cap:

- Redundancy pay (statutory and contractual);
- Payments to reduce or eliminate an actuarial reduction to a pension on early retirement (‘pension strain’);
- Payments under settlement agreements;
- Severance pay or any ex gratia payment;
- Payments in the form of shares;

¹⁷ HM Treasury, [Annex C: Restriction on public sector exit payments: guidance on the regulations](#), July 2020, para 4.2

¹⁸ Reg. 4, *Restriction of Public Sector Exit Payments Regulations 2020*

¹⁹ Reg. 9, *Restriction of Public Sector Exit Payments Regulations 2020*

²⁰ BMA, [The Restriction of Public Sector Exit Payments Regulations 2020: Parliamentary briefing](#), September 2020

- Payments on voluntary exit;
- Payment in lieu of notice (except for three months' worth);
- Payments to extinguish a liability to pay money under a fixed-term contract; and
- Any other payment due as a result of termination of employment or loss of office.²¹

The Regulations also list a number of payments which will not count towards the cap:

- Payments for death in service;
- Payment for incapacity as a result of an accident, injury or illness.
- Payments relating to various Firemen's Pension Schemes;
- Payments relating to the Judicial Pension Scheme;
- Payments for unused annual leave; and
- Payments in compliance with an order from a court or tribunal.²²

A number of stakeholders have expressed concerns about certain payments that are included within the exit payment cap. This includes 'pension strain' payments and settlement agreements (see below).

There are certain circumstances in which the cap can be relaxed either by a Minister or by a local authority (see below).

Redundancy payments

Employees who have worked for their employer for two or more years have a right to statutory redundancy pay.²³ Statutory redundancy pay is [capped at a relatively low level](#). The maximum statutory redundancy pay an employee can receive is currently £16,140. Employees may have a right to enhanced redundancy pay under their contract.

The Regulations provide that a relevant authority must not reduce a statutory redundancy payment. If an exit payment being made to an individual exceeds the cap the authority must reduce other payments and ensure statutory redundancy pay is paid in full.²⁴

Entitlement to exit payments

It is important to note that while the Regulations prohibit relevant authorities from making exit payments in excess of the cap, they do not alter an employee's legal entitlement to the various payments. This could create challenging situations where an employee is entitled to a payment (under statute or contract) but the authority cannot pay it.

The [Draft Regulations published in 2016](#) contained a clause that a payee's entitlement would not be enforceable to the extent that the authority is prohibited from making the payment. However, no such clause exists in the current Regulations.

²¹ Reg. 5, *Restriction of Public Sector Exit Payments Regulations 2020*

²² Reg. 6, *Restriction of Public Sector Exit Payments Regulations 2020*

²³ Section 135, *Employment Rights Act 1996*.

²⁴ Reg. 7, *Restriction of Public Sector Exit Payments Regulations 2020*

In its response to the 2019 consultation the Employment Lawyers Association highlighted that the absence of such a clause in the current Regulations could lead to litigation:

We assume that the previous draft regulation still reflects the government's intention for the way the cap operates. We therefore consider that it would be beneficial for the current draft regulations to include a similar provision, in order to avoid potential litigation. In the absence of such a provision, if a public sector employer entered into an agreement to make an exit payment exceeding the cap, the agreement might still be enforceable (see, for example, [Gibb v Maidstone and Tunbridge Wells NHS Trust \[2010\] EWCA Civ 678](#); but see also [Mohamed v Alaga & Co \[2000\] 1 W.L.R. 1815](#), which held that a contract was illegal as it was entered into in contravention of subordinate legislation). This type of provision might also assist in relation to the retrospective nature of these regulations insofar as they apply to pre-existing contractual rights, although we note that SBEEA 2015 does not expressly authorise regulations curtailing such rights.²⁵

2.5 Pension strain

Pension 'strain' is the term used to refer to payments made by an employer, as an additional contribution to an individual's pension in respect of their exit from that employment. This can enable an individual to take early retirement on an unreduced pension rather than a lump sum redundancy payment. The effect is that the individual receives greater pension than they would otherwise be entitled to.

