



Protection of workers' wage claims in enterprise insolvency

► 18 / May / 2020

This factsheet provides an international overview of approaches taken to address the protection of workers' claims in the event of enterprise insolvency*.

Key considerations regarding worker wage claims in insolvency

The bankruptcy/insolvency of a company has a variety of impacts on employers and workers. A bankrupt/insolvent company may owe outside creditors such as financial institutions (e.g. banks), suppliers, and landlords among others partial or full payments for outstanding debt. At the same time, the company as an employer may have internal debts to workers if they have not paid part or all of wages and remuneration owed to workers. This can have significant and profoundly negative consequences for workers as they and their families may be wholly dependent on that wage or remuneration to live. Incomplete or unpaid wages to workers by a bankrupt/insolvent company may also have a negative economic multiplier effect as workers with limited or no spending power will not be able to spend in local communities. For these reasons policy, legal, and institutional mechanisms become important to address worker wage claims in company bankruptcy/insolvency.

Below are key considerations when addressing worker wage claims in insolvency. They include definitions found in international labour standards and national labour legislation.

An international labour standard definition on the protection of wages

In Article 1 of the ILO Protection of Wages Convention, 1949 (No. 95), the definition of wages includes remuneration or

earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered.¹ The intention of the drafters of ILO Convention No. 95 was to use the term “wages” not in a technical sense, such as may exist within the framework of national legislation, but rather in a generic sense covering all the various forms and components of labour remuneration.² In this context, different countries have defined wages as remuneration or earnings, including basic wages, wage supplements, bonuses, premiums and other payments.³

The definition of wages in this context is important as it covers most forms of compensation. This is particularly significant in cases of enterprise insolvency where there may be a list of creditors all seeking to have debts paid, including workers. It is also worth noting that wages, including minimum wages, are often used to determine the amount of benefits for temporary disability, pregnancy, childbirth, as well as for other purposes of compulsory social insurance, which may be owed. Wages also form the basis of severance pay which may need to be made in insolvency situations.

An international labour standard definition of insolvency as it relates to worker wage claims

The definition of insolvency can be found in Article 1 of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173):⁴

- The term insolvency refers to situations in which, in accordance with national law and practice, proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors.

* This factsheet was prepared by Mr Naj Ghosheh, Working Conditions specialist of the Conditions of Work and Equality Department.

1 This is read in conjunction with Article 11 of ILO Convention No. 11, which addresses the protection of worker wage claims in an employer (enterprise insolvency). See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C095

2 [ILO General Survey of the reports concerning the Protection of Wages Convention \(No. 95\) and the Protection of Wages Recommendation \(No. 85\)](#), 1949, ILO Geneva, 2003.

3 See <https://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-1b.pdf>

4 See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C173

- For the purposes of this Convention, a Member State may extend the term "insolvency" to other situations in which workers' claims cannot be paid by reason of the financial situation of the employer, for example where the amount of the employer's assets are determined to be insufficient to justify the opening of insolvency proceedings.

The aim of the Article 11 of ILO the ILO Protection of Wages Convention, 1949 (No. 95)⁵, the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173), and the Protection of Workers' Claims (Employer's Insolvency) Recommendation, 1992 (No. 180) is to avoid a situation where wage earners are deprived of their remuneration in the event of the insolvency or bankruptcy of their employer. These standards were developed to guarantee the immediate and full settlement of debts owed by employers to their workers.⁶

General concepts of bankruptcy and insolvency

The terms bankruptcy and insolvency are used to define legal proceedings relating to when an individual or enterprise do not have enough resources to pay all of their financial liabilities to their creditors. The terms are sometimes used interchangeably, which can lead to some confusion. The use of the legal terms can also vary by country. National legislation in some countries use either insolvency or bankruptcy to define the whole legal proceeding. In some countries bankruptcy and insolvency address specific types of economic failure, either by an individual or a company.⁷ Other countries use both insolvency and bankruptcy terms as possible steps in the within the same legal process.⁸ Owing to these factors and the absence of a globally unified conceptual approach in applying both of these terms, these legally complex concepts might be understood in the simplest and broadest possible terms in the following way:

- Bankruptcy is a legal process for individual persons or companies that cannot pay what they owe to their creditors to get some relief from some or all of their debts.
 - The relief can be in the form of extra time to pay the debt or re-organising debt payments. Ultimately if this does not work, liquidation of all assets to pay the remaining debts is possible.
- Insolvency is legal process generally used for companies that are unable to pay what they owe to their creditors within the time the money is owed. Insolvency can take two forms:
 - Cash-flow insolvency is when a company does not have the money to pay, but has assets (e.g. tools, equipment, etc.). that might be used to pay debts when they are sold.

- Balance-sheet insolvency is when a company does not have enough money or assets to pay all of the debts it owes. In the worst case, where financial liabilities to creditors are more than the financial and economic assets a company holds, it can result in dissolving of the company and liquidation of the company's remaining assets to pay the debts owed to creditors (which may include workers' wages).

ILO Conventions on protection of workers wage claims in insolvency

Two ILO Conventions and one ILO Recommendation specifically address worker claims in the event of the enterprise insolvency. ILO Conventions are legal instruments, which on ratification create legal obligations and lay down the basic principles to be implemented by ratifying countries. ILO Recommendations are not open to ratification, but can supplement a convention by providing more detailed guidelines on how it could be applied in legislation, policies, or practice.

Article 11 Protection of Wages Convention, 1949 (No. 95)

In the context of worker wage claims in insolvency, Article 11 of the Convention embodies one of the oldest measures of social protection in the ILO, namely the priority given to wage debts in the distribution of the employer's assets in case of an enterprise bankruptcy or insolvency.⁹

Article 11 Protection of Wages Convention, 1949 (No. 95):

1. In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations.
2. Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share of the assets.
3. The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations.

Article 11 Protection of Wages Convention, 1949 (No. 95) establishes that in the event of the bankruptcy or judicial liquidation of a company/enterprise, the workers employed there will be treated as privileged creditors as regards wages due to them. Within the category

5 See <https://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-1b.pdf>

6 Ibid

7 For example, bankruptcy in the United Kingdom applies only to individuals, whereas insolvency applies to companies.

8 For example, in the United States Title 11 of the United States Code (known as the United States Bankruptcy Code) use insolvency and bankruptcy as possible separate steps within the legal process for individuals and companies in financial difficulties.

