

labour and employment lawflash

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UK Government Publishes Response to Consultation on TUPE

The response to the Consultation will result in key changes to automatic employee transfer legislation, although the changes do not go as far as originally planned.

On 5 September, the UK government published its response¹ to the Consultation on the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations). The government launched the Consultation to respond to criticism of the TUPE Regulations for imposing often impractical obligations on employers, as well as for seemingly “gold plating” the minimum European requirements. The government’s proposed changes to the TUPE Regulations, which are intended to reduce the burden on employers, will be welcomed by businesses.

Background

In the UK, the TUPE Regulations will apply in certain situations to automatically transfer employees’ employment from one employer to another on the same terms and conditions and with continuity of service preserved.

Broadly, the TUPE Regulations will apply in the following two situations:

- **Business or asset transfers:** The sale of a business or part of a business (including assets) that will retain the same identity after the sale
- **Service provision changes:** Where activities (i.e., services) are outsourced or outsourced services are brought back in house

The TUPE Regulations apply across Europe. If the TUPE Regulations apply to a business transfer or a service provision change, there are a number of consequences, including the following:

- The existing employer is required to inform and consult with the transferring employees about the effect of the TUPE Regulations (with input from the new employer).
- The existing employer is required to provide “employee liability information” to the new employer.
- Liability arises for automatically unfair dismissals if employees are dismissed because of the transfer itself or for a reason connected with the transfer.

The TUPE Regulations are derived from the European Acquired Rights Directive. However, the inclusion of service provision changes in the TUPE Regulations was not required by EU law and was therefore seen as one example of the UK government going further than is required by EU law (so-called “gold plating”).

Consultation

In 2011, the government announced its intention to review the TUPE Regulations to respond to the “gold plating” concerns and claims that the TUPE Regulations are overly bureaucratic. This led to a “Call for Evidence” in 2011 and 2012 and a Consultation in January 2013 on the TUPE Regulations and proposed changes. In its 5

1. View the government’s response at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236932/bis-13-1023-transfer-of-undertakings-protection-of-employment-regulations-2006-government-response-to-consultation.pdf.

September response to the Consultation, the government outlined the following key changes that will be made to the TUPE Regulations:

- **Service provision changes:** The TUPE Regulations will be amended so that the activities to be provided following the transfer must be fundamentally or essentially the same as those provided before the transfer.
- **Changes to collective agreements:** Renegotiation of collective agreements will be permitted one year after a transfer, provided that any changes made must be no less favourable to the employees. In addition, the TUPE Regulations will be amended to provide for a “static approach” to the transfer of employees’ terms that are derived from collective agreements. This means that the new employer will not be bound by terms negotiated after the transfer if it is not a party to the collective agreement or involved in the bargaining process.
- **Post-transfer dismissals:** The TUPE Regulations will be amended so that changes in the location of a workforce following a transfer can amount to an economic, technical, or organisational reason entailing changes in the workforce. This means that redundancies resulting from a change in workplace will not be automatically unfair dismissals.
- **Collective redundancy consultation:** The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)—the legislation governing collective redundancy consultation—will be amended so that any collective redundancy consultation that begins pre-transfer will count towards a new employer’s obligations under TULRCA, provided the existing and new employers agree on this and the consultation by the new employer is meaningful.
- **TUPE Regulations consultation:** Micro businesses (those with 10 or fewer employees) will be able to inform and consult with employees directly rather than through elected employee representatives, provided there is no recognised trade union and no existing representatives.
- **Employee liability information:** The time limit for providing such information will be extended to 28 days before the transfer (from 14 days).

Implications

The proposed changes to the TUPE Regulations unfortunately do not go as far as the government had originally suggested. For example, the TUPE Regulations’ inclusion of service provision changes will not be repealed. The change that will be made to service provision changes (i.e., that the services must be fundamentally or essentially the same) simply follows recent case law developments and therefore may make little difference in practice.

However, it is helpful for employers to have confirmation on this and other points. For example, changing the law to allow pre-transfer consultation to count towards collective redundancy consultation will benefit new employers that know they will need to make redundancies on or shortly after the transfer date. Currently, some new employers have been carrying out pre-transfer redundancy consultations for practical and financial reasons. The change will mean that this practice is supported by legislation.

The government will now produce draft TUPE Regulations to be approved by Parliament. It is likely that the amended TUPE Regulations will come into force in early 2014.

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