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Dear Colleague

NHS SCOTLAND: GUIDANCE ON SETTLEMENT AND SEVERANCE ARRANGEMENTS

Summary

1. I write to inform you that 'A Severance Policy for Scotland' was implemented on 27 September 2019. This has necessitated updating the Guidance to Health Boards on Settlement Agreements, which was last issued in March 2015; and replacing and extending that process to include all Severance Arrangements (including Settlement Cases).

Background

2. In 2017, Scottish Ministers consulted on four options to determine whether new powers under the Small Business, Enterprise and Employment Act 2015 should be used to develop a Scottish approach to severance arrangements; an approach that would achieve better outcomes by delivering best value to the taxpayers, flexible and responsive public services and a fair deal for public sector employees. The four options included in the consultation were:

- Option 1: Status Quo,
- Option 2: Non-Legislative Reform,
- Option 3: Replicating UK Arrangements (i.e. legislate for changes to severance arrangements),
- Option 4 : A Hybrid Approach

3. Trade Unions who responded to the consultation indicated a preference for the status quo. Scottish Ministers recognise that severance payments are generally well-managed across the devolved public sector and that voluntary early severance, voluntary early retirement and settlement agreements are essential tools to enable organisations to deliver value for money through reshaping services, managing their workforce and reacting to changing

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22 October 2019

Addresses:

For action

Chief Executives, NHS
Boards and Special Health
Boards.

Directors of Human
Resources, NHS Boards and
Special Health Boards.

NHS National Services
Scotland (Common Services
Agency), Central Legal Office.

For Information

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organisational circumstances, while at the same time helping leavers to bridge the gap into new employment or retirement.

4. However, some recent high value, contentious and inappropriate exit payments had led to a loss of public confidence. Accordingly, Scottish Ministers saw an opportunity to strengthen decision-making and governance of severance arrangements through non-legislative reform.

5. Details are set out in 'A Severance Policy for Scotland' below (page 3 – 13) and in the seven Annexes following (pages 14 – 21).

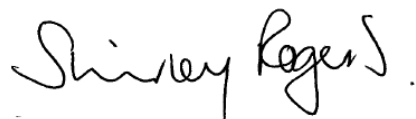
6. Plans are being developed for a bespoke event for Chief Executives (as Accountable Officers) HRDs and Remuneration Committee members, on the new process since the implementation of A Severance Policy for Scotland and further details will be available in due course.

Action

7. NHS Boards, Special Health Boards and Central Legal Office are asked to ensure that this letter is drawn to the attention of all those involved in the preparation and submission of settlement agreement business cases.

8. Employers are asked to make their own arrangements for obtaining additional copies of this Director's Letter, which can be viewed at:
<https://www.publications.scot.nhs.uk/>.

Yours sincerely



Shirley Rogers

Director of EU Exit and Transition, NHS Scotland Chief People Officer & Director of Health Workforce, Leadership & Reform.

A Severance Policy for Scotland

The key elements of this administrative approach, which was implemented on 27 September, are to:

- Introduce a £95,000 administrative severance payment cap and recovery arrangements for voluntary early severance, voluntary early retirement, voluntary redundancy and settlement agreements;
- Set a consistent maximum pay-back period of two years for voluntary early severance and retirement schemes;
- Set a maximum notice period of six months' in new contracts and reduce the use of discretionary payments; and
- Introduce measures to improve governance, accountability and transparency of severance payments.

In taking this decision, Scottish Ministers listened to the concerns raised by Trade Unions, for instance in deciding not to include employer pension costs in any severance payment cap which may unduly expose longer-serving and lower-paid employees to the cap.

We have sought to minimise the administrative burden where possible and would encourage a proportionate approach to preparing the required business cases for both severance and settlement cases. However, the process has been designed to ensure greater consistency and transparency of approach across the public sector in Scotland and to ensure that the preparation of all business cases is based on good practice.

