Liquidation: A guide for employees

Information sheet – 46

This is **Information Sheet 46 (INFO 46)**. It provides information for employees of companies in liquidation.

If you are an employee of a company in liquidation, you should also read Information Sheet 45 *Liquidation: A guide for creditors* (INFO 45).

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Who is an employee?

You are an employee if you are:

- engaged by a company under an award, enterprise agreement, agreement-based transitional instrument (i.e. agreements that were in force before the commencement of the *Fair Work Act 2009*) or a contract of employment
- paid a salary, wages or commission.

If you are a **contractor**, you may be classified as an unsecured creditor, not an employee. You should seek your own legal advice or contact the Australian Taxation Office (ATO), the Fair Work Ombudsman or your union representative to determine if you are a contractor or an employee.

If you are an employee owed money for unpaid wages, superannuation, annual leave, sick leave (in limited circumstances), long service leave, retrenchment pay or other benefits, you are a creditor of the company. You may be entitled to some or all of what you are owed before other creditors (this is known as 'priority').

The purpose of liquidation

The liquidation of an insolvent company allows an independent registered liquidator (the liquidator) to take control of the company so its affairs can be wound up in an orderly and fair way to benefit creditors.

There are two types of insolvent liquidation:

- creditors' voluntary liquidation
- court liquidation.

The most common type is a creditors' voluntary liquidation, which begins when:

- an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator, or
- creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement.

In a court liquidation, a liquidator is appointed by the court to wind up a company following an application (usually by a creditor). Directors, shareholders and ASIC can also make a winding-up application to the court.

It is possible for a company in liquidation to also be in receivership. For more information, see Information Sheet 55 *Receivership: A guide for employees* (INFO 55).

The liquidator's role

Liquidators have a duty to all company creditors. Their role is to:

- protect, collect, and sell the company's assets
- investigate and report to creditors about the company's affairs, including any:
  - unfair preferences (payments made to certain creditors and not others) that may be recoverable
  - uncommercial transactions that may be set aside
  - possible claims against the company's officers (including insolvent trading)
  - creditor-defeating dispositions, including phoenix activity
- inquire into the failure of the company – and possible offences by people involved with the company – and report to ASIC
- distribute money from the collection and sale of assets after payment of the costs of the liquidation, including the liquidator's fees (subject to the rights of any secured creditor) – first to priority creditors, including employees, and then to unsecured creditors.

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to incur any expense for the winding up unless there are enough assets to pay their costs.

Employee entitlements

In most cases, the liquidation of a company terminates the employment of employees.

If there are funds left over after paying the liquidator's fees and expenses, employees have the right to be paid their outstanding entitlements before other unsecured creditors are paid (priority claims). Employee entitlements are grouped into categories (or classes) and paid in the following order:

- outstanding wages and superannuation
- outstanding leave of absence (e.g. annual leave and long service leave)
- retrenchment pay.

Each class must be paid in full before the next class is paid. If there isn't enough money to pay a class in full, the available funds are paid on a pro-rata basis (and the next class or classes will be paid nothing).

If directors and their spouses or relatives are employees, their priority claims for the period they are a director, spouse or relative of a director are limited to a maximum of:

- $2,000 for outstanding wages and superannuation
- $1,500 for outstanding leave entitlements.

Directors and their spouses or relatives are excluded employees and are not entitled to any priority retrenchment pay for the period they are a director, spouse or relative of a director. Any amounts left owing after these priority amounts are treated as an ordinary unsecured claim along with other unsecured creditors (e.g. trade creditors).

Employees may also be entitled to make a claim against the Fair Entitlements Guarantee (FEG).

Sometimes, the liquidator may continue to trade the business for a short period to help in the winding up. If this happens, employee entitlements accruing during this period (on terms agreed with the liquidator) are paid out of available assets as a cost of the winding up and before other outstanding employee entitlements are paid.

Attempts to avoid employee entitlements

It is an offence for anyone to enter into an agreement or transaction with the intention of avoiding employee entitlements of a company.

