



TRANSFER OF CONTRACTS OF EMPLOYMENT

THE LAW

When a company is transferred or sold 'as is' to a new owner, the employees' contracts of employment are transferred to the new company without any changes. The rights and obligations of the old employers and employees are transferred to the new employer, including length of service, unless both parties agree to the terms of the contract.

BUYING AN EXISTING BUSINESS

If a new company takes over or buys out an existing company, the new employer is responsible for all the rights and obligations related to the employees of the old company. In such a case, no agreement is required from the employees before their contracts of employment are transferred.

Anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the committing of an unfair labour practice or act of unfair discrimination is considered to have been done in relation to the new employer.

Unless otherwise agreed, the new employer is similarly bound by any collective agreement concluded with the union or bargaining council. The new employer is also obligated to comply with any arbitration award made in terms of the LRA, unless otherwise agreed.

An agreement on the transfer of business should be concluded between the old employer and the new employer and all relevant information should be disclosed. The agreement should be in writing and should include the dates at transfer of the following issues:

- The leave accrued by the employees from the old employer;
- The severance pay that would have been payable to the transferred employees in the event of dismissal for operational requirements;
- Any other payments that the employees have accrued but have not been paid to the employees by the old employer,

- Which employer is liable to which payments as well as which employee should receive what.
- The transferred employees should be informed of the terms of the agreement between the old and new employer.

If the new owner wants to change any terms and conditions of employment, he/she would need to consult with the employees, and get their agreement to those changes. Any conditions that are not changed in the new contract must stay the same as they were under the old contract.

If the new owner wants to retrench, he/she would need to consider when the employees joined the old company, in order to calculate severance pay.

BUYING A BUSINESS THAT IS BEING LIQUIDATED

In circumstances where a company buys a business that is being liquidated or where the employer is being sequestered, the company is bought in order to prevent it from being liquidated, in this event the employees' contracts of employment can be transferred to the new owner without the consent of the employees.

Unless otherwise agreed, the new employer automatically substitutes the old employer in all contracts of employment.

However, all the rights and obligations between the old employer and each employee at the time of the transfer, remain the rights and obligations between the old employer and each employee.

Anything done before the transfer in respect of each employee is considered to have been done by the old employer.

For more information please read with info sheet on [INSOLVENCY](#).

SELLING A DIVISION OF A BUSINESS

If a company sells off whole or part of a division of its business, the new company that is formed by this sale becomes the new employer of all the employees, and takes over their contracts of employment.

The same conditions would apply in such a case, as if the whole business had been sold.

OUTSOURCING AS A TRANSFER OF BUSINESS

Outsourcing is explained as a procedure of hiring outside consultants, trainers, technicians and other professionals that take over the complete function of a particular department rather than employing full-time personnel e.g. catering, cleaning, data processing of a company. It has become commonplace for companies to outsource part of their enterprise in order to focus on their core business.

The opinions on the interpretation of s197 pertaining to "outsourcing" differ substantially. However, there has been a broad consensus and these views are mentioned below.

There may be a transfer for the purposes of the relevant regulations even though the outsourcer retains a "very considerable degree of control" over the manner in which the contractor provides services under the contract with the outsourcer. The fact that there is a form of control is enough to indicate that there has been a transfer. Therefore the only test that could be applied to determine whether a company has been transferred as "a going concern" would be to examine the substance of the transfer and not the form thereof.

It is important that there must be an assessment of the facts. Therefore, one should not treat any one fact as conclusive in itself but to consider all facts when deciding on whether there was a transfer of business.

RELEVANT LEGISLATION

Labour Relations Act, s197
For information on retrenchments, see info sheet — *Retrenchments*
For information on insolvency, see info sheet - *Insolvency*