

Agenda item:

Title of meeting: Employment Committee

Date of meeting: 29th November 2016

Subject: Legislation Update

Report by: Director of HR, Legal and Performance

Wards affected: None

Key decision: No

Full Council decision: No

1.0 **Purpose of report**

This report is to update Members of Employment Committee on recently implemented and forthcoming legislation changes and any implications for the Local Authority.

2.0 **Recommendations**

To note the changes and any implications for the Local Authority.

3.0 **Background**

There are a number of legislative changes that have recently or are due to come into force over the next few months. Some of these changes will have implications for the Local Authority. These legislative changes are listed below.

3.1 **Cap on Public Sector Exit Payments**

A proposal for capping public sector exit payments at £95,000 was contained within the Enterprise Bill 2015 (which is now an Act). The cap will apply to the total aggregate value of most public sector exit payments and will apply to the following payments:

- Voluntary or compulsory redundancies
- Payments in lieu of notice (PILON)
- Additional payments the council has to make into the pension fund for people aged 55 and over who are made redundant, commonly referred to as 'pension strain'
- 'Special severance' payments such as those agreed in settlement of threatened litigation

The Government confirmed that these regulations would not be implemented before 1st October 2016 as originally anticipated and that further consultation on

the regulations is taking place this autumn. Following this consultation it is anticipated that the regulations will be published and in force early next year.

Implications for staff

This may influence senior staff to leave Portsmouth City Council where their redundancy payment would exceed £95,000, prior to the Act coming into force. It will also affect staff who are lower earners, such as third tier managers, because of their ability to access their pensions over 55 years of age.

This cap may have an impact on any redundancy or restructure exercises that are being planned now. For example, this may result in employees who will be affected by this cap such as older and/or long serving employees and the highly paid pushing to exit Portsmouth City Council now, rather than risk receiving a capped compensation payment if they leave by reason of redundancy at a later date. This could lead to a potential loss of specific skills/experience that may be difficult to attract or retain within the Council.

Next steps

HR and Finance are working together to ascertain who will be impacted by the cap and HR will ensure that there is a fair and consistent process in place to deal with staff affected. Communication has been sent out to all staff on 7th November so that they are aware of this legislative change. Finance is seeking further Pensions guidance on how staff will be affected, however this will be dependent on the individual's circumstance and a "one size fits all" approach will not be appropriate.

3.2 The Recovery of Exit Payments

The Government issued draft regulations on 21st December 2015 concerning the recovery of Exit Payments made to those employees within the public sector and returning to the public sector within a period of 12 months. The draft Regulations define 'returning to the public sector' as "becomes an employee (other than by virtue of a relevant transfer) or enters into a relevant contract for services with a public sector authority listed in Part 1 of the Schedule" (or becoming an office holder of the same).

The Regulations were due to take effect from April 2016. However, draft legislation has yet to be laid before Parliament. The regulations will hopefully be laid before Parliament just before or after the New Year, so the effective date should be early 2017 if that happens.

This matter was the subject of consultation some time ago and subsequent to the Government's own 'post consultation' response, there were some significant changes announced in the final consultation.

- Firstly, the 'minimum salary' to which the recovery provisions will apply has been reduced from £100,000 to £80,000 per annum.
- Secondly, the exclusion of payments to provide unreduced pensions for early retirement under the LGPS where there is an unqualified right to access

pension has now been overturned and such will be considered as an exit payment and be subject to recovery. This is despite the original consultation document (June 2014) stating “However, the Government has said that it will not seek to recover such payments where they are not discretionary, but there is an unqualified right to those payments under the scheme. This ensures that the Government’s 25 year guarantee in relation to public sector pensions is upheld”

- Thirdly, there are changes to remove the full recovery period of 28 days and the tapering now commences on day 1 following termination. In essence, the repayment liability reduces proportionately over the subsequent 365 days.
- Finally, additional exemptions have been granted to Housing Associations and the FSCS.

3.3 Response to Government Consultation on further reforms to Exit Payments

The following is a summary on the main points from the Government's response to its consultation on further reforms to exit payments and the next steps that are envisaged.

The Government is planning to go ahead with its proposals as set out in its original consultation document on Exit payments, which are in addition to the £95,000 cap on exit payments and the recovery provisions for those earning £80,000 or more. It will set a common framework of upper limits which should be applied to the main elements of compensation provision across the main public sector schemes. It is hoped that this will ensure greater consistency between schemes and bring public sector terms more in line with exit terms available in the wider economy.