The context for this is that a pension drawn early (after minimum pension age but before the scheme's 'normal pension age') will generally be 'actuarially reduced' to reflect the fact that it will be in payment for longer.²⁶ However, the rules of some public service pension schemes allow an unreduced pension to be drawn early where an individual exits their employment for reasons of redundancy, business efficiency, or as part of a voluntary exit scheme. In this scenario, the pension scheme pays the pension at its actuarially reduced rate and the employer tops it up to the full amount.²⁷

2019 consultation

The Government consulted on including these additional 'pension strain' costs to employers in the scope of the cap on public sector exit payments, unless specifically exempted.²⁸

In July 2020, the Government said a "significant amount" of respondents to the consultation had expressed concerns about this

²⁵ Employment Lawyers Association, [HM Treasury Consultation Restricting Exit Payments in the Public Sector: Consultation on Implementation of Regulations Response from the Employment Lawyers Association](#) ('Response from the Employment Lawyers Association'), 3 July 2019, p. 17

²⁶ [Public service pension age – 2015 onwards](#), Commons Library Briefing Paper, CBP 6581, December 2019

²⁷ HM Treasury, [Restricting exit payments in the public sector: consultation on implementation of the regulations](#), April 2019, para 2.2. This can take other forms. For example, the Fire and Rescue Authorities have discretion to lift the restriction on lump sum payments from Firefighters' Pension Scheme 1992

²⁸ *Ibid*; [Firefighters Pension Scheme Order 1992](#), rule B7

proposal, relating in particular to the impact on long-serving, lower earning employees and the potential for it discriminatory to older workers.²⁹ However, the Government believed it was “right to include all payments related to exit within the scope of the cap.” It said the option of employer-funded early retirement was often the most expensive element of an exit payment and was ultimately funded by the taxpayer.³⁰ The cap would “not affect any pension that a person has earned through their years of service or have any impact on accrued pension rights.”³¹

Following its consultation, the Scottish Government decided not to include pension strain payments in any future cap.³²

Regulations

The Regulations include ‘pension strain’ payments within the definition of exit payments for the purpose of the cap, subject to limited exemptions.³³ They provide for exemptions, which include the ability for Fire and Rescue Authorities to lift restrictions on certain lump sum payments.³⁴

Where the pension strain cost is capped, the expectation is that pension scheme rules will provide members with options to use their own monies to make up any shortfall, or to take a partially reduced pension.³⁵

In debate, Treasury Minister, Steve Barclay, said it had been agreed that a waiver would apply to the pensions of Nuclear Decommissioning Authority staff. In addition, Ministers would have discretion to waive it in certain circumstances, such as where “implementing the cap would go against the original principles and result in hardship.”³⁶ He said that “in the vast majority of cases, the cap will have no effect on the exit package of an individual, because individuals retain any right to receive an unreduced pension, provided their overall exit payment falls below the cap of £95,000, which applies in most cases.”³⁷

Local Government

Members of the Local Government Pension Scheme over the age of 55 and with more than 2 years’ membership who are made redundant, may immediately receive unreduced pension benefits. Other public

²⁹ HM Treasury, [Restricting public sector exit payments: Government response to consultation](#), July 2020, para 3.18-22

³⁰ HM Treasury, [Restricting public sector exit payments: Government response to consultation](#), July 2020, para 3.18-22

³¹ [PO 272902, 3 July 2019](#)

³² Scottish Government, [A severance policy for Scotland consultation](#), March 2017; [Letter from Cabinet Secretary for Finance, Economy and Fair Work](#), 21 June 2019

³³ Reg. 5(2)(b), *Restriction of Public Sector Exit Payment Regulations 2020*

³⁴ Reg 6, *Restriction of Public Sector Exit Payment Regulations 2020*

³⁵ Reg 8, *Restriction of Public Sector Exit Payment Regulations 2020*, HM Treasury, [Annex C: Restriction on public sector exit payments: guidance on the regulations](#), July 2020, paras. 2.2 and 4.1

³⁶ [HC Deb 21 September 2020 c6](#)

³⁷ [HC Deb 21 September 2020 c5](#)

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sector pension schemes have similar features, although such payments are typically the largest in the local government sector.³⁸

On 7 September 2020, the Ministry of Housing, Communities and Local Government launched a consultation on [Reforming local government exit pay](#), seeking information on the effect of proposed reforms on the local government workforce. The consultation closes on 7 November.

