

The content

Debt Advice Handbook 15th edition

Description

With living costs and unemployment rising, budgets squeezed and problem debt on the increase, no adviser should be without this essential guide to the practice and process of giving money advice in England and Wales.

Who's this book for?

It is essential for debt advisers, welfare rights advisers, lawyers, local authority and housing association staff, social workers and union official.

What does it do?

The handbook provides the most comprehensive information needed by advisers on the key stages of money advice, including interviewing clients, establishing liability, prioritising debts, preparing a financial statement, negotiating with creditors and dealing with bailiffs. Fully indexed and cross-referenced to law, regulations and official guidance, and to court and tribunal decisions Includes tactical guidance and examples

What's new?

Fully updated to cover all recent changes to legislation, caselaw and court procedure and practice Emphasis is placed on taking due care of vulnerable clients and making sure that any payment arrangements agreed are appropriate. There is a focus on sustainable credit arrangements that do not affect a client's abilities to pay essential living expenses and priority debts.

Properties

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2. Types of small business

Most self-employed clients who contact debt advice run their businesses on their own. However, their situations can vary greatly. It is important to identify how clients are set up in business – their trading status – because this affects which debts they are liable for and when specialist advice is needed.

Trading status also affects the type of financial statement that a client needs to complete (see here).

Clients who are unsure of their trading status could ask their accountant or bookkeeper for information. If this is not available, signpost the client to specialist business advice.

Sole trader

A sole trader is a person who is self-employed and runs their business on their own (without any business partners). Sole traders can use their own name for their business or use a separate business name. Sole traders do not register their business with Companies House and their business name should not end with 'Ltd' or 'limited'.

Sole traders are legally responsible for their business. They are personally liable for any debts created through running their business and personally own any business assets. Typical sole traders might include plumbers, electricians, taxi drivers and salespeople who work on a purely self-employed basis.

Giving advice to a sole trader

A sole trader and their business are one and the same. If the business struggles to pay its debts, the client's personal income and assets may be at risk. Consider the client's overall situation.

If a client is still trading

Give advice about dealing with personal debt emergencies, such as council tax enforcement agents (bailiffs). If the advice will not negatively impact on the client's business, provide basic advice about dealing with personal creditors. You may also be able to advise the client about the implications for continuing to trade, such as the risk to assets and further indebtedness.

Specialist advice is required if the client has any business debts or any complex business issues, such as a disputed tax debt. The client also needs specialist debt advice before deciding how best to proceed with their debts. A specialist adviser looks at the client's overall situation (at home and in the business) and explains how any action that the client is considering could affect their ability to continue trading. For example, a sole trader plumber who relies on trade credit for their business supplies may struggle to meet the credit limits imposed by a debt relief order (DRO). The client would need to be prepared to inform a supplier about the DRO if they borrow more than the £500 limit imposed by the restrictions during the moratorium. Such a disclosure could put the client's supply at risk.

If a client has ceased trading

Check whether the client has any complex business debts, such as an ongoing liability for a business lease. If any complex debts are identified, the client needs specialist advice. Specialist advice may also be required if the client has a disputed tax debt or has failed to submit tax returns (see TaxAid [1]).

Providing the client has no complex business advice needs, you can usually give full debt advice. Advise the client to tell their creditors, suppliers and HMRC that they have stopped trading.

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1 taxaid.org.uk

Partner in a business partnership

Giving advice to a business partner

A business partnership can exist when two or more people carry out a business together to make a profit. A partnership is sometimes also called 'a firm'.

A partnership can trade using the partners' names or by using a separate business name. Partners do not register the partnership with Companies House and their business name should not include 'Ltd', 'limited', 'LLP' or 'limited liability partnership'.

A partnership may be set up formally through a written partnership agreement. The written agreement should cover how any profits in the business are shared and how the partnership can be ended. Unless the partnership rules state otherwise, contracts can be entered into by any of the partners. The partnership agreement can be useful if there is a dispute between the partners.