It is also worth reiterating that the arrangements do not change existing accountabilities and that the decision on whether to enter into any severance arrangement (including settlement cases) rests with the Accountable Officer of the Health Board. Where a confidentiality clause is used the Scottish Government expects to see evidence from the Board that the member of staff has agreed to its inclusion.

SETTLEMENT AGREEMENTS

SUMMARY:

1. The final decision as to whether to enter into a Settlement Agreement will rest with **the Accountable Officer** for the Health Board. Information on Settlement Agreements, particularly where the Scottish Government (SG) has provided comments indicating that the agreement should not be entered into, will form part of the information that will be made available to the Scottish Parliament.
2. These arrangements will not affect the requirements for related disclosures in **annual accounts**: individual bodies will follow the requirements of the Financial Reporting Manual (FReM) for the financial year in question.
3. SG will collate and provide information to the **Scottish Parliament** on the number of Settlement Agreements and the costs involved in reaching those agreements across the Scottish Administration.
4. The Public Audit and Post-Legislative Scrutiny Committee has also expressed concern about **the use of confidentiality clauses** in Settlement Agreements. These clauses may still be used but only where there is explicit agreement between both the employer and employee that this is required and there will be a general presumption against their use.
5. Payment to individuals will normally be **capped** at £95,000. Where a Health Board considers that there are compelling reasons to exceed the cap, a full business case must be submitted outlining the reasons for this.
6. A **maximum** payback period of 24 months will apply in all cases (i.e. the time taken to recover the compensation costs against normal salary costs). Where Boards' own compensation schemes have a payback period of less than 24 months, the lower period will apply.

POINTS TO CONSIDER:

When to use Settlement Agreements

In general they may be used for one of the following reasons:

1. Where an end to the employment relationship is being considered or has actually happened in circumstances that are the subject of an employment dispute between the parties.
2. In situations where the employment relationship is continuing, but the employee has indicated that they have an employment dispute that remains unresolved. A legal claim may already have been lodged by the employee or the employer might believe there to be grounds that one might be. If the employer wishes to seek to settle the dispute, a Settlement Agreement might be an option for consideration.

As well as paying any contractual sums due, Settlement Agreements will often involve payment of a non-contractual financial consideration. A Settlement Agreement is legally binding in form and is intended to remove the possibility of the

matters that it covers being the subject of future or, where commenced, further legal action. Settlement Agreements have statutory status.

The [ACAS Code of Practice](#) and the [ACAS Guide](#) are essential further references.

Alternative Approach

In some circumstances, Accountable Officers may wish to consider the option of voluntary resignation secured by a financial consideration which does not involve a Settlement Agreement.

Choice of Approach

Any Board considering either the offer of a financial consideration to secure a voluntary resignation or a Settlement Agreement is expected to have taken legal advice from Central Legal Office (CLO).

While a Settlement Agreement may entail some additional cost with regard to a contribution towards the cost of legal advice for the employee, it does have the effect of removing the possibility of future legal action and is likely to be the preferred approach in most situations where an employment dispute exists.

Exclusions

Claims for damages, personal injury or lost property which are handled by reference to the Health Board's normal litigation or lost property management procedures are not covered by this guidance and do not require a business case to be submitted using this process.

If you are in any doubt as to whether or not a settlement agreement is the right approach send an email to the Pay, Terms and Conditions Unit in Scottish Government via the dedicated mailbox: nhsssettlementandseverancedealcases@gov.scot

Data Protection and Information Sharing/Reporting

Please see the [draft information sharing clause](#) for Settlement Agreements. This is not prescriptive and Boards should feel free to use their own version provided the Agreement makes reference to the Scottish Government being entitled to use the fact that an Agreement has been entered into in order to collate and publish information on the number of Settlement Agreements entered into across the Scottish Administration and the costs involved.

The Scottish Government will not, however, disclose the terms or circumstances of the Agreement or the name of the employee without the written consent of the employee or as required by the Scottish Parliament solely for the purposes of Parliamentary scrutiny relating to the use of public money, or as required by law.

