Guidance for employers within the NHS on the process for making severance payments

December 2013
This guidance, revised in December 2013, has been formulated by the NHS Employers organisation to assist employers in handling special severance payments. Originally designed to cover senior managers, this guidance now outlines the process for issuing a special severance payment to any employee.

Please note this guidance is intended to provide an aid to employers and is not a replacement for the need to take legal and audit advice in each particular situation.

A flow chart summarising the considerations employers need to make is available at Appendix 5.

**When to use this guidance**

This guidance applies to NHS employers who are considering terminating the employment of an individual with a special severance payment.

HM Treasury define a ‘special severance payment’ as paid to employees, contractors and others above normal statutory or contractual requirements when leaving employment in public service whether they resign, are dismissed or reach an agreed termination of contract. (See appendix 4).

**Key documents**

This guidance should be looked at alongside the normal financial rules and guidance your organisation needs to adhere to. The following are of particular relevance:

1. **NHS Financial Manual**: chapter 5 covers losses and special payments (this is being updated and will be available to employers later in 2013)
2. **HM Treasury guidance, Managing Public Money**
3. The template that Monitor requires Foundation Trusts to use (appendix 3) and accompanying document ‘Managing Public Money’ (Appendix 4)

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1 This includes the new paragraph inserted in April 2013, which the Department of Health now require all applications to meet. This is an extension of the standard HM Treasury template found in ‘Managing Public Money’ but should be used by all bodies described in this document.
Judicial mediation: clarification issued by Department of Health

As from 11 March 2013, any employment tribunal case(s) to be settled with a special severance payment at judicial mediation must now be approved in advance by HM Treasury. The following has been confirmed:

- HM Treasury now accepts that Judicial Mediation is simply another form of mediation procedure and that any payments so agreed remain non contractual and will now require HM Treasury approval.

- For the avoidance of doubt HM Treasury accept that all such settlements made prior to 11 March 2013 by judicial mediation, without HM Treasury approval, are regular and legal and no further action needs to be taken.

Process applicable from 1 April 2013

All NHS organisations require agreement to make a special severance payment from a relevant national body before presenting a paper to the HM Treasury for approval. The table below indicates where to seek initial agreement:

<table>
<thead>
<tr>
<th>Organisation type</th>
<th>National body</th>
</tr>
</thead>
<tbody>
<tr>
<td>NHS trust</td>
<td>NHS Trust Development Authority</td>
</tr>
<tr>
<td>NHS foundation trust</td>
<td>Monitor</td>
</tr>
<tr>
<td>Clinical Commissioning Groups (CCG's)</td>
<td>NHS England</td>
</tr>
<tr>
<td>Arms Length body/ Special Health Authority</td>
<td>Department of Health</td>
</tr>
</tbody>
</table>

This guidance outlines the process requirements for NHS employers, including foundation trusts and CCG’s.

Special Health Authorities and Arms Length Bodies may find this guide useful but should confirm their process arrangements for making special severance payments directly with the Department of Health.

Initial considerations

All NHS organisations may wish to use the following questions to help inform their decision making processes, but it is advisable to clarify any specific process requirements from Monitor for foundation trusts, the NHS Trust Development Authority (NHS TDA) for NHS trusts and NHS England for Clinical Commissioning Groups:

1. **Is it appropriate to terminate the individual’s employment?**
   Severance should not be used as an option if it is primarily to avoid formal performance management action, disciplinary processes, unwelcome publicity or reputational damage.
2. **What is the appropriate method of termination?**
   For example, in cases involving performance or misconduct issues, generally the capability or disciplinary procedures are appropriate and should be utilised as appropriate.

3. **Have all the circumstances of the case been considered, including the scope for potential litigation and the consequences of this?**

4. **Is this arrangement in the public interest?**
   Consider:
   a. why the severance payment is in the public interest
   b. why it represents value for money
   c. how it represents the best use of public funds.