9 See <https://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-1b.pdf>

of privileged creditors (there can be more than one privileged creditor) a country's national legislation can determine the priority that wages are given within this category. In this case, wages as privileged debt must be paid in full before ordinary creditors can claim a share of assets.

To date, 98 countries have ratified ILO Convention No. 95.¹⁰

Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) [and Protection of Workers' Claims (Employer's Insolvency) Recommendation, 1992 (No. 180)]¹¹

Article 11 of the Convention was partially revised by the Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173), which was adopted in 1992, with a view to improving the protection provided for in 1949 in two ways.¹² First, it set detailed standards concerning the scope, limits and rank of the privilege, which were not fully addressed in Convention No. 95. It also introduced a new concept, wage guarantee schemes, designed to offer an alternative form of protection for worker wage claims than the traditional privilege system.

ILO Convention No. 173 (and Recommendation No. 180) establish two ways in which workers can make wage claims. They are:

1. In the event of an employer's insolvency, workers' claims arising out of their employment shall be protected by a privilege so that they are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share. (Part II in ILO Convention No. 173). The minimum coverage of the privilege coverage includes:
 - I. Workers' claims for wages relating to a prescribed period of not less than three months prior to the insolvency or prior to the termination of the employment.
 - II. Claims for holiday pay as a result of work performed during the year in which the insolvency or the termination of the employment occurred and in the preceding year.
 - III. Claims for amounts due in respect of other types of paid absence (e.g. sick leave or maternity leave) relating to a prescribed period which may not be less than three months prior to the insolvency or prior to the termination of the employment.

IV. Severance pay.

V. It requires that national laws or regulations must give workers' claims a higher rank of privilege than most other privileged claims, and in particular those of the State and the social security system for arrears in taxes or unpaid contributions.

VI. Whenever national laws or regulations set a ceiling to the protection by privilege of workers' claims, the prescribed amount may not fall below a socially acceptable level, and that it therefore has to be reviewed periodically so as to maintain its value.

2. The payment of workers' claims against their employer arising out of their employment shall be guaranteed through a guarantee institution when payment cannot be made by the employer because of insolvency. (Part III in ILO Convention No. 173). With regard to guarantee institutions the minimum coverage includes:
 - I. Workers' claims for wages relating to a prescribed period of not less than eight weeks prior to the insolvency or prior to the termination of the employment.
 - II. Claims for holiday pay as a result of work performed during a prescribed period which may not be less than six months prior to the insolvency or the termination of the employment.
 - III. Claims for amounts due in respect of other types of paid absence relating to a prescribed period which may not be less than eight weeks prior to the insolvency or prior to the termination of the employment.
 - IV. Severance pay.
 - V. Limitations on guaranteed compensation to a certain amount are allowed, but requires such amount not to fall below a socially acceptable level, and to be periodically adjusted so as to maintain its value.

For those countries choosing to do so, ILO Convention No. 173 can be ratified as a whole. It is also possible to ratify either Part II or Part III of ILO Convention No. 173.¹³

To date, 21 countries have ratified ILO Convention No. 173 (Parts II, III, or all).¹⁴

¹⁰ As of May 2020, see https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312240

¹¹ ILO Convention No. 173 and ILO Recommendation No. 182

¹² See <https://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-1b.pdf>

¹³ Article 3 of ILO Convention No. 173 lists options for ratification of all or part of this convention and its relationship to Article 11 of ILO Convention No. 95. See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C173

¹⁴ Albania (Part II); Armenia (Parts II and III); Australia (Part II); Austria (Part III); Botswana (Part II); Bulgaria (has accepted the obligations of Parts II and III with the exclusion, with regard to the latter, of: 1) associated partners in the trade corporation, 2) members of the management and control bodies of the trader, 3) spouses and relatives in direct line of the descendant of the trader or of the persons under items 1 and 2); Burkina Faso (Part II); Chad (Part II); Finland (Part III); Latvia (Part III); Lithuania (Part II); Madagascar (Part II); Mexico (Part II); Portugal (Parts II and III); Russian Federation (Part II); Slovakia (Part II); Slovenia (Part III); Spain [has accepted the obligations of Parts II (with the exclusion of public employees) and III (with the exclusion of household servants)]; Switzerland (Parts II and III); Ukraine (Part II); Zambia (Part II).

Committee of Expert on the Application of Conventions and Recommendations (CEACR) regarding ILO Convention No. 173

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) set up in 1926 to examine the growing number of government reports on ratified Conventions. Today it is composed of 20 eminent jurists appointed by the Governing Body for three year terms. The Experts come from different geographic regions, legal systems and cultures. The Committee's role is to provide an impartial and technical evaluation of the state of application of international labour standards in ILO member States.

When examining the application of international labour standards, the Committee of Experts makes two kinds of comments: observations and direct requests. Observations contain comments on fundamental questions raised by the application of a particular Convention by a state. These observations are published in the Committee's annual report. Direct requests relate to more technical questions or requests for further information. They are not published in the report, but are communicated directly to the governments concerned.

The ILO Committee of Experts to date has made 106 comments on application of ILO Convention No. 173 in member states that have ratified ILO Convention No. 173.¹⁵ Some key issues addressed by the ILO Committee of Experts regarding the application of ILO standards relating to protection of worker claims in insolvency include:

- **Privileging worker wage claims** – The CEACR has identified problems with legislation in countries that have ratified ILO Convention No. 173 (and to an extent, Article 11 of ILO Convention No. 95) that have not properly privileged workers wage claims in insolvency. Article 6 of Convention No. 173 protects, by a privilege, worker's claims for wages for a prescribed period, holiday pay due, and the amounts due for other types of paid absence or severance pay. Where the CEACR has found this legal gap, it has identified to governments what needed to be addressed.¹⁶ The CEACR has also questioned whether a countries national interpretation of privilege amounts to a "super-privilege" of worker claims on wages.¹⁷
- **Data provision on bankruptcy numbers and costs of bankruptcy** – The CEACR has asked, and often received, data how many bankruptcies have taken place on an annual basis. This is of particular interest

as it relates to the establishment of wage guarantee funds and socio-economic implications of how the fund impacts on workers and employers in a country.¹⁸

- **Clarity as to what is included as part of workers wage claims in insolvency** – The ILO Convention No. 173 identifies several key compensation issues as being part of a worker's privileged claim. Article 6 of ILO Convention No. 173 privileges pay, holiday pay, paid absences, and severance pay on the termination of employment.¹⁹ The CEACR has also requested clarification as to whether wage claims are covered by national insolvency legislation and to specify if worker wage claims are privileged in insolvency proceedings.²⁰

Regional Legislation Regarding Workers Claims in the Event of Enterprise Insolvency

Regional legislation has been developed to address worker claims in the event of an employer's insolvency, mainly in the European Union. In addition, the European Social Charter has highlighted the importance of developing guarantee funds to address worker financial obligations in the event of an employer's insolvency.

