

Guidance on Public Sector Exit Payments: use of Special Severance Payments

What the new Public Sector Exit Payments guidance means for NHS organisations.

30 June 2021

Jacqui Atkinson, Head of Employment Healthcare at Browne Jacobson steers us through the new guidance and what it means for NHS organisations.

For all of us working in or with NHS organisations we have become well accustomed to the need to adhere to the guidance in Managing Public Money when exiting staff from an organisation. H M Treasury has recently released new guidance to supplement the earlier guidance, the emphasis of which is on ensuring that such payments represent value for money and are fair to the taxpayer who funds them. It's clear from the guidance that the default setting here is not to settle cases and for severance payments to be the exception rather than the norm.

The Guidance makes the point that Special Severance Payments ("SSPs") are any payments on termination of employment which are not required by contract, statutory or other rights and suggests that if there is any doubt about whether a payment is an SSP, approval should be sought.

Interestingly, the new guidance goes further than previous guidance and states that any payment where the right is disputed by the employer (in whole or in part) should be treated as an SSP which requires approval. So, if an employee states that they are owed a particular sum of money contractually (e.g. for waiting list work) and presents you with a large but disputed bill for outstanding work as they exit the organisation, approval should be sought.

Payments likely to constitute Special Severance Payments:

- Any payments under a settlement agreement
- The value of any employee benefits or allowance which continues to run beyond the employee's agreed exit date;
- Write-offs of any outstanding loans or overpayments;
- Special leave such as gardening leave;
- Any honorarium payments or gifts;
- Hardship payments;
- Payments to employees for retraining related to their termination of employment;
- Compensation in lieu of notice;
- Payments agreed as part of a judicial or non-judicial mediation.

Payments which may constitute Special Severance Payments

The guidance highlights that these may constitute SSPs but this will depend on the individual's contract, terms and conditions and relevant statutory provisions.

- Payments in lieu of notice

- Pension strain payments.

Payments which do not constitute Special Severance Payments

- Statutory redundancy payments
- Contractual redundancy payments whether due to voluntary or compulsory redundancy and whether agreed by collective agreement or otherwise
- Payment for untaken annual leave
- Payments (e.g. for compensation) ordered by a court or Tribunal.

Approval process

The guidance makes it clear that HM Treasury must approve Special Severance Payments and sets out the approval process in the guidance, emphasising that it is the responsibility of the individual employer to ensure that the payments are “fair, proportionate and lawful”. The guidance also provides that payments can appear to reward failure and set a poor example of the public sector and should not be seen as a soft option to avoid management action, disciplinary processes, unwelcome publicity or reputational damage.

Employers are urged to seek HM Treasury approval by submitting the pro-forma for Special Severance Business cases at Annex A before any offer is made, whether orally or in writing. This may not prevent an offer being made which is clearly contingent upon approval being required and clearly marked “without prejudice, subject to contract offers” being made pending approval but we would recommend further guidance is sought from NHSE/I before any such offer is made.

For exit packages which include a Special Severance Payment of £100,000 or more, and/or where the relevant employee earns more than £150,000, ministerial approval is required.

The guidance sets out lengthy criteria for assessment of cases which should be followed in submitting business cases.

Transparency

The ‘*Reporting and Transparency*’ requirements in Chapter 4 of the guidance reinforce that employers should continue to follow existing guidance on the reporting of payments and disclose all relevant information in their annual accounts. For public bodies, this should include a published breakdown of the number of Special Severance Payments made in the previous financial year, the total value of the payments paid out and also the maximum, minimum and median value of all of the payments made. Records of cases submitted for approval and the subsequent decisions should be retained.

Penalties for non-compliance

A question frequently asked is what’s the worst that can happen if I don’t go for approval? Unlike previously, the new guidance establishes that non-compliance may result in a fine of either five times the amount of the Special Severance Payment, or £10,000, whichever is higher - at the discretion of the Chief Secretary of the Treasury. The amount may be higher for repeat offenders who do not seek approval and a close eye is being kept on the number of payments per organisation. In our view, compliance with the approvals guidance is a matter of good governance and the more stringent ability to penalise organisations means that compliance is a more serious issue.

Examples of non-compliance are provided and include agreeing Special Severance Payments without the approval of HM Treasury, making a payment in excess of the approved amount and non-compliance with any part of the new guidance. Sponsoring departments must inform HM Treasury within 20 working days of any potential breaches although mitigating circumstances such as the value of the payment and previous compliance may be considered.

Conclusion

It’s clear that the new guidance discourages settlement and is very much in keeping with urging public bodies to be learning organisations defending claims that lack merit. Interestingly, the new guidance states that SSPs will only be considered if attempts to settle a dispute without such payments have been made or if legal advice supports settling the case. The overriding sense that you take from the guidance is that the purse strings are being further tightened and that organisations should expect some scrutiny on whether they have

explored alternative means of resolution rather than reaching for the cheque book. This reinforces the importance of tackling employee relations issues early to avoid matters escalating to a dispute, to which the only resolution might be costly and disruptive litigation.

Our Health Employment team has a vast amount of experience in advising on settlement agreements and the governance surrounding business cases submitted for approval. If you have any questions please get in touch with us.

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