   This exercise of consideration should be undertaken by the chief executive in the case of directors of the trust, with appropriate HR advice sought (although in some circumstances this may well be external HR advice) or, where the manager concerned is the chief executive, the chairman and non-executive directors.

5. **Have Monitor, the NHS TDA or NHS England been informed? (as applicable)**
The employer should inform their contact at the relevant body at the earliest opportunity.

### Next steps

If the above steps have been taken and the employer is satisfied that termination of the employee's employment, together with making a severance payment, is in the best interests of the employer and represents value for money, then a proposal for the remuneration committee, as appropriate and in line with its terms of reference, should be prepared containing the business case for the severance payment.

This document should be created in order to take legal effect and should be marked as such. A suggested proposal is set out at Appendix 1 to this guidance.

In addition to the preparation of the proposal, the following steps should be taken:

1. **Written advice from the trust’s auditors and legal advisors should be taken on the proposed business case and severance payment.** Advice should also be sought on the proposal and, if appropriate, a settlement agreement should be drafted. NHS Employers has also published [guidance on settlement agreements](#) (formerly known as compromise agreements) that you may find useful.

   The legal advice about the draft proposal, together with the audit advice and the proposal itself, should be put before the remuneration committee of the employer for approval. See below for advice on the remuneration committee’s role.
2. In the event the remuneration committee approve the business case, further approval should be sought from NHS England, the NHS TDA or your contact at Monitor (as applicable).

A sample draft letter seeking such approval is set out at Appendix 2 of this guidance.

For foundation trusts, Monitor request that applications are received at least one month before approval, by contacting your relevant relationship manager directly and supplying a reasoned explanation as to why a special payment is needed; and whether the proposed settlement will represent good value for money.

For trusts, NHS TDA advise contacting their HR team as soon as a potential severance is under consideration and they will provide relevant guidance.

The template, which should be used to accompany each submission can be downloaded from Monitor’s website; and is also available from the NHS TDA or in Appendix 3 of this guidance.

Please note that if a settlement agreement is to be used, both the approving body and HM Treasury will need to be assured that it does not include a confidentiality clause that prohibits an individual raising a concern covered under the Public Interest Disclosure Act (PIDA).

The template has been updated to reflect this. You may wish to refer to our guidance on settlement agreements.

3. If Monitor/NHS TDA/NHS England approve the business case they will seek HM Treasury approval behalf of the employer.

The remuneration committee’s role

The remuneration committee, operating in accordance with its Terms of Reference, should:

1. satisfy itself that it has the relevant information before it, to make a decision
2. conscientiously discuss and assess the merits of the business case
3. consider the payment or payment range being proposed and address whether it is appropriate, taking into account the issues set out under initial considerations. The committee should only approve such sum or range which it considers value for money, the best use of public funds and in the public interest
4. keep a written record summarising its discussions and its decision (remembering that such a document could potentially be subject to public scrutiny in various ways, for example, by the Public Accounts Committee (PAC)).
Final agreement with the employee

It is only once all of the above steps have been taken and the necessary approvals received, that the employer should enter into the appropriate agreement to terminate the employee’s employment and make the severance payment.

Employees who are subject to this process must be informed that no offers can be agreed until the appropriate approvals have been received. All offers should be made subject to receiving the necessary approvals and complying with the above process.

In reaching a final agreement consideration should be given to the need for a settlement agreement (if not dealt with above).

Any settlement agreement should be in line with legislation and reflect existing guidelines and, in particular, include an express clause preserving the employee’s rights to make a protected disclosure. Please see our guidance on settlement agreements.
Appendix 1: Draft proposal for remuneration committee

Legally Privileged
Strictly Private & Confidential

CONFIDENTIAL – THIS DOCUMENT HAS BEEN BASED ON LEGAL ADVICE AND CONTAINS A SUMMARY OF LEGAL ADVICE RECEIVED BY THE EMPLOYER. IT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE AND BY ITS REQUIRED DISCLOSURE TO THE HM TREASURY, THAT PRIVILEGE IS NOT WAIVED.

