

# Transfers - Duty to Inform and Consult

## Introduction

The law relating to business transfers is set out in the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations"). The Regulations deal with all aspects of a business transfer including the duty to inform and consult. Set out below is a summary of this duty.

## In a nutshell

- Employers have a duty to inform and consult 'employee representatives' about a business transfer. This applies regardless of the size of the employer or the size of the business transaction. Smaller companies in particular find this obligation onerous and do not always comply. Sometimes, companies are reluctant to give out information about a possible sale or purchase of a business for reasons of confidentiality. They question the point of informing their staff about the impact on them of a transaction which may ultimately not go ahead! Employees often do not hear about a deal or how it will impact on them until terms have been agreed. In this situation, the employer is likely to be in breach of the Regulations. In practice, there may well be no legal repercussions but disgruntled employees may take legal action where there has been a failure to inform and consult and this could be costly for the out-going and incoming employers who are both liable to pay fines for any failure to inform and consult. It is therefore in the interests of all employers who may become parties to a "transfer" to be aware of their obligations. They can then make an informed decision as to whether and to what extent they will comply with their obligations.
- The obligation is to inform and consult 'employee representatives' of all employees affected by a business transfer. This term is defined in the Regulations. If there are no employee representatives with whom an employer can consult it is the duty of the employer to arrange for the election of representatives. The employer, whether he is the seller or the purchaser of the business, must inform the representatives of all affected employees of:
  - the fact of the transfer and when it is to take place;
  - the reasons for the transfer;
  - the 'legal, economic and social implications' for affected employees. What does this mean?
    - **'Legal'** implications - Employees of the seller will unless they object (in which case they are deemed to have resigned) automatically become employees of the purchaser from the time of a transfer, on the terms and conditions that they previously held with the seller.
    - **'Economic'** implications - This could be a reference to any effect on employees' remuneration and other employment benefits such as the loss of an occupational pension. It may also be appropriate to disclose information about the new employer e.g. size and resources to enable their worth to be assessed.
    - **'Social'** implications could be information about the location where the purchaser is based and details of local amenities (if relevant). The purchaser may provide social facilities for staff and this could also be disclosed.
- the steps or arrangements which he envisages making in relation to the employees e.g. a reduction in staffing levels (or, if no steps are intended, then this fact needs to be stated); **and**

- if he is the seller, the steps or arrangements which the purchaser envisages he will make in relation to the employees who are automatically assigned to the purchaser on transfer e.g. a planned reduction in staffing levels or an allocation to a new office (or, if no steps are intended, then this fact needs to be stated). The purchaser must give sufficient information to the seller to enable him to comply with this obligation.
- If he is the seller he must provide the following “employee liability” information to the purchaser in writing about the transferring employees at least 14 days before the transfer:
  - the identity and age of each employee;
  - all of the particulars of employment that have to be given to the employee under s1 of the Employment Rights Act 1996;
  - information about any disciplinary action taken against an employee, or any grievance raised by the employee, within the preceding two years;
  - information about any court or tribunal claim brought within the preceding two years or which the transferor has reasonable grounds to believe may be brought, arising out of the employment; **and**
  - information about any collective agreement that would continue to apply to any transferring employees following the transfer

The information must be given in writing and adequate consultation must take place afterwards - see below. In many cases at least two weeks will be needed for the consultation process (or more). This will very much depend on the nature of the transaction but the purchaser can apply to a tribunal for compensation from the seller for failure to provide the information.

### When do the Regulations apply?

The Regulations apply where an ‘undertaking’ or ‘part of an undertaking’ is transferred from one employer to another. An undertaking includes any trade or business.

The Regulations may (but will not always) apply in the following situations:

- sales of business
- mergers and acquisitions
- granting of leases
- franchises, licences, concessions and grants
- contracting out of services (outsourcing), contracting back in and changes of contractor - “service provision changes”

The Regulations do not apply if the activities performed consist merely of the supply of goods to clients. Nor do they apply to the provision of single specific events or tasks of short-term duration.

## Employee representatives

The employer must provide information and consult with 'appropriate representatives'. Appropriate representatives may be:

- trade union representatives, if an independent trade union is recognised; or if not,
- employee representatives appointed or elected by the affected employees specifically for the purpose of being given information and consulted by the employer. The employer must take steps to ensure that employees have the opportunity to elect representatives in time to allow for meaningful consultation to take place (for further information please see the Electing Employee Representatives Client Information Sheet – CIS3); **or**
- representatives appointed or elected by the affected employees for other purposes. The employer may be able to consult with an existing consultative body such as a staff council or staff committee, which is regularly, consulted about staff matters

Employee representatives are entitled to time off to carry out their duties and to attend training in order to perform their functions. They have the right not to suffer any detriment or dismissal on account of their status or activities as employee representatives.

It is automatically unfair to dismiss an employee if the principal reason for the dismissal is that he took part in an election of employee representatives.

## Duty to disclose information and to consult

Information regarding the transfer must be provided in good time to allow a period of consultation to take place. The employer's duty to consult is triggered when the employer foresees that he will be taking steps that will affect his employees e.g. planned reductions in manpower or changes in terms and conditions. The employer should give careful consideration to any representations made and give reasons for the rejection of those representations (if this is what happens).

The seller's duty to consult does not apply to steps that the purchaser is intending to implement but the duty to inform still exists.

The seller must bear in mind that the purchaser is not required to ask for the "employee liability" information described above.

## Employer's Defence

There are very limited circumstances in which the employer will not be required to comply with the duty to inform and consult. The employer will have to show that there were 'special circumstances' which rendered it impracticable to comply with the duty e.g. the sale of the business had to take place extremely quickly because of a sudden and unforeseen emergency.

The employer must show that he took all reasonable steps to comply with his obligations.

## Remedies

If an employer is in breach of his duty to inform and/or consult, the affected employees may present a claim to an employment tribunal. If the tribunal decides that the employer acted in breach of the Regulations it must make a declaration to that effect and may make an award of compensation. The maximum compensation award is up to 13 weeks' actual pay for each affected employee. An obligation by the seller of a business to pay compensation to employees will pass to the purchaser once a 'transfer' has been completed. A purchaser should therefore ensure that he has adequate warranties and indemnities from the seller.

If a seller is in breach of his duty to provide "employee liability" information to the purchaser the purchaser may present a claim to the employment tribunal against the seller. The tribunal may award compensation in which case the minimum award must be £500 per employee unless there are exceptional circumstances.

This checklist is provided for your general information only and does not seek to set out the employment legislation in this area in detail. If you have any queries or wish to discuss specific circumstances, please do not hesitate to contact one of our employment team who will be happy to assist.

## Contact

### Guildford Office

Andrea Tishler  
Joanna Lada-Walicki  
Susanna Fowler  
Michelle Tudor

The Oriel  
Sydenham Road  
Guildford  
Surrey  
GU1 3SR

**T** +44(0)1483 562901  
**F** +44(0)1483 464260

### Woking Office

David Ludlow  
Michael-Jon Andrews  
Andrew Peters  
Ben Collingwood

Concord House  
165 Church Street East  
Woking  
Surrey  
GU21 6HJ

**T** +44(0)1483 748500  
**F** +44(0)1483 729933