In its briefing on the regulations, the Association of Local Authority Chief Executives and Senior Managers (ALACE), said it opposed the inclusion of pension strain payments in the cap and noted that the Government had not yet published the Equality Analysis on the final version of the regulations, saying it would do so when they came into force.³⁹ ALACE's own analysis showed that this would affect long-serving staff earning well under £40,000 and could therefore affect staff in a range of front line and supervisory and junior management roles:

The pension strain for staff in their mid- to-late 50s in one council, with service in the range of 35 to 39 years and earning between £31,000 and £34,000 would exceed £100,000 if made redundant. The redundancy payments in each case would be well under £20,000. The regulations would mean that they would all suffer a reduced pension, for the rest of their lives.⁴⁰

This concern was shared by UNISON, which said that people affected would "either have to pay the fee themselves or face a pension cut. It will cost them thousands of pounds at a time when many are having to cope with the strain of losing their jobs."⁴¹

In debate in the Lords on 23 September 2009, Peers expressed concern that the regulations would come into force before the local government consultation had finished and at a time when the sector might face redundancies.⁴²

2.6 Settlement agreements

A settlement agreement is a type of contract where an employee agrees to waive their right to bring claims to a court or tribunal in return for a payment. They are typically signed at the end of an employment relationship if there is some ongoing dispute. There are a number of statutory requirements that must be fulfilled to create a valid settlement agreement.⁴³ The [ACAS guidance on settlement agreements](#) provides further information.

³⁸ [Explanatory Memorandum to the Restriction of Public Sector Exit Payment Regulations 2020](#), para. 7.2; Reg. 30 (7) [Local Government Pension Scheme Regulations 2013](#); [Rules of the Civil Service Compensation Scheme](#), section 2

³⁹ [PQ 293443](#), 7 October 2019; HM Treasury, [Restricting public sector exit payments: Government response to consultation](#), July 2020, para 3.35

⁴⁰ [The Restriction of public sector exit payments regulations 2020](#), ALACE briefing for Parliamentarians

⁴¹ [Limit on mega council pay-offs could cost middle-income workers thousands](#), UNISON press release, 31 July 2020

⁴² [HL Deb 23 September 2020 c1898](#)

⁴³ Section 203, *Employment Rights Act 1996*

The payment under a settlement agreement will often have various different components. The Employment Lawyers Association (ELA) explained this in its response to the 2019 consultation:

[A]n employee who leaves their employment under a settlement agreement may have several exit payments – payment in lieu of notice, a redundancy payment, an ex-gratia payment, a compensation payment for injury to feelings etc. A settlement agreement may (and probably will) provide that a payment which is not a payment in lieu of notice is payable within a certain period of time after the settlement agreement is signed provided that the employee complies with the terms of the agreement (e.g. as to confidentiality or not instituting employment tribunal proceedings).⁴⁴

Value of settlement agreements

The terms of a settlement agreement, including the payment the employee receives, are ultimately determined through negotiation between the parties. However, with respect to the payment for compensation there will usually be some correlation with the award that the employee might expect to receive if the case proceeded to a court of tribunal.

In this context, it is worth noting that the compensation that can be awarded by a tribunal in many employment law claims is capped. For example, an award of compensation for unfair dismissal is limited to 52 weeks' pay, capped at £88,519.⁴⁵ For some claims, awards are not capped. Examples include claims for discrimination and claims for unfair dismissal in whistleblowing cases.⁴⁶ However, even in such cases large awards are not common. Employment Tribunal statistics show that in 2019/20 only 14 awards for unfair dismissal (2% of all awards), eight awards for disability discrimination (11% of awards) and three awards for sex discrimination (7% of awards) were in excess of £50,000.⁴⁷

Nevertheless, there may be a number of circumstances in which parties would decide that a settlement agreement should be in excess of £95,000. As already noted, a settlement agreement will also typically cover a number of other payments in addition to compensation, including redundancy pay and payment in lieu of notice.