By entering into a Settlement Agreement the employee will be agreeing to the release of information on the above basis, and will be taken to have provided the

necessary consent for the use of their personal data for this limited purpose as required by under data protection laws.

Boards will also be required to advise the employee that personal data will be released to the Scottish Government during the preparing and submission of the business case for the Settlement Agreement. The Scottish Government will handle all data supplied to it under this process in accordance with data protection legislation.

Confidentiality clauses

A [draft confidentiality clause](#) should only be inserted on the request of either party (i.e. employee or employer) and then explicitly agreed with both parties, particularly the employee.

No confidentiality clause can be used to prevent relevant parliamentary committees or audit bodies from carrying out their appropriate oversight and scrutiny functions.

Any Agreement which sought to prevent staff from raising concerns about health and safety or malpractice would be void under the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998).

SETTLEMENT AGREEMENT - BUSINESS CASE SUBMISSION PROCESS

The purpose of this process is to provide a strategic oversight of Settlement Agreements across the Scottish Administration and to provide advice and guidance to Health Boards to achieve consistency in the use of such Agreements. It will also allow for a central record of Agreements to facilitate responses to Freedom of Information requests, other requests for information on the number and costs of Agreements across the Scottish Administration and to prepare the annual report on settlement agreements for the Scottish Parliament.

1. With the approval of their Accountable Officer, the Health Board prepares a business case.*

* **prior** to offering or entering into any Settlement Agreement, the Health Board will consult Scottish Government by submitting a copy of the business case to the Pay, Terms and Conditions Unit via the dedicated mailbox:

nhsssettlementandseverancedealcases@gov.scot

2. Ministerial views will be sought, as and when appropriate, including in relation to any potentially high profile/high value cases or where the proposed payment cannot be capped at £95,000.
3. If further information is required the Pay, Terms and Conditions Unit will co-ordinate by seeking information directly from the Health Board with any questions relating to the terms or value for money of any proposed agreement directed to the relevant Accountable Officer.
4. The response will be in writing with a target of responding within 5 working days, unless further information is required from the Health Board or discussion with Ministers is required (for potentially high profile/high value cases), in which case up to 15 working days.
5. If the Scottish Government is not satisfied with either the need for such an agreement, or the terms of the proposed agreement, or its value for money, this will be highlighted in the response.
6. **The final decision as to whether to enter into a Settlement Agreement will rest with the Accountable Officer for the Health Board.** Information on Settlement Agreements, particularly where SG has provided comments indicating that the agreement should not be entered into, will form part of the information that will be made available to the Scottish Parliament.
7. Once the Settlement Agreement is **finalised** the Health Board is required to notify the Pay, Terms and Conditions Unit via the dedicated mailbox:
nhsssettlementandseverancedealcases@gov.scot

8. The SG will be entitled to use the fact that a Settlement Agreement has been entered into to enable SG to collate and provide information to the Scottish Parliament on the number of Settlement Agreements and the costs involved in reaching those agreements across the Scottish Administration.
9. It is worth noting that the process for Settlement Agreements differs from that for [voluntary resignation](#)¹.

Nothing in this process prevents a Health Board from having a protected conversation with an individual to investigate whether a Settlement Agreement is a potential route to resolving on-going employment issues. **Health Boards should not, however, make any formal offer to an employee without first having consulted SG on the business case.**

¹ In summary a Settlement Agreement is used to settle an employment dispute and Voluntary Resignation/s are used where post/s or skills no longer exist and redeployment is problematic.

The Business Case & Employment Information Schedule

The Business Case template is designed to ensure rigorous consideration of whether a Settlement Agreement would be appropriate to pursue and, if so, what costs it might be appropriate to incur. It is essential that the narrative supporting the business case is clear and concise to allow proper judgement of the risks, costs (to both parties) and potential benefits to be made.