European Union Legislation: Directive 2008/94/EC

The European Union has had legislation addressing worker claims in the event of enterprise insolvencies for almost 40 years. The first directive on this issue was the Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. The directive was created for a number of reasons:

- to address inadequate protection for employees
- assets of the business were often inadequate to meet the claims of employees
- insolvency proceedings can take a long time and are difficult for employees to understand
- that there was a need for a special institution to safeguard employee claims
- where such institutions exist, they did so under very different terms
- not extending equal protection to employees in all Member States would have an adverse effect on the development of the common market.

15 This is the case up to May 2020. The comments on how the CEACR has interpreted the application of all ILO standards can be found at [ILO NORMLEX website](#). This includes all comments made by the CEACR on ILO Convention No. 173.

16 [CEACR comments to Burkina Faso on application of ILO Convention No. 173](#); [CEACR comments to Chad on application of ILO Convention No. 173](#); [CEACR comments to Spain on application of ILO Convention No. 173](#)

17 [CEACR comments to Madagascar on application of ILO Convention No. 173](#)

18 [CEACR comments to Mexico on application of ILO Convention No. 173](#); [CEACR comments to Bulgaria on application of ILO Convention No. 173](#)

19 [CEACR comments to Bulgaria on application of ILO Convention No. 173](#)

20 [CEACR comments to Armenia on application of ILO Convention No. 173](#)

This directive was amended by the European Parliament and Council Directive 2002/274/EC to address some concerns that had not been foreseen when the original directive was created.

In recent years, this directive was amended again to account for new legal and economic developments.²¹

The emphasis of EU Directive (2008/94/EC)²² has been to:

- ▶ Require Member States to set up an institution to guarantee the payments.
- ▶ Ensure guarantee institutions payments of employees' outstanding claims for a period determined by Member States. The Directive lays down an EU minimum guarantee period covering the remuneration for the last three months (within a reference period of at least six months) or eight weeks (within a reference period of at least eighteen months).
- ▶ Require Member States to adopt the necessary measures to protect occupational supplementary pension entitlements.
- ▶ Ensure that if an insolvent employer has activities in at least two EU Member States, an employee's outstanding claims must be met by the institution in the Member State where the employee worked.

Council of Europe: European Social Charter

The European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights. It guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare.²³ The charter includes an important article addressing the protection of worker claims in the event of an employer insolvency. It states²⁴:

Article 25 – The right of workers to the protection of their claims in the event of the insolvency of their employer

With a view to ensuring the effective exercise of the right of workers to the protection of their claims in the event of the insolvency of their employer, the Parties undertake to provide that workers' claims arising from contracts of employment or employment relationships be guaranteed by a guarantee institution or by any other effective form of protection.

National laws and policies on worker claims in the event of an employer insolvency

There is relatively wide diversity of approaches to wage and related compensation claims during insolvency. Some jurisdictions have enacted a system of priority or

preference for claims for wages and other compensation, without adopting a guarantee fund, insurance system or other social safety net expressly aimed at compensating employees for wage and other losses in the event that an enterprise insolvency. The underlying policy rationale for enacting a system of priority or preferred claims for employees is frequently that employees are considered particularly vulnerable claimants and a statutory priority offers them some limited relief from losses incurred due to their employer's insolvency.

Other jurisdictions have adopted wage or compensation guarantee funds or insolvency insurance schemes to pay out wage claims to employees, but have chosen not to adopt a preference or priority scheme for wage and related claims to the bankrupt or insolvent estate. The policy rationale is that such funds guarantee payments to workers when they are most vulnerable and can be far more efficient than recovery after a bankrupt or insolvent estate has been liquidated and payments made to creditors.

Some countries have adopted a hybrid approach in order to reduce the losses to employees on firm failure, adopting both a preferred claim or priority system of claims during bankruptcy/insolvency and a wage guarantee fund or insurance scheme. The policy rationale in this case is that both strategies are needed to protect employees and to create the appropriate incentives for director and officer conduct in the period leading up to the business enterprise entering insolvency proceedings.

While insolvency procedures differ from country to country (and sometimes there are different legal procedures within a country), their aims are usually the same, i.e. (a) to determine the state of the debtor's assets and liabilities; (b) to preserve the debtor's assets from depletion either by the debtor or by creditors instituting judicial proceedings individually; (c) to promote, where possible, an arrangement between the debtor and the creditors with a view to restoring the enterprise's financial soundness or, failing that, to enable part of it to continue operating; (d) if the total or partial recovery of the enterprise is impossible, to sell its assets and wind it up in order to reimburse its creditors to the greatest extent possible; (e) to ensure an equitable distribution among the creditors of the proceeds from the sale of the assets. These procedures are based on one principle: the need to ensure that, in the event of insolvency, all creditors receive fair treatment (which includes workers).

The information contained below is structured around several key themes. The information provided below will present illustrative examples of how policymakers have chosen to address these issues in their national legal systems.

21 Also see <https://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=198>

22 See [Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer](#)

23 See [Council of Europe](#)

24 See [European Social Charter](#)

Liability of the company owner in the event of bankruptcy

Bankruptcy/insolvency law sets out to protect the creditors collectively from the common debtor, but this may often require individual sacrifices. Given their collective nature, bankruptcy/insolvency proceedings are marked by the following features:

- a. all individual enforcement actions against the debtor are suspended and placed in the hands of one person, who is known as "official receiver" or "trustee".
- b. all the assets of the insolvent enterprise form part of one property which constitutes the common security of all the creditors: the debtor's estate;
- c. all the individual creditors are grouped together into a collective body: the body of creditors;
- d. all individual creditors are placed on an equal footing (*par condicio creditorum*)²⁵; consequently, either they recover all their claims once the enterprise's assets have been sold or - and this is much more common - they receive, once the proceedings are over, a dividend in proportion to the amount owed them;
- e. the common debtor is forbidden to make individual arrangements that might result in some creditors enjoying preferential treatment over others.

