



The Insolvency
Service

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DEAR INSOLVENCY PRACTITIONER Issue 126 – April 2021

Dear Reader

Please find enclosed the latest articles by the Insolvency Service.

<i>In this issue:</i>	
<i>Information/Notes page(s):</i>	
Chapter 11	Employment issues
Article 73	Increased holiday pay carry-over
Chapter 17	Legislation
Article 65	Pre-pack sales in administration: New regulations coming into force 30 April 2021
Chapter 24	Voluntary arrangements
Article 56	Publication of the IVA protocol 2021

73) Increased holiday pay carry-over

To ensure businesses have the flexibility they need to respond to the coronavirus pandemic, and to protect workers from losing their statutory holiday entitlement, the Working Time (Coronavirus) (Amendment) Regulations 2020 was introduced. This enables workers to carry holiday forward where the impact of coronavirus means that it has not been reasonably practicable to take it in the leave year to which it relates.

<https://www.legislation.gov.uk/ukxi/2020/365/made>

Guidance has been provided to assist employers in identifying when increased holiday carry-over could be appropriate. [Holiday entitlement and pay during coronavirus \(COVID-19\) - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

The guidance focuses on businesses that have seen their workloads increase as a result of the pandemic, and that have therefore not been able to allow workers to take their holiday entitlement. The key consideration is whether it was not *reasonably practicable* for a worker to take annual leave as a result of Covid-19. Various factors should be considered such as:

- whether the business has faced an increase in demand due to Covid-19 that would reasonably require the worker to continue to be at work and cannot be met through alternative practical measures
- the extent to which the business' workforce is disrupted by the Covid-19 and the practical options available to the business to provide temporary cover of essential activities
- the health of the worker and whether they need to take a period of rest and relaxation

The above list is not exhaustive.

Furloughed employees are expected and encouraged to continue to take their holiday. As mentioned in a previous Dear IP, employees taking holiday during the furlough period must have received their normal contractual rate of pay (i.e. 80% from Govt plus 20% from employer).

In determining whether employees who have been furloughed are entitled to carry-over increased holiday, Insolvency Practitioners must be satisfied the employer either prevented or refused leave as a result of Covid-19 measures or for some other direct impact of Covid-19.

Where an employee was furloughed and received an 80% payment for holiday pay, but the employer has not paid the 20% shortfall, the Redundancy Payments Service (RPS) will accept the employee will have a shortfall of 1/5th of their entitlement remaining unpaid. This shortfall can be expressed on the

RP14A as an increase in holiday days accrued. Where this has occurred, it is recommended that this is communicated to the claimant(s) so they can adjust their claim.

It is the responsibility of the Insolvency Practitioner to decide whether they feel the circumstances meet the above criteria, as this will not be a decision made by RPS. If the Insolvency Practitioner agrees they meet the criteria, then the uploading of the RP14a will be treated by the RPS as confirmation of their acceptance of the debt.

RPS will pay the lower figure from the RP1 & RP14a. If the claimants have any queries regarding pro-rata holiday calculation based on the information supplied on their RP1 claim, it will be a matter for the Insolvency Practitioner to decide on whether they will need to provide guidance to the claimant.

Any enquiries regarding this article should be directed to:
rps.stakeholder@insolvency.gov.uk

65) Pre-pack sales in administration: New regulations coming into force on 30 April 2021

Issue 122 of Dear IP advised that draft regulations entitled “The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 (“the Regulations”) were laid before Parliament on 24 February 2021.

The Regulations come into force on 30 April 2021, and apply to England, Scotland and Wales. As from this date, an administrator cannot proceed with the sale, disposal or hiring out of all or a substantial part of a company’s assets to a connected person within 8 weeks of the commencement of administration, unless there has been either:

- creditor approval; or
- the connected person has obtained a report on the reasonableness of the disposal from an individual qualified to do so within the meaning of the Regulations and referred to as an “evaluator”

Creditor approval

Where the creditor approval route is used, and an administrator seeks a decision from the company’s creditors under paragraph 51(1) of Schedule B1 to the Insolvency Act 1986, the rules and procedures set out in the Insolvency (England and Wales) Rules 2016 and The Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 for seeking approval of the administrator’s proposals apply.

The Regulations do not specify a requirement for the decision to be made by a qualifying decision procedure, and therefore the deemed consent procedure can be used. Deemed approval of a proposal where the administrator has made a statement under paragraph 52(1) of Schedule B1 cannot be used, however, since this would not meet the requirements of paragraph 4(2)(b) of the Regulations.

A report from an evaluator

Where the connected person obtains a report from an evaluator, the evaluator’s report must include a statement as to whether they are satisfied that the consideration and the grounds for the disposal are reasonable, or if they are not satisfied that the consideration and the grounds are reasonable in the circumstances.

An administrator must consider the evaluator's report before making any disposal but is not bound by it. An administrator can proceed with a disposal even where an evaluator has stated that they are not satisfied that the disposal is reasonable, if the administrator considers that it would be in the best interests of creditors to do so.

