The European Union: Compliance With Transfer Of Undertakings

Insights
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Employers with operations in a country that is a member of the European Union (EU) should be well versed with EU Directives, as well as the specific country's own domestics laws related to the EU Directive. There are a total of twenty-seven (27) countries that are EU member states. EU Directives set out the policy objectives and goals that need to be attained by the Member nation-states within a certain time frame. The Member states must then pass their own relevant domestic or sovereign legislation to effectuate the EU Directive. In effectuating an EU Directive on a national sovereign level, Member states use the Directive as guidance and a minimum standards benchmark, but can effectuate more strict and stringent policies to meet the objectives and goals sought by the Directive. Although Directives seek and encourage Member states to effectuate its own laws, EU Directives can and do have legal force even if Member states do not actively and affirmatively pass its own national legislation. Therefore, for best business practice, employers should ensure compliance with EU Directives, as well as the Member states own national legislation and laws.

There are numerous EU Directives, including but not limited to, data privacy and transfer of undertakings. The EU Directive on Transfer of Undertakings was first issued March 2001, known as Directive (2001/23/EC). The Directive (2001/23/EC) codifies a previous Directive (77/187/EEC) which was amended by a third (98/50/EC). For those unfamiliar with the term, the transfer of an undertaking occurs as a result of a legal transfer or merger of an establishment or entity. Following a transfer, the transferee of the undertaking becomes an employee of the undertaking transferred by the transferor. Under these circumstances, the aim of this Directive is to protect employees in the event of a change of employer following a transfer of undertaking, including but not limited to, a merger, a purchase, an acquisition, etc. From a public policy prospective, the goal of EU Directive for transfer of undertakings is to achieve a high level of employment and social protection by improving and sustaining working conditions that enhance economic growth and social cohesion. From a business perspective for employers, the goal of EU Directive for transfer of undertakings is to prevent unfair dismissals or unfair terminations as a result of a legal transfer or merger of companies and entities.

What Constitutes a Transfer?

The applicability of this Directive depends on whether or not a "transfer" will actually occur. The Directive provides definitions for what constitutes a "transfer", however, gives deference to Member states to assess whether or not there is an actually "transfer" based on certain factors. These factors include: (1) type of undertaking or business, (2) whether or not the tangible assets such as

factors include: (1) type of undertaking or business, (2) whether or not the tangible assets such as buildings and movable property are transferred, (3) the value of the intangible assets at the time of transfer, (4) whether or not the majority of employees are taken over by the new employer as a result of the undertaking, (5) whether or not customers and clientele are transferred (e.g. good will), (6) the degree of similarity between the business activities carried on before the transfer and after the transfer, and (7) the period (if any) for which the business activities are suspended. Of these seven factors, not one is dispositive or governing, nor is one given substantially more weight than others. Comparably speaking, the European Court of Justice provides rational and conclusions similar to the "totality of circumstances" test and standard in the United States. However, European courts interpreting this Directive more often than not utilize a very broad definition to determine whether or not a transfer will occur – "any situation when one business entity, by contract, assigns to another business entity/entrepreneur responsibility for running a facility or staff of which the former entity directly managed or operated."

How Do Employers Ensure Compliance After A Transfer?

Once it is determined that a transfer will occur, then the transferee (e.g. new establishment) of the undertaking becomes the employer of the employees following the transfer. In accordance with the objectives and goals of the Directive, the rights and obligations of both the employee and the new employer must remain the same, thereby, safeguarding and protecting employees' rights as well as the social responsibilities of both the previous entity and the new entity. This Directive applies to the large majority, if not all types, of employment relationships with respect to (1) the number of working hours, (2) duties and responsibilities of work to be performed, and (3) type of employment contract or relationship (e.g. at-will, fixed duration, or temporary). It is noteworthy to mention that the EU Directive for transfer of undertakings do not related to entities going insolvent or bankrupt.

How Do Employers Handle Deviations Among Countries Within the EU?

As discussed above, it is important and pertinent to ensure compliance with both the EU Directive for transfer of undertakings, as well as the specific county or countries own national legislation and laws. This is because deviations exist among the various Member states national laws, legislation and regulations.