The data provided in the Employment Information Schedule, attached to the Business Case template, sets out the financial context. When completed, those considering the case will know the value of the employee's current employment benefits, the total employment cost, contractual termination costs and, where applicable, what the costs of defending a legal case might be taking into account the likelihood of it being pursued and won by the employee.

This will then help inform the decision on whether an agreement should be pursued and, if so, what if any non-contractual financial consideration it would be reasonable and proportionate to offer.

Advice on any technical aspects of the completion of the Business Case template, Employment Information Schedule or Final Confirmation of Costs return may be sought from the Pay, Terms and Conditions Unit via the dedicated mailbox: nhsssettlementandseverancedealcases@gov.scot

Employment Tribunal Cases

Where an employee has lodged an Employment Tribunal claim, consideration should be given at an early stage as to whether a Settlement Agreement may be appropriate as an alternative to allowing the case to proceed to a full hearing.

In such circumstances, a business case should be submitted setting out the estimated costs and potential award if the case is upheld, along with the estimated likelihood of success.

A ceiling within which a settlement may be negotiated should be set out. A settlement up to this ceiling may be negotiated at any time during the Employment Tribunal process.

Where costs exceed the original ceiling, a revised business case should be submitted immediately for consideration providing a detailed explanation of the reasons for the higher costs.

Timeframes for Feedback

A target for response is a maximum of 5 working days if the Scottish Government does not find the case to be contentious or unusual, or within 15 working days if

there may be elements which are contentious or unusual, or if the case is being referred to Scottish Ministers.

Where cases require fast tracking, contact should be made with the Pay, Terms and Conditions Unit to discuss how this can be accommodated.

Defining Contractual versus Non-Contractual Payments

A non-contractual financial payment is not always required in order for a Settlement Agreement to be reached whereas, by definition, securing a voluntary resignation by use of a financial consideration does. Where payments to an employee are made under either type of agreement they will be either contractual or non-contractual in nature.

Contractual payments are those which would be received in the normal course of employment. These will include performance related payments and, on termination, notice payments and payments in lieu of time owed. They will also include lump sum and pension payments to which the employee may be entitled to in relation to termination of employment.

Non-contractual payments are those to which the employee has no entitlement in the normal course of employment and which are being offered solely in order to resolve an employment dispute or secure the voluntary resignation of an employee. Accountable Officers must ensure that any non-contractual payment represents value for money and is defensible in all the circumstances of the case.

Termination payments of over £95,000

Following the outcome of the severance policy consultation, Ministers have placed a cap on termination payments of £95,000. This cap should include both [contractual and non-contractual elements](#) of any settlement agreed. Where it is not possible to cap the payment at £95,000, a business case will require to be discussed with the relevant Minister prior to approval and should set out fully the reasons why applying the cap is not possible. Confirmation of Ministerial approval should be included in the business case.

VOLUNTARY RESIGNATIONS SECURED BY A FINANCIAL CONSIDERATION

KEY POINTS:

1. The final decision as to whether to offer a voluntary resignation secured by a financial consideration will rest with **the Accountable Officer** for the Health Board.
2. Payment to individuals should be **capped** at £95,000
3. Can be used on an **individual or on a scheme** (multiple) basis
4. **Ministerial views** must also be obtained, as and when appropriate, including in relation to any potentially high profile/high value cases or where it is proposed that the cap is not applied.
5. Where appropriate, it is expected that notice should be worked rather than a payment being made in lieu of notice.
6. A maximum payback period of 24 months will apply in all cases (i.e. the time taken to recover the compensation costs against normal salary costs). This will be applied at an individual rather than scheme level.
7. An individual leaving as a result of a voluntary resignation secured by a financial consideration may not return to employment within the same employer for a period of at least 12 months, including as a temporary agency worker or via a procurement route.

POINTS TO CONSIDER:

When to use voluntary resignations secured by a financial consideration

Compensation should only be offered on a **value for money** basis for example restructuring and post(s) no longer available or the individual/s particular skill sets or location means that redeployment would be problematic.