Business case for making a severance payment

Employer: [insert name] (“the employer”)
Employee: [insert name] (“the employee“)

Executive summary

This paper seeks approval for the payment of [insert] (“the severance payment”) to the employee in full and final settlement of [insert as appropriate, e.g.: his/her Employment Tribunal claims/any statutory and contractual claims which the employee may have against the employer and the severance of his/her employment from the employer]. The employee’s annual salary is [insert]. The employer has obtained legal advice that this settlement represents value for money and this legal advice is attached and referred to in this document. [The audit advice that we have received is also attached].

The severance payment constitutes a value for money because [insert appropriate detail, e.g. we have calculated potential liabilities in this matter and these liabilities together with the legal costs equal or exceed the severance payment].

It is proposed that the employee’s employment is terminated together with payment of the severance payment under a settlement agreement (or if drawn up prior to 29 July 2013 a compromise agreement). This would have the following advantages:

[Insert as appropriate, e.g.:
• protection from any subsequent legal claims
• saving significant management time and internal disruption
• saving legal costs in relation to [ongoing litigation/future litigation]
We can confirm that the following clause will be included in any such agreement:

For the avoidance of doubt, nothing in this Agreement shall prejudice any rights that the Employee has or may have under the Public Interest Disclosure Act 1998 and/or any obligations that the Employee has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to his/her professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.

On this basis, approval is sought for the severance payment to be made.

1. Background

[Insert the background to this matter, for example:
• position of the employee, and when they commenced employment with the employer
• the genesis of the current situation including an explanation of any procedures followed to date
• a summary of any proceedings which have been brought or are currently underway
• any other background information which might subsequently be referred to in the subsequent sections of this document.]

2. Process

This paper has been produced by the employer in consultation with the professional legal services of [insert name of employer’s solicitors], the employer’s employment law advisors. Their legal advice on the proposed agreement is attached.

The employer has also sought audit advice [and the views of the employer’s auditors are also attached to this document].
3. Justification

The employer considers termination of the employee’s employment under a settlement agreement, together with the making of a severance payment to the employee as appropriate for the reasons set out in this section. The employer considers it appropriate to act now because: [insert reasons].

3.1 Value for money

[insert the reasons why the severance payment constitutes value for money – this may be taken from legal advice received. For example:

The employee potentially has claims against the employer [for ...] together with claims for a breach of contract and unfair dismissal if his/her employment is terminated. His/her chances of success in litigation have been rated as [    %] and a realistic view of the employer’s liability for compensation is [insert]. This compensation figure is based on the following:

- [insert explanation of likely compensation amount – this should be taken from the legal advice,.]
- The legal costs in defending these claims would be in the region of [£insert] plus VAT.

The recommended severance payment therefore represents good value for money (and will be subject to appropriate terms within a compromise agreement). Authorisation is sought for payment up to this amount.]

[This proposal should be signed off by the employer’s HR director or an appropriate Executive Director. Where the employee concerned is the chief executive the sign off will need to be provided by the chairman or a non-executive director]

[insert date of paper]
Appendix 2: Letter to the NHS Trust Development Authority

Dear [insert name]

Application for NHS Trust Development Authority/NHS England approval for a severance payment

In accordance with the process requirements for making severance payments, the [insert name of employer] seeks approval for the severance payment set out in the proposal attached.

The proposal attached is a legally privileged document which sets out the legal advice that we have received and by seeking the your approval in this way, the employer does not waive privilege on the attached document in any way.

The severance payment set out in the attached proposal has been approved by the Remuneration Committee as representing value for money and appropriate. [insert name of employer] has also received legal and audit advice on the proposal and this is attached to the proposal.

The [insert name of employer] seeks the NHS Trust Development Authority/NHS England approval of the proposal and if granted, request this is forwarded on for HM Treasury approval.

Any queries concerning the proposal should be addressed to [insert name and position in employing organisation].

