

Briefing Note

Transfer of Undertaking (Protection of Employment) Regulations 2006

The purpose of this Briefing Note is to provide a summary of the effect of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the “Regulations”) which came into force in April 2006.

The Regulations cover all transfers of undertakings including those which arise in insolvent situations but it is not intended that this Briefing Note should cover circumstances where there are insolvency proceedings. Further advice should be sought if required.

Overview of the Regulations

The purpose of the Regulations is to preserve employees’ terms and conditions when a business or undertaking, or part of one, is transferred to a new employer. Employees employed by the previous employer (the “Transferor”) when the undertaking changes hands automatically become employees of the new employer (the “Transferee”) on the same terms and conditions.

The Regulations also provide that the employees affected, whether employed in the part of the business that is transferring or elsewhere, have a right to be informed about the transfer. They must also be consulted about any measures which the Transferor or Transferee envisage taking in connection with their employment.

Transfers Covered by the Regulations

The Regulations apply when an undertaking or part of an undertaking is transferred from one employer to another. Examples of transfers are:

- Where a business or part of one is sold or otherwise transferred
- Where two companies cease to exist and combine to form a third
- Where a company, or part of it, is bought or acquired by another, provided this is done by the second company buying or acquiring assets and then running business and not acquiring shares only
- Where a contract for goods or services is transferred in circumstances which amount to the transfer of a business or undertaking to a new employer (contracting out).

Position of Transferor and Transferee in a Transfer

The Transferor

- Must provide Employee Liability Information to the Transferee

The Transferee

- At the moment of transfer, takes over the contracts of employment of employees employed in the undertaking immediately before the transfer, including those who would have been so employed but for an unfair dismissal for a reason connected with the transfer;
- Takes over all rights and obligations arising from the contracts of employment except criminal liabilities;
- Takes over any collective agreements made on behalf of the employees and in force immediately before the transfer; and
- May not, for a reason connected with the transfer, unilaterally worsen the terms and conditions of any transferred employee.

The Transferor and the Transferee

- Must inform and consult representatives of employees; and
- May not fairly dismiss an employee because of the transfer or a reason connected with it unless the reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce.

Provision of Employee Liability Information

The Transferor has a duty to provide information which he/she knows, or ought to know as to his rights, liabilities, powers and duties regarding the transferring employees. The information must be provided in writing, or in a readily accessible form, to the Transferee not less than 14 days before the relevant transfer, or if special circumstances make this not reasonably practicable, as soon as is reasonably practicable thereafter. The Regulations provide a list of actual information (including names) which must be included.

The Transferor must also notify the Transferee in writing of any changes to this information.

The Transferee may claim against the Transferor for a failure to comply with this obligation. The Regulations provide for a minimum payment of £500 per employee in respect of whom there was a failure, having regard to the loss sustained by the Transferee which is attributable to the failure by the Transferor and the terms of any contract between the Transferor and Transferee.

Informing and Consulting

Employees of the Transferor or the Transferee (whether or not employed in the undertaking or the part of the undertaking to be transferred) who may be affected by the transfer or may be affected by measures taken in connection with it are entitled to be informed and in some circumstances consulted with. It is the employer's responsibility (be that the Transferor or Transferee) to ensure that information and consultation is offered to "appropriate representatives".

Where employees who may be affected by the transfer are represented by an independent trade union recognised for collective bargaining purposes, the employer must inform and consult an "authorised official" of that union. This may be a shop steward or a district union official or, if appropriate, a national or regional official. The employer is not required to inform and consult any other employee representatives in such circumstances, but may do so voluntarily if desired. A trade union may be recognised for one group of employees, but not for another.

Where all employees who may be affected by the transfer are not represented by a trade union as described above, the employer must inform and consult other appropriate representatives of those employees. These may be either existing employee representatives or new ones specially elected for the purpose.

If there are existing representatives in place, their remit and method of election or appointment must give them suitable authority from the employees concerned. An example might be a fairly elected or appointed committee of employees that is regularly informed or consulted more generally about a business' financial position and personnel matters. If new representatives are to be specially elected, certain election conditions must be met.

Duty to Inform

The employer of any employee who may be affected must tell the representatives the following information:

- That the transfer is going to take place, approximately when, and why;
- The legal, economic and social implications of the transfer for the affected employees;
- Whether the employer envisages taking any action (reorganisation for example) in connection with the transfer which will affect the employees, and if so, what action is envisaged; and
- Where the employees being informed are to transfer the Transferor must disclose whether the Transferee envisages carrying out any action which will affect the employees, and if so, what. The Transferee must give the Transferor the necessary information to allow him to meet this requirement. The information must be provided long enough before the transfer to give adequate time for consultation.

This information is most easily provided by way of letter.

Duty to Consult

If action is envisaged which will affect the employees, the employer (whether Transferor or Transferee) must consult the representatives of the employees affected about that action. The consultation must be undertaken with a view to seeking agreement. During these consultations the employer must consider and respond to any representations made by the representatives. If the employer rejects these representations he/she must state the reasons.

If there are special circumstances which make it not reasonably practicable for an employer to fulfil any of the information or consultation requirements, he/she must take such steps to meet the requirements as are reasonably practicable. Advice should be sought on whether a particular set of circumstances would be considered to amount to special circumstances in terms of the Regulations.

If the employees are given the opportunity to elect representatives, but do not do so within a reasonable time, the Transferor or Transferee can inform and consult with the employees individually.

Failure to Comply with Duty to Inform and Consult

If an employer fails to comply with the duty to inform and consult, a complaint may be made to a tribunal by the appropriate representative or any of the employees who are affected. If the tribunal finds that the employer did not comply they may award a sum not exceeding thirteen weeks' pay for each employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty. Liability for this award will be split jointly and severally between the Transferor and Transferee.

Pensions

Since April 2005, the Pensions Act 2004 has introduced pension protection when a TUPE transfer takes place. This results in employees' rights arising from some occupational pension schemes surviving a transfer. For example, where the Transferor made contributions towards an occupational pension scheme for an employee then statutory requirements are imposed upon the Transferee.

The above information is a summary of the law in relation to Transfer of Undertakings (Protection of Employment) Regulations 2006 only and further advice should be sought before acting on it.

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