European Communities
(Protection of Employees' on Transfer of Undertakings) Regulations 2003

Origin And Purpose Of The Regulations

The Regulations implement the mandatory requirements of Council Directive 2001/23/EC. The purpose of the Regulations is to safeguard the employment of employees and to protect their terms and conditions when a transfer of a business or undertaking occurs. The Regulations impose certain obligations on both a *transferor* (the employees existing employer from whom they are expected to transfer) and the *transferee* (the employer to whom the employees are expected to transfer).

Who Is Covered By The Regulations?

Under the Regulations an 'employee' means a person of any age, who has entered into or works under (or where the employment has ceased, entered into or worked under) a contract of employment.

The Regulations applies to anyone –

- working under a contract of employment or apprenticeship;
- employed through an employment agency
- in the service of the State including civil servants and employees of a local authority, the HSE or harbour authority.

When Do The Regulations Apply?

The Regulations apply to -

Any transfer of an undertaking, business or part of an undertaking or any business from one employer to another employer as a result of a legal transfer (including the assignment of forfeiture of a lease) or merger.

However, these Regulations do not apply to any transfer where the transferor is subject to bankruptcy or insolvency proceedings.

What Is A Transfer Of A Business Or Undertaking?

A "transfer" means the transfer of an economic entity which retains its identity. An "economic entity" is defined in the Regulations as an organised grouping of resources

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which has the objective of pursuing an economic activity whether or not that activity is for profit or whether it is central or ancillary to another economic or administrative entity.

What Are the Necessary Components For The Regulations To Apply?

- There must be a transfer of an economic entity which retains its identity. (The Regulations do not apply to a share sale, but do to an asset or business sale, management buy-out, outsourcing etc.)
- There must be an undertaking (An undertaking is any type of organisation engaged in economic activities, whether or not they are operating for gain and can include charities, local authorities, health boards, schools and colleges, state and semi-state bodies etc.)
- There must be employees not independent contractors. (The Regulations apply to those employees wholly or mainly employed at the time of the transfer.) Workers who had been dismissed before the transfer, in breach of the Regulations, must be considered as still employed by the business or undertaking on the date of transfer.

What Protections Do Employees Have Under the Regulations When There Is A Transfer?

The Regulations provide for –

- the protection against a transfer related dismissal
- the preservation of rights (bonus entitlements, commission etc. all other terms and conditions but not pension rights)
- the recognition of prior service
- the continuation of trade union representation and collective bargaining if it existed in the previous employment.

The Protection Against A Transfer Related Dismissal

An employee may not be dismissed solely on the grounds of the transfer of undertaking, business or part of a business by either the new employer or the old employer – however dismissals may take place for economic, technical or organisational reasons entailing changes in the work-force;

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If an employee is dismissed because a transfer involves a substantial deterioration in the working conditions of the employee, the employer concerned shall be considered to have been responsible for the dismissal;

If a dismissal occurs in breach of the Regulations and it is also a dismissal which is in breach of the Unfair Dismissals Act relief may only be awarded to an employee in respect of either the Regulations or the Act.

The Preservation Of Rights

The rights and obligations arising from a contract of employment or employment relationship are transferred from the transferor to the transferee.

The Recognition Of Prior Service

If an employee is employed on the date of transfer, there shall be no break in their service or in the continuity of their service.

Trade Union Representation And Collective Bargaining

Employees retain the same right to representation in the employment of the transferee as they enjoyed in the employment of the transferor where the undertaking or business preserves its autonomy after transfer. The transferee must also continue to observe the terms and conditions of any collective agreement until it terminates, expires or a new collective agreement it entered in to.

What About Pension Entitlements?

The Regulations do not apply in relation to employee's rights to old-age, invalidity or survivors benefits under supplementary company or inter-company schemes that do not fall within the Social Welfare Acts.

However, the interests of employees and of persons no longer in the employment of the transferor at the date of transfer, in respect of their immediate or prospective entitlement to old-age and survivors benefits under a supplementary company pension scheme (occupational pension scheme), which is protected by the Pension Act 1990 (as amended) continue to be protected by that Act.

The transferee must ensure that the interests of employees and of persons no longer in the employment of the transferor at the date of transfer, in respect of their immediate or prospective entitlement to old-age and survivors benefits under a supplementary company pension scheme (occupational pension scheme), which is not protected by the Pension Act 1990 (as amended) are protected.

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The Obligation To Inform

There is an obligation on both the transferor and the transferee to inform the employee's representatives affected by a transfer of the -

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

The transferor must give the above information to the employee's representatives, where reasonably practicable, not later than thirty (30) days before the transfer is carried out and, in any event, in good time before the employees are directly affected by the transfer as regards their conditions of employment.

The transferor and transferee must also provide information as respects –

- the number of agency workers temporarily engaged;
- what part of the employment the agency workers are working in;
- the type of work that the agency staff are engaged to do;

The Obligation To Consult

Where there are measures envisaged by either the transferor or the transferee in relation to the employees then then transferor or transferee or both must consult with the employee's representatives, where reasonably practicable, not later than thirty (30) days before the transfer is carried out and in any event, in good time before the transfer is carried out, in relation to any such measures. This consultation must be conducted with a view to reaching agreement.

If there are no employee representatives the transferor and transferee are obliged to put in place a procedure where the employee's may choose from among them a person/s to represent them for the purposes of information and consultation.

The obligation on the transferor and the transferee will still exist in circumstances where the decision to transfer was made by a controlling employer and not by the transferor or transferee.

Can An Employee Or A Transferor Or A Transferee Contract Out Of The Regulations?

No. Any agreement which limits or excludes the Regulations or is inconsistent with the Regulations is void. If any provision in an agreement is less favourable than the

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Regulations, then it is deemed by the Regulations to be modified so as not to be less favourable.
There is nothing in the Regulations to prevent a provision in an agreement being more favourable then any provision in the Regulations.

Raising A Complaint About The Regulations?

An employee or a trade union may raise a complaint about a contravention of the regulations with the Workplace Relation Commission within six (6) months of the date of the contravention that gave rise to the complaint. The case will be heard by an Adudication Officer in the first instance. The Adjudication Officer may extend the six (6) month time limit for making a complaint to twelve (12) months if there was reasonable cause for not submitting it within the six (6) months.

The Adjudication Officer will send a copy of the complaint to the employer and will arrange a hearing between the parties. Following a hearing the Adjudication Officer will issue a decision.

The Adjudication Officer may

- declare that the complaint is or is not well founded;
- require the employer to comply with the Regulations;
  or
- require the employer to award compensation as is adjudged to be just and equitable in the circumstances. The maximum compensation for a contravention of the information and consultation obligations is four (4) weeks' remuneration. The maximum compensation for all other contraventions is two (2) years' remuneration.

Employees (Provision of Information and Consultation) Act 2006

This Act imposes a statutory obligation on the transferor to notify the transferee of the rights and obligations arising from a contract of employment existing at the date of a transfer in so far as they are known or ought to be known to the transferor.

A failure by a transferor to notify the transferee of such rights and obligations does not affect the transfer of that right or obligation and does not affect the rights of any employees against the transferee in respect of that right or obligation.

If a transferee is required to pay compensation to an employee because of the failure of the transferor to provide the necessary information, the transferee has a right of action in a court of competent jurisdiction to recover some or all of the amount paid.

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