

Client Alert

Corporate Practice Group

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UK Government Announces Proposals to Reform TUPE

The UK Government has published its proposals to amend the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which implemented the Acquired Rights Directive in the UK. The consultation process regarding these proposals ends on 11 April 2013, with a view to the changes becoming effective in October 2013. The key proposed changes are summarised below with our comments.

Repeal of the service provision changes

The most significant proposed change is to repeal the service provision change regulation which was brought into force by the previous Government in 2006. The service provision change regulation was intended to give job protection to employees working in Great Britain when the service provision changed to another contractor or when the services were outsourced or insourced. In these situations, TUPE resulted in the employees assigned to the services automatically transferring their employment contracts to the new service provider. This regulation gave certainty to employees in Great Britain over and above their counterparts in other European countries as the UK Government chose to implement a more definitive regulation on service provision changes than was required by the European Commission. This has been viewed as “gold-plating” the Acquired Rights Directive for employees assigned to services provided in Great Britain. The repeal of this provision will take businesses back to the uncertainties of the pre-2006 position, when complex legal and factual analysis was required as to whether a service provision change constituted a transfer of an undertaking under TUPE.

Repeal of disclosure of Employee Liability Information by old employers

Currently, certain information about the transferring employees has to be provided by the old employer to the new employer at least 14 days before the transfer takes effect. In practice, new employers usually need to have more extensive information about employment terms and benefits than was required by TUPE and, arguably, new employers need less information about resolved disputes that occurred in the previous two years. The Government now proposes to repeal this requirement, also introduced in 2006, but it is mindful that some employment information will need to be provided to the new employer particularly to enable it to comply with any information and consultation obligations. It intends, therefore, to issue guidance and possibly

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also model terms for commercial agreements about relevant employment information which the old employer should provide to the new employer.

Harmonisation of employment terms

The Government proposes to change the current restrictions on harmonising employment terms so that it is in line with the Acquired Rights Directive and European case law, but no more restrictive than this. Currently, changes are void if they are made where the sole or principal reason for the change is not only the transfer itself but also a reason “connected” with the transfer. The proposal to align TUPE with European case law may in some circumstances, for example, permit changes to employment terms where both the employee and the employer agree to the changes. The proposed changes are likely to include removing the reference to restricting changes for a reason “connected” with the transfer being void and allowing changes for “economical, technical and organisational reasons entailing changes to the workforce” (ETO) made by reason of the transfer itself. The intention behind this proposal is likely to be welcomed by businesses but the precise outcome of this proposal remains to be seen.

Introduction of “location changes” to allow fair dismissals

Dismissals because the new employer is based in a different location are proposed to be expressly lawful under TUPE. This would be consistent with the UK test of redundancy, allowing dismissals to be made fairly (but subject to a fair process being followed) where there is a change of workplace location.

Allowing the old employer to rely on the new employer’s ETO to make fair dismissals

Currently, the old employer cannot rely on the new employer’s ETO to make fair dismissals before the transfer takes place. The old employer must have its own genuine ETO reason for the dismissals or they will be automatically unfair. The Government proposes to allow the old employer to dismiss assigned employees fairly where the reason relates to the (would-be) new employer’s business reasons.

Reducing collective redundancy consultation obligations

A welcome proposal is that the new employer may, under the reformed TUPE regulations, be able to rely on redundancy consultation carried out by the old employer or the proposed new employer before the transfer takes place, thereby reducing the period before which the new employer can start to dismiss affected employees. Together with the introduction of a reduced collective consultation period for proposed redundancies of 100 or more employees in 90 days, from 90 to 45 days, these reforms will assist employers making headcount reductions more quickly.

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