The framework is as follows:

- A maximum tariff for calculating exit payments of three weeks' pay per year of service. Employers could apply tariff rates below these limits.
- A ceiling of 15 months on the maximum number of months' salary that can be paid as a redundancy payment. Where employers distinguish between voluntary and compulsory redundancies there may be a case for maintaining a differential by applying a lower limit. Likewise, where employers offer voluntary exit packages that are not classed as redundancies there may be a case for applying a different maximum. Employers could also apply lower limits.
- A maximum salary on which an exit payment can be based. As a starting point the Government will expect this to align with the existing NHS scheme salary limit of £80,000.
- A taper on the amount of lump sum compensation an individual is entitled to receive as they get closer to their normal pension retirement age.
- Action to limit or end employer-funded early access to pension as an exit term. As part of an overall package Government will consider proposals appropriate for each workforce, including proposals to:
 - Cap the amount of employer funded pension 'top-ups' to no more than the amount of redundancy lump sum to which that individual would otherwise be entitled

- Remove the ability of employers to make such top ups, or offer greater flexibility to employers to determine the specific circumstances in which they would be available
- Increase the minimum age at which an employee is able to receive an employer funded pension top up, so that this minimum age is closer to or otherwise linked more closely with the individual's normal pension age in the scheme in which they are currently accruing pension benefits

The Government does not wish to introduce a cross-public sector scheme at this time, rather that each department responsible for a particular workforce will devise its own scheme within the framework. This will be introduced through negotiation with the trade unions, where existing schemes form part of a collective agreement.

Local Government are slightly different than the rest of the public sector in that for most local authority employees the redundancy compensation regime is not set out in a collective agreement, but is contained in the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006. It is also very rare that a local authority's redundancy compensation scheme approaches anywhere near the limits set under the new framework of 3 weeks/15 months.

Timescale

The timescale for this is to draw up a scheme within 3 months from the publication of the response (therefore by 26 December 2016), following which there will be a period for consultation and negotiation. The Government has said that if a particular workforce fails to have implemented the reforms within 9 months (i.e. by 26 June 2017) it will consider making the changes through legislation.

3.4 Changes to Taxation Rules on Intermediaries

The Government announced in its 2016 Budget that it intends to reform the rules governing payments to public sector workers who operate through an intermediary. The proposed changes will take effect from April 2017.

The intermediaries legislation (more commonly known as IR35) was introduced by the Finance Act 2000 and requires individuals working through an intermediary to pay broadly the same tax and National Insurance contributions (NICs) as employees, where they would have been an employee if they had provided their services directly. An intermediary in this context is typically someone's own limited company, often known as a personal service company (PSC).

Many people find the rules confusing and there is widespread non-compliance. At the Summer Budget last year, the government published a discussion document and engaged with stakeholders on how to improve the effectiveness of the legislation.

Public sector bodies have a responsibility to taxpayers to ensure that the people working for them are paying the right tax. From April 2017, individuals working through their own company in the public sector will no longer be responsible for deciding whether the intermediaries legislation applies and then paying the relevant tax and NICs. This responsibility will instead move to the public sector employer, agency, or third party that pays the worker's intermediary. The employer, agency or third party will have to decide if the rules apply to a contract and if so, account for and pay the liabilities through the Real Time Information (RTI) system and deduct the relevant tax and NICs.

Many public sector bodies are already required to seek assurance that some of their workers are paying the correct employment taxes under Government rules on off-payroll appointments in the public sector. This change will reinforce and extend this requirement across all public sector bodies and all workers engaged through a PSC.

The reformed rules will not apply for workers provided through an agency or similar business where the workers are employees of the agency and not supplied through their own company.

3.5 Trade Union Bill

The Trade Union Bill has now become the Trade Union Act 2016 following the gaining of Royal Assent in May 2016.

The government announced a series of modernising reforms last year (2015) to ensure strikes can only go ahead as a result of a clear and positive democratic mandate from union members: upholding the ability to strike while reducing disruption to millions of people.

The Trade Union Act will ensure industrial action only ever goes ahead when there has been a ballot turnout of at least 50%.

In important public services, including in the health, education, transport, border security and fire sectors, an additional threshold of 40% of support to take industrial action from all eligible members must be met for action to be legal.

During the Parliamentary process, the government agreed to commission an independent review into electronic balloting within 6 months.

