

GUIDANCE: Retention and Exit Terms (RETs) for Business Critical Staff

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Introduction

1. The major goal for all organisations during the transition is to deliver change, while maintaining high levels of business performance and delivering critical activities and functions.
2. The [HR annex](#) to Sir David Nicholson's transition letter published in December 2010 established a number of principal objectives to guide thinking on the implications of the proposed reforms on organisations and their staff. One of these objectives is to support business continuity during the transition. It is a priority to identify and retain those staff whose posts have been designated as business critical throughout the transition period by offering some certainty around pay and terms during transition and on exit.
3. The HR annex committed to produce guidance to support the retention of business critical staff, including an offer of guaranteed severance terms for some staff. In the annex, this was described as a 'national pre-authorised MARS for the NHS'. This is now called 'Retention and Exit Terms' (RETs) for Business Critical Staff.

Purpose

4. This guidance has been developed in partnership with NHS Employers and the Trade Unions with the aim of supporting organisations to develop a local policy to assist with the retention of those staff whose role is considered to be *business critical*. The guidance focuses on the application of two approaches which can support retention:
 - The provision of a severance payment of up to 24 months pay, based on one month's salary for each year of reckonable service, for staff who are eligible at the end of the required retention period.
 - The use of existing contractual flexibilities, such as short-term retention premia and/or the use of a special payment¹ where staff take on additional responsibilities or a wider portfolio.
5. Subject to the normal approval processes, organisations may choose to apply either of the approaches set out above or both. It is important to ensure that, whichever approach is taken, the rationale is detailed in an individual business case and considered by the remuneration committee. In either case it is important that organisations use objective and non-

¹ See paragraph 42.

discriminatory criteria in order to determine which posts are designated as business critical.

Scope

6. This guidance covers the following organisations:

SHAs and PCTs

Strategic Health Authorities (SHAs) up to March 2012 and Primary Care Trusts (PCTs) up to March 2013 must continue to effectively discharge their statutory duties and maintain a strong grip on quality and current performance whilst providing expertise and support to emerging GP consortia.

Abolished SpHAs and ENDPBs (on NHS terms and conditions)

Similarly those Special Health Authorities (SpHAs) and Executive Non-Departmental Public Bodies (ENDPBs) on NHS terms that are due to be abolished will need to maintain delivery of their statutory functions until closure.

The Provider Development Authority

It is the government's intention that all NHS trusts will become foundation trusts by April 2014. Therefore, the new time-limited PDA will be set up to continue the development of NHS Trusts to become NHS Foundation Trusts.

Retention and Exit Terms

7. The RETs offer gives eligible staff the guarantee that they can leave with a severance payment of up to 24 months salary (based on one month's salary for each year of reckonable service) at the end of the required retention period if they:
 - are not offered a post transferring to one of the new organisations and;
 - have applied for and are not offered, following application, suitable alternative employment with their own or another NHS employer.
8. RETs gives an individual the choice either to leave with the RETs severance payment or to leave under the NHS redundancy terms in force at the time if staff have not secured suitable alternative employment following application. See flow chart attached at **Annex A**.
9. The offer of RETs does not affect general contractual terms and conditions of employment. If the employee chooses not to take the RETs offer then the normal arrangements for redundancy in force at the time will apply.
10. RETs payments are not related to early retirement benefits. An individual who wishes to access their pension early and leave under early

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retirement on the grounds of redundancy rules that are in force at the time, will need to participate in the redundancy process. This process may result in the offer of suitable alternative employment with their own or another NHS employer.

11. RETs provides staff with guaranteed employment up to the end of the agreed retention period. Although the RETs agreement cannot prevent someone from resigning prior to this date, it is expected that with the guarantee staff will commit to remain in post until the agreed date. If an individual resigns prior to the agreed date, the RETs option cannot be taken and so will not, of course, apply.
12. When considering the offer of RETs, the salary for the business critical role should be agreed at the outset and should apply for the duration of the appointment, subject to normal cost of living increases. Where an individual is already in receipt of a recruitment or retention premium (RRP) and/or other additional pay and where the weight of responsibilities is unchanged, the individual should remain on his/her existing terms. The offer of RETs should not be misinterpreted as an opportunity to review and increase pay. Any changes to VSM pay must comply with current pay policy including normal VSM Pay Framework rules, and grand-parent and Chief Secretary to the Treasury (CST) approval where required.
13. The RETs offer should be set out in an agreement with the individual concerned. The individual should confirm their acceptance in writing. The agreement should include the date to which the organisation would wish the member of staff to stay – the end date of the required retention period. This is most likely to be the date when the individual's organisation is due to be abolished. However, there will be a number of staff where this date may be, by mutual agreement, shortened or extended beyond the abolition date of the individual's employer.
14. The RETs offer should say that the individual will be required to sign a Compromise Agreement, at the time when it is clear that they wish to proceed to leave with a RETs severance payment rather than accept NHS redundancy terms.
15. Independent legal advice will need to be obtained by the employee before signing the Compromise Agreement. The organisation will contribute up to a maximum of £400.00 inclusive of VAT towards the cost of this legal advice.
16. Staff who accept the RETs offer are not precluded from being assigned to or from applying for posts in the restructuring process. Staff who accept the RETs offer will receive no preference or advantage in the process of selection for assignment.
17. In the event that the member of staff finds suitable alternative employment, the RETs agreement will lapse and will not carry forward to the new employer

