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DEAR INSOLVENCY PRACTITIONER Issue 138 – October 2021

Dear Reader

Please find enclosed the latest articles from the Insolvency Service and HMRC.

In this issue, the Insolvency Service's Cyber Security Team provides advice and guidance for the insolvency community, including on the potential costs of security breaches. Matthew Atkinson, the Head of the Cyber Security and Information Governance Team, shares some important resources for Insolvency Practitioners to consider to identify and address potential risks.

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34) Update: Recording tax and national insurance – dividend payments to former employees of an insolvent entity

HMRC's 'Recording tax and national insurance – preferential dividends' article (issue 130, chapter 8, article 28) has prompted some further questions. HMRC has therefore updated the guidance and added a question and answer section.

There may be times when you need to record tax and national insurance due on a dividend paid to the former employees of an insolvent entity. For example:

- Holiday pay.
- Arrears of pay arising before the date of insolvency.
- Pay in lieu of notice claims.
- Redundancy pay.

Please help HMRC ensure these payments are allocated correctly by setting up a new PAYE Scheme:

- Contact HMRC to set up the Scheme only when you are ready to make the payments.
- Once the final dividend payment has been made, please ensure HMRC receives a final Full Payment Submission (FPS) with a cessation date for both the former employee(s) of the insolvent entity to whom a dividend payment was made and the EPA scheme. This will prevent any reminder of late penalty notices being issued if the scheme remains active.

How do I set up a PAYE Scheme?

Contact HMRC's Employer Helpline on 0300 2003200. Tell the advisor you need to set up an EPA Scheme – they will ask you for the following information:

- The name and National Insurance Number (NINO) of directors, if available.
- Your phone number and email details.
- Your registered office address.
- Any other correspondence address HMRC may need to note for you.
- Date of the first pay day.

The advisor will then ask some more questions and tell you what you will receive and when.

Once the EPA Scheme is set up, see [PAYE and payroll for employers - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/payee-and-payroll-for-employers) for guidance on operating PAYE.

Making additional payments

If you need to make additional payments after the Final FPS has been submitted, please contact HMRC's Employer Helpline who can arrange for the Scheme to be restarted.

This can only be done:

- In the same tax year as the date of cessation or cancellation, or
- the next tax year after the date of cessation or cancellation.

For any other year, a further scheme will need to be set up.

Questions and Answers

Q. If an insolvent entity continues to employ employees after the Insolvency Practitioner's (IP) appointment and makes payments in respect of any sums owed to employees, which relate to the pre-insolvency period, should an EPA Scheme still be set up for those payments?

A. Yes.

Q. If an insolvent entity continues to employ employees after the IP's appointment, what scheme should be used when there is tax and National Insurance due on employment income accrued both pre- and post-administration?

Example

A company goes into administration on 15 August, and its employees are paid monthly in arrears on the last calendar day of the month. The company continues to trade, and the administrator decides staff will receive their normal monthly salary payment in full on 31 August. That payment includes:

- *Their claim for arrears of pay from 1 to 14 August.*
- *Post-administration salary from 15 to 31 August.*

Other employees may receive holiday pay where entitlement has been accrued both before and after the date of administration.

A. Where there is tax and National Insurance due on employment income earned during both the pre- and post-administration period, these should be reported on an EPA Scheme.

Q. I am concerned that requiring an IP to telephone HMRC’s Employer Helpline could result in excessive wait times or speaking to HMRC staff who aren’t familiar with insolvency. Could contact be made instead via a dedicated email address or phone number?

A. Unfortunately a dedicated email address or phone number is not possible. Internal guidance has been updated to ensure that Employer Helpline advisors have the information they need to deal with requests to set up EPA Schemes.

Q. If the insolvent entity is a sole trader or a partnership, what information do you require instead of the NINO of the directors?

A. NINO of the sole trader or partners.

Q. Where the address of the registered office is asked for, is this the registered office address of the employer if it was a company or the IP’s own firm if he trades through a company?

A. This is the registered office address of the IP.

Q. Where the guidance reads ‘any other correspondence address HMRC may need to note for you’, does that relate to addresses for the IP dealing with the insolvent entity?

A. This would be an alternative address to the registered office. For example, a registered IP may have several office locations and may wish to nominate one as the correspondence address.