Alternative Approach

In circumstances where there is an employment dispute, Accountable Officers may wish to consider whether use of a Settlement Agreement is more appropriate.

Exclusions

They should not be used to deal with poor performance or attendance as NHS Employers will have separate policies to deal with these situations.

Early Retirement

Organisations which offer early retirement with the employer topping up any shortfall in pension at a cost should follow the guidance and processes for Voluntary Resignation.

BUSINESS CASE SUBMISSION PROCESS

1. A Health Board prepares a business case using the attached guidance and templates.*

***prior** to running a scheme or offering an individual voluntary resignation secured by a financial consideration, the Health Board will consult Scottish Government by submitting a copy of the business case to the Pay, Terms and Conditions Unit via the dedicated mailbox:

nhsssettlementandseverancedealcases@gov.scot

2. Ministerial views will be sought, as and when appropriate, including in relation to any potentially high profile/high value cases or where the proposed payment cannot be capped at £95,000.
3. If further information is required the Pay, Terms and Conditions Unit will coordinate this by seeking information directly from the Health Board with any questions relating to the terms or value for money of any proposed scheme or individual directed to the Accountable Officer.
4. The response from the SG will be in writing via the Pay, Terms and Conditions Unit with a target of responding within 5 working days, unless discussion with Ministers is required (for potentially high profile/high value cases), in which case up to 15 working days.
5. If the Scottish Government is not satisfied with either the need for such a scheme or the individual case, or the terms of the proposed scheme or individual case, or its value for money, this will be highlighted in their response.
6. **The final decision as to whether to enter into a scheme or individual case for Voluntary Resignation with financial consideration will rest with the Accountable Officer for the Health Board.**

VOLUNTARY RESIGNATION WITH FINANCIAL CONSIDERATION BUSINESS CASE TEMPLATE AND GUIDANCE

The Business Case template is designed to ensure rigorous consideration of either a scheme or individual case. It is essential that the narrative supporting the business case is clear and concise to allow proper judgement of the reasons, costs and potential benefits to be made.

Advice on any technical aspects of the completion of the Business Case template, Employment Information Schedule or Final Confirmation of Costs return may be sought from the Pay, Terms and Conditions Unit via the dedicated mailbox:

nhsssettlementandseverancedealcases@gov.scot



Timeframes for Feedback


A target for response is a maximum of 5 working days if the Scottish Government does not find the case to be contentious or unusual, or within 15 working days if there may be elements which are contentious or unusual, or if the case is being referred to Scottish Ministers.

Termination payments of over £95,000



Following the outcome of the severance policy consultation, Ministers have placed a [cap on termination payments of £95,000](#). Where it is not possible to cap the payment at £95,000, a business case will require to be discussed with the relevant Minister prior to approval and should set out fully the reasons why applying the cap is not possible. Confirmation of Ministerial approval should be included in the business case.

SETTLEMENT AGREEMENT BUSINESS CASE TEMPLATES

PRIOR TO ENTERING INTO AN AGREEMENT	
BUSINESS CASE	SUPPORTING DOCUMENTATION
 NHS SCOTLAND - SETTLEMENT CASES -	 NHS SCOTLAND - SETTLEMENT CASES I

POST AGREEMENT – FINAL CONFIRMATION OF TERMS
 NHS SCOTLAND - SETTLEMENT CASES I

VOLUNTARY RESIGNATION WITH FINANCIAL CONSIDERATION BUSINESS CASE TEMPLATES

INDIVIDUAL CASES	BULK CASES
BUSINESS CASE	BUSINESS CASE
 <p>NHS SCOTLAND - SEVERANCE - INDIVI</p>	 <p>NHS SCOTLAND - SEVERANCE - BULK.c</p>

DRAFT INFORMATION SHARING CLAUSE

The Scottish Government will be entitled to use the fact that an Agreement has been entered into to enable them to collate and provide information on the number of Settlement Agreements entered into with the Scottish Government and across the wider public sector and also to provide collated information on the costs involved. The Scottish Government will not, however, disclose the terms or circumstances of the Agreement or the name of the Employee without the written consent of the Employee or as required by the Scottish Parliament solely for the purposes of Parliamentary scrutiny relating to the use of public money or as required by law.

