

### Protection of Employees (TUPE)

In general, the Protection of Employees on Transfer of Undertaking Regulations apply to any person:

- Working under a contract of employment, including apprenticeship
- Employed through an employment agency
- Holding office under or in the service of the State, an officer or servant of a harbour authority, health board or vocational education committee, and a member of the Garda Síochána or of the Defence Forces.

The Protection of Employees on Transfer of Undertaking Regulations apply to public and private undertakings engaged in economic activities whether or not they are operated for gain.

They do not apply to sea-going vessels.

In the case of agency workers, the party who is liable to pay the wages (employment agency or client company) is the employer for the purposes of these Protection of Employees on Transfer of Undertaking Regulations.

#### TUPE Consultation

The Employees (Provision of Information and Consultation) Act 2006 provides a general right to information and consultation for employees from their employer on matters which directly affect them.

In addition to this, under the Protection of Employees on Transfer of Undertaking Regulations, the employer must consult with the employees' union or, in the absence of a union, with the chosen representative(s) of the employees.

Both the original employer and the new employer must inform the representatives of the employees affected by the transfer, of:

- The date, or proposed date, of the transfer;
- The reasons for the transfer;
- The legal implications of the transfer for the employees and a summary of any relevant economic and social implications of the transfer for them, and any measures envisaged in relation to the employees.

The original employer must give this information to the employees' representatives, where reasonably practicable, not later than **30 days** before the transfer and in any event, in good time before the transfer occurs.

The new employer must give the information to the employees' representatives, where reasonably practicable, not later than 30 days before the transfer occurs and in any event, in good time before the employees are directly affected by the transfer as regards their conditions of work and employment.

Where there are no employee representatives, the employers must arrange for the employees to choose (including by means of an election) representatives for this purpose.

However, if there are still no employees' representatives in the undertaking through no fault of the employees, the employees concerned must be notified in writing, with the details described above, where reasonably practicable, not later than 30 days before the transfer and, in any event, in good time before the transfer.

The consultation obligations apply whether the decision resulting in the transfer is taken by the employer or another undertaking controlling the employer. The fact that the information concerned was not provided to the employer by the controlling undertaking will not release the employer from those obligations.

### **Dismissal as a result of a Transfer of Undertakings**

The transfer of an undertaking, business or part of a business does not constitute grounds for dismissal.

However, there is nothing in the Protection of Employees on Transfer of Undertaking Regulations that prohibits dismissals if the employer can show justification for such dismissals for economic, technical or organisational reasons involving changes in the work-force.

However, a company must have clear, factual grounds for dismissals in these circumstances.

Termination of employment arising out of changes to working conditions to the detriment of the employee is regarded as the responsibility of the employer imposing the changes and would be considered to be a possible constructive dismissal.

Although the UK transfer regulations provide for a right of refusal to transfer to another employer, in Ireland the (Protection of Employees on Transfer of Undertakings) Regulations are silent on the consequences for an employee who refuses to transfer.

An employee cannot be forced to work for the new employer.

However, equally, an employee cannot insist on continuing to work with the old employer if the whole business, or the part of the business in which they have been employed, transfers.

Where an employee refuses to transfer, no liability ensues for the new employer - save where an employee sues for constructive dismissal.