Q. Where the date of the first pay day is requested, does this refer to the date the former employee was first paid by the insolvent entity or the date of the first dividend payment?

A. This is the date of the first dividend payment.

Q. Often, there can be a considerable length of time between dividends being paid in an insolvency. If a second or subsequent dividend is declared more than one tax year after the first, what action should the IP take?

A. As referenced in the guidance, a Scheme can be restarted but only:

- In the same year as the date of cessation or cancellation, or
- the next tax year after the date of cessation or cancellation.

For any other year, a new scheme will need to be set up.

Please contact HMRC's Employer Helpline on 0300 200 3200 to restart or set up a new scheme.

Q. Are you able to provide details of a point of contact at HMRC for IPs who have further queries?

A. If IPs have any further queries about this guidance, they should be directed through R3 or your representative body who will take them forward with HMRC.

35) Cancelling your VAT registration – form VAT7

Insolvency Practitioners are sending HMRC numerous different versions of the VAT7 postal form and this is causing problems.

Which form to use

The only VAT7 form that should be used (or replicated exactly) is VAT7 v1.3. This form is located on GOV.UK via the Insolvency (VAT Notice 700/56) Public Notice - [Cancel your VAT registration](#).

Using an incorrect version causes many problems. Forms are:

- Being sent to incorrect address.
- Not being received.
- Not recognised by our scanning system and being rejected.
- Not being scanned correctly – the layout of the forms isn't the same.
- Being captured incorrectly and information is wrong.
- Being rejected.
- Taking longer to reach the relevant HMRC department.

What to do with the form VAT7

The final page of the print and post form states:

What to do now

Print this form – Click the 'Preview' button to create a copy to print and post. Please ensure that you check your form carefully before you click 'Preview'. If you make any changes afterwards, you must click 'Preview' again to create a new copy with the changes included.

Send the form to HMRC.

Where to send the form

Please send the completed form to: **BT VAT, HM Revenue & Customs BX9 1WR.**

VAT7 forms **MUST** only be sent to this address. A Royal Mail redirection is currently in place for VAT7 forms sent to HMRC's previous Grimsby address. When the redirection expires all mail sent to this address will be returned to sender.

If you have any questions about this article, please direct them to R3 or your licencing body who will take them forward with HMRC.

77) Update on RPS policy on directors' claims

N.B. This update replaces any previous practices set out in the Dear IP 82 article of November 2018.

Employee status

In the first instance, upon receipt of a director's claim to the RPS for payments from the National Insurance Fund, the RPS will assess the employment status of that claim in line with Section 230 of the Employment Rights Act 1996 (ERA) and relevant case law.

Where the director is deemed to have been an employee of the company, the claim will be considered for the payment of their statutory entitlements from the RPS.

Where status is deemed to fall short of "employee" status, a formal rejection letter will be provided to the claimant. Should they wish to contest this decision, details of how to apply to an Employment Tribunal will be provided within the rejection letter.

A week's pay and dividends

Payments made by the RPS are with reference to 'a week's pay'. A week's pay for the purposes of Section 220 of the ERA can only include remuneration that is paid in respect of services provided under a contract of employment. Dividends should be removed from the calculation of a week's pay when making statutory declarations to the RPS.

Director's fees

The payment of a director's fee cannot also be said to be remuneration for employment. A director's fee is paid solely in respect of the director's office-holding. Solely being an office-holder does not give rise to employment status.

National Minimum Wage

If the removal of dividends or director's fee from "a week's pay" means the remaining rate of pay is below the applicable National Minimum Wage (NMW), the rate of pay used by the RPS will be uplifted to the NMW. This is because employees have the right to be paid at least the NMW for their employment. This includes payments from the RPS.

Director loans

When assessing payment, consideration must be given to any sums owed to the employer by the employee, as under Rules 14.24 and 14.25 of the Insolvency (England and Wales) Rules 2016 and case law, these should be offset. Any

payments that are due from the RPS can be offset by any outstanding director's loans.

Referrals to other government departments

The RPS has a duty to protect public funds and cannot pay out monies where there is doubt as to eligibility for payment. The RPS therefore may require the director to put in writing that they deemed themselves an employee and that they require an uplift to NMW to be paid from the National Insurance Fund.

