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EMPLOYMENT UNIT

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EMPLOYEE'S RIGHTS ON THE TRANFER OF AN UNDERTAKING

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 aim to safeguard employees' rights in the event of a transfer of a business. The decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity as indicated by the fact that its operation is actually continued or resumed. In order for a business activity to come within the definition of the transfer of an undertaking the business in question must retain its identity. The essential question is whether the party taking over the business obtained a business or an undertaking (or part thereof) which it can continue to operate.

The economic entity may consist of the provision of services where the real asset may be goodwill or possibly just the right to provide the service in question.
In ascertaining whether a transfer of an undertaking has taken place one must examine the following factors:

~ has the entity retained its identity?
~ has the customer base transferred?
~ are the activities carried on after the transfer similar to those carried on before the transfer?
~ have the assets transferred and have the intangible assets e.g. goodwilltransferred?
~ have the majority of the employees been taken over by the new employer?

These factors are only a part of the overall examination of the situation. Each situation must be examined on its own merits. It is a matter of substance over form.

PROTECTION OF EMPLOYMENT RIGHTS

All the rights and obligations of an employer under a contract of employment existing on the date of transfer are transferred to the new employer on the transfer of the business or part thereof. Effectively the new owner steps into the shoes of the previous owner and the terms and conditions of employment remain the same. The new employer must continue to observe these terms and conditions of employment. All claims that the former employer may have had against him/her are also transferred to the new owner. An employee cannot be dismissed solely by reason of the transfer. Furthermore, the terms and conditions of employment of the employees cannot be varied as a result of the transfer.

INFORMATION AND CONSULTATION

Both the transferor and transferee must consult with their employees before any transfer takes place. Employee representatives must be informed of the following: -

~ the date or proposed date of the transfer;
~ the reasons for the transfer;
~ 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 above information must be given, where practicable, not later than 30 days before the transfer. Where measures are envisaged as a result of the transfer, for example, redundancies, changes in work practices etc., the transferor must consult with the employee representatives with a view to reaching agreement. A purchaser should ensure that the consultation process has been properly conducted as it is the purchaser who will become liable for all breaches of the Regulations which occur before the transfer takes place.

DISMISSALS AND LIABILITY FOR SEVERANCE COSTS

The purchaser will clearly be impacted by any attempt to reduce the workforce by structural or organisational changes. The purchaser will carry liability to employees. The only possibility the purchaser has of mitigating the effect of reductions in the workforce is to seek indemnities from the Vendor/Transferor, however, these will be personal to the parties. This will provide a purchaser with some degree of security in the event of an action by employees after the business has been taken over. A dismissal of an employee is deemed to be automatically unfair if the grounds for the dismissal are the transfer of a business. Any decisions to terminate the employment of any existing employees must be justified by economic, technical or organisational reasons which entail changes in the workforce.

REDRESS FOR EMPLOYEES

An employee may seek redress from a Rights Commissioner for any breach of the Regulations. Rights Commissioners have been given a very broad power to require employers to "take a specified course of action" in order to comply with the Regulations, for example, he/she could order that completion of a transaction be delayed until the consultation procedure has been properly completed or, indeed, the power may extend to voiding a transaction.

The Rights Commissioner may also make awards against employers of such compensation as is just and equitable, subject to the following limits:

~ up to four weeks' remuneration for breach of the employer's obligation to inform/consult with employees; and
~ up to two years' remuneration for breach of any other provision of the Regulations (e.g. an improper dismissal or unlawful change to terms and conditions of employment).

Furthermore, employees may take an action under the Unfair Dismissal Acts where they can claim re-instatement, re-engagement or compensation up to two years gross remuneration. Employees may also bring a civil action under common law for breach of contract/statutory duty.

For further information please contact Dawn Carney, Solicitor, Employment Unit, Sheehan & Co., Solicitors, Galway.
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Please note that this leaflet is intended to give general guidance only. Liability is not accepted for any errors or omissions.