

BLP: LOOKING AHEAD

Key changes in employment law explained

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TUPE

On 5 September 2013, the Government published its response to the consultation on proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The changes are not as far reaching as expected and not all of the original proposals made in the consultation are to be introduced. Most significantly, the service provision change regulations are being kept.

The Government hopes to have the draft legislation ready to lay before Parliament by December 2013 and the changes are anticipated to come into effect in January 2014. The table below sets out a summary of the changes.

The changes

Current Position	Change
TUPE contains regulations designed specifically to bring most service provision changes within the ambit of TUPE, whether insourcing, outsourcing or second generation contracting.	The service provision change regulations will remain, but will be amended to clarify that the activities must be "fundamentally or essentially the same" after the purported transfer as before.
Specific information regarding the transferring employees (known as employee liability information) must be provided by the transferor to the transferee at least 14 days before the transfer.	This obligation will remain in place, but with the information having to be provided at least 28 (rather than 14) days before the transfer.
Dismissals are automatically unfair and changes to terms and conditions are void if the sole or principal reason for the change is the transfer itself or a reason connected with the transfer that is not an ETO reason. An ETO reason is an economic, technical or organisation reason entailing a change in the workforce.	There will be no fundamental change, but the wording will mirror the Acquired Rights Directive more closely, so as to prevent TUPE being interpreted in the UK more restrictively than the Directive.
Employees are protected against dismissals on a transfer, except where there is an ETO reason. Case law says that a change in location does not amount to an ETO reason.	TUPE will be amended to provide that a change in location can fall within the remit of an ETO reason.
A transferor cannot rely on the transferee's ETO reason to make redundancies pre-transfer.	No change.

<p>Where substantial changes are proposed to a transferring employee's working conditions to the employee's material detriment, this can be an automatically unfair dismissal even where there is no breach of contract. It can also result in liability remaining with the transferor for changes proposed by the transferee.</p>		<p>No change.</p>
<p>If collective redundancies are proposed, any consultation with the transferring employees pre-transfer does not count towards the minimum consultation period for large scale redundancies.</p>		<p>Provided that the transferor and transferee agree, the transferee will be able to count any period of meaningful pre-transfer consultation towards the minimum period for collective redundancy consultation.</p>
<p>There is no time limit on the period for which a transferee has to observe the terms of a collective agreement inherited on a transfer.</p>		<p>The transferee will be able to renegotiate terms of a collective agreement one year after the transfer, on condition that the changes are no less favourable to the transferring employees.</p> <p>TUPE will clarify that the static approach applies to collective agreements. This means that transferees will not be bound by changes to the collective agreement that are made post transfer where the transferee is not a party to the negotiations.</p>
<p>All employers must inform and consult with elected representatives or recognised trade unions.</p>		<p>Micro businesses (those with fewer than 10 employees) will be able to inform and consult with their employees directly, where there is no trade union.</p>
<p>Where transferring employees are eligible to participate in an occupational pension scheme pre-transfer, transferees have to match employees' pension contributions up to 6% of salary.</p>		<p>The draft Transfer of Employment (Pension Protection) (Amendment) Regulations 2013 provide that the transferee can choose to contribute either a matching contribution (up to 6% of salary) or a contribution equal to the transferor's contribution immediately pre-transfer. If approved, these regulations will come into effect from 1 October 2013.</p>

BLP Comment

- Despite its intention to repeal the service provision change element of TUPE, it is clear that the Government has listened to the overwhelming objections to this proposal. Its retention will be a welcome relief in the outsourcing sector, as will confirmation that a change of location can amount to an ETO reason. The current case law on this issue has created a significant risk for outsourcing operators, who often relocate transferring employees.
- The extended period for the provision of employee liability information is unlikely to satisfy incoming service providers, but the retention of this obligation will be welcomed.
- The ability for transferees to consult for the purposes of mass redundancies prior to the transfer taking place is likely to be relied upon heavily and should reduce financial burdens on incoming employers.

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Getting in touch

If you would like to talk through your project or discuss solutions to your legal needs, please get in touch.

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