



EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

**Draft Repayment of Public Sector
Exit Payments Regulations ('the draft Regulations')**

Response from the Employment Lawyers Association

25 January 2016

**Draft Repayment of Public Sector
Exit Payments Regulations ('the draft Regulations')**

Response from the Employment Lawyers Association

25 January 2016

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, chaired by Paul McFarlane, was set up by the Legislative and Policy Committee of ELA to consider and comment on the draft Regulations. Its report is set out below. Members of the sub-committee are listed at the end of this paper.

General

As the government will be aware, it previously consulted on this issue back in the summer/autumn of 2014 to which ELA responded to. We are pleased to say that many of the comments we made in our earlier response have been taken on board when producing the draft Regulations.

However, ELA regrets to say that the draft Regulations are, in our opinion, unnecessarily complicated and are likely to put off those affected by them (employees, employers and prospective employers in the public sector) if they have to make a repayment, or anyone trying to challenge a calculation of a repayment.

Further, ELA considers that it is undesirable to have draft regulations which require any one reading them, or seeking to rely upon them, to have to cross refer to at least six other pieces of legislation to determine the scope and meaning of them.

Specific

We will now make comments on each of the 'Parts' of the draft Regulations.

Part 1

The definitions contained in regulation 3 are of themselves straight forward, and do address some of our concerns as raised in our response to the consultation. We previously said that *"The proposals lack clarity in various terms including "statutory payments", "casual worker", "sector" and "sub sector" which will lead to uncertainty of outcome and potential legal uncertainty and argument"*.

The draft Regulations set out which types of payments will form part of a 'relevant exit payment' and which will not. Statutory Redundancy payments do count, whereas statutory holiday pay or pay in lieu of notice will not for example. The government has also clarified that the 'relevant paying authorities' are those set out in the schedule, and the type of worker is defined with greater clarity, although the question of whether a worker subsequently becomes a person to whom the repayment regulations may apply is less clear.

However, terms used in the draft Regulations are not all defined in the interpretations section e.g. '*minimum amount*' and '*net final pay*' (are defined at regulations 7(5) and (6) respectively). Would it not be make it easier for the user of these regulations if these, and any other definitions in the draft Regulations, were put in the 'Interpretation' section?

Turning specifically to some of the definitions contained in the proposed regulation 3 we would make following comments:

Whilst the term '*hiring authority*' is defined in regulation 3(1)(b) – there is reference in its definition to the term '*subsequent authority*' which is not defined. In any event this definition does not make it clear who it is meant to cover and we would suggest that it is revisited.

The term '*minimum amount*', which is a figure needed to calculate the precise amount that may be repayable, is defined in regulation 7(5)(a) in that reference is made to payments or amounts payable under section XII of Employment Rights Act 1996. This then requires someone who does not know the section to look it up. ELA would suggest, for the easy of simplicity for the user of these proposed regulations, that they set out the definition of the type of payment being referred to.

ELA makes an identical point in relation to regulation 3(2), which currently reads '*Except where provided otherwise, any expression used in these Regulations which is used in sections 154 and 155 of the SBEE has the meaning which is given in those sections*'.

Detailed terms of recovery

It is not clear to ELA what provision(s) are meant to address the government's wish, as expressed in the consultation paper that accompanies the draft regulations for

4. *No recovery will be sought for appointments made on a casual basis for less than 15 days in any period of 91 consecutive days.*
5. *The government would seek to ensure that it would not be possible to avoid the provision through re-engagement as a contractor or consultant, and it would seek to do this in a way that does not prejudice fair competition between suppliers of services to government.* (Section 4.2 of the consultation paper).

ELA would suggest that the above desired outcomes are expressly stated, in the appropriate parts, of the Regulations.