Yours sincerely

On behalf of [insert name of employer]
Appendix 3: Template for HM Treasury approval for special severance cases at NHS Foundation Trusts

Revised 25 April 2013

Please read *Managing Public Money* Annex 4.13 before completing this pro-forma. You should be aware that HMT cannot approve special severance payments that reward, or will be seen to reward, failure, dishonesty or inappropriate behaviour.

This template is to be used for all special severance cases to be submitted to HMT for approval. We will only be able to give approval if all aspects are answered. **Do not type in the shaded areas.**

<table>
<thead>
<tr>
<th>Relationship manager at Monitor:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Trust:</td>
</tr>
<tr>
<td>Initials/name/number of case:</td>
</tr>
<tr>
<td>Date case is submitted:</td>
</tr>
<tr>
<td>Date decision is needed and why:</td>
</tr>
</tbody>
</table>

### Case history & details
Please provide a brief case history, with dates, summarising how the situation has come about. What are individual’s terms of employment (age, length of service, current salary, contractual notice period, type of contract (e.g. fixed term, part time), whether member of PCSPS)?

### Management procedures
Explain what procedures have been followed; or why relevant procedures have not been followed.

### Proposed ways of proceeding
What is the individual’s contractual entitlement, and why do you propose to make a special severance payment? What is the scope for reference to tribunal (incl. summary of the legal assessment of the chances of winning or losing the case, potential consequences). Other options considered?

### Value for money (VFM) consideration underlying the proposed settlement
Set out break-down of costs, including legal costs; potential tribunal awards. Provide rationale for proposed level of settlement (with pay comparison i.e. x months’ pay/y% of salary); costs of alternative options, and why proposed settlement offers best (incl. best value for money) solution. When considering vfm, non-financial costs (i.e. effect on staff morale, achievement of business objectives) can also be taken into account.

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### Confirmations

<table>
<thead>
<tr>
<th>Please confirm that any compromise agreements or undertakings about confidentiality leave severance transactions open to adequate public scrutiny, including by the NAO and the PAC.</th>
<th>[answer Yes or No]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Please confirm that any compromise agreement or any undertaking about confidentiality associated with the severance transaction includes an express clause to the effect that no provision in the compromise agreement or undertaking purports to prevent the individual from making a protected disclosure in accordance with Part IVA of the Employment Rights Act 1996. <em>(Note: Part IVA ERA 1996 contains the ‘PIDA’ provisions)</em></td>
<td>[answer Yes or No]</td>
</tr>
<tr>
<td>Please confirm that your Accounting Officer (i.e. your CEO) is aware of and satisfied with the proposed settlement.</td>
<td>[answer Yes or No]</td>
</tr>
</tbody>
</table>

### Wider impact and potential precedents

Explain whether this case might have an impact on or set a precedent for other existing or future cases, both within own organisation, or for other public sector bodies.

### Other useful information

### Lessons learnt from this case

Explain what lessons have been learned and how management systems have been/will be improved to avoid future occurrences of similar cases.

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**FOR HMT USE:**

Approval given by:  
Advice taken from (TOA/WPP):  
Rationale for approval and any conditions:
Appendix 4 – HM treasury guidance and rules: managing public money

Managing Public Money is HM Treasury guidance on how to handle public funds properly. It includes the rules covering special payments within annex A.4.13. They can be found on the HM Treasury website and we have copied the relevant section below:

**ANNEX 4.13**

**SPECIAL PAYMENTS**

This annex explains how public sector organisations should approach current transactions outside the usual planned range. It is often right, or essential, to consult the Treasury beforehand. In some cases, it is also important to notify Parliament.

A4.13.1 In voting money or passing specific legislation, Parliament does not and cannot approve special payments outside the normal range of departmental activity. Such transactions are therefore subject to greater control than other payments.

A4.13.2 Departments should authorise special payments only after careful appraisal of the facts and when satisfied that the best course has been identified. It is good practice to consider routinely whether particular cases reveal concerns about the soundness of the control systems; and whether they have been respected as expected. It is also important to take any necessary steps to put failings right.