These are the general features that define bankruptcy/insolvency procedures in most countries. For workers, it is important to note that the debtor's estate in this context normally refers to the employer's company. However, bankruptcy/insolvency procedures at national level can take a variety of forms to address diverse circumstances. The level of employer exposure in this context can vary depending on the national legislation and depending on the type of bankruptcy/insolvency procedures that is utilised in the circumstances. For example:

Colombia - The Colombian Civil Code (articles 2488 to 2511)²⁶ establishes the preference and order in which creditors must be paid:

- The first class to be paid corresponds to employment-related obligations and special tax-related obligations.
- The second class includes creditors who have a pledge constituted in their favour.
- Creditors who have a mortgage belong in the third class.
- Other tax-related obligations and strategic suppliers to the business belong in the fourth class.

- Finally, all other creditors who have a title such as a promissory note or contract with no guarantees are part of the fifth class and are paid last.
- Credits with related companies are subordinated and paid after the fifth class.

External creditors are paid before paying the internal debt, i.e. before returning equity to shareholders. Furthermore, if a shareholder has not paid its equity, or social liability is extended beyond such contributions (by law or by the company's bylaws), the liquidator within a liquidation process may start a process against that shareholder to collect the owed sum in order to pay external creditors. Some credits are legally delayed, which means they are only paid when all the others have been fulfilled. These debts include those owed to persons specially related to the debtor. The law defines "specially related" as "corporations related among them as parent companies, subsidiaries or branches, or the company and its administrators, statutory auditors and attorneys at law in some cases".

Article 36 of Law 50 of 1990²⁷ provides that all wages, indemnifications and social benefits or rights are considered to be privileged and are entitled to the preferential treatment in insolvency or bankruptcy proceedings. There are no restrictions on the realization of the preferential wage claims, such as a cap on the amount given preference or the length of the employee's employment. Under the Colombian insolvency regime, there is a distinction between labour claims that originated before the initiation of the insolvency procedure and labour or wage rights originated after the initiation of the process called "administration expenses". These administration expenses have a preference for their payments above those subject to the reorganization agreement.

Japan - A debtor or its creditor may petition the court to initiate a proceeding under the Japanese Bankruptcy Act²⁸ if the debtor is unable to make payments when debts become due or if the debtor's liabilities exceed its assets. If either of these conditions is met, the court will issue a commencement order and appoint a trustee to manage the bankruptcy estate, which consists of all assets that belong to the debtor at the time of the commencement order. Eventually, the bankruptcy estate is liquidated into cash, which will be distributed to claimholders in order of priority.

In the Bankruptcy Procedure, according to Article 308 of the Japanese Civil Code (Min Pou)²⁹, an employee's wage and retirement payment claims are treated as preferential claims (*Yusenteiki Hasan Saiken*). In addition, claims for wages arising during the three months prior to the beginning of the Bankruptcy Procedure are treated as super-priority claims (*Zaidan Saiken*). Furthermore,

25 This important principle means that in the insolvency procedure all creditors' claims are to be evenly satisfied. For further information regarding this principle see <https://www.britannica.com/topic/bankruptcy#ref248841>

26 See http://www.secretariasenado.gov.co/senado/basedoc/codigo_civil_pr077.html

27 See <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=281>

28 *Japanese Bankruptcy Act, Law No. 75 of 2004*

29 See <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&id=2057&re=02&vm=02>

the partial claim for retirement payments equal to three months' wages just before retirement is treated as a superpriority claim (Zaidan Saiken). If the amount of the retirement payment is less than the amount of three months' wages just prior to retirement, the claim for retirement payment is treated as a superpriority claim (Zaidan Saiken), the amount equal to the three months' wages before retirement. Super-priority claims can be paid on demand independently of the Bankruptcy Proceeding so employees receive the three months wages and a part of their retirement payment at any time independently of the Bankruptcy Proceeding.

Director and officer liability for claims in insolvency

The liability requirements on company directors and officers for wages and related compensation claims by workers during insolvency is not a legal/policy tool that is commonly applied in most countries. For those jurisdictions that do impose such liability, the underlying policy premise of a director liability regime is that corporations act only through real people and that corporate law has granted corporations considerable power to engage in wealth creating activity that could cause various harms. Owing to this, there needs to be an incentive for those with oversight of the corporation to ensure that harms are minimized or their personal wealth may be at stake. Since employees are particularly vulnerable claimants, some countries have made these corporate decision makers responsible for ensuring that the employees are paid in the period leading up to insolvency proceedings. Even where directors are found liable for particular conduct, indemnification by the enterprise and insurance purchased on the directors' behalf often means that directors themselves are not usually 'out of pocket' from a finding of director liability. It is only where the corporation is bankrupt/insolvent and there are not sufficient assets or insurance to cover the liability does the threat to directors' personal assets become a real possibility. National examples of how this works in practice include:

Canada - In most jurisdictions in Canada, directors and officers are liable, under either corporate law statutes or provincial employment standard legislation for six months of employee wages in the period leading up to insolvency.³⁰ Federal, provincial and territorial statutes specify that directors may be held personally liable to the employees of the corporation for wages and related compensation, frequently limited to six months' wages. Such liability, of course, only becomes significant where the corporation has failed to pay, usually in the period leading up to financial distress. The liability includes wages, vacation pay and other payment for services rendered to the corporation. The liability in

Canada is jointly and severally held by directors; thus, employees can look to each of the directors.³¹ Usually, the corporation has indemnified its directors against such liability, and therefore the liability only becomes significant when the corporation becomes bankrupt/insolvent and there are insufficient assets to cover the outstanding wages owing.

China - Under Article 6 of 2006 Enterprises Bankruptcy Law of China, in the hearing of a bankruptcy case, the People's Court is to guarantee the legitimate rights and interests of the employers in the insolvent enterprise and subject its directors and managers to legal liabilities.³² Further, there is a general provision involving the legal liability of corporate directors, supervisors or senior managers. Under Article 125, where a director, supervisor or senior manager violates his or her obligations of honesty and diligence, and thus leads to enterprise's bankruptcy, he or she shall be subject to the relevant civil liabilities according to law. None of these persons may, within three years of the day when the procedures for bankruptcy are concluded, assume the post of director or senior manager of any enterprise. It may apply to employee wage and pension claims since the violation of fiduciary duties might result in the bankruptcy of enterprise, which then cause the failure to pay or make contributions towards social claims/or pension funds.