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18. Where it is clear that their post will transfer under TUPE² or TUPE like terms to a new organisation, the individual will transfer to the new organisation on the date of transfer. Staff who do not wish to transfer can choose not to do so but will be deemed to have resigned and will not be entitled to either a RETs payment or redundancy compensation.
19. Where it is clear that their post will not transfer, the individual will be at risk of redundancy.
20. In a redundancy situation, an employer has a responsibility to seek to avoid redundancy by trying to identify suitable alternative employment for displaced staff. This may include employment in a different role, location or with a different NHS employer. What might constitute suitable alternative employment will depend on the circumstances of the individual case; however, employers should consider factors such as:
 - Pay, including the opportunity to earn overtime or allowances
 - Status
 - Job content, is it within the employees capabilities
 - Working hours
 - Location
21. An employee may forfeit his/her right to redundancy payment if s/he does not apply for or accept an offer of suitable alternative employment. On the other hand, factors which may be raised for consideration as grounds for refusal to accept an offer of employment might include:
 - Family circumstances
 - Additional travel
 - Status issues
22. Where there is any doubt with regard to a particular case the employer and/or the employee should seek appropriate legal advice.
23. Members of staff who leave the NHS under RETs would not be re-employed under normal circumstances by the NHS, in the same or a different post, before a period of one month has elapsed. If an individual does return to the NHS within one month they would be required to repay any RETs payment in full.
24. Where a member of staff returns to work for the NHS within six months and before the expiry date of the period for which they have been compensated (as measured in equivalent months/part months salary), then the employee would be required to repay any unexpired element of their compensation. This would be reduced to take account of any appointment to a lower grade and reflect net salary. The RETs agreement

² Transfer of Undertakings (Protection of Employment) Regulations 2006

should specify the requirement to repay monies in such circumstances and may provide for a period of repayment.

Eligibility

25. Although it is not the intention of this guidance to prescribe *exactly* which staff will be eligible for the RETs offer, or all the criteria which will determine a post being deemed business critical, it provides some broad criteria and sets out the approval process organisations are expected to follow.
26. It is for the *organisation* to identify the business critical posts and hence the individuals to whom the RETs offer will be made, in line with the business critical criteria. This scheme is not open to 'application'. The RETs agreement should not be confirmed with the individual until the full approval process has been completed. Organisations will need to undertake their own service reviews, which should identify business critical roles. They will need to ensure that the process for identification is fair and transparent and proportionate. They will need to record the criteria used in their process and be able to justify that they are objective and non-discriminatory.
27. The employer should set out, to all staff within the organisation, the roles that are identified as business critical and therefore eligible for RETs. A new role attained either following cluster appointments or where staff are 'assigned' should not preclude them from being considered for RETs.
28. An offer of RETs should not compromise any current or future fair selection for redundancy or provide any advantage to those applying for posts in the new structures i.e. an offer of RETs to any individual should not prejudice the statutory and contractual employment rights of another member of staff.
29. The following criteria should be taken into account when considering the application of a RETs offer to a member of staff:
 - a. The individual must be occupying a *business critical* role. That is a role, which if not filled, will result in an unacceptable risk to the organisation concerned.
 - b. Either the individual occupying a *business critical* role has scarce skills and knowledge that are only available amongst a very limited number of staff, if any, and there would be little or no likelihood, should the individual concerned leave, of recruiting or otherwise covering the post in question quickly and effectively; or

An individual or group of individuals required to close down a particular activity within the organisation being abolished would be prohibitively costly to replace eg. the most likely route to covering the activity would be the procurement of a management consultant or consultancy.

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c) The offer should:

- be in the interests of the service
- meet probity requirements
- provide value for money
- be subject to acceptable performance and conduct standards throughout the required retention period
- result from part of an equitable process for all affected staff, whereby the criteria and selection process should be as transparent and robust as that required for redundancy
- be fully documented
- be consistent with the employer's duty to analyse the equality impact of the offer and the outcome and to publish this analysis.

