

August 2019

TRANSFER OF UNDERTAKINGS NORWAY

Norway is not a member of the EU but is a party to the European Economic Area Agreement. The agreement includes Norway's participation in EU's inner market. The EEA agreement is dynamic, in the sense that EU rules regulating the inner market will apply also for Norway.

The Working Environment Act chapter 16 implements the EU Directive 2001/23/EC on the transfer of undertakings. The interpretations of the Court of Justice of the European Communities are therefore relevant when determining the meaning of the regulations in addition to the rulings of the EFTA Court.

1. WHAT IS THE DEFINITION OF A RELEVANT TRANSFER / WHEN DOES TUPE APPLY?

1.1 The Working Environment Act, chapter 16 applies in the following scenarios:

A business transfer:

A transfer of a business or undertaking (or part of a business or undertaking) where there is a transfer of an economic entity that retains its identity – typically a transfer of the business and its assets. This does not include a change in ownership due to a share transfer, as this would not change the identity of the employer.

Out- or insourcing:

Out- or insourcing may de facto constitute a business transfer that will trigger TUPE. This would e.g. be the case where there was an organised grouping of employees carrying out the relevant activity pre-transfer and the transferor intends that the transferee will take over the activity on a continuous rather than one-off basis.

1.2 TUPE applies in cross border transfers within the EEA/EU, although a recent appeals court decision stated that a cross border transaction could entail such a changed way of operating the business, that the identity of the undertaking would not be intact.

2. WHAT ARE THE MANDATORY INFORMATION AND CONSULTATION REQUIREMENTS?

2.1 The former and new employer shall as early as possible provide information concerning the transfer and discuss it with the employees' elected representatives. Information shall particularly be given concerning:

- a) the reason for the transfer,
- b) the agreed or proposed date for the transfer,
- c) the legal, economic and social implications of the transfer for the employees,
- d) changes in circumstances relating to collective pay agreements,

- e) measures planned in relation to the employees,
- f) rights of reservation or preference and the time limit for exercising such rights.

If the previous or new owner is planning measures in relation to their respective employees, they shall consult with the elected representatives as early as possible on the measures with a view to reaching an agreement.

The same information shall also be given directly to the employees after the elected representatives have been informed.

3. CAN EMPLOYEES OBJECT TO THE TRANSFER AND, IF SO, WHAT ARE THE CONSEQUENCES?

- 3.1 Although they cannot prevent the transfer going ahead, individual employees can object to their employment being transferred. If they do so, their employment will end on the date of the transfer.

4. CAN THE EMPLOYER CHANGE TERMS AND CONDITIONS OF EMPLOYMENT FOLLOWING THE TRANSFER?

- 4.1 The rights and obligations of the former employer ensuing from the contract of employment or employment relationships in force on the date of transfer shall be transferred to the new employer.
- 4.2 If the new employer seeks to impose new terms or working arrangements which are materially detrimental to the employees, this would be deemed to be a termination of the employment agreement, and the employee would be able to trigger rights concerning unfair dismissal.
- 4.3 The new employer thus may only make changes to terms and conditions in the extent the previous employer could carry out such changes, or by agreement with the employee.

5. WHAT PROTECTIONS DO AFFECTED EMPLOYEES HAVE AGAINST DISMISSAL?

- 5.1 Transfer of an undertaking to another employer is not in itself grounds for dismissal with notice from a former or new employer.
- 5.2 If a contract of employment or employment relationship expires because a change of employer involves major changes in the working conditions to the detriment of the employee, the termination is deemed to be a consequence of circumstances relating to the employer, and the employee may trigger rights against unfair dismissal.

6. WHAT IS THE EFFECT OF THE TRANSFER ON THE COLLECTIVE STATUS OF EMPLOYEES (COLLECTIVE AGREEMENTS AND COMMON PRACTICES)?

- 6.1 The new employer shall be bound by any collective pay agreement that was binding upon the former employer. This shall not apply if the new employer within three weeks after the date of transfer at the latest declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have nevertheless the right to retain the individual working conditions that follow from a collective pay agreement that was binding upon the former employer. This shall apply until this collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.

7. WHAT IS THE IMPACT OF THE TRANSFER ON STAFF REPRESENTATIVES?

7.1 If the undertaking retains its autonomy, the elected representatives of the employees affected by the transfer shall retain their legal position and function. This shall not apply if the transfer entails that the basis for the employees' representation ceases to exist. In such cases, elected representatives of the employees shall still be ensured protection in accordance with agreements that protect elected representatives of the employees in this area.

If the undertaking does not retain its autonomy, the transferred employees who were represented prior to the transfer shall still be adequately represented until a new election can be held.

This material is for general information only and is not intended to provide legal advice

For more information regarding employment law in Norway, please contact

Niels R. Kiær

nik@rime.no / www.rime.no

Rime Advokatfirma DA, Oslo, Norway