This piece of legislation delivers key manifesto commitments.

The Trade Union Act will also improve union practices and increase transparency by:

- setting a 6 month time limit (which can be increased to 9 months if the union and employer agree) for industrial action so that mandates are always recent

- requiring a clearer description of the trade dispute and the planned industrial action on the ballot paper, so that all union members are clear what they are voting for
- creating a transparent process for trade union subscriptions that allows new members to make an active choice of paying into political funds
- giving more powers to the Certification Officer to ensure new and existing rules are always followed by unions
- reducing the burden on taxpayers by ensuring that payroll deductions for trade union subscriptions are only administered where the cost is not funded by the public and ensuring transparency and greater accountability relating to the use of public money for facility time.

3.6 English Language Requirements for Public Sector workers

New English language requirements for public-sector workers in customer-facing roles will come into force on 21 November 2016, following the publication in early November of provisions under the Immigration Act 2016.

Workers must be sufficiently fluent in English, or – in Wales – in English or Welsh, for the effective performance of their role when the requirements come into effect. Agency staff and self-employed contractors used by public bodies to provide customer-facing services must also meet the requirement.

Public-sector authorities will need to ensure that their HR policies and practices incorporate the language requirements, such as during recruitment, although strong communication skills are already assessed and required by many public employers.

The Government has published a code of practice to help employers meet the language requirements.

If staff do not meet language fluency requirements, the code states that employers may consider additional training, redeployment to non-customer facing roles or, as a last resort, dismissal from employment.

The code reminds employers that the Equality Act 2010 prohibits discrimination on the grounds of race and disability, and that the public-sector equality duty requires public authorities to exercise their duties with regard to eliminating discrimination.

Public-sector employers should therefore ensure that they apply the language requirements strictly to the required standard for the role, and that they do not discriminate based on a worker's race, nationality, ethnic origin or disability.

3.7 Gender Pay Gap Reporting

Gender pay gap reporting legislation will require large employers to publish their overall mean and median gender pay gaps from 2018. Under the new laws, employers will have to calculate their gender pay gap from April 2017 and publish

the details by April 2018. The regulations will apply to employers who employ 250 or more employees.

The gender pay gap differs from equal pay as it is concerned with the differences in the average pay between men and women over a period of time no matter what their role is. Equal pay deals with the pay differences between men and women who carry out the same or similar jobs. This, on its own, does not prevent a gender pay gap. Organisations that have a higher level of men in senior jobs and women in junior roles are more likely to have a gender pay gap.

The intention behind gender pay gap reporting is therefore to increase transparency of the differences in pay between men and women in the workplace with the aim of closing the gender pay gap.

On an annual basis the employer will need to publish the report on their own website, including the overall percentage difference in mean and median pay between male and female employees, as well as submit evidence of compliance to the Government. Subject to the commencement of the legislation, organisations must publish their first report within 12 months from April 2017.

Employers will be required to keep their gender pay figures online for three years in order to show the progress made.

Employers will also need to calculate and publish three other types of figures:

- gender bonus gap
- proportion of men and women receiving a bonus
- proportion of men and women working at each quartile of the organisation's pay distribution.

Organisations may wish to review and update policies to help address any gender pay gap, these policies include:

- equality and inclusion
- enhanced paternity leave and equalised shared parental leave entitlement
- bullying and harassment
- flexible working
- people development.

Employers should seek to understand and probe the drivers behind their organisation's gender pay gap where one exists to ensure any action taken will have the desired impact. It would also be good practice for employers to review how they pay people to ensure it is fair and non-discriminatory.

3.8 Salary Sacrifice schemes

In recent years, salary sacrifice schemes have come under increasing scrutiny by the government as they grow in size and scope.

In the March 2016 budget, HM Revenue & Customs has launched a consultation paper to examine the use of salary sacrifice for the provision of benefits.

The consultation closes on 19 October 2016, and the likely outcome will be a reduction in the types of benefits that could be offered through this tax-efficient arrangement.

What is salary sacrifice?

Before looking at the HMRC consultation, it may be useful to explain the basics of salary sacrifice – who the beneficiaries are, why it is so popular in the workplace, and how the system works.

In the words of HMRC: “A salary sacrifice arrangement is an agreement between an employer and an employee to change the terms of the employment contract to reduce the employee’s entitlement to cash pay. This sacrifice of cash entitlement is usually made in return for some form of non-cash benefit.”

