



INFORMING AND CONSULTING OBLIGATIONS ON TRANSFERS UNDER TUPE 2006 – A SHORT GUIDE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) requires employers to inform and (where the employer envisages taking any measures in relation to its employees in connection with the transfer) consult with appropriate representatives of its affected employees (*regulation 13, TUPE 2006*). These obligations apply to both the transferor (seller) and transferee (buyer) of the business.

1. Information

a. Information to be provided

The appropriate employee representatives (or, if there are none, the affected employees themselves) must be informed in writing of:

- The fact of the transfer, when it is to take place and the reasons for it.
- The legal, economic and social implications of it for affected employees.
- The measures which the employer (and, where the employer is the seller, the buyer) envisages it will take in connection with the transfer in relation to any affected employees. The seller must also state the measures the buyer envisages taking in relation to transferring employees. It is important to note that the buyer has an obligation to provide the information to the seller in time to allow the seller to perform its obligation to give the information to the union/employee representatives.
- If neither the seller nor the buyer is envisaging taking measures, that fact should be stated.

b. Timing

- The information must be provided **long enough before the transfer** to enable the employer of affected employees to consult with the appropriate representatives with a view to seeking their agreement on the relevant measures. There is no minimum period.
- The seller must also provide the buyer with employee liability information at least 14 days before the transfer date unless not reasonably practicable, in which case, at the earliest possible date.

2. Consultation

Where the employer intends taking any measures in respect of the affected employees, it must consult appropriate representatives with a view to reaching agreement over the intended measures.

a. Regulation 13

The seller and buyer each have an obligation to inform and (if appropriate) consult with recognised trade unions or elected employee representatives in

relation to any of their own employees who may be affected by the transfer or any measures taken in connection with it. Where an employer recognises a trade union, it must consult with the union.

The obligation is to inform and consult in relation to any "affected" employees, which is wider than just those employees who will be transferred under TUPE and includes any employees who will be affected by the transfer of the employees or the measures being taken.

It is important to note that TUPE probably only requires the seller and buyer to inform or consult with representatives of their **own** employees. Therefore, for example, trade unions recognised by the seller have no right to be informed or consulted directly by the buyer prior to the transfer.

b. Employee representatives

There are detailed regulations concerning the election of employee representatives for the consultation exercise, and their functions and responsibilities. The employer must allow the appropriate representative's access to the affected employees and provide them with such accommodation and other facilities as may be appropriate (*regulation 13(8)*).

If the seller or the buyer does not recognise a trade union or do not have appropriate elected employee representatives already in place, they will need to hold elections for appropriate representatives before the consultation process can begin. This may mean that employers have to break the news of a proposed TUPE transfer earlier than they may otherwise like to.

If the employees fail to elect appropriate representatives then the employer must provide the relevant information to each affected employee individually. However there is no obligation under TUPE to consult individually with each of the employees.

The seller and/or buyer may also be obliged to inform and consult any European Works Council or "national works council" that exists.

Moreover, if redundancies are being planned at the same time as the transfer, the obligation to consult on collective redundancies may arise. In practice, it may be possible to inform and consult a single group of representatives in relation to both the proposed redundancies and the proposed transfer, and to consult with them under both obligations. The two consultation periods could therefore run concurrently.

3. Remedies

If the employer fails to inform or consult then the appropriate representatives may bring a claim in the employment tribunal. If the claim is successful the tribunal may award up to 13 weeks' gross pay to each relevant affected employee. Unlike some statutory awards, there is no limit on the amount of a week's pay.

The employer has a defence if it can show that there were special circumstances making it not reasonably practicable for information to be given or consultation to take place, and

that it had done the best it could to comply in the circumstances (*regulation 13(9), TUPE 2006*). However, in practice, this defence is construed narrowly.

If you are planning to acquire or sell a company or if you have been affected by a TUPE transfer and you would like some legal advice, please contact Emmanuelle Ries.

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