DRAFT CONFIDENTIALITY CLAUSE**OPTIONAL CONFIDENTIALITY DRAFT CLAUSE**

1.1 The Employee agrees that he/she will continue to be bound by the terms and conditions of employment which relate to confidentiality.

1.2 The terms and conditions of this Agreement are confidential to all parties and all parties agree that all matters relating to the termination of the Employee's employment and all circumstances leading to the termination of the Employee's employment will remain confidential between the parties and their appointed representatives, and will not be revealed to or discussed with any other parties, with the exception of: (i) the Employee's immediate family provided that the Employee has obtained their agreement to keep the information confidential; (ii) HM Revenue & Customs and any other statutory bodies; (iii) any other person to whom the employer is bound to report, or (iv) as required by law, including any court or tribunal, or as required in relation to appearance as a witness in any court or tribunal. In particular, no information will be given to the media either directly or indirectly.

NO DEROGATORY STATEMENT DRAFT CLAUSE

1.3 The Employee will not at any time in the future make any detrimental or derogatory statements about matters concerning the Employer, its employees or directors, his/her employment with the Employer, or the termination of that Employment.

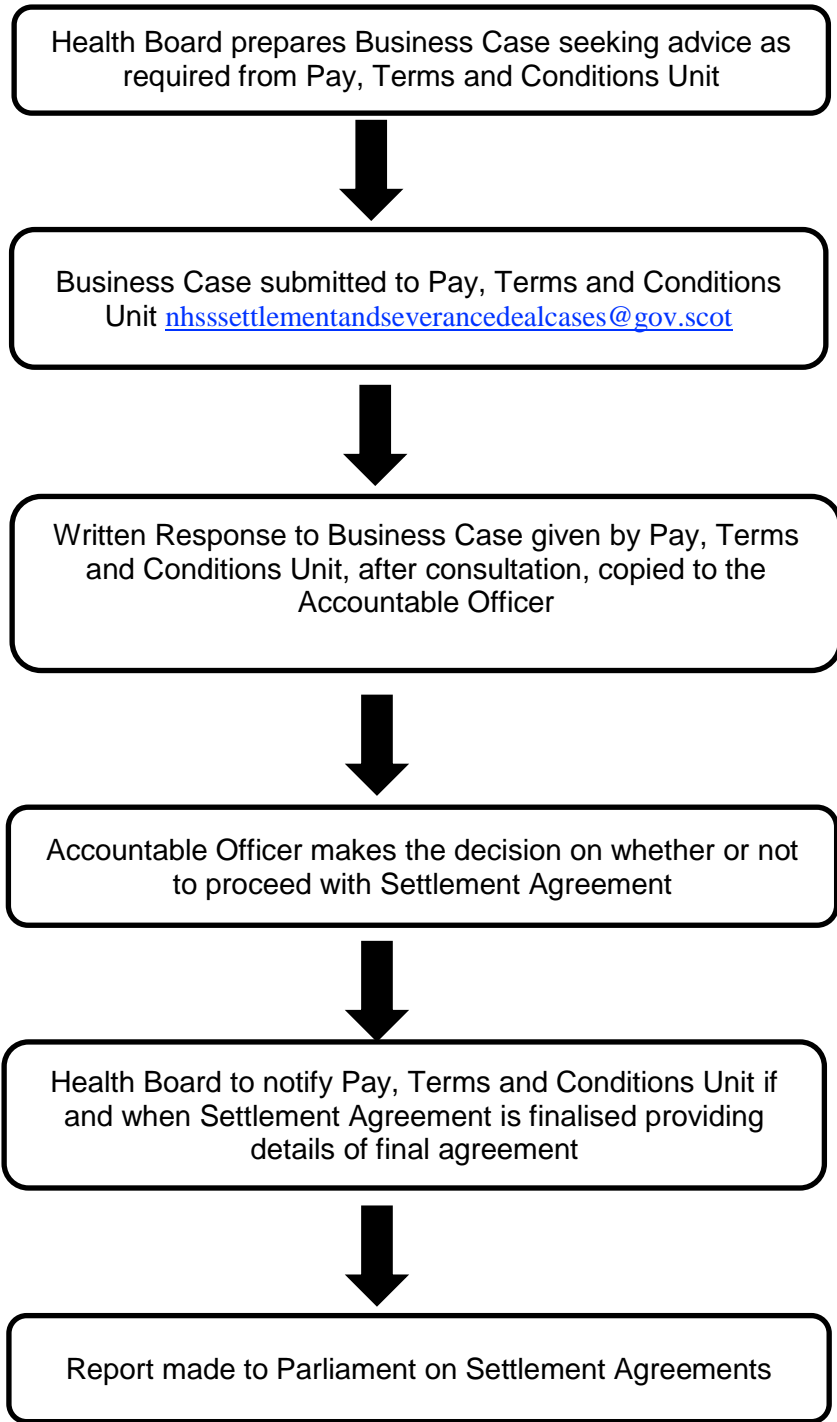
1.4 The Employer will take reasonable steps to ensure that its employees do not make any detrimental or derogatory statements regarding the Employee. The Employer's obligations in this regard will be fully discharged by the sending of an email, the text of which will be as set out at Schedule 3, to the following persons within seven days of the signing of this Agreement by the Employer: INSERT NAMES. For the avoidance of doubt, the sending of that email will not be a breach of the foregoing clause regarding confidentiality.

