Transfer of undertaking

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Introduction

Article L 1224-1 of French Labour Code applicability requirements

Two cumulative requirements

- **Autonomous economic entity**

  - Dedicated staff
  - Tangible means
  - Intangible means

- **Activity pursuing its own goals (specific purpose with specific results)**

1- Consultation of the Employee Representative Bodies

- **Works Council (« Comité d'entreprise »)**

The Works Council has to be consulted whenever a modification of the economic or legal structure of the company occurs *(article L 2323-19 of French Labour Code)*. Transfer of undertaking is such a modification, both on the transferor and on the transferee side.

Obtaining the Works Council's opinion is mandatory. This opinion has to be received prior to the transfer, even though it is not binding for the company.

- **Health, Safety and Working Conditions Committee (CHSCT)**

This Committee is entitled to deliver its opinion if the considered project of transfer has consequences on the employees' health, safety or working conditions *(article L 4612-8 of French Labour Code)*.

In practice and according to the French Supreme Court (Cour de Cassation), obtaining this Committee's opinion is also mandatory in almost every transfer of undertaking.

2- Transfer of undertaking without assets (service providers)

- Due to the absence of an « autonomous economic entity », the service providers are usually excluded from the provisions of article L 1224-1.

- However, and in order to protect the employees, some collective bargaining agreements, such as the agreements applicable for cleaning and security companies, specify that the employment contracts shall be transferred in case of succession of different service providers.

- There are no specific rules which apply to a change of service providers in the consultancy sector. Most often these are not considered as transfers of undertaking.

3 - Automatic transfer of the employment contracts
What if an employee refuses the transfer?

All the ongoing employment contracts are **automatically transferred to the transferee, without any formalities**, which means :

- ✓ the transferee **does not have to receive prior agreement** from the employees of the transferor
- ✓ the employees are entitled to **bring a legal action against the transferee** if it does not take over their employment contracts.

The transferee has the right to terminate the transferred employees after the transfer, but only inasmuch as they have become his own employees. The fact that they have become employees of the transferee in the course of the transfer must not be taken into consideration.

As a result, for example in case of redundancies/economic terminations, the employees to be terminated must be selected on the basis of criteria applied to the entire concerned population, including both pre-existing employees and transferred employees.

An outright refusal can in certain cases equal to a resignation (French Labour Court, October 10, 2006), provided the following conditions are fulfilled :

- **an individual refusal (for instance, it can not be inferred from participation in a strike)**
- **an unequivocal refusal.**

However, in most cases, failure by the employee to join the transferee will be considered as an abandonment of position ("abandon de poste"), which constitutes a serious misconduct and allows the employer to terminate the contract immediately, without notice nor severance.

4-1 - Collective provisions

Collective status

The transferor's applicable trade collective bargaining agreement (CBA), if different from the transferor's, and, as the case may be, company collective agreements, remain in force :

- for a notice period of 3 months
- and from then on for an additional period of 12 months

unless "adaptation agreements" are signed between the transferee and unions represented within the transferee in order to :

- adapt the change from one trade CBA to another (if applicable)
- and/or adapt the transferor's company agreement(s) to the transferee's company agreement(s) on the same subjects.

In the absence of such adaptation agreement(s), after these 3+12 = 15 months, the transferred employees retain the individual benefits provided by their former CBA and company agreements (« avantages individuels acquis »).

4-2 - Collective provisions

Pension schemes

Pension schemes in France are most often standard, mandatory and based on a “repartition” scheme (AGIRC and ARRCO schemes). As a consequence, most often the transferred employees are simply affiliated to the transferee’s pension schemes, which are to all practical purposes equivalent to the transferor’s schemes, and the accrued benefits are transferable.

In the case of additional or “supplemental” pension schemes:

- **if such schemes result from an unilateral decision of the transferor, they can be terminated with a notice of 3 months,**
- **If such schemes result from a company agreement within the transferor, 4-1 (previous slide) applies.**

5 – Employees seconded within a group of companies

By a decision of October 21, 2010, the EUCJ has ruled that employees permanently seconded within a group of companies from one company (company A) to another (company B) are concerned by the transfer if the undertaking run by company B is transferred.

This EUCJ decision is now taken into consideration by French case law, namely the Civil Court (Tribunal de Grande Instance) of Paris (TGI Paris July 9, 2013, n°13/04765).

However, the issue is not grounded into statute law and further court decisions will have to define more clearly what is meant by "permanently seconded".

6 – Changes in terms and conditions of employment

Collective terms and conditions of employment resulting from CBA and company agreements can be changed in the conditions described in slide 6 (paragraph **4-1**).

Collective terms and conditions of employment resulting from unilateral decisions and past established practice ("usages") of the transferor can be discontinued by giving notice (3 months).

Individual terms and conditions of employment resulting from the employment contract (written or implied) can be changed only with the consent of the employee.

Refusal of such consent is generally not valid grounds for termination, except in specific cases in case of economic terminations (redundancies).

7 - Coordinated consultation in case of Pan European project

The approach would be to answer the following questions :

a) Is this really a transfer of undertaking ?

b) If yes to **a**), what is the exact scope of the undertaking ?

c) Identify the employees to be transferred, deal with the problem of employees assigned to the transferred entity for only part of their work

d) Make precise description of the transferred undertaking collective status in terms of applicable CBA, company agreements, established practices, define to what extent it is different from the transferee's collective status, and propose a plan for harmonization

e) Make an "état des lieux" of employee representation within both transferor and transferee, for the purposes of : - information-consultation on the transfer;

- defining impacts of the transfer on employee representation itself