The RPS may refer claims to HMRC to take action as they see fit. HMRC can issue a notice of arrears for the relevant period of the director's employment. HMRC can also issue penalties and/or seek redress in the civil court where the maximum fine is £20,000.

Additionally, the RPS can refer cases to the Insolvency Service's Investigation and Enforcement Services (IES) to assess any possible breaches of fiduciary duty whilst acting as a director of the company, which may result in being named publicly and disqualified from acting as a company director for up to 15 years.

General enquiries regarding this article may be sent to
RPS.Stakeholder@insolvency.gov.uk

112) IT security incidents – resources for Insolvency Practitioners

Background

[Research](#) released earlier this year by the UK Government has revealed the impact of cyber security breaches for UK businesses. The key points the insolvency profession may be interested to know are:

- Four in ten businesses (39%) reported having cyber security breaches or attacks in the last 12 months.
- Of those 39%, one in five ended up losing money, data or other assets.
- The average cost of a cyber security breach for a small business was £8,460.
- The average cost for a medium/large business was £13,400.

IBM has also produced a report on the costs of security incidents. IBM carried out 3,500 interviews across 17 sectors. All costs are in US dollars, but similarly apply across the globe.

- The average cost of a successful destructive attack (such as ransomware) was \$4.62 million.
- The average cost of a data breach (where between 2,000 and 100,000 personal data records were lost) was \$4.24 million.
- The average cost of a single lost record is \$161.

What you can do

We have identified that a handful of members of the IP community have experienced a compromise of their email systems.

We strongly recommend that Insolvency Practitioners take advantage of guidance from the National Cyber Security Centre (NCSC). The Insolvency Service, as with the rest of HM Government, follows the NCSC's advice. It is based on evidence, research and experience. It is often written in plain English, is proportional and pragmatic. We advocate its use because doing so can potentially reduce the number of incidents we are collectively exposed to.

You may wish to read the advice from the NCSC about how you can help your business be cyber secure. A great example of the NCSC's guidance is the widely used [10 steps to cyber security](#), which is designed to help businesses address common technical and organisational vulnerabilities.

Further considerations

There is also specific advice for [self-employed/sole traders](#), [small and medium organisations](#), or [for large ones](#). There is even advice for families – a rich resource for discussions with those about to take their first steps on the internet.

Once you have read the advice, it may be worthwhile understanding which of the NCSC's recommendations your organisation has or does not have in place. Doing so can help you identify the costs, risks and benefits of implementing a given NCSC recommendation; for example, if your organisation wants to protect itself from [phishing](#), it's a good idea to consider the [email security](#) advice.

General enquiries may be directed to the Agency's switchboard, on 0300 678 0015 or by using [our contact form](#).

59) Update: Reviewing current Individual Voluntary Arrangements (IVAs)

The Insolvency Service has received a number of questions and feedback following the article on reviewing current IVAs (Dear IP 133, chapter 24, article 58). As a result, the guidance has been updated.

Insolvency practitioners will be aware that the criteria for consumers to enter a Debt Relief Order (DRO) changed on 28th June 2021.

Insolvency practitioners are reminded of their obligation to ensure that people in financial difficulty enter the right solution for their individual circumstances and that, once implemented, it remains appropriate.

Those who supervise IVAs should therefore consider the impact of the changes to the DRO criteria on their portfolio and if necessary, put in place a policy to review cases in order that they approach cases consistently.

When determining when to review cases, insolvency practitioners should look at consumers' individual circumstances in order to decide whether this should happen immediately or at their annual review.

The expectation is that the IP will explain carefully and objectively the pros and cons of effecting a change from IVA to DRO, and that making any such change is the consumer's choice. In each individual circumstance, the IP should make it clear to the consumer that:

- The consumer would have to fail their IVA (by stopping payment)
- Those circumstances have risks and will not be suitable for everyone
- The consumer would not be protected in the period leading up to a DRO being put in place.

In each case the IP should maintain a contemporaneous note of any considerations made, and if a consumer wishes to take up a DRO, they should be directed to FCA regulated debt advice.

If insolvency practitioners are unsure how they should approach particular cases, they should approach their RPB for advice.

General enquiries may be directed to IPRegulation.section@insolvency.gov.uk