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Ireland: Employment protection in relation to business transfers

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Ireland

Phase:

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Native name:	The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003; S.I. No. 15/2018 - European Communities (Seafarers) Regulations 2018
English name:	The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003; S.I. No. 15/2018 - European Communities (Seafarers) Regulations 2018

Article

Entire regulation

Description

Irish law has defined transfers of undertakings as defined by the European Court of Justice and requires the transfer of an economic entity which retains its identity after transfer. The term 'economic entity' is defined as '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'. The central question as to whether a transfer of undertakings has occurred will be to establish what the principle or most significant assets in the operation of a business are, and to establish whether they have been transferred. In deciding whether or not the business has retained its identity, only large-scale changes should be taken into account. Small changes (or changes which do not amount to a change in the entire operations) are not considered sufficient to constitute a change in identity. The regulations do not apply to businesses which are purely transient.

The regulation may also not be applicable in cases where the transferee refuses to take on contracted services because they already have enough personnel or assets to fulfil the contracted services on their own. However, in such cases all other factors would be examined to determine whether such is sufficient to be considered a transfer.

Employees (both permanent and fixed-term staff) who are employed by, or working in the affected department or business at the date of the transfer will be subject to employment protection. Employees partially employed by the affected department may also be covered, depending on the percentage of their work life spent in such a role.

Employees are entitled to object to the transfer. In such cases the transferor must provide alternative employment, and if no such employment is available, the employee would be made redundant.

The provisions laid out in the employment contract agreed upon by the transferor and employee will be transferred as stated to the transferee. This includes salary and accumulated benefits. The exception to this rule is the case of pension rights. In general, these are occupational pension schemes which are tax exempt and are usually characterised as defined benefit or defined contribution. Personal Retirement Savings Accounts are also regulated by the Pensions Acts 1990-2008.

All obligations arising from a contract of employment will transfer, including accrued service. Moreover, the transferee must continue to observe the terms and conditions of any collective agreement on the same terms applicable to the transferor until the date of termination or expiry, or until another collective agreement is entered into force.

For the employer to make changes to individual contracts or the transferred workforce (through dismissals), they must be able to prove that such changes were not in relation to the transfer itself, and must not decrease the employees' overall benefits or position within the company. Such changes must be explicitly agreed upon by the new employer and employee as stipulated in a normal employment relationship.

Any changes or dismissals which do not meet these criteria will be deemed to be invalid.

Trade unions are generally involved in the transfer process at firms that have collective agreements in place. Works councils can have a consultative role during the transfer process. Trade union involvement is more common.

In 2018, secondary legislation (Statutory Instrument 15 of 2018) removed the exclusion of seafarers from the TUPE Regulations. Seafarers on fishing vessels that fly the Irish flag are now within the scope of the TUPE protections.

Comments

Though it is not explicit in the Regulations, TUPE (transfer of undertakings under the EC Regulations 2003) can apply in outsourcing scenarios: the McDowell Purcell law firm note that the Court of Justice of the EU and the Employment Appeals Tribunal have determined in several cases that the regulations can apply where there is a change in the provider of a service.

Two tests for whether a TUPE applies are:

- a transfer of significant tangible or intangible assets; or
- the taking over of the majority of the workforce in terms of numbers and skills.

Cost covered by

Not applicable


Involved actors other than national government

Trade union
Works council

Thresholds

No, applicable in all circumstances

Sources

-  [S.I. No. 131/2003 - European Communities \(Protection of Employees on Transfer of Undertakings\) Regulations 2003](#)
-  [S.I. No. 15/2018 - European Communities \(Seafarers\) Regulations 2018](#)
-  [McDowell Purcell: What is TUPE?](#)
-  [A Ius Laboris Publication \(2009\) 'Transfers of Undertakings Guide'](#)

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