The Regulations

As noted above, the Regulations treat payments under a settlement agreement as exit payments. By contrast, if the employee refuses to settle and brings their claim to a court or tribunal and the tribunal makes an award in their favour, payment in pursuance of that order would not count as an exit payment.⁴⁸

⁴⁴ ELA, [Response from the Employment Lawyers Association](#), 3 July 2019, p. 5

⁴⁵ Section 124, *Employment Rights Act 1996*

⁴⁶ Section 124, *Equality Act 2010*; Section 124(1A), *Employment Rights Act 1996*

⁴⁷ Ministry of Justice, [Tribunal Statistics Quarterly: April to June 2020](#), September 2020

⁴⁸ Reg. 6(f), *Restriction of Public Sector Exit Payments Regulations 2020*

Comment

A number of stakeholders have expressed concern that including settlement agreements as exit payments could discourage settlement and encourage litigation.

The Local Government Association made this point in its response to the consultation:

The confusion over the waiver process and legal limitations will also frustrate opportunities for mutually agreed departures. This means some staff will be more inclined to resort to the legal process and pursue Employment Tribunal claims instead of reaching a settlement that would ultimately demonstrate value for money for the taxpayer. Instead both employer and employee will be faced with an uncertain, time consuming and potentially costly legal process.⁴⁹

The issue was also raised by Wes Streeting MP in the Delegated Legislation Committee:

COT3 settlements, which are ACAS-arranged compromise settlements, are mostly included in the scope of the cap—but not employment tribunal awards. That will have the utterly perverse effect of incentivising people to go to tribunal, and flies in the face of the Government’s push towards early conciliation, creating a much more costly process for everyone.⁵⁰

Responding to similar concerns in the House of Lords, Treasury Minister Lord Agnew said that the Government would publish Treasury Directions allowing relevant authorities to relax the cap for certain types of settlement agreements:

Like many others, the noble Lord referenced the system—I hope that I have addressed this—in relation to the guidance and directions outlining the situations where the cap must be waived, including where a payment is made to settle a discrimination grievance, and where it may be waived, such as instances where implementing the cap may result in genuine hardship. Guidance and directions explaining the way the systems were published at consultation—and updated versions of these documents—will be published in due course.⁵¹

2.7 Circumstances in which the cap can be relaxed

Under the *Small Business, Enterprise and Employment Act 2015*, Ministers have the power to relax the exit payment cap.⁵² The Regulations also delegate this power to local authorities provided they act in accordance with Treasury Directions or otherwise with the consent of the Treasury.⁵³

Treasury Directions are a type of legislation and are legally binding. However, they are not subject to Parliamentary scrutiny or approval.

⁴⁹ LGA, [Restricting exit payments in the public sector, HM Treasury consultation on implementation of regulations: LGA Response](#), June 2019, para. 11.5

⁵⁰ [HC DL Committee 21 September 2020 c9](#)

⁵¹ [HL Deb 23 September 2020 c1908](#)

⁵² Section 153, *Small Business, Enterprise and Employment Act 2015*

⁵³ Regs. 10-11, *Restriction of Public Sector Exit Payments Regulations 2020*

As noted above, the Government has stressed the importance of the ability to relax the cap in response to concerns about how the cap could unfairly impact lower-paid workers.

Authorities with delegated power to relax the cap

The power to relax the cap is only delegated to certain authorities. These bodies include:

- The full council of a local authority;
- The London Assembly;
- The Fire and Rescue Authority.

In other cases, it appears the power can only be exercised by a Minister.

In its response to the 2019 consultation the Employment Lawyers Association noted that bodies like NHS trusts cannot relax the cap:

It appears unlikely that this was in fact the intention. It would seem consistent with the overall policy direction that the restriction should apply to all bodies in Schedule 1. For example, it would be of considerable concern to NHS bodies if they were not permitted to request mandatory relaxation in relation to complaints of whistleblowing for instance given the propensity for high value whistleblowing complaints in the NHS compared with other public bodies. In relation to the guidance, it should contain a full explanation of the reasons for why the power to relax the restriction on exit payments does not apply to all bodies in Schedule 1.

This issue was not addressed in the Governments consultation response.

Relaxing the cap: mandatory and discretionary cases

As noted above, the Government can determine the circumstances in which authorities can relax the cap through Treasury Directions.

The Government published [draft Treasury Directions](#) and [guidance](#) to accompany the 2019 consultation. The Explanatory Memorandum to the Regulations says that final Directions and guidance will be published when the Regulations come into force.⁵⁴

The draft Directions published in 2019 outlined two situations in which the cap could be waived: mandatory cases and discretionary cases.