A partnership can also be entered into informally. A written agreement is not needed for a partnership to exist. The Partnership Act 1890 applies in the absence of a written agreement. The partners share equally in the profits and losses of the business unless otherwise agreed. Sometimes it can be difficult to identify whether a business partnership exists if there is no written agreement. If you are unsure whether a business is being run as a partnership, seek specialist advice.

Usually, partners personally own a share of the partnership's assets and are jointly liable for the debts accrued by the partnership. [1] Each partner is liable for the whole balance of the partnership's debts and creditors can usually choose whether to take recovery action (including court action) against one partner only, or against several partners at the same time, [2] although each partner always has sole liability for their own income tax and national insurance contributions.

- Unless an agreement states otherwise, a partner is not liable for debts accrued by the partnership before they joined.
- Unless the other partners and creditors agree otherwise, a client who has left a business partnership continues to be liable for the debts accrued during the time they were a partner.
- Unless suitable notice is given to creditors and the client's name is removed from the partnership's paperwork, a client could be liable for partnership debts accrued after they leave the partnership. The client also needs to check the terms of any written partnership agreement.

A client should do all they can to limit their personal liability for any existing or future partnership debts. If a client is considering leaving a business partnership or disputes liability for a partnership debt, signpost the client to specialist advice (also see here).

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1 s9 Partnership Act 1890

2 s3 Civil Liability (Contribution) Act 1978

Giving advice to a business partner

If the client or partnership struggles to pay its debts, the client's income and assets (at home and in the business) may be at risk. Consider the client's overall situation.

If a client is still trading

Give advice about dealing with personal debt emergencies, such as council tax enforcement agents (bailiffs). If the advice will not negatively impact on the client's business, provide basic advice about dealing with personal creditors. Advise the client that some debt options such as DRO and bankruptcy will impact their business. You may also be able to advise about the implications for continuing to trade, such as the risk to assets and further indebtedness. Since partnerships can be complex, it is often best to seek specialist advice.

Specialist advice is required if the client has any business debts or any complex business issues, such as a disputed tax debt. The client also needs specialist debt advice before deciding how best to proceed with their debts. A specialist adviser looks at the client's overall situation (at home and in the business) and explains how any action they may take could affect whether the client and the partnership can continue in business. Also, some strategies, such as an individual voluntary arrangement, do not usually offer the same protection for partnership debts. Sometimes, a separate strategy is required to deal with the partnership's debts. Specialist advice is required.

If a client has ceased trading

Check whether the client has any complex business debts, such as an ongoing liability for a business lease. If any complex debts are identified, the client needs specialist advice. Also check whether the client has notified their creditors, suppliers and HMRC that they have stopped trading in the partnership and has complied with the exit terms of any partnership agreement. If you are unsure whether the client has exited the partnership properly, always signpost the client to specialist advice. Specialist advice may help the client to limit their personal liability for any existing or future partnership debts.

Providing there are no complex debts and the client has exited the partnership properly, you can give full advice about dealing with the client's debts.

Director of a limited company

Giving advice to a director of a limited company

A limited company is a separate legal entity and must be registered with Companies House. A limited company's name must usually end in either 'limited' or 'Ltd' or the Welsh equivalents of 'Cyfyngedig' and 'Cyf'.

Although a limited company can be limited by shares or by guarantee, most companies set up to make a profit are 'limited by shares'. The business can be set up as a private company (in which shares are owned by and transferred between a set number of people) or as a public company (in which shares can be bought and sold on the stock market).

The most common type of limited company that business debt advisers deal with is a private company limited by shares. This type of limited company is owned by its shareholders and run by its directors. Commonly, many small companies are run by just one person, who is both the director and shareholder.

Since a limited company is a separate legal entity, it can own assets and is liable for its own debts. A limited company will need to comply with company law, as well as important documents lodged with Companies House (the memorandum of association and articles of association). Dealing with limited companies can be complex. Advisers should signpost clients to specialist advice if there is an issue with the limited company.

