

EUROPEAN COMMUNITIES (PROTECTION OF EMPLOYEES ON TRANSFER OF UNDERTAKINGS) REGULATIONS 2003

Explanatory Booklet for Employers and Employees

Web: www.workplacerelations.ie

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Department of Jobs, Enterprise and Innovation**

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1. Purpose of the Regulations

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003) apply to any transfer of an undertaking, business or part of a business from one employer to another employer as a result of a legal transfer (including the assignment or forfeiture of a lease) or merger.

The Regulations, which came into operation on **11 April 2003**, revoke and replace the Regulations of 1980 (S.I. No. 306 of 1980), and the amending Regulations of 2000 (S.I. No. 487 of 2000) which had been in operation since 3rd November 1980 and 21st December 2000, respectively. The Regulations implement an EU Directive¹ aimed at safeguarding the rights of employees in the event of a transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

2. Scope of the Regulations

These Regulations apply to public and private undertakings engaged in economic activities whether or not they are operated for gain.

An administrative reorganisation of public administrative authorities or the transfer of administrative functions between administrative authorities is not a transfer for the purposes of the Regulations.

These Regulations do not apply to sea-going vessels.

3. Definition of a 'Transfer'

For the purposes of the Regulations -

Transfer means the transfer of an economic entity which retains its identity.

¹ Council Directive No. 2001/23/EC of 12 March 2001 (OJ No. L 82 p16 22.03.2001)

Economic entity means an organised grouping of resources 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.

4. Who is covered by the Regulations?

In general, the Regulations apply to any person

- working under a contract of employment, including apprenticeship
- employed through an employment agency or
- holding office under, or in the service of, the State (including a civil servant within the meaning of the Civil Service Regulation Act, 1956), an officer or servant of a harbour authority, health board or vocational education committee, and a member of the Garda Siochana or of the Defence Forces.

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 Regulations.

5. Employer's insolvency

The contractual rights of the employees do not, however, transfer where the original employer is subject to proceedings whereby he may be adjudicated bankrupt, or wound up for reasons of insolvency, by order of the High Court.

However, if the **sole or main reason** for the institution of bankruptcy or insolvency proceedings is the evasion of an employer's legal obligations under the Regulations, then the Regulations apply to a transfer effected by that employer.

6. Protection of Employment

All the rights and obligations of an employer under a contract of employment (including terms inserted by collective agreements) other than pension rights (see

Paragraph 7 below), existing on the date of transfer, are transferred to the new employer on the transfer of the business or part thereof.

The new employer must continue to observe the terms and conditions of the collective agreement until it expires or is replaced.

An employee **may not be** dismissed solely by reason of the transfer. However, dismissals **may take place** for economic, technical or organisational reasons involving changes in the work-force.

If an employment is terminated because a transfer involves a substantial deterioration in the working conditions of the employee, the employer concerned is regarded as having been responsible for the termination.

In this regard, it should be noted that an employee who is dismissed within the meaning of the Unfair Dismissals Acts 1973 to 2001 with -

less than one year's service may refer a case to a Rights Commissioner under the Regulations;

more than one year's service may refer a complaint to a Rights Commissioner under the Regulations or under the Unfair Dismissals Acts 1973 to 2001.

However, an employee may not obtain relief in respect of that dismissal under both the Regulations and those Acts.

7. Protection of pension rights

Employees' pension rights in relation to old age, invalidity or survivors benefits under supplementary company or inter-company pension schemes do not transfer to the new employment.

However, where there is a pension scheme in operation in the original employer's business at the time of the transfer, the Regulation provides that

- (a) if the scheme is an occupational pension scheme within the meaning of the Pensions Act, 1990, then the protections afforded by the Pensions Act apply to any such scheme, and
- (b) in respect of the pension schemes which do not come within the remit of the Pensions Act, the new employer must ensure that rights conferring immediate or prospective entitlement to old age benefits, including survivor's benefits, are protected.

Queries/complaints regarding the protection afforded by the Pensions Acts not being properly applied should be referred to the Pensions Board (ph. 01-6131900), address – Verschoyle House, 28-30 Lower Mount Street, Dublin 2. Website - www.pensionsboard.ie.

Should any complaint arise in relation to a scheme to which the Pensions Act does not apply, it should be referred to a rights commissioner under the Regulations (See paragraph 10 below).

It would be advisable for employees to refer any such queries/complaints in the first instance to the trustees of the relevant pension scheme.

8. Information and Consultation

In a transfer situation, both the original employer and the new employer must inform the representatives of their employees affected by the transfer, of -

- (i) the date or proposed date of the transfer;
- (ii) the reasons for the transfer;
- (iii) 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.

If either employer envisage measures in relation to their employees, the employees' representatives must be consulted, where reasonably practicable, not later than **30 days** before the transfer occurs and, in any event in good time before the transfer about such measures, with a view to reaching agreement.

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, where reasonably practicable, not later than **30 days** before the transfer and, in any

event, in good time before the transfer, with the particulars described at (i), (ii) and (iii) above.

These 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.

Under the Regulations –

employees' representatives means a trade union, staff association or excepted body with which it has been the practice of the employees' employer to conduct collective bargaining negotiations, or in their absence, a person or persons chosen by such employees (under an arrangement put in place by the employer, including by means of an election) from among their number to represent them in negotiations with the employer.

9. Protection of employees' representation

Where a business or part thereof **preserves its autonomy** after the transfer, the status and function of the employees' representatives affected by the transfer must be preserved on the same terms and subject to the same conditions as existed before the transfer.

In a situation where the business or part thereof **does not preserve its autonomy** after the transfer, the new employer must arrange (by means of an election or otherwise) for the employees transferred who were represented before the transfer to choose employees to represent them.

If those representatives (affected by the transfer) term of office expires as a result of the transfer, they will continue to enjoy the express protection provided by the Unfair Dismissals Act 1977 (section 6(2)(a)) for such representatives.

13. Voidance of certain provisions in agreements

The Regulations provide that a provision in any agreement shall be void in so far as it attempts to exclude or limit the application of any provision of the Regulations or is inconsistent with any provision of the Regulations.

Nothing in the Regulations shall be construed as prohibiting the inclusion in an agreement of a provision more favourable to an employee than any provision in the Regulations. References to an agreement are to any agreement, whether a contract of employment or not, and whether made before, or after, the passing of the Regulations.

14. Non Co-operation with Employment Appeals Tribunal

Failure by a witness to appear before the Employment Appeals Tribunal where a subpoena is served and/or failure to produce documentation is an offence liable, on summary conviction, to a fine of up to € 3000.

15. The High Court

A party to proceedings before the Employment Appeals Tribunal may appeal to the High Court from a determination of the Employment Appeals Tribunal on a point of law.

The Minister for Jobs, Enterprise and Innovation, at the request of the Tribunal, may refer a question of law to the High Court for determination.

16. Enforcement of Decision of Rights Commissioner/Determination of Tribunal

A decision of the Rights Commissioner or a determination of the Tribunal, unless appealed or where the appeal has been abandoned, may be enforced in the Circuit Court within **6 weeks** from the date on which the decision or determination was

communicated to the parties by - the employee, his/her trade union, or the Minister for Jobs, Enterprise and Innovation (if he or she considers it appropriate having regard to all of the circumstances).

The Circuit Court may, if appropriate, apply Courts Act interest to compensation payable, for the period beginning 6 weeks after the decision/determination was communicated to the parties and ending on the date of the Court Order.

Further information in this regard may be obtained from the Circuit Court Office nearest the employee's place of employment. Website – www.courts.ie