A4.13.3 Arm’s length bodies should operate to similar standards as departments unless there are good reasons to the contrary, eg overriding requirements of the statutory framework for Companies Act companies. Departments should ensure that their oversight arrangements (see chapter 7) enable them to be satisfied that they arm’s length bodies observe the standards.

Dealing with special payments

A4.13.4 Departments should always consult the Treasury about special payments unless there are specific agreed delegation arrangements. So a department should seek Treasury approval, in advance, for any special payment for which it has no delegated authority, or which exceeds its authority. Similarly, NDPBs and many other arm’s length bodies should consult their sponsor departments in comparable circumstances. In turn, the department may need to consult the Treasury.

A4.13.5 The special payments on which the Treasury may need to be consulted are summarised in box A.4.13A. The list is not exclusive. If a department is in doubt, it is usually better to consult the Treasury.

A4.13.6 In particular, it is important to consult the Treasury about any cases, irrespective of delegations, which:

- involve important questions of principle;
- raise doubts about the effectiveness of existing systems;
- contain lessons which might be of wider interest;
- might create a precedent for other departments;
- arise because of obscure or ambiguous instructions issued centrally.
Guidance for employers within the NHS on the process for making severance payments

**SPECIAL PAYMENTS**

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**box A.4.13A special payments**

- **extra-contractual payments**: payments which, though not legally due under contract, appear to place an obligation on a public sector organisation which the courts might uphold. Typically these arise from the organisation’s action or inaction in relation to a contract. Payments may be extra-contractual even where there is some doubt about the organisation’s liability to pay, e.g. where the contract provides for arbitration but a settlement is reached without it. (A payment made as a result of an arbitration award is contractual.)

- **extra-statutory and extra-regulatory payments** are within the broad intension of the statute or regulation, respectively, but go beyond a strict interpretation of its terms.

- **compensation payments** are made to provide redress for personal injuries (except for payments under the Civil Service Injury Benefits Scheme), traffic accidents, damage to property etc. suffered by civil servants or others. They include other payments to those in the public service outside statutory schemes or outside contracts.

- **special severance payments** are paid to employees, contractors and others beyond above normal statutory or contractual requirements when leaving employment in public service whether they resign, are dismissed or reach an agreed termination of contract.

- **ex gratia payments** go beyond statutory cover, legal liability, or administrative rules, including:
  - payments made to meet hardship caused by official failure or delay
  - out of court settlements to avoid legal action on grounds of official inadequacy
  - payments to contractors outside a binding contract, e.g. on grounds of hardship.

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**A.4.137** The Treasury does not condemn all special payments out of hand. Each needs to be justified properly in the public interest against the key public sector principles set out in Chapter 1, box 1.1, with particular emphasis on value for money since there is no legal liability. Any proposal to keep a special payment confidential needs to be justified especially carefully since confidentiality could appear to mask underhand dealing. The Treasury’s bottom line is usually to ask the department to establish that the responsible Accounting Officer(s) would feel able to justify the proposed payment in Parliament if challenged.

**A.4.138** Departments should also consult the Treasury about proposals for special payments above the relevant delegated limits. They should explain:

- the nature and circumstances of the case;
- the amount involved;
- the legal advice, where appropriate;
- the management procedures followed;
- an assessment of the value for money of the case
- any non-financial aspects;
- whether the case in question could have wider impact.
Severance Payments

A4.13.9 Special severance payments when staff leave public service employment should be exceptional. They always require Treasury approval because they are usually novel, contentious and potentially repercussive. So departments should always consult the Treasury in advance when considering a special severance payment, whether or not the proposed amount falls within its delegated limit. Legal advice that a particular severance payment appears to offer good value for the employer may not be conclusive since such advice may not take account of the wider public interest.