Funding procedures for settlement of wage arrears in the event of employer bankruptcy

Guarantee funds and insolvency insurance schemes for wage protection are means of protecting employee wage claims during insolvency. Numerous jurisdictions have chosen to create wage guarantee funds or comprehensive insurance systems that are aimed at redressing the problems faced by employees in realizing their wage claims. The greatest advantage of such funds or schemes is that they usually offer immediate financial relief to employees suffering job loss due to bankruptcy/insolvency by paying out some of claims directly and then seeking to recover funds from the estate of the debtor company once the assets are liquidated. Guarantee funds therefore enable employees to have some immediate realization of their claims, and places the risk of non-payment with the guarantee fund or government agency providing the funding.

Austria - Austria's Insolvenz-Ausfallgeld-Fonds is funded primarily through a premium payable by employers on their annual unemployment insurance contribution, which is payable pursuant to the Labour Market Policies Funding Act (Arbeitsmarktpolitikfinanzierungsgesetz)³³. In addition, the Insolvenz-Ausfallgeld-Fonds receives recoveries from the employee claims it has paid out, through recoveries from the insolvent estate, interest payments on the fund's assets, and from fines imposed

30 [Section 119, Canada Business Corporations Act](#)

31 [Section 119, Canada Business Corporations Act](#)

32 [2006 Enterprises Bankruptcy Law of China](#)

33 See <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008903>

on employers, pursuant to sec. 16 of the Insolvency Wage Protection Act 1977 (Insolvenz-Entgeldsicherungsgesetz 1977)³⁴. The premium under the Austrian wage guarantee fund is set annually by the Federal Minister of Economics and Labour. In accordance with the Insolvenz-Entgeldsicherungsgesetz 1977, the Federal Minister of Economics and Labour must ensure that the Insolvenz-Ausfallgeld-Fonds is able to achieve balanced accounts each year. Accordingly, the Minister must set the premium payable by the employers annually at a level that provides sufficient funds. Although not funded by state revenue, the fund is subrogated to the claims of employees.

In some countries, the wage guarantee system is the sole protective mechanism for worker wage related claims in bankruptcy/insolvency. They are called wage guarantee funds or an bankruptcy/insurance schemes for the payment of employee wage claims on insolvency, the latter distinguishable from general unemployment insurance schemes in that they have been created to address the specific economic and social problem of employee wage losses on insolvency or bankruptcy. Wage guarantee funds and bankruptcy/insolvency wage insurance systems provide a different option to wage claims in bankruptcy/insolvency if they are used as the sole protective device, in comparison with granting a priority claim for employee and other social claims during insolvency or bankruptcy. An advantage is that the wage guarantee fund does not interfere with the hierarchy of claims in bankruptcy/insolvency, but affords employees protection for a portion of their unpaid compensation claims. Creditors may make different decisions regarding pricing and availability of credit, knowing that their secured claims will not be made a lower priority to an unknown amount of liability from the employers' failure to make wage and related compensation payments in the period leading up to insolvency proceedings. Furthermore, the timeliness of payments to employees at a time they are financially vulnerable can be vital, assuming that the fund has a mechanism for timely and efficient processing and pay-out of employee claims.

In most countries' costs are controlled under guarantee funds or insurance schemes through the capping of amounts that can be claimed by individual employees suffering the consequences of an enterprise's financial failure. The capped amount can be by either total amount claimed or by a limit on the period back-dated from the date of bankruptcy or insolvency filing for which claims can be made.

Germany - Germany has a wage protection fund for wage claims during insolvency, which will pay the net wages for the last three months before the opening of insolvency proceedings, pursuant to the Federal Labour Agency (§ 165 ff. SGB III).³⁵ Employees receive compensation if the employer has become bankrupt, if insolvency

proceedings do not take place for insufficient assets, or in case of complete termination of business if there are no assets. Germany does not have a wage preference for employee wage claims; the Insolvency Code of 1994 abolished any preferences. The only exception is that wages earned while a preliminary receiver has been appointed, after application, but before opening of insolvency proceedings, as such employees and their claims are massegläubiger, creditors of the bankrupt's estate, and receive full payment.

The German wage protection fund is industry funded. The employers' associations requires payment from enterprises, the share depending on the total sum of wages of all socially insured employees, including quarterly advance payments and one final payment. This method of funding ensures adequate capitalization. The statutory provisions create the fund. Having paid out wage claims relating to insolvency, the Federal Labour Agency subrogates the claims of employees, but without the privilege.

Mixed systems: wage priority and guarantee fund system

Many countries have adopted legislation mixing wage priority and guarantee fund system, providing a more integrated approach to addressing social claims at the point of insolvency. The objective of these "mixed systems" is to have the debtor company or bankrupt estate pay employee claims where assets are sufficient, at whatever priority the jurisdiction decides, while having a guarantee fund available where the assets are insufficient.

"Mixed systems" have been used by legislators in developed and emerging nations. This is based on the degree of acceptance that multiple strategies are needed to adequately protect employee wage claims. A key rationale for adopting "mixed system" is that a preference or super-priority system that accompanies a wage guarantee system allows the guarantee fund to recover from the insolvent estate on a priority basis. This removes incentives for directors and officers to pay other creditors in advance of employees in the period leading up to insolvency proceedings because they know that employee wages will be covered by the state fund. At the same time, employees are guaranteed a level of payment even where assets in the insolvent estate are not sufficient to cover those claims, and those payments can be made on a timely basis when employees are most in need of the funds.

France - Section L.143-7 of the French Labour Code provides that wages are guaranteed by the general preference that exists in the French Civil Code (section 2331-4° and section 2375-2°, créances privilégiées).³⁶

34 See <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008418>

35 § 165 SGB III claim Social Code (SGB III), Third Book, Employment Promotion, Status: Last modified by Art. 3 G v. 12.7.2018 I 1147. See <https://www.sozialgesetzbuch-sgb.de/sgbiii/165.html>

36 See also Code du travail - 3e partie Durée du travail, salaire, intéressement, participation et épargne salariale Livre II (art. L) - Salaires et avantages divers. See <https://www.ags-garantie-salaires.org/files/ags-theme/ags/fichiers/L3253-6%20a%20L3253-21.pdf>

Section L.143-10 provides that wages are guaranteed by a super-priority, which supersedes any other preferential debt (créance super-priviligée). The totality of the wage claim, covering the six months of actual work prior to the judgment pronouncing the insolvency, is entitled to the general preference. The wage claim has a cap; specifically, the claims entitled to the superpriority correspond to the last 60 days of actual work before the judgment and realization of the preferential claim. The ability to access the fund is not submitted to a condition of length of employment. The super-priority is limited by a monthly cap. All employees and apprentices are granted a general priority on their employer's personal property and real estate assets to ensure the recovery of the following claims: the last six months' wages, provided they were earned before the opening judgment; compensation in lieu of notice; vacation pay; compensation for unfair breach of contract; redundancy payment; compensation in case of dismissal without cause; compensation for end or anticipated breach of fixed-term contract; insecurity of work bonus for temporary employees; compensation for unfair or erratic dismissal of workers victim of an industrial accident or occupational illness.