If the company is in liquidation and the employees suffer damage or loss as a result of a person entering into such an agreement or transaction, that person is liable to pay compensation for the loss suffered. Employees have priority to any compensation recovered by a liquidator.

If you believe such an offence has been committed, tell the liquidator. You can also lodge a report of misconduct with ASIC.

Proving your claim

Before any amount is paid to you for your outstanding entitlements, you will need to give the liquidator information to prove your debt. You can obtain the relevant form, called a 'proof of debt' from the liquidator.

The liquidator will notify you if funds might be available for payment and will call for proofs of debt to be lodged.

The liquidator may be able to tell you what you are owed based on the company's records. However, company records may not be well maintained, and it is important you keep your pay and other records about the terms of your employment. You may also need these records to complete your income tax return and establish your entitlement to the FEG.

The liquidator may reject your claim if company records are inadequate and you have insufficient information to justify your claim.

When you submit your claim, ask the liquidator to confirm receipt of your claim and if they require any further information.

Contact the liquidator if you have questions about the calculation of your claim, or the timing of the payment.

If the liquidator rejects your claim and you are dissatisfied with the decision, follow the steps outlined in the notice of rejection. You will have a limited time after you receive the notice to appeal the liquidator's decision. If you do not appeal within this time, the liquidator's decision on your claim is final.

A liquidator may also ask you to submit a proof of debt to vote at a creditors' meeting. This is **not** the same as a proof of debt for dividend purposes.

The Fair Entitlements Guarantee (FEG)

Employees owed certain entitlements after losing their job because their employer went into liquidation may be able to get financial help from the Australian Government.

This help is available through the FEG.

The FEG is a scheme of last resort assisting employees who have lost their job because their employer entered liquidation. For more information, see the FEG website.

The FEG does not cover unpaid superannuation contributions. For information about outstanding superannuation entitlements, contact the Australian Taxation Office (ATO).

Payment summaries and separation certificates

Most employees require a PAYG payment summary (group certificate) to complete and lodge their income tax return. A separation certificate may also be required before an employee who loses their job can apply for social security.

If a liquidator pays you any employee entitlements, they must provide you with a PAYG payment summary recording the entitlements paid and any income tax deducted. Contact the liquidator to find out if they are going to prepare your PAYG payment summary for entitlements paid by the company before their appointment and, if so, what period it will cover. The liquidator is not obliged to prepare this.

If you cannot obtain a PAYG payment summary for any period, contact the ATO to find out how to meet your obligations.

Contact the liquidator to find out if they are going to prepare your separation certificate. Also, contact Centrelink to find out what you should do if you cannot obtain a separation certificate.

Committee of inspection

A committee of inspection may be formed to assist and advise the liquidator. The committee of inspection also:

- monitors the conduct of the liquidator
- may approve certain steps in the liquidation
- may give directions to the liquidator.

The liquidator must consider but is not always required to follow the directions. For more information, see INFO 45.

All creditors, including a representative of the company's employees, are entitled to stand for committee membership to represent the interests of all creditors. Employees and large creditors can appoint their own member.

Right to request information

As a creditor, you can ask the liquidator to give you information, provide a report or produce a document relevant to the liquidation.

If the request is reasonable, the liquidator must provide this information, report or document. Complying with the request will not cause the liquidator to breach their duties.

Questions and complaints

Contact the liquidator to raise any questions or complaints. If the liquidator fails to resolve your concerns, including any concerns about the liquidator's conduct, you can lodge a report of misconduct with ASIC. ASIC does not usually become involved in matters of commercial judgement by a liquidator.

More information

- Information Sheet 39 *Insolvency information for directors, employees, creditors and shareholders* (INFO 39)
- Australian Restructuring Insolvency & Turnaround Association (ARITA) website
- ARITA Code of Professional Practice for Insolvency Practitioners

Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. We encourage you to seek your own professional advice to find out how the applicable laws apply to you, as it is your responsibility to determine your obligations.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of

the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases, your particular circumstances must be taken into account when determining how the law applies to you.

> Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.
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> This information sheet was reissued in June 2023.