Where this is the case, or where the evaluator's report contains details of any previous report stating that an evaluator was not satisfied that the disposal was reasonable, the administrator must provide a statement setting out their reasons for proceeding with the sale.

The administrator is required to send a copy of the evaluator's report (which may exclude any information that is confidential or commercially sensitive), and, where appropriate, any statement made on the reasons for proceeding with the sale, to:

- be registered at Companies House
- creditors of the company

The documents must be sent at the same time as the administrator sends their statement of proposals, and for the purposes of sending to Companies House should be included as an annex to the proposals. Companies House have confirmed that form AM03 has been updated with additional tick boxes for notification of the inclusion of the above-mentioned documents.

A copy of The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 can be found here:

<https://www.legislation.gov.uk/ukdsi/2021/9780348220421/contents>

Guidance has been prepared to accompany the Regulations. The guidance is intended to aid connected persons, Insolvency Practitioners and evaluators to understand their responsibilities under the new legislation. A copy of the guidance can be found here:

www.gov.uk/government/publications/requirements-for-independent-scrutiny-of-the-disposal-of-assets-in-administration-including-pre-pack-sales/requirements-for-independent-scrutiny-of-the-disposal-of-assets-in-administration-including-pre-pack-sales

We understand that similar legislation is intended to be introduced in Northern Ireland before the end of June.

Amendments to Statement of Insolvency Practices

The Joint Insolvency Committee (JIC) has updated the requirements in SIP 13 (Disposal of assets to connected parties in an insolvency process) and SIP 16 (Pre-packaged sales in administration) to align with the new Regulations. The revised SIPs come into effect on 30 April 2021, the same day as the

Regulations. Insolvency Practitioners should look on the websites of their relevant regulatory body for the revised SIPs.

There have been a number of questions about the intentions behind the revised version of SIP 16. The JIC has provided the following information:

- The changes made to SIP 16 have been limited only to those necessary to accommodate the change in the law.
- If the purchaser is a connected person (as defined in the Regulations) SIP 16 now highlights the additional statutory requirements placed on the purchaser and the administrator (paragraphs 5 and 11 of SIP 16). The SIP also requires the disclosure of the qualifying report with the SIP 16 statement (Appendix – disclosure requirements). These obligations only apply where the purchaser is a connected person (as defined in the Regulations).
- SIP 16 continues to emphasise the need for transparency in a pre-pack sale, particularly when there is some connection between the insolvent entity and the purchaser, even if the connection is not defined in the legislation. SIP 16 has always recognised that in such circumstances a greater level of detail will need to be provided to creditors to explain that the transaction was in their best interests.
- The amendment made at paragraph 6 of the SIP introduces a more subjective test for a connection between the insolvent entity and the purchaser and the Insolvency Practitioner will need to take a view on the level of detail which will need to be provided to creditors to explain the transaction.

SIP 16 will be reviewed and amended further during the next 6 to 12 months. Any questions or difficulties with the SIP should be reported to the JIC Secretariat, via the Insolvency Practitioners Association.

Any queries about this Dear IP article should be directed to:
Policy@insolvency.gov.uk

56) Publication of the IVA protocol 2021

The individual voluntary arrangement (IVA) protocol 2021 has been published on behalf of the IVA standing committee on 29th April 2021 and can be found [here](#).

This protocol can be used for all new consumer IVAs immediately, however there is a three-month transition period (until 1st August 2021) during which the 2016 protocol can also be used for new arrangements. After 1st August 2021 no new 2016 protocol IVAs should be presented to creditors for approval. We hope this will allow time for practitioners to make relevant changes to their IT systems and any internal procedures.

The 2021 protocol aims to be more user friendly for insolvency practitioners, consumers and creditors and includes 8 annex documents. Its aim is to ensure that consumers have as much information as possible on their chosen debt solution. It also makes clear what consumers and creditors can expect from the nominee and supervisor, and the consumer's obligations under the arrangement.

Key updates include:

- Changes to the way in which equity in a consumer's home is dealt with, including the introduction of a 72-month IVA for those who have equity over £5000 and are unlikely to be able to re mortgage at the end of their IVA term
- Highlighting the need to consider vulnerability of consumers and providing further guidance on what practitioners should do if vulnerabilities are identified
- Requiring the insolvency practitioner to record more information in respect of any lead who has referred the case to them
- An obligation that the practitioner ensures that the consumer has received appropriate debt advice from either an FCA regulated firm or an individual working under the exclusion (FSMA 2000) and, as part of that, considers the sustainability of that IVA
- Several practical annex documents which including an easy guide to the regulatory framework for consumers (annex 2), a sample letter for use in full or part by practitioner when the proposal is put together (Annex 3) and a more detailed and accurate estimated outcomes template to compare an IVA with Bankruptcy.

*Any enquiries regarding this article should be directed towards
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