Earnings exemption and taper

At section 4.5 of the consultation paper that accompanies the draft Regulations, the government says

Reflecting the above, the government proposes to recover payments from all employees earning above £100,000 per annum in the position from which they departed. To avoid introducing a sharp difference in the rules at this earnings level, a taper would apply below this level. Individuals earning up to a second (lower) earnings threshold would have payments recovered on a reduced basis. The government's lead option for achieving this is set out in the table below – with the proposed lower earnings threshold to be finally decided upon following this consultation. As indicated above, these measures represent a baseline legal requirement. Where employers' existing or proposed policy go further they will underpin rather than replace them.

	Earnings	% of payment to be recovered
Primary threshold	£100k +	100%
	£95–99.9k	80%
	£90–94.9k	60%
	£85–89.9k	40%
Lower earnings threshold	£80–84.9k	20%
Excluded from policy	£0–79.9k	Entirely determined by employer

Whilst in the 'Interpretation' section it is clear that those who earned under £80,000 are not deemed to have received a 'qualifying exit payments' (regulation 3(5)(f)) it is not clear to ELA, how the regulations make it clear that those who earn between £80,000 – £99,999 are subject to a taper – as shown above and those who earn £100,000 or more will have make a 100% repayment. This issue needs to be addressed in the final regulations

Part 2

Regulation 4

The duty at Regulation 4(1) is placed on the "responsible authority" but although the 'hiring authority' is defined, the 'responsible authority' is not. Although what the "responsible authority" is may be taken to be self-evident, employment arrangements within the public sector can be complex, for example secondment and joint working arrangements are not uncommon. In corresponding legislation terms such as "employer" are defined. It would seem appropriate to define precisely on whom this legal duty falls.

Under regulation 3 (6) an exit payee is deemed to have received a qualifying exit payment on the same date that they left employment. The record to be kept under regulation 4(1) is the date on which the exit payment was made. In ELA's experience very few exit payments will be made on the day an individual leaves employment. There is a risk of confusion arising between these two provisions in practice. ELA believes that it would be sensible for the regulation 4(1)(d) duty to be clear that it refers to the date on which the qualifying exit payment is deemed to be made in accordance with regulation 3(6).

There is also a duty on the responsible authority to keep a record of an exit payment and for the exit payee to notify the responsible authority and the hiring authority of the fact of payment, but there is no duty on the responsible authority to inform the exit payee that the payment they receive is considered to be a qualifying exit payment. This would seem to be an oversight which could be remedied by requiring the responsible authority to provide a copy of their record of the qualifying exit payment to the exit payee.

Part 3

Regulation 8(1), in terms, imposes a restriction on an exit payee who has received a qualifying exit payment from returning to the public sector (and on a hiring authority permitting the return of such an individual to the public sector) unless, inter alia, the exit payee has either:

- repaid the repayment amount; or
- made a 'relevant arrangements' for the repayment of the repayment amount.

However, whereas in regulation 8(3) [which applies if there has been a breach of regulation 8(1)] a time limit is set for the repayment of the 'repayment amount', regulation 8(1) does not include a time limit for such repayment. Did the government intend this to be the case? If it did not, then it needs to spell out what the time limit for repayment in regulation 8(1) is.

Whilst we note that the draft Regulations place an onus (and in fact obligation) on the exit payee to repay the qualifying exit payment, ELA considers that, as currently drafted, regulation 8(6) enables hiring authorities the scope to circumvent the intention of the regulations i.e. that exit payee who are the subject of these regulations, should repay the 'relevant authority' a qualifying exit payment. Regulation 8(6) merely requires the hiring authority to keep a record of the reason why it has not taken under regulation 8(5). ELA consider two issues flow from this:

- i. the draft regulations do not, currently, set out the circumstances when a hiring authority can decide not to take any action – we would have thought that there ought to be some generic guidance on this issue for hiring authorities;
- ii. where the hiring authority takes such a decision query, should the responsible authority be able to recover the qualifying exit payment from the hiring authority?

Members of ELA Sub-Committee

Chair: Paul McFarlane, Weightmans LLP

Catherine Rayner, 7 Bedford Row

Helen Cookson, Trowers & Hamlin LLP

John Moore, Bevan Brittan LLP