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Briefing: Restructuring Update - Increased Protection for Employees and a Renewed Focus on Receivership

The Employment (Collective Redundancies and Miscellaneous Provisions) Act 2024 (the "**Employment Act**") was signed into law on 9 May 2024 and was commenced in full on 1 July 2024. The Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill 2024 (the "**Companies Bill**") was published and laid before the Oireachtas in July 2024. Both make significant changes to the restructuring and insolvency regime. The key changes include:

The Employment Act

1. Where a company presents a winding up petition to the court, directors are obliged to notify employees of the petition at the time it is presented to Court or as soon as reasonably practicable thereafter.
2. When deciding whether it is just and equitable to make an order under to wind up a company, the Court can have regard to whether the directors complied with this new obligation to notify employees of the presentation of the petition.
3. The provisional liquidator must inform employees of their appointment and of the winding up process in so far as it relates to employees.
4. The liquidator must notify employees when they receive the company's Statement of Affairs and must make a copy available to any employees who requests one.
5. A less restrictive test is introduced for contribution orders. The requirement to establish that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company is no longer a necessary condition.
6. Currently, for a transaction to be considered an unfair preference, it must have occurred within 6 months of the date of the commencement of the winding up of the company, or within 2 years for connected persons. Under the new legislation,

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the Court may consider acts falling outside these time limits.

7. The Court has the power to order the return of assets which were improperly transferred. Under the revised wording, payments made in the ordinary course of business are not captured by the set aside provision.
8. Three key changes are made to the reckless trading test:
 - The subjective test of whether an officer of the company was 'knowingly' a party to the carrying on of the business in a reckless manner is replaced by an objective test which does not require any intention on the part of the officer.
 - Currently, an officer of the company is deemed to have been recklessly trading if they ought to have known their actions would cause loss. The new text states that an officer *may be* found to have been recklessly trading if they ought to have known their actions *would be likely* to cause loss.
 - The defence of acting honestly and responsibly is replaced by the defence of taking such reasonably practicable steps as the officer ought to have taken to minimise loss.

The Companies Bill

1. In relation to receivers, changes are planned to increase transparency around fees and align rules on remuneration with those of liquidators. The proposed changes include:
 - The method by which the terms of remuneration of a receiver must be set out. Employees and shareholders will be entitled to request information on the terms of the receiver's appointment.
 - The receiver will have increased obligations to notify the Registrar of Companies in relation to company financial information and the time limits for provision of this information will be shortened.
 - In the context of a dispute, the factors to be considered by the court in fixing the amount of the receiver's remuneration will be listed.
2. Several changes to the Small Companies Administrative Rescue Process ("**SCARP**") are envisaged, however, most of the changes make technical clarifications or correct errors. The more substantial changes include:
 - The list of factors to consider when deciding if a company has a reasonable prospect of survival will include the social and cultural importance of the company.

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- Prescribed forms will be introduced for notices and orders of the court.
 - The date of termination of the process adviser where no rescue process is approved will be set out.
 - The process adviser will be required to refer a suspected breach of the Companies Act 2014 (the "2014 Act") to the Corporate Enforcement Authority ("**CEA**") as soon as possible after referring it to the Director of Public Prosecutions ("**DPP**").
 - The process adviser will be required to provide written reasoning to the court to justify a decision not to use the services of the staff or the facilities of the company where the court is considering a matter related to costs, expenses and remuneration.
3. With regard to liquidators, certain prescribed forms will be introduced and, mirroring the above change to the SCARP regime, a suspected breach of the 2014 Act will be required to be reported to the CEA as quickly as possible after the referral to the DPP.

The changes increase transparency for employees and strengthen the remedies available to liquidators and creditors to hold directors to account and to increase the pool of assets available for distribution to creditors.

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