RIGHTS IN RELATION TO PROTECTED DISCLOSURES

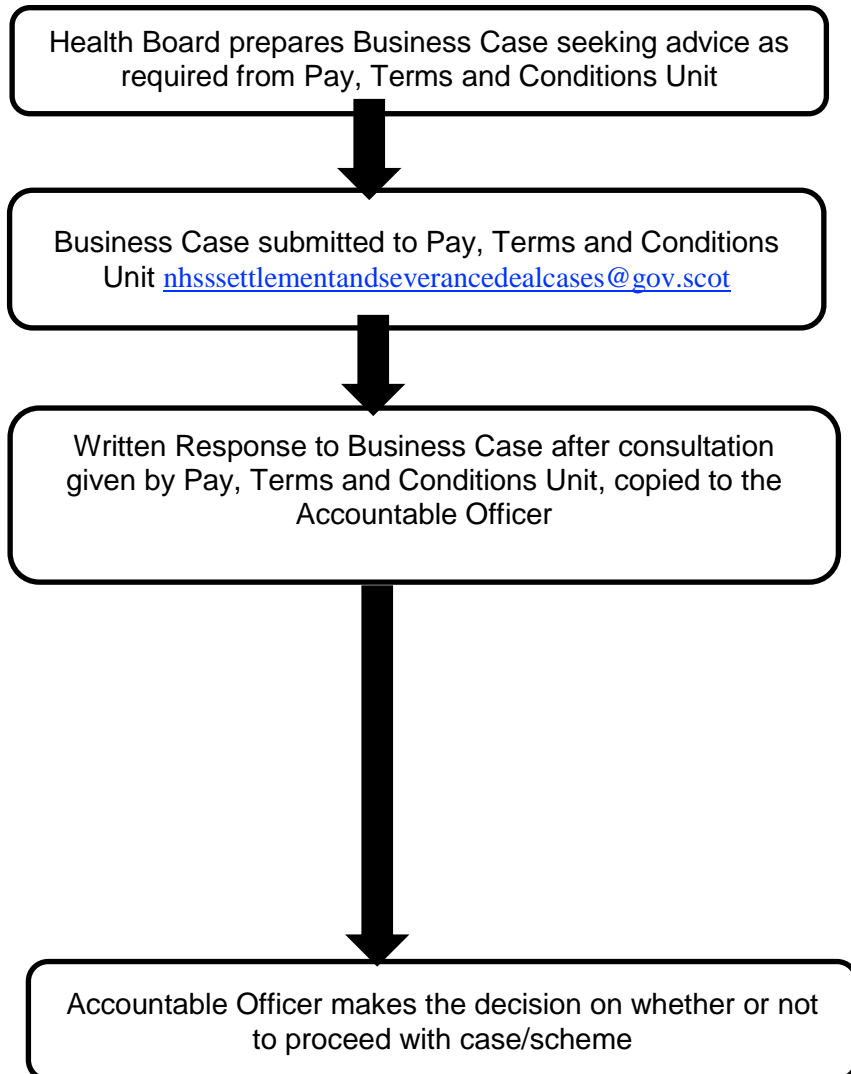
1.5 For the avoidance of doubt, nothing in this clause, nor in this Agreement generally, shall prejudice any rights that the Employee has, or may have, under the Public Interest Disclosure Act 1998 (sometimes referred to as whistleblowing rights) and/or any obligation that the Employee may have or raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to his professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.