It appears that the government has taken the view there are benefits being structured through salary sacrifice that do not actively form part of any policy.

In practice, this arrangement often allows employers to purchase goods and services in bulk and offer them to staff at a reduced price paid from their gross salary and this results in a saving of income tax and National Insurance Contributions (NICs) for both the employee and employer.

Salary sacrifice was purposely introduced as a vehicle for employee pension contributions, childcare vouchers and cycle-to-work schemes.

More recently, it has become the deduction method for a wider range of employee benefits, from the more traditional dental insurance and critical illness through to mobile phones, laptops and other technology items.

It is this broadening of the scheme that has caught the Treasury’s attention, leading to a review.

What’s under consultation?

Pension contributions through salary sacrifice do not form part of the consultation. This means that the City Council’s plans to implement a salary sacrifice scheme for Additional Voluntary Contributions (AVCs) should be approved by HMRC. Childcare vouchers, cycle to work, annual leave purchase and health screenings are also outside the scope.

The bad news is that some of the benefits we had hoped to introduce such as cars, technology, life insurance and mobile phone schemes are specifically named in the document as being under threat. This is mainly due to the loss of income to the Exchequer on tax and NICs.

From the example below, taken directly from the HMRC paper released on 10 August, it seems the government has taken the view there are benefits being structured through salary sacrifice that do not actively form part of any policy but are costing the Treasury considerable sums.

What is the impact of the review?

According to the consultation, the government proposes to change tax legislation so that, where a benefit in kind is provided through salary sacrifice, it will be chargeable to income tax and Class 1A employer NICs, even if it is normally exempt from tax and Class 1A NICs, at the greater of:

- The amount of salary sacrificed; and
- The cash equivalent set out in statute (if any).

This would mean that where the normal taxable value of the benefit in kind is higher than the amount of salary sacrificed, it would be subject to tax and Class 1A NICs in the normal way.

This proposal does not prevent employers from providing benefits in kind to their employees through salary sacrifice, but it will remove the tax and employer NICs advantages that come from doing so.

Example

In September 2016 employer A and employee X agree a salary sacrifice arrangement. Employee X earns £25,000 annually and agrees to sacrifice £600 for workplace parking.

Employee X agrees to a £50-a-month reduction in their salary for a period of 12 months. Until 5 April 2017 there will be no tax or Class 1A NICs due on the cost of the workplace parking because this is subject to an exemption from tax.

From 6 April 2017, the exemption will be disapplied and there will be a taxable benefit in kind equal to the amount of salary sacrificed. In addition, a corresponding Class 1A NICs liability will arise for the employer on that same amount.

What happens next?

The consultation closes on 19 October and a wide range of views will be submitted prior to this date. As an example the car industry is heavily lobbying HMRC to retain cars as a salary sacrifice item. The benefits that generate the most significant savings for employers are those not currently under consideration.

The City Council has suspended plans to bring in further salary sacrifice schemes (other than shared cost AVCs) until the outcome of the consultation is known. The reason for this is that if we were to introduce schemes which are then restricted by legislation, staff would see an unexpected increase in their tax deductions and the 13.8% employer NIC saving would be lost.

The following communication has been issued to make staff aware of what is happening.

My Rewards: update on salary sacrifice schemes

My Rewards is an online portal for staff that offers exclusive savings on goods and services. Schemes are also available through the portal which allow staff to buy childcare vouchers and lease cycles through salary sacrifice arrangements, saving staff money on tax and national insurance payments.

When the portal was launched, it was intended that salary sacrifice schemes to allow staff to lease cars and technology would be introduced.

The government however has recently launched a consultation paper which examines the use **of** salary sacrifice schemes and this could potentially lead to a reduction in the types of benefits that are allowed to be offered through such schemes.

So in the light of this consultation, the implementation of salary sacrifice schemes for lease cars, mobile phones and technology in the council has been delayed until there is further clarification on these schemes by the government.

The result of the consultation is due to be announced on 23 November in the Chancellors of the Exchequer Autumn Statement.

4. Reasons for recommendations

The report is an information update to make Members aware of the legislative changes.

5. Equality impact assessment (EIA)

An EIA is not required.

6. Legal implications

There are no legal implications.

7. Director of finance's comments

There are no financial implications.

.....
Signed by:

Appendices: None

Background list of documents: Section 100D of the Local Government Act 1972

The following documents disclose facts or matters, which have been relied upon to a material extent by the author in preparing this report:

Title of document	Location