Complementary to the priority system, France has a guaranteed insurance for wage claims called Assurance de Garantie des Salaires. The Assurance de Garantie des Salaires is funded by employer contributions. All employers are liable for guaranteed insurance for wage claims, pursuant to section L.143-11-1 of the Labour Code. This structure ensures that the system is sufficiently funded.³⁷ The Assurance de Garantie des Salaires covers the sums owed for work within a limit calculated according to the length of employment. The official receiver is to pay the wage claim entitled to the super-priority within ten days following the judgment pronouncing the insolvency. If the company has no liquid assets, the Assurance de Garantie des Salaires advances the funds within five to eight days following the statement of wage claims (relevé de créances salariales).

Israel - In insolvency, the Israeli Companies Ordinance places employee wages as the first priority among other guaranteed creditors of the company. In the event of bankruptcy, section 78 of the Bankruptcy Ordinance, specifies a super-priority for employee wage claims.³⁸ The National Insurance Law sets a parallel arrangement in section 182, according to which the National Insurance Institute is liable for wage claims that were approved by the trustee/liquidator. In addition, according to the Severance Pay Law, an employee whose employment is terminated due to an event of liquidation is entitled to severance payment as if he or she was dismissed by

the company. Such severance pay is deemed as wages payable in precedence to all other debts. Furthermore, the Israeli courts have ruled that payments prior to the notice period shall also have a super-priority, and shall be paid together with wages in cases of insolvency or bankruptcy. According to Section 27 of the Severance Law, the amount of severance pay and wages paid in the event of insolvency is not, in the aggregate, to exceed 150% of the amount described in the cap. According to the National Insurance Law, the super-priority is limited to 10 times the average salary.

Korea - Korea is another example of a "mixed system". Article 38 of the Labour Standards Act of Korea (LSAK) provides for preferential treatment of employee wage claims. Furthermore, guaranteed payment of employees' wage claims is prescribed in the Wage Claim Guarantee Act of Korea (WCGAK). The wages of the last three months and accident compensation allowance are entitled to preference over secured claims by pledges or mortgages, taxes and public charges, and other claims.³⁹

Thailand - Thailand has a priority system for wage claims during insolvency. Wage claims rank equally with taxes and have priority over unsecured creditors but not secured creditors. The amount entitled to priority is limited to four months' wages. There is also a wage guarantee fund in Thailand, called the Employees' Provident Fund, created under the Labour Protection Act 1998, which is funded by both employer and employee contributions.⁴⁰ These sources of funding are sufficient for the Provident Fund's needs; and benefits available under the Provident Fund include unpaid wages not exceeding 60 times the amount of the monthly payment.

Funding of insolvency guarantee funds and insurance systems

Funding of insolvency guarantee funds and insurance systems can be done in a number of ways and can depend on the priorities lawmakers may have in addressing worker wage claims in company insolvency situations.

Canada - The Canadian Wage Earner Protection Program Act creates the Wage Earner Protection Program (WEPP), which provides for the payment of outstanding wages at a capped amount, to individuals whose employment is terminated as a result of a bankruptcy or receivership. The term "wages" is defined to include salary and vacation pay, but does not include severance or termination pay. Employee claims are reduced by any amount paid to them by a receiver or trustee. The WEPP is funded out of the general tax revenues.⁴¹

37 Chapter III: Payment of wages; Section II: Privileges and Guarantees of the Salary Claim; Article L. 143-7 – L.143-11 of the Labor Code of France See in https://aida.ineris.fr/consultation_document/21291

38 Israel [The Bankruptcy Ordinance of 1980](#); [National Insurance Law](#)

39 [Labour Standards Act of Korea](#); [Wage Claim Guarantee Act of Korea](#)

40 Thai Ministry of Labour ([Employee Welfare Fund](#))

41 Canada [Wage Earner Protection Program Act](#)

Denmark - There is also a wage protection fund (Lønmodtagernes Garantifond) for wage claims during insolvency that is employer/industry funded, which was created in 2005.⁴² The Lønmodtagernes Garantifond provides funds for Danish companies in suspension of payments, to be used to pay outstanding wage and related compensation claims to employees affected by the debtor company's insolvency. The Fund provides relief to workers and, at the same time, avoids the distressed company's limited cash flow being used as security for the mandatory guarantees for wages that could jeopardize a successful restructuring and prevention of job loss.

Dominican Republic - Article 465 of the Dominican Labour Code provides that a guarantee must be set up to insure the payment of (i) up to four months of overdue salaries to employees in case of insolvency of the employer corporation and (ii) all wage claims awarded by a court of law or by arbitral award in case of termination of a labour contract, to a limit of one year of salaries. For such purposes, the guarantee will be set up as an insurance policy contracted by the employer with an insurance company and notified to the Labour Ministry.⁴³ This guarantee should be funded in a way similar to other insurance policies; specifically, it should be funded by the employer. It is relevant to point out that it has not been implemented yet due to the fact that pursuant to the provisions of Article 738 of the Dominican Labour Code, such Guarantee was to be ruled by means of a Tripartite Agreement among the Dominican State, the workers and the employers. To date, no agreement has been reached. (Law No. 87-01 as of May 14, 2001 which creates the Dominican Social Security System).⁴⁴

Germany - The German wage protection fund is industry funded.⁴⁵ The employers' associations require payments from any enterprise, the share depending on the total sum of wages of all socially insured employees, including quarterly advance payments and one final payment.⁴⁶ This method of funding ensures adequate capitalization.