Mandatory cases in which the cap had to be relaxed included settlement agreements relating to discrimination or whistleblowing claims if the authority is satisfied on the balance of probabilities that an award would be made to the employee if the claim proceeded to a tribunal. The guidance said that authorities would be expected to act on the basis of legal advice.⁵⁵

Other mandatory cases included payments under TUPE Regulations and certain pension payments by the Nuclear Decommissioning Authority.

⁵⁴ Explanatory Memorandum to the Restriction of Public Sector Exit Payments Regulations 2020 [SI 2020 XXXX], para 11.1

⁵⁵ HM Treasury, [Annex C: Restriction on public sector exit payments: guidance on the regulations](#), July 2020, paras. 5.3(B) and para. 5.3(C)

The draft Directions also listed discretionary cases in which the cap could be relaxed. The circumstances included:

- Where the application of the cap would cause undue hardship;
- Where the application of the cap would inhibit workplace reform;
- Where payment is due under an agreement reached before the implementation of the cap, but the employee's exit was delayed until after the cap came into force.

The term 'genuine hardship' was not defined in the draft Direction although the guidance said that there should be "few, if any" cases.⁵⁶

The guidance said that in discretionary cases the authority would need to submit a business case and seek approval from the relevant Department as well as the Treasury.⁵⁷

The Government's response to the 2019 consultation notes that prior approval is required in discretionary cases to ensure accountability:

The waiver process is designed to ensure that the cap can be relaxed in exceptional circumstances where it is necessary or desirable. The government is committed to making the process for considering waivers efficient in order to not cause any unnecessary delays for public sector employers and employees, whilst ensuring that cases receive sufficient and appropriate scrutiny.

The waiver process has been designed to ensure there is accountability for the way the waiver is being used at all stages, therefore it's appropriate that uses of the waiver receive ministerial clearance. If needed, further guidance may be provided by the sponsoring department or employer.⁵⁸

2.8 Judicial Review

In September 2020 the British Medical Association (BMA) applied for permission for judicial review of the Regulations. A BMA press release provided a brief overview of the claims being made:

The BMA will today ask the courts for permission to apply for a judicial review, and will argue that the Government's intention to seek to override potential payments due to exiting employees is unlawful as the Government cannot interfere with and override rights agreed in workers' employment contracts. Doctors' contracts of employment are nationally negotiated by the BMA and NHS Employers and are the result of lengthy negotiations which take into account the needs of the NHS, NHS Employers and doctors.

The BMA also argues the proposed regulations are contrary to human rights legislation as they put public sector employees at a significant disadvantage in seeking to enforce their rights to peaceful enjoyment of their property, as compared to private sector workers.⁵⁹

⁵⁶ Ibid. para. 5.4

⁵⁷ Ibid. para. 5.1

⁵⁸ HM Treasury, [Restricting public sector exit payments: Government response to consultation](#), July 2020, paras. 3.28-3.29

⁵⁹ Peter Blackburn, [BMA launches legal challenge to public sector payment cap](#), BMA, 15 September 2020

In a Parliamentary briefing published in September, the BMA argued the Regulations prohibit public sector bodies from making payments that they are legally required to make either under statute or under contract. They argued that such a power was not provided by the 2015 Act under which the Regulations are made:

The BMA has no difficulty with a cap on voluntary payments. However, the Regulations are not entitled to require public sector bodies to cap payments in respect of their legal liability to an exiting employee in relation to matters which took place during their employment, before their exit⁶⁰ (such as where the employee was subjected to race or sex discrimination or harassment by a colleague). The settlement of a legal claim which arose prior to the termination of the employee's employment does not meet the conditions of the 2015 Act.⁶⁰

In the debate in the House of Lords, Baroness Finlay, former president of the BMA, specifically highlighted the issue of women with equal pay claims dating back many years who would not be able to enter into settlement agreements.⁶¹

Treasury Minister Lord Agnew said the Government would not comment on ongoing litigation.

⁶⁰ BMA, [The Restriction of Public Sector Exit Payments Regulations 2020: Parliamentary briefing](#), September 2020

⁶¹ [HL Deb 23 September 2020 c1903](#)

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