Receivership: A guide for employees

Information sheet – 55

> This is **Information Sheet 55 (INFO 55)**. It provides information for employees of companies in receivership.

If you are an employee of a company in receivership, you should also read Information Sheet 54 *Receivership: A guide for creditors* (INFO 54).

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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 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').

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.

The purpose of receivership

A company goes into receivership when an independent registered liquidator (the receiver) is appointed by a secured creditor, or in special circumstances by the court, to take control of some or all the company's

assets. Court receiverships and controllerships are not covered in this information sheet.

The secured creditor can appoint a receiver because they hold a security interest that allows them to appoint a receiver. The security interest may comprise:

- a non-circulating security interest (e.g. a security interest in land, plant and equipment)
- a circulating security interest in assets that are used and disposed of in the course of normal trading operations (e.g. a security interest in debtors, cash and stock).

The powers of the receiver are set out in the security agreement, appointment documentation and the *Corporations Act 2001* (Corporations Act).

Under the terms of their appointment, if a receiver has the power to manage the company's affairs, they are known as a receiver and manager or a managing controller.

It is possible for a company in receivership to also be in provisional liquidation, liquidation, voluntary administration or subject to a deed of company arrangement: see Information Sheet 46 *Liquidation: A guide for employees* (INFO 46) and Information Sheet 75 *Voluntary administration: A guide for employees* (INFO 75).

The receiver's role

Generally, the receiver's role is to:

- collect and sell enough of the secured assets to repay the debt owed to the secured creditor (this may include selling assets or the company's business)
- pay out the money collected in the order required by the Corporations Act
- report possible offences or other irregular matters they come across to ASIC.

The receiver's main duty is to the secured creditor that appointed them. The duty owed to unsecured creditors is an obligation to take reasonable care to sell the secured assets for not less than its market value or, if there is no market value, the best price reasonably obtainable. A receiver also has the same general duties as a company director.

The receiver has no obligation to report to unsecured creditors, including employees, about the receivership.

Employee entitlements

If the receiver continues to trade the business, they must pay ongoing employees for services provided after the date of appointment from the company assets available to them. These payments are treated as an expense of the receivership.

The appointment of a receiver and manager does not automatically terminate the employment of the company's employees. Unless the receiver adopts the employment contracts or enters into new contracts of employment with employees, they are not personally liable for any employee entitlements that arise during the receivership.

If the company's business is sold by the receiver as a going concern, the company's employees may keep their jobs. In this case, it is usual for the new owner to take over the company's liability for outstanding employee entitlements, although this is not always the case. You should seek advice about how ongoing trading of the business and the terms of the proposed sale affect the payment of your entitlements.

If there are insufficient funds to pay all creditors in full, the money from the realisation of assets must be paid as follows:

- money from the sale of non-circulating assets is paid to the secured creditor after the costs and fees of the receiver in collecting this money have been paid
- money from the sale of circulating assets is paid out in the following order:
  - the receiver's costs and fees in collecting this money
  - certain priority claims, including employee entitlements (if the liability for these has not been transferred to a new owner)
  - repayment of the secured creditor's debt.

In both cases, any funds left over are paid to the company or its external administrator, if one has been appointed.

If the receiver is appointed under a security interest comprising both non-circulating and circulating security interests (which is common), there will be costs and fees of the receivership that cannot be directly allocated to realising the non-circulating assets or circulating assets. These costs are allocated in proportion to the amount realised from the non-circulating assets and circulating assets.

If employee entitlements are paid by the receiver under a circulating security interest, the payments must be made in the following order:

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

Each category (or class) of entitlement must be paid in full before the next class is paid. If there are insufficient funds 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, they are excluded employees, and 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 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).

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.

If you are employed by a company that is in receivership you are not eligible for the FEG until and unless the company enters liquidation.

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 your outstanding superannuation entitlements, contact the ATO.

Establishing your claim

If a receiver must pay outstanding priority employee entitlements, they may advise you beforehand how much they believe you are owed. Promptly contact the receiver if you disagree with their calculation.

You may be required to complete an employee entitlement claim form. In this case, you should contact the receiver's office to agree and settle the amount.

You may need to provide evidence to justify your claim. It is important that you keep your pay or other records about the terms of your employment. You may also need these records to help you complete your income tax return and establish any entitlement to the FEG if the company enters liquidation.

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

If the receiver rejects your claim after you have taken the above steps, seek legal advice. If you have a query about the timing of the payment, discuss this with the receiver.

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 receiver 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 receiver 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 receiver 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.

A receiver must prepare a separation certificate for any employee whose employment is terminated during the receivership. They are not obliged to prepare one for terminations that occurred before the receivership.

Contact Centrelink to find out what you should do if you cannot obtain a separation certificate.

Questions and complaints

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

More information

- Australian Restructuring Insolvency & Turnaround Association (ARITA)
- 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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