Korea - Under Article 17 the Wage Claim Guarantee Act of Korea, the Minister of Labour establishes a wage claim guarantee fund to apply to wage claims paid by the government instead of employers who have failed to pay owed wage amounts (i.e., wages of the last three

months and accident compensation allowance).⁴⁷ This fund is established with financial resources consisting of recovered amounts by the exercise of a subrogation right by the Minister of Labour, charges from employers, borrowings from financial institutions, and profits accruing from the management and operation of the fund.⁴⁸

Compensation

Limits on the amount of worker claims

The legislation on worker wage claims in insolvency in a number of countries include caps on the amounts of claims that are given a priority in insolvency or bankruptcy, either a cap of the total monetary amount of the claim or a weekly maximum amount that can be claimed.

Bermuda - Claims of an employee to accrued vacation, earned but unpaid wages, and severance allowance have priority over all claims on the winding-up or insolvency of an employer's business.⁴⁹ The amount of severance allowance payable to an employee on termination of employment is based on the length of employment (up to 26 weeks wages), but unpaid wages and accrued vacation are not subject to such restrictions.⁵⁰

Canada - In bankruptcy and receivership: Pre-filing unpaid wages and vacation pay are granted a super-priority over cash, accounts receivable and inventory for up to CAD\$2,000 per employee. The federal Wage Earner Protection Program (WEPP) pays eligible workers up to approximately CAD\$3,600 for unpaid wages, vacation pay, and severance and termination pay.⁵¹ The WEPP is subrogated to the employees' claim for up to the amount of the super-priority.⁵²

Colombia - According to Article 2495 of the Colombian Civil Code, modified by Article 36 of Law 50 of 1990, which establishes the order of preference of creditors' claims, all wages, indemnifications, social services benefits or rights are considered to be privileged and must prevail over any other claim.⁵³ There are no restrictions on the realization of the preferential wage claims, such as a cap on the amount given preference or the length of the employee's employment.

42 The law creating and governing the Lønmodtagernes Garantifond is called the Lovbekendtgørelse 2005-10-28 nr. 1043 om Lønmodtagernes garantifond. See <https://www.retsinformation.dk/Forms/R0710.aspx?id=30306>

43 [Dominican Republic Labour Code](#)

44 [Ley No. 87-01](#) de fecha 14 de mayo de 2001 que crea el Sistema Dominicano de Seguridad Social

45 Social Code (SGB) Third Book (III) - Employment Promotion - (Article 1 of the Law of March 24, 1997, Federal Law Gazette I p. 594), Third Section, Section 175

46 [Ministry of Labour](#)

47 [Wage Claim Guarantee Act of Korea](#) (This is done in accordance with Article 7 of this Act).

48 Article 18 of [Wage Claim Guarantee Act of Korea](#)

49 Section 33(3) of the [Bermuda Employment Act 2000](#)

50 Section 33(3) of the [Bermuda Employment Act 2006](#) (amending the Employment Act 2000)

51 See <https://www.canada.ca/en/employment-social-development/services/wage-earner-protection.html>

52 See <https://laws-lois.justice.gc.ca/eng/acts/W-0.8/index.html>

53 Colombia, [Law 50 of 1990](#)

France - Section L.143-7 of the French Labour Code provides that wages are guaranteed by the general preference that exists in the French Civil Code (section 2331-4° and section 2375-2°, créances privilégiées⁵⁴).⁵⁵ Section L.143-10 provides that wages are guaranteed by a super-priority, which supersedes any other preferential debt (créance super-privilégiée). All employees and apprentices are granted a general priority on their employer's personal property and real estate assets to ensure the recovery of the following claims: the last six months' wages (provided they were earned before the opening judgment); compensation in lieu of notice; vacation pay; compensation for unfair breach of contract; redundancy payment; compensation in case of dismissal without cause; compensation for end or anticipated breach of fixed-term contract; insecurity of work bonus for temporary employees; compensation for unfair or erratic dismissal of workers victim of an industrial accident or occupational illness. The wage claim entitled to super-priority corresponds to the last 60 days of actual work before the judgment. Realization of the preferential claim is not based on a length of employment condition. The super-priority is limited by a monthly cap (section D.143-1 of the Labour Code).

Guatemala - Article 82 of the Guatemalan Labour Code establishes that in case of insolvency, bankruptcy, or judicial or extrajudicial liquidation of the business the General Labour and Social Security Inspection shall graduate the amount of the business' obligations, which will be a minimum of two days wages and a maximum of four months wages, per worker.⁵⁶

India - Article 53 of the Insolvency and Bankruptcy Code, 2016 indicates that the distribution of assets for workers. According to Article 53 (b) of the Code, the following debts shall rank equally between and among the following: (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52 of the Code.⁵⁷ Article 53 (c) of the Code also addresses wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date.

Namibia - Payment of salary or wages, for a period not exceeding two months prior to the date of sequestration of the estate, is due to an employee who was engaged by the insolvent.⁵⁸

Nepal - The Insolvency Act, 2063 (2006) provides for the preference of employee wage claims over other loans and liabilities of an insolvent company.⁵⁹ The Insolvency Act provides preferential treatment to the whole amount of outstanding wages and remuneration of workers and employees. Vacation pay, gratuity, or provident funds payable to workers and employees is to be settled only after the payment of wages and remuneration.

Singapore - Section 328 of the Companies Act (Cap. 50) (Statutes of Singapore) provides for the priority of wage claims in Singapore.⁶⁰

Sweden - Employees in Sweden are protected in situations of insolvency by a state wage guarantee. The wage guarantee may be paid in connection with both company bankruptcy and company reorganization. Decisions regarding the right to wage guarantee payments in bankruptcy are determined by the bankruptcy administrator and, in connection with reorganization, by the reorganization administrator. All employees are entitled to wage guarantee payments. In 2019, the maximum amount of the wage guarantee was around €17,035 (SEK 179,200) per employee.⁶¹

United States - The US Bankruptcy Code grants priority to pre-proceeding wage claims over other unsecured claims under 11 U.S.C. section 507(a)(4), for 100% of amounts owing up to a maximum of US\$10,000 for wages and under section 507(a)(5) up to US\$10,000 per employee for employment benefits. Vacation pay, severance pay, and termination pay are all included within the wage priority up to the maximum of US\$10,000. Several dollar amounts in the US Bankruptcy Code are adjusted for inflation every three years and the current adjusted amount of wages that are granted a priority is US\$12,850 (last set in 2016).⁶²

Insolvency and unemployment schemes

With regard to bankruptcy/insolvency, some countries do not provide for wage guarantee funds nor an insurance system expressly designed to address employee wage and related compensation claims. However, more general social insurance schemes may exist or are linked to insolvency, which offers some relief to employees whose jobs are terminated on insolvency. For example:

