

SUBSIDIARY LEGISLATION 452.85

**TRANSFER OF BUSINESS (PROTECTION OF
EMPLOYMENT) REGULATIONS**

1st January, 2003

LEGAL NOTICE 433 of 2002, as amended by Legal Notices 427 of 2007, 195 of 2010, 129 and 443 of 2011, 363 and 467 of 2012, 483 of 2014, and 285 of 2017.

1. The title of these regulations is the Transfer of Business (Protection of Employment) Regulations. Title.

2. (1) For the purposes of these regulations -

"Act" means the Employment and Industrial Relations Act;

"service provision change" means a situation in which:

- (i) activities cease to be carried out by a person, hereinafter referred to as a "client", on his own behalf and are carried out instead by another person on the client's behalf, hereinafter referred to as a "contractor";
- (ii) activities cease to be carried out by a contractor on a client's behalf, whether or not those activities had previously been carried out by the client on his own behalf, and are carried out instead by another subsequent contractor on the client's behalf; or
- (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf, whether or not those activities had previously been carried out by the client on his own behalf, and are carried out instead by the client on his own behalf;

Definition.
Amended by:
L.N. 363 of 2012.
Cap. 452.

"transfer" means a transfer of an undertaking which retains its identity as an organised group of resources having the objective of pursuing an economic activity and shall include a service provision change in accordance with these regulations;

"transferee" shall mean any natural or legal person who, by reason of a transfer, which includes a service provision change, becomes the employer in respect of the undertaking or part of the undertaking so transferred;

"transferor" means any natural or legal person who, by reason of a transfer of the undertaking or part of the undertaking, which includes a service provision change, ceases to be the employer in respect of the undertaking or part of the undertaking so transferred.

(2) Subject to the provisions of subregulation (1), terms and expressions used in these regulations shall, unless the context otherwise requires, have the meaning assigned to them in the Act.

Applicability.

Amended by:

L.N. 195 of 2010;

L.N. 129 of 2011;

L.N. 363 of 2012;

L.N. 483 of 2014;

L.N.285 of 2017.

3. (1) Article 38 of the Act and these regulations shall apply:

- (a) to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger:

Provided that there is a transfer within the meaning of this regulation whenever there is a transfer of an economic entity which retains its identity, with the objective of pursuing an economic activity;

- (b) to a service provision change;
- (c) to any undertaking engaged in economic activities whether or not that activity is central or ancillary and whether or not it is operating for gain;
- (d) where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated in Malta;
- (e) to a transfer of a seagoing ship that is part of a transfer of an undertaking, business or part of an undertaking or business within the meaning of this regulation: Provided that the transferee is situated, or the transferred undertaking, business, or part of an undertaking or business remains within Malta:

Provided further that article 38 of the Act and these regulations shall not apply where the object of the transfer consists exclusively of one or more seagoing ships.

(2) Article 38 of the Act and these regulations shall not apply to an administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities.

(3) A transfer of an undertaking or part of an undertaking in terms of these regulations:

- (a) may be effected by more than one transaction; and
- (b) may take place whether or not any property, movable or immovable, is transferred to the transferee by the transferor.

Rights, powers, obligations, etc., after transfer.

Added by:

L.N. 363 of 2012.

Amended by:

L.N. 467 of 2012.

3A. (1) After a transfer, the contract of employment of each person employed by the transferor shall have effect as if originally made between the person so employed and the transferee.

(2) On the completion of a transfer, all the transferor's rights, powers, obligations and liabilities under or in connection with any contract of employment referred to in sub-regulation (1) shall be transferred to the transferee:

Provided that the transferor shall be civilly liable to reimburse the transferee for the payment of the *pro rata* annual leave entitlement not availed of during employment with the transferor in respect of the period during which the transferor was the employer, whilst the transferor shall have the civil right to be reimbursed by the transferee in respect of any annual leave which had been granted to the

employee by the transferor prior to the date of transfer which was in excess of the pro rata entitlement of annual leave till the date of transfer:

Provided further that in the case where employees who were employed in the business or part of the business to be transferred have been made redundant prior to a transfer of business which would have otherwise resulted in the transfer of their employment with the transferee, the transferee has an obligation to re-employ, with the same conditions of employment, such employees if their previous posts become available within one year from the notice of redundancy according to and in terms of article 36 of the Act and the transferor shall provide all the necessary information in order for the transferee to be able to abide by this requirement.

