

"Your staff are your most valuable resource..." Whether your company employs two people or two hundred, this key item should be at the top of every manager's priority list. Yet, keeping up to date with changing employment legislation - especially with added European Community Directives - becomes more complex and costly every day. In these Fact Sheets, we have tried to provide basic guidelines and ideas to help you adapt or improve your personnel procedures. Please remember the advice given is general and not intended to be legally definitive. The Fact Sheets on various employment and human resource matters can be accessed at www.aslrecruitment.co.uk/useful-resources

TUPE – THE DUTY TO INFORM AND CONSULT

The transfer of an undertaking occurs on the selling or the buying of a business or part of it as a going concern. The transfer can affect employees both in the business which is being purchased and the purchasing business itself. When the transfer of the business takes place the contracts of employment for all employees generally transfer to the new owner. Therefore it is important for both businesses to consider their duties to their employees under the relevant legislation.

These duties are governed by the Transfer of Undertakings (Protection of Employment) Regulations 1981, known as TUPE, the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(c) A) and The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999.

The most important duty under the legislation is the duty to inform and consult with the "affected employees" in relation to the transfer issues. The duty applies even if only one employee is affected, as there is no minimum threshold.

If the employees are represented by a recognised union for collective bargaining purposes then the business should inform and consult with the union representative. If there is no union representation then the employer can choose to consult with representatives elected specifically for consultation under TUPE or with representatives who were initially appointed for other purposes other than consultation under TUPE. However, if there are no such representatives, the onus is on the employer to facilitate the necessary election before consultation can begin.

There are no specific time limits as to when an employer has to inform or consult with the affected employees. There is no minimum statutory period as with redundancy consultation, nor is there a general obligation to consult at the earliest possible time or in good time.

However, under the Acquired Rights Direction (upon which TUPE is based) there is a requirement for information to be provided "in good time before the transfer is carried out". Where the transfer is effected within a short period of time, the information must be delivered as soon as practically possible.

The employer must consider any representations made by the representatives and reply to the representations. However, this may be unrealistic if the transfer occurs within a very short timescale. It is advisable to inform and consult as soon as management are aware that such a transfer is being discussed. This however may cause conflict between the need to inform and consult and the commercial realities and the commercial nature of the transfer.

There is the risk of claims being brought by the employees if they feel there has been a failure to inform or consult. The danger is that these applications can be made to the Employment Tribunal prior to the completion of the transfer. The compensation that the Employment Tribunal could award to each employee is known as a Protective Award. The Protective Award can be up to a maximum of 13 weeks' pay.

This fundamental right is likely to extend beyond the TUPE duty to inform and consult and could apply to all managerial decisions affecting employees. This could possibly include for example, consulting with employees who are affected by the introduction of a new staff member, or where there may be a merger of two businesses. Such considerations as training managerial staff on how to deal with consultation situations and/or drafting a procedure for any possible future consultation situations that may occur would be a sensible way forward.