A director of a limited company has duties and responsibilities to the limited company. A director is not usually liable for the limited company's debts unless:

- the director gave a personal guarantee; *or*
- the company was dissolved (struck off) or liquidated and, following an investigation, it was decided that the director had acted inappropriately in their role.

A director could have acted inappropriately in their role for many reasons. Here are a few examples:

- acting fraudulently towards the company's creditors; *or*
- taking money from the company for their own use at the expense of the company's creditors; *or*
- increasing a company's debt by continuing to trade a company while it was insolvent, when there was no reasonable chance that it could trade out of its difficulties. From 1 March 2020 to 30 September 2020 and from 26 November 2020 to 30 June 2021, the government suspended the rules for this type of offence. This was to help companies to continue trading during the pandemic.

A director of a limited company can also create personal liability by agreeing to give an indemnity for a limited company contract. A creditor can use an indemnity to give them protection under a contract if a specific event happens – eg, if a director voluntarily puts their company into liquidation. An indemnity obligates the person giving the indemnity (such as the client) to compensate another party (such as the creditor) for any loss or expense they have incurred.

If a director disputes liability for a limited company debt or personal liability is unclear, signpost the client to specialist advice.

Giving advice to a director of a limited company

The limited company is a separate legal entity to the director, with its own debts and assets. A director should be signposted to specialist help for all matters related to the limited company, including how to close the business.

If a client is still trading

You can advise directors on their personal debts. However, because personal and business finances often become merged for these clients, there are some common issues that you need to consider.

- Personal debt issues for a director of a limited company often suggest problems with the limited company. For example, it may indicate that the client uses personal credit to prop up the limited company. Explore the reasons for the client's personal indebtedness. If the client's debts are caused by the limited company's performance, signpost the client to a specialist adviser.
- Check whether the client has given any personal guarantees for the limited company. If they have, the client must consider how certain debt options may affect the limited company. This can be particularly important if a guarantee exists but has not been called in. Signpost the client to specialist business advice if that is the case.
- Ask the client to check whether they have given an indemnity for any of the limited company's contracts.
- Suggest the client also gets specialist business debt advice before deciding how to proceed with their personal debts. The client must consider whether any action they take to deal with their personal debts could affect their ability to continue acting as a director. The client is unlikely to be able to continue as a company director if they get a DRO or go bankrupt (see Chapter 10).

If a client has ceased trading

Check whether the client has closed the business and resigned as a director. Signpost to a specialist business adviser for advice on leaving or closing the business if that is needed.

Ask the client whether they have given any personal guarantees for the limited company's debts. The client usually needs specialist advice if a personal guarantee relates to a complex business debt – eg, an ongoing business lease.

Also check whether the client has given an indemnity for any of the limited company's contracts. If they have, check how any indemnities that have already been triggered, or could be in the future, will affect the client's situation. If the client disputes any personal liability created by an indemnity, specialist advice is usually required.

Providing the client does not have any complex business debts or disputes that require specialist help, you can give the client full advice on their personal debts.

Member of a limited liability partnership

A limited liability partnership (LLP) is a separate legal entity that is run by its members. An LLP must be registered with Companies House and has some characteristics of a partnership and some of a limited company. The liability of a member of an LLP to pay towards the debts of the LLP is usually limited to the value of the assets that the member put into the business. Solicitors and accountancy businesses commonly use LLPs.

Debt advisers rarely deal with LLPs. Get specialist advice if the client is trading as a member of an LLP, or wants to stop trading as a member of an LLP.

Client with a franchise agreement

A franchise is a business agreement. It allows a client to run a branch of an existing business using the established business's name. A client who has bought a franchise can usually decide how to set up their business – eg, as a sole trader, a partner in a business partnership or as a director of a limited company.

Debt advisers rarely deal with franchises. Get specialist advice if there is any doubt about a client's liability or if the client wants to end the franchise agreement.

Member of a co-operative

A co-operative is a business owned and controlled collectively by the people working for the business. Debt advisers rarely deal with co-operatives. Specialist advice may be needed as it can be difficult to establish a co-operative member's individual liability for any business debts.