3B. The transferor shall effect payment and settle any dues owed to the employees affected by the transfer in relation to the employment relationship with the transferor in respect of any wages, *pro rata* bonuses and weekly allowances due up to the end of the relationship with the transferor, by the next pay date falling immediately after the transfer of the undertaking or part of the undertaking which would have been the next pay date had the employees concerned been still in an employment relationship with the transferor.

Payments.
Added by:
L.N. 483 of 2014.

4. Article 38(2) of the Act shall only apply to those undertakings or to those parts of undertakings that are being transferred and that employ more than twenty employees, including all full-time and part-time employees:

Applicability of
article 38 of the
Act.
Amended by:
L.N. 443 of 2011;
L.N. 363 of 2012;
L.N. 483 of 2014.

Provided that notwithstanding anything stated in the Act and in these regulations, and irrespective of the size of the workforce, the transferor shall provide information about the conditions of employment of every employee to the transferee, which information shall always include a copy of the contract of employment or written statement in terms of the Information to Employees Regulations, and the information provided by the transferor to the transferee in respect of a particular employee shall also be given to that employee and shall be provided by the transferor to the transferee within five working days from the date of identification of the transferee or by the date of the transfer of business, whichever is the earlier.

S.L. 452.83

5. (1) For the purpose of these regulations, article 38(1) and (3) of the Act shall apply in relation to employees' rights to old age, invalidity or survivors' benefits under supplementary company pension schemes outside the provisions of the Social Security Act.

Safeguarding of
employees' rights.

Cap. 318.

(2) The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute sufficient grounds for dismissal of employees by the transferor or the transferee:

Provided that this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

(3) Whenever a transfer which involves a substantial change in

working conditions to the detriment of the employee results in the termination of the contract of employment, the employer shall be regarded as having been responsible for such a termination.

(4) If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the employees' representatives of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer.

(5) If the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives shall continue to be considered and recognised as such and enjoy the protection provided by the Act until such a time as a new representative is in place.

Duty of transferor and transferee to inform employees' representatives.
Amended by:
L.N. 443 of 2011.

6. (1) Without prejudice to what is stated in the proviso to regulation 4, for the purposes of article 38(2) of the Act, the transferor and the transferee shall be bound to give the information therein specified by means of a written statement containing all the information specified in article 38(2) of the Act.

(2) The written statement mentioned in the preceding subregulation is to be delivered to the employees' representatives at least fifteen working days before the transfer is carried out or before the employees are directly affected by the transfer as regards their conditions of work and employment, whichever is the earlier.

(3) The obligations laid down in article 38(2) of the Act and in the preceding subarticles shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer.

(4) In considering alleged breaches of the information and consultation requirements laid down in these regulations, the argument that such a breach occurred because the information was not provided by an undertaking controlling the employer shall not be accepted as an excuse.

Duty of employer to inform the Director responsible for employment and industrial relations.
Amended by:
L.N. 129 of 2011.
Substituted by:
L.N. 443 of 2011

7. Without prejudice to what is stated in the proviso to regulation 4, the transferor and the transferee shall also be bound to forward to the Director responsible for employment and industrial relations, a copy of the written statement mentioned in regulation 6 on the same day that these are notified to the employees' representatives.

Beginning of consultations.

8. In those cases where the transfer includes measures affecting the conditions of employment of the transferred employees, consultations between the transferor, the transferee and the employees' representatives shall begin within seven working days from the day on which the employees' representatives have been notified of the intended transfer and such consultations shall cover the impact of the transfer on the employees' conditions of employment.

9. Any person contravening the provisions of these regulations shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand and one hundred and sixty-four euro and sixty-nine cents (1,164.69) for every employee that is affected by the transfer.

Offences.
Amended by:
L.N. 427 of 2007.