Brazil - Under Brazil's Federal Law 11101/05, Law of Restructuring and Insolvency, Article 83, labour-related claims, up to 150 minimum wages per creditor, and occupational accident claims have priority in bankruptcy.⁶³

54 See <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006445849&cidTexte=LEGITEXT000006070721&dateTexte=20040626>

55 [Labour Code of France](#)

56 Código de Trabajo de Guatemala (adoptado por Decreto N° 1441 de 5 de mayo de 1971)

57 India [Insolvency and Bankruptcy Code, 2016](#)

58 Namibia [Insolvency Act 24 of 1936](#) and Namibia [Insolvency Amendment Act, No. 12 of 2005](#)

59 Nepal [Insolvency Act, 2063 \(2006\)](#)

60 Singapore [Companies Act](#)

61 See <https://www.eurofound.europa.eu/observatories/emcc/erm/legislation/sweden-wage-guarantee-in-case-of-insolvency>

62 United States [Bankruptcy Code; Federal Register](#) (set inflation adjustment amounts)

63 [Brazil Law No 11,101, of 9 February 2005](#)

Other than the cap on the amount entitled to preference, there are no restrictions on the realization of wage claims. Brazil does not have a wage protection fund or guaranteed insurance scheme. Discharged employees can seek social assistance, receiving monthly 1 minimum national wage paid by the National Institute for Social Security (INSS) for 3-5 months (Law No. 13,134, of June 16, 2015).⁶⁴

Estonia - The Unemployment Insurance Act in Estonia has a section that addresses insolvency.⁶⁵ The Act grants the right to receive unemployment insurance benefits for persons registered as unemployed pursuant to section 6 of the Market Services and Benefit Act. Section 8 of the Unemployment Insurance Act places a cap on unemployment benefits of: 180 calendar days if the insurance period of the insured person is shorter than 56 months; 270 calendar days if the insurance period of the insured person is 56-110 months; or 360 calendar days if the insurance period of the insured person is 111 months or longer. An employee has the right to receive unemployment benefits in the amount of one month's average wages of the employee, if the employee has been continuously employed by or in the service of the employer for up to five years. That amount increases to 1.5 times one month's average wages of the employee, if the employee has been continuously employed by or in the service of the employer for five to ten years; and to an amount of two months' average wages of the employee, if the employee has been continuously employed by or in the service of the employer for over ten years. The Estonian unemployment insurance scheme is funded by employer and industry taxes.

Netherlands - The Dutch Employee Insurance Agency (Uitvoeringsinstituut Werknemersverzekeringen, or UvW) will take over some of the employer's financial obligations towards the employees, including: (1) the payment of salary and benefits over a maximum of thirteen weeks (including overtime and expenses); and (2) holiday allowance and pension contributions that have remained unpaid over a maximum of one year.⁶⁶

South Africa - Employees are entitled to unemployment benefits during the period of suspension of the contracts of employment. An employee whose contract of employment has been suspended or terminated are entitled to claim compensation from the insolvent estate of their former employer for loss suffered by reason of the suspension or termination of a contract of service prior to its expiration. This claim will be the employee's weekly or monthly salary minus benefits received from

the Unemployment Insurance Fund.⁶⁷ It could also include damages suffered as a result of the termination of a contract of service prior to its expiration in terms of the original terms of the contract.

Switzerland - According to Article 51 and subsequent Articles of the Swiss Unemployed and Insolvency Insurance Law⁶⁸, the employees of an insolvent employer are entitled to request from a public insurance fund the payment of their past four months unpaid wages, after termination of their employment agreement. Employees and employers equally contribute to the funding of the structure, and employee contributions are deducted from wages. In Switzerland, each canton is responsible for the foundation of a public insurance (Article 77 and following of the Unemployed and Insolvency Insurance Law). Under Swiss law, employees have the right to be fully paid and to receive a maximum indemnity covering the four months prior the opening of an insolvency proceeding, during which the wage has not been paid by the employer. Payment includes the employer-guaranteed gratifications.⁶⁹

Turkey - Section 33 of the Turkish Labor Law establishes a wage guarantee fund within the Unemployment Insurance Fund, which is funded by one percent of the employer contributions to the unemployment compensation system.⁷⁰ The fund covers the last three months of salary of the employees before their employer filed for insolvency.

Final Observation

It is important to understand that bankruptcy/insolvency should be viewed as a lagging economic indicator. This is the case for a number of reasons. Companies and enterprises may go through an extended period of financial or economic difficulties before being forced into bankruptcy/insolvency proceedings, if they ever do. If they do enter into bankruptcy/insolvency proceedings it can take additional time as these proceedings will often prioritise saving the enterprise. Only when these efforts are unsuccessful will a company go into liquidation.

As the time before and during bankruptcy/insolvency proceedings can take extended periods of time, this has consequences for employers and workers who are employed by these economically distressed companies. For employers, in addition to the financial challenges that may exist in paying their workforce, they may also face employee retention issues. For workers, concerns regarding the financial status of the company before or during a bankruptcy/insolvency may lead them to

64 [Brazil Law No. 13,134, of June 16, 2015](#)

65 [Unemployment Insurance Act in Estonia](#)

66 See <https://www.uvw.nl/particulieren/ontslag/jik-word-ontslagen/detail/mijn-werkgever-gaat-failliet-of-kan-mij-niet-meer-betalen>, Also see [Articles 61 to 68 of Werkloosheidswet](#)

67 [Section 38\(3\) of the Insolvency Act](#)

68 See <https://www.admin.ch/opc/fr/classified-compilation/19820159/index.html>

69 For amounts involved in the Swiss insurance see:

https://www.swisscanto-stiftungen.ch/pdf/infoblaetter/Obligatorische_Sozialversicherungen-sst-Infoblaetter-2018-en.pdf

70 [Labor Law of Turkey](#)

seek employment elsewhere where possible. If or when a worker might change companies could be impacted by any outstanding wages they may be owed by the employer in the bankrupt/insolvent company and the employer's ability to pay.

For these reasons, it is important to ensure that well-functioning mechanisms to address worker wage claims in enterprise bankruptcy/insolvency are developed and implemented to address these worker concerns, notably during periods of economic uncertainty.

► **Contact details**

International Labour Organization
4, Route des Morillons
CH-1211 Geneva 22 – Switzerland

Conditions of Work and Equality Department
E: inwork@ilo.org