30. Business critical staff may be identified across all grades and clinical professions, and not just limited to Very Senior Managers (VSMs). However, it is expected that organisations will contain numbers to a ceiling of 15% of their workforce.
31. All organisations should comply with current equality legislation and all local processes should ensure fairness and transparency. An analysis of the impact on equality on RETs scheme should be undertaken by organisations, including an equality analysis before and after business critical roles are determined. This analysis should be published. Appropriate equality monitoring should be undertaken in accordance with local equality and diversity procedures and shared with recognised trade unions. Organisations should pay due regard to the positive action provisions within the Equality Act 2010 as part of their determinations.
32. In order to ensure fairness, consistency and affordability, all recommendations should be supported by a business case to remuneration committees and follow the same approval process currently used for VSMs. This is set out below:

RETs Approval Process

		Grandparent
SHAs	SHA RC makes recommendations to SHA Board	DH
PCTs	PCT RC makes recommendations to PCT Board	SHA
SpHAs ENDPBs	SpHA/ENDPB RC makes recommendations to SpHA/ ENDPB Board	DH through PaPOC*

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* ALB Pay and Performance Oversight Committee (a Department of Health Committee)

33. In addition to its grandparent role for SHA, SpHA and ENDPB staff, the Department will need an overview of the overall numbers, including those PCT staff approved by the SHAs. However, it will remain the role of SHAs to approve PCT Board recommendations regarding the application of RETs and to ensure the overall numbers are maintained within the 15 % cap. Any analysis of all approved RETs should be shared within clusters with recognised trade unions and across SHAs with the Regional Social Partnership Forum.
34. SHAs should normally have designated posts and individuals for RETs by the end of April 2011 and PCTs by the end of June 2011.
35. SHAs should use the template attached at **Annex B** when submitting returns on the overall uptake of the RETs agreement.

Local retention premia

36. Organisations already have the discretion to apply the use of retention premia to posts identified as unique or where circumstances mean that the employer would find it difficult to recruit to the post if an individual were to leave. Staff, on AfC terms and conditions and those covered by the VSM pay framework, are eligible to be considered for local retention premia in accordance with the strict criteria and assurance process set out in the NHS Staff Terms and Conditions Handbook and the Pay Framework for Very Senior Managers. These can be found at:

[NHS Terms & Conditions of Service Handbook](#)

[Pay Framework for Very Senior Managers](#)

37. Staff on consultant terms and conditions may also be eligible for retention premia³. Details can be found at:

[Terms & Conditions Consultants \(England\) 2003](#)

38. It is expected that the award of any *new* local retention premia during the period of transition should be exceptional. The rationale should be detailed in an individual business case to be considered by the organisation's Remuneration Committee and approved by the relevant grandparent in the usual way. These arrangements are summarised below:

³ For consultants on the 'old' contract – i.e. pre 2003 - there is no provision for a retention premium.

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Retention premia – VSMs

		Grandparent	Assurance
SHAs	SHA RC makes recommendations to SHA Board	DH	-
PCTs	PCT RC makes recommendation to PCT Board	SHA	DH
SpHAs ENDPBs	SpHA/ENDPB RC makes recommendations to SpHA/ ENDPB Board	DH through PaPOC	-

Retention premia - AfC staff

		Grandparent	Assurance
SHAs	SHA RC	None	None
PCTs	PCT RC	SHA	-
SpHAs ENDPBs	SpHA RC ENDPB RC	DH through PaPOC	-

39. It is expected that retention premia, applied within the context of retaining business critical staff during transition, should be regarded as short-term and non-pensionable.
40. Normally retention premia are paid on a monthly basis, however, they can be awarded on a one-off basis. Organisations should give due consideration to paying a proportion of the total retention premium as a lump sum at the end of the required retention period.
41. In offering local premia, organisations should be compliant with equal pay legislation and the need for objective justification for any awards of premia.

Additional responsibilities payments

42. In addition, staff covered by the VSM pay framework can be paid an additional payment, where they either take on significant responsibilities outside their core role or where directors take on roles with a broader remit, where additional responsibilities would be part of their core role. The same grandparenting and assurance process used for VSM retention premia (as set out in the table above) must be followed when considering the application of additional responsibilities payments.

Chief Secretary to the Treasury approval

43. It is important to note that where discretionary payments (recruitment and retention premia and additional responsibilities payments) take an individual's salary over £142,500 pa then the Chief Secretary to the Treasury must approve the salary.

Joint management arrangements

44. Remuneration for VSM staff affected by the clustering arrangements is covered by paragraph 35 of the ['PCT Cluster Implementation Guidance'](#) on joint management arrangements.