A4.13.10 The Treasury adopts a sceptical approach to proposals for special severance settlements. Precedents from other parts of the public sector may not be a reliable guide in any given case. And even if the cost of defeating an apparently frivolous or vexatious appeal will exceed the likely cost of that particular settlement to the employer, it may still be desirable to take the case to formal proceedings. Winning such cases demonstrates that the government does not reward failure and should enhance the employer’s reputation for prudent use of public funds.

A4.13.11 Departments should not treat special severance as a soft option, eg to avoid management action, disciplinary processes, unwelcome publicity or reputational damage. Box A4.13B sets out the factors the Treasury needs to evaluate in dealing with special severance cases. It is important to ensure that Treasury approval is sought before any offers, whether oral or in writing, are made. Any proposals for retrospective approval should contain the same level of detail as if the case had been brought to the Treasury in advance. A proforma for seeking Treasury approval is at


box A4.13B Factors to consider in special severance cases

Any case for special severance put to the treasury should explain:

- the circumstances of the case
- any scope for reference to a tribunal, with its potential consequences, including the legal assessment of the organisation’s chances of winning or losing the case
- the management procedures followed
- the value for money offered by the possible settlement
- any non-financial considerations, eg where it is desirable to end someone’s employment without dismissal, perhaps because of restructuring
- whether the case could have wider impact, eg for a group of potential tribunal cases

A4.13.12 Particular care should be taken to:

- avoid unnecessary delays which might lead to greater severance payments than might otherwise be merited;
- avoid offering the employee concerned consultancy work after severance unless best value for money can be demonstrated;
- ensure any undertakings about confidentiality leave severance transactions open to adequate public scrutiny, including by the NAO and the PAC;
Special Payments

- ensure special severance payments to senior staff are transparent and negotiated avoiding conflicts of interest.

AA13.13 Organisations seeking retrospective Treasury approval for special severance payments should not take it for granted that approval will be provided, since such payments usually appear to reward failure and set a poor example for the public sector generally. Requests for retrospective approval will be considered as if the request had been made at the proper time.

Reporting

AA13.14 As Parliament does not provide for special payments when voting Estimates or passing specific legislation, special payments should be brought to Parliament’s attention, usually through a note in the organisation’s resource account. Any special severance payments for senior staff will in any case be itemised in resource accounts.

AA13.15 Notification is separate from accounting treatment, which will depend on the nature of the special payment. Special payments should be noted in the accounts even if they may be reduced by subsequent recoveries.

AA13.16 Special payments should be noted in resource accounts where total losses exceed £250,000. Individual losses of more than £250,000 should be noted separately.
Appendix 5: Flowchart of process for making severance payments

Consider is termination the appropriate action

Follow internal processes e.g. disciplinary and capability procedures to resolve situation

Yes

No

Can employment be terminated without a severance payment

Employment terminated in usual way

Yes

No

Severance payment inappropriate and the termination must be reconsidered

Chief executive (or chairman/non-executives) considers if case in public interest/vfm

Inform NHS TDA/Monitor/NHS England and seek advice on process

No

Yes

Do the employer’s legal and audit advisers support a payment?

Yes

No

Draft proposal for remuneration committee

Does the employer’s remuneration committee approve the payment?

Yes

No

Is a settlement agreement to be used?

Prepare agreement seeking appropriate HR and legal advice

Terminate employment and make a severance payment

Yes

No

Yes

No

Does the NHS TDA/Monitor/NHS England approve the payment?

Yes

No

Monitor/NHS TDA/NHS England will submit on behalf of employer. Does HM Treasury approve the business case for payment?
NHS Employers

NHS Employers represents trusts in England on workforce issues and helps employers to ensure the NHS is a place where people want to work. The NHS workforce is at the heart of quality patient care and we believe that employers must drive the workforce agenda. We work with employers to reflect their views and act on their behalf in four priority areas:

- pay and negotiations
- recruitment and planning the workforce
- healthy and productive workplaces
- employment policy and practice.

NHS Employers is part of the NHS Confederation.

Contact us

For more information on how to become involved in our work, email getinvolved@nhsemployers.org

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