

labour and employment lawflash

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Changes to UK's TUPE Regulations

New TUPE Regulations come into force on 31 January, with the Department for Business, Innovation and Skills issuing updated accompanying guidance.

On 31 January 2014, the regulations that will amend the UK's Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006 (the Amendment Regulations)¹ will come into force. To accompany the Amendment Regulations, the Department for Business, Innovation and Skills issued updated guidance (the Guidance).² Summarised below are the main changes and how they will impact employers.

Background

TUPE is the UK legislation that implements the European Acquired Rights Directive. It applies when there is a relevant business or asset transfer and when there is a "service provision change".³

The Changes

The Amendment Regulations published in early January 2014—which are broadly in line with the previous draft version of the regulations—clarified the specific changes that will come into force on 31 January. Set out below are five of the changes that will have the greatest impact.

- **Service provision changes:** After much debate, the government elected to retain the concept of "service provision changes" (SPCs), which, in general terms, occur when a business outsources or insources a particular service or changes its third-party service provider. TUPE will therefore continue to apply to SPCs, but only where the services to be provided by the new employer (transferee) following the SPC are fundamentally the same as those carried out by the older employer (transferor) before the SPC.
- **Pre-transfer collective redundancy consultation:** Provided that the transferor agrees, the transferee may start to collectively consult with the transferring employees about post-transfer redundancy proposals before the date of the transfer. This means there is now a mechanism for concurrent consultation for the purposes of TUPE and collective redundancy. In practice, this will allow the transferee to carry out redundancy dismissals more quickly than was previously the case. However, such dismissals will still need to take place after the transfer has occurred.
- **Greater flexibility to vary terms and conditions of employment post-transfer:** The general prohibition on contractual changes that are by reason of a TUPE transfer has now been relaxed, meaning that any contractual change as a result of, or in connection with, such a transfer will be permitted, provided it is for an economic, technical, or organisational reason entailing changes in the workforce (an "ETO" reason). In addition, the concept of ETO has been broadened to include a change in work location post-transfer. This means that, if the transferee requires transferring employees to work at a new location after the transfer, any

1. View the Amendment Regulations at <http://www.legislation.gov.uk/uksi/2014/16/contents/made>.

2. View the Guidance at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274720/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf.

3. For further details about TUPE and the rationale for the imminent changes, please see our 6 September 2013 LawFlash, "UK Government Publishes Response to Consultation on TUPE", available at https://www.morganlewis.com/pubs/LEPG_LF_ResponseToConsultationOnTUPE_06sep13.

dismissal of employees who refuse to move to the new location will no longer be automatically unfair (although any such dismissal will still be subject to the normal “fairness” rules that apply to dismissals generally).

- **Employee liability information (ELI):** A transferor will now be required to provide ELI 28 days prior to a transfer (an increase from the current 14-day deadline).
- **Collective agreements:** From one year after the transfer, the transferee will be permitted to make changes to any collective agreement it inherits as part of the transfer, provided that any revised terms are no less favourable to the employee “when considered together”. Further, following the European Court of Justice’s decision in *Alemo-Herron v Parkwood Leisure Ltd*, the transferee will not be bound by any post-transfer changes to a collective agreement where it was not a participant in the negotiation that resulted in such changes.⁴

All of the changes set out above will come into effect on 31 January, except for the change to the deadline for providing ELI, which will be effective from 1 May.

Impact of the Changes

The changes to TUPE have generally been welcomed by employers as they go some way to addressing certain aspects of the regulations that have proved most challenging in the past. In particular, the increased flexibility when looking to change terms and conditions post-transfer and the mechanism for allowing pre-transfer collective redundancy consultations are viewed as positive developments.

However, the government has made it clear that a transferor cannot rely on a transferee’s ETO reason to justify a transfer-related dismissal and, in doing so, has missed an opportunity to greatly simplify the process that needs to be followed when making redundancies in the context of a business transfer and/or service provision change. By preventing such redundancy dismissals from occurring until after the transfer of employment, it remains the case that, in certain situations, it will still be necessary for the transferee to consult with its existing workforce and/or consider pooling across both sets of employees before any dismissals take effect.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

London

Rachel Ashwood	+44 (0)20 3201 5557	rashwood@morganlewis.com
Matthew Howse	+44 (0)20 3201 5670	mhowse@morganlewis.com
Nick Thomas	+44 (0)20 3201 5561	nthomas@morganlewis.com

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4. For more information on the *Alemo-Herron* decision, see our 19 July 2013 LawFlash, “ECJ Issues Ruling in *Alemo-Herron v Parkwood Leisure Ltd*”, available at http://www.morganlewis.com/pubs/LEPG_LF_ECJRuling_Alemo-HerronvParkwood_19july13.

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