1.6 With regard to the confidentiality obligations generally on either party in this clause, nothing in those obligations shall prevent this Agreement from being subject to appropriate scrutiny by a statutory body tasked with the scrutiny of public bodies such as Audit Scotland or the Public Audit and Post Legislative Committee.

SETTLEMENT AGREEMENT REPORTING PROCESS



VOLUNTARY RESIGNATION WITH FINANCIAL CONSIDERATION REPORTING PROCESS



ELEMENTS TO BE INCLUDED/EXCLUDED FROM £95,000 COMPENSATION CAP

Included	Not Included
Any non-contractual sum agreed as part of the compensation	Pension benefits to which the employee is already entitled
Pay in Lieu of Notice	Mandatory payments made by the employer to the pension scheme to either top up pension or underwrite the actuarial reduction to allow early access to pension benefits (sometimes known as strain costs for fully funded schemes)
Payments for accrued annual leave or other time off owed to employee	Awards made by an Employment Tribunal or other court of law
Lump sum payments due under any compensation scheme for early exit, redundancy etc	
Payments for legal costs incurred by employee	
Any additional payments made to employee e.g. for outplacement support	
Discretionary payments made by the employer to the pension scheme to either top up pension or underwrite the actuarial reduction to allow early access to pension benefits	

REDUNDANCY

Since 2007, Scottish Government has been committed to a policy of **No Compulsory Redundancies**. This is on the basis that public bodies are expected to negotiate extensions to the policy in return for continuing or additional workforce flexibilities.

- The key aim is for constructive and collaborative discussions between employers and their trade unions to make the most effective use of the funding available for their pay awards.
- Maintaining employment in the public sector is crucial for the economy as well as individuals, families and communities.
- Ministers expect all public bodies to engage with this framework and will continue to work with all public sector employers, staff and their representatives to meet this commitment and consider how this might be extended further.
- In the current climate, we would expect any extension of the commitment to be balanced by workforce flexibilities that increase efficiencies and manage costs while maintaining the quality of services.
- Employers are best placed to determine what flexibilities are necessary and appropriate for their particular staff group, rather than these being laid down centrally – the details will be for agreement between employers and staff groups.
- Public bodies are expected to look at all appropriate measures to avoid compulsory redundancy and should work closely with affected staff and their unions, to identify suitable alternative employment opportunities where necessary.

The No Compulsory Redundancy policy does not prevent organisations from managing their workforces through voluntary redundancy schemes as set out in the **voluntary resignation secured by a financial consideration** section of this guidance.