AFRICA GUIDE – EMPLOYMENT CONSEQUENCES OF BUSINESS TRANSFERS
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Introduction

The African continent has seen a significant increase in cross-border transactions and foreign investment. This guide provides an overview of the employment law consequences of business transfers in ten African jurisdictions - Botswana, Cameroon, Kenya, Madagascar, Nigeria, Senegal, South Africa, Uganda, Tanzania and Zambia.

Different African countries regulate the impact of business transfers on employment differently. A key distinguishing feature of regulation across jurisdictions concerns whether there is an automatic transfer of employment with a going concern transfer and if there is, whether this also applies in outsourcing situations.

In jurisdictions with automatic employee transfer provisions, such as South Africa and Uganda, everything done by or on behalf of the old employer immediately before the business transfer is deemed to have been done by or in relation to the new employer. This means that, for the buyer, employment due diligence is critical, and risk must be mitigated by appropriate warranties and indemnities given by the seller. In addition, pension arrangements can be complicated and trade union and collective bargaining rights typically fall outside the scope of the regulation.

In jurisdictions with no automatic transfer provisions, such as in Kenya, Nigeria and Zambia, the situation is reversed, and the seller of a business is primarily at risk. For the seller, the commercial terms of the transaction may depend to a material extent on the likely cost and complexity of employment redundancies, and the transaction may be conditional on agreed transfers of employment or the regulatory approval of redundancies. Risk can be mitigated by the commercial terms of the transaction and the extent to which the buyer is willing to take on employee obligations voluntarily. Knowing whether employment risks lie predominantly with the buyer or the seller will assist the parties to a transaction to mitigate risks successfully.

Although, broadly speaking, there are two distinct approaches to the employment consequences of business transfers in different African countries, there are other specific differences across each jurisdiction that may have a vital effect on the success of a commercial transaction. This guide provides insight for entities planning