To demonstrate the deviations, here are some examples of distinctions among the laws of Member states of the EU.

The Netherlands:

Under Dutch Law, the existing employment relationship becomes apart of the undertaking. This means that the transferee will have to respect all condition of employment existing with the transferor at the time of the transfer. At the time of the transfer of undertaking, it is not possible to agree upon deviations in employment terms, and the new entity is under an obligation to offer the employees the same compensation and benefits package, including the same pension plan. It is advised that compensation, benefits and pension plans are identical because if the terms and conditions are different, then they can be deemed invalid. Noteworthy to mention is that the public transport industry in the Netherlands is an exception to the laws surrounding transfer of undertakings, and any movement among business in the public transport sector are not

undertakings, and any movement among business in the public transport sector are not automatically considered a transfer of undertaking under the Dutch law.

United Kingdom:

In the United Kingdom (UK), employees must be given the same terms and conditions as a result of a transfer of undertaking. Other than certain aspects of the pension plan (which is different from Dutch law), an obligation to meet minimum requirements as it relates to prior pension entitlement is required but not necessarily after the transfer. However, terms and conditions of employment must be the same, unless it is for a "permissible reason" outlined in the UK's statutory authority echoing the EU Directive, known as the Transfer of Undertakings for Protection of Employment, Regulations 2006 (TUPE). Further, dismissals during a transfer of undertaking is automatically deemed unfair unless it is for an economic, technical or reorganization reasons necessitating changes in the workforce. Additionally, employees must be informed and consulted with through representatives prior to a transfer of undertaking. Penalties and recourse are provided in the TUPE for failure to inform and give notice prior to the transfer of undertaking.

France:
French law on transfer of undertakings is virtually identical to the EU Directive governing transfer of undertakings. There is no legal requirement in France as there is in the UK to inform each employee before the transfer, but there is a legal requirement to inform and consult the works council (if one exists) before the transfer. As a practical matter, information regarding a transfer is usually provided to employees in an attempt to achieve a seamless transition and build unity with the new entity. It is noteworthy to mention that in French, an employee cannot object to a transfer, and the only other realistic option is resignation. However, terminations directly before, during, or immediately after a transfer is highly scrutinized and more likely than not deemed null and void.

Germany:
Like British law, German laws requires an obligation to inform and consult with employees prior to the transfer of undertaking. As part of this requirement, a statement explaining the new employer's intentions concerning the future of the business entity, and any planned or likely changes must be provided to employees. However, unlike French law, German law provides employees with a "right of contradiction" even though transfers of employment are automatic and protected. For practical purposes, an employee who exercises his or her right of contradiction may end in a cessation of employment for "operational reasons," but proper procedures and protocols must be carefully followed to ensure it is not a termination based on the transfer of undertaking as it is illegal.

Italy:

Italian laws are identical and echo the EU Directive, but also implements and utilizes an inform and consult requirement. Indeed, transfers of employment are deemed automatic. However, it is important for employers to be mindful that joint liability is applied to transfer of undertakings, and both the previous entity (e.g. seller) and new entity (e.g. buyer) may be held liable in a court of law

for employment issues on the date of the transfer.

Poland:

Polish law also honors the EU Directive by largely following and echoing it's EU authority. It also has an inform and consult requirement, and also deems transfers of employment automatic. In fact, all employment contracts remain the same, except the new employer is a new party to the employment contract. Similar, but even broader than Italian law, both the previous and new employer can be held jointly liable for employment obligations and issues stemming from before the transfer of undertaking through the course of employment.

Based on the few deviations discussed above for demonstrative and comparable purposes only, it is best business practice to consult with an experienced attorney to ensure compliance. In addition to ensuring compliance with black and white letter laws, it important to be mindful of subjective working culture concerns of a transfer of undertaking. For example, after an undertaking, and depending on the EU country, you may have employees from the previous entity with five weeks vacation while new employees only receive four weeks vacation. This can and may cause working culture dissatisfaction and tension, and lead to practical problems in building optimal business operations. Therefore, the notion of consulting with an experienced attorney is even more important to provide employers with well-rounded perspective and guidance to ensure legal compliance, and also build a healthy and productive working culture.