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DEAR INSOLVENCY PRACTITIONER

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Dear Reader

Please find enclosed the latest articles from the Insolvency Service:

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Chapter 11 Employment issues

Article 82 Update on new legislation affecting payments
due to employees

Chapter 17 Legislation

Article 69 Building Safety Regulations: New requirements
in relation to insolvency

82) Redundancy Payment Service: Update on new legislation affecting payments due to employees

Practitioners are asked to note the coming changes resulting from a small number of Private Member's Bills having recently received Royal Assent. This will affect the calculation of payments due from the RPS. The effective provisions have not yet been brought into force. A further update will be issued once this happens.

The Employment (Allocation of Tips) Act 2023 aims to ensure employees receive all qualifying tips, gratuities, and service charges, and that these are allocated fairly. Section 11 is not yet in force, but it modifies the definition of wages under section 27 of the Employment Rights Act 1996 to make clear that the term 'wages' includes any amount of qualifying tips, gratuities or service charges allocated to the worker. The Act also removes the ability of the worker's contract, or the worker, to consent to their allocation of tips, gratuities and service charges being withheld; to do so would be an unauthorised deduction of wages.

The Neonatal Care (Leave and Pay) Act 2023 provides a statutory entitlement to paid leave for neonatal care. The Carer's Leave Act 2023 creates an entitlement for employees to take unpaid leave to care for dependents with long term care needs. The effective provisions when brought into force are likely to modify the calculation of 'a week's pay' to take account of statutory neonatal care leave and carer's leave.

Enquiries regarding this article may be sent to:
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69) Building Safety Regulations: New requirements in relation to insolvency

The Department for Levelling Up, Housing and Communities laid the Building Regulations (Higher-Risk Building Procedures) (England) 2023 and the Building Regulations etc. (Amendment) (England) Regulations 2023 on 17 August 2023. **The regulations place new requirements on Insolvency Practitioners and other appointed officeholders in relation to any work they undertake involving a higher-risk building.**

You must be aware of these requirements to ensure you remain compliant with the law.

The regulations deliver the recommendations of Dame Judith Hackitt in her report “Building a Safer Future” and cover the technical detail underpinning the new, more stringent regime for the design and construction of higher-risk buildings. The regulations will fundamentally reform the way buildings are designed and built to ensure safety of those who live in them. The regulations can be found here: [The Building Safety Act: secondary legislation - GOV.UK](#).

The Building Regulations (Higher-Risk Building Procedures) (England) 2023 introduce a new bespoke approach to building control for blocks of flats, hospitals and care homes of 18 metres or more, or seven storeys or more, under the new Building Safety Regulator (“higher-risk buildings” in design and construction). These regulations include provisions related to the insolvency of a client for whom higher-risk building work is being carried out. The regulations come into force on 1 October 2023. The regulations also include transitional provisions in relation to in-scope projects that have notified their building control body of their plans before 1 October 2023.

As part of this new approach to building control, new requirements will need to be followed by those involved in the commissioning, designing and constructing of a higher-risk building. There will be duties and requirements placed upon the named entity instructing the building work, “the client”. These are introduced by the Building Regulations etc. (Amendment) (England) Regulations 2023 and apply to all building work.

The client must make suitable arrangements for planning, managing and monitoring a project, including the allocation of sufficient time and resource, to deliver compliance with building regulations. In practice, this means appointing the right people, with the right competencies (the skills, knowledge, experience and behaviours or organisational capability) for the work, and ensuring that those they appoint have systems in place to ensure compliance with building regulations. This also includes following the procedural requirements of the new higher-risk regime where the proposed project is

higher-risk building work e.g., applying for building control approval before work begins, when there is proposed changes to the originally approved plans and on completion of building work.

While considered unlikely, there will be scenarios where the client on a project changes. This may be because a client decides to sell the project to another entity, a client dies before the project is completed, or the client becomes insolvent. Regulation 27 and 28 of the Building Regulations (Higher-Risk Building Procedures) (England) 2023 outline requirements that must be followed where the client changes on a project and where a client experiences financial difficulty, e.g. becomes insolvent.

Regulation 27 prescribes the process that must be followed when there is a change to the client of higher-risk building work. The requirements place certain requirements on the outgoing client and the new client. The requirements are necessary to ensure that it is always clear who is the client of the project, that the client is aware of their responsibilities and that there is a clear audit trail of key information relevant to the higher-risk building in design and construction.

A duty is placed on the outgoing client to share the “golden thread of information” about the building, documentation describing compliance arrangements, and a declaration that the work to date complies with all applicable building regulations with the new client, before they cease to be the client, or within 14 days. It will be a criminal offence under section 35 of the Building Act 1984 for an outgoing client to fail to share this information.

The new client of the project will be required to submit a notification to the Regulator within 28 days after becoming the client. The notification must include:

- Their contact details and the date they became the client;
- The date the outgoing client ceased to be the client;
- Confirmation that they have received the necessary documents from the outgoing client and are aware of their responsibilities; and,
- A copy of the signed declaration from the outgoing client that, to the best of their knowledge, the building work at the point of handover is compliant with building regulations.

The client of higher-risk building work is the person or entity for whom a project is carried out and therefore, the change of client process will only need to be followed where someone other than the original client is the entity instructing higher-risk building work.

There may be scenarios where a client becomes insolvent and an entity is appointed to act in relation to the client, either to rescue the business or to sell assets and make payments to creditors. Similarly, a fixed charge receiver or a

Law of Property Act receiver may be appointed by the holder of a fixed charge over the higher-risk building.

Given the role of an Insolvency Practitioner and other appointed officeholders, we would not expect a change of client to occur where an Insolvency Practitioner, or other officeholder, has been appointed in relation to the client of a higher-risk building project and the relevant property remains vested in that client. As a result, we would not expect an Insolvency Practitioner to assume the duties and obligations of the client in this scenario, and the change of client process would only need to be followed when the project is sold. However, the circumstances surrounding insolvency and receivership are complex and the exact responsibilities of the client and appointed officeholders would be dependent on the insolvency proceedings or receivership and the type and status of the higher-risk building work being carried out.

There may be scenarios where a trustee in bankruptcy has been appointed in relation to a client, or the client's property vests in a liquidator under section 145 of the Insolvency Act 1986, but no building work has been carried out since their appointment or vesting. In these scenarios, when no further building work has been carried out, the appointed officeholder under the 1986 Act is not considered to be the client, but there will be additional requirements the appointed officeholder must comply with to ensure that key information related to the design and construction project is shared with the right people at the right time.

Where a higher-risk building in the design and construction phase 'vests' in an appointed officeholder, the appointed officeholder is required to provide a copy of the golden thread information and other information detailing the work comprised in the project to a new client once the asset is sold. If the appointed officeholder is unable to share the relevant documentation, they should explain the reason why to enable the new client to include this in their notice to the Building Safety Regulator. These requirements are set-out in Regulation 27(4).

Regulation 28 sets out certain requirements that must be met in the event of a client experiencing an insolvency event, or a receiver being appointed by the courts or by a mortgagee. The procedure is necessary to ensure the Regulator is informed when a client of a higher-risk building is in financial difficulty. While insolvency is unlikely to result in a change of client until the asset is sold to a new client, it is important that the Regulator is notified when an insolvency event occurs as a material financial impact on the client may impact on the design and construction of the higher-risk building.

When 'debtor in possession' proceedings are enacted, there is a requirement on the client to notify the Regulator of this fact within 14 days. This notification

must provide information on the insolvency proceedings taking place. The requirements are set-out in regulation 27(1) and 27(2). The notification must:

- State they are the client in relation to the project;
- Provide their contact details and a company registration number, where applicable;
- Give details which are sufficient to identify every project of the client which relates to a higher-risk building; and,
- Provide so much of the information referred to in the table in rule 1.6 of the Insolvency (England and Wales) Rules 2016 as is known to them.

For all other insolvency proceedings or appointments of official receivers, it will fall on the appointed person acting on behalf of the insolvent company or individual to notify the Regulator of this fact within 14 days of their appointment. As set-out in Regulation 28(4), an appointed person is prescribed as an administrator, administrative receiver, a receiver appointed by the courts or by a mortgagee, a liquidator or a trustee. Regulation 28(3) prescribes that the notification given to the Building Safety Regulator must:

- State the name and address of the client which the appointment relates to, and give details which are sufficient to identify every project of the client which relates to a higher-risk building;
- Identify the nature of the appointment held in relation to the client;
- State their name, address, telephone number and email address;
- Provide so much of the information referred to in the table in rule 1.6 of the Insolvency (England and Wales) Rules 2016 as is known to them.

The Regulator will not be able to enforce against an appointed officeholder should they fail to meet these requirements within 14 days. The protection against enforcement reflects the role of appointed officeholders and the often-challenging circumstances surrounding insolvency and receivership. However, the deadline is important to ensure appropriate building information handover and safety of the building.

Regulation 28(5) prescribes that where any property in relation to a higher-risk building is disclaimed under section 178 or 315 of the Insolvency Act 1986, the disclaimer of the property must give a copy of the notice of disclaimer under rule 19.2 of the Insolvency (England and Wales) Rules to the Regulator within 28 days.

You can find further information on the above policies in the following government response:

<https://www.gov.uk/government/consultations/consultation-on-implementing-the-new-building-control-regime-for-higher-risk-buildings-and-wider-changes-to-the-building-regulations-for-all-buildings>

The regulations described in this article are part of a wider package of building safety reforms to improve the safety of higher-risk buildings throughout their lifecycle. In August, the government also laid regulations to introduce the new in-occupation regime where dutyholders must demonstrate that they are managing the building safety risks of an occupied higher-risk building on an ongoing basis. The next set of regulations supporting the in-occupation regime will be laid in Parliament in the Autumn, and will also include provisions of information about insolvency events to the Building Safety Regulator. The Department of Levelling Up, Housing and Communities will provide further information in the next 'Dear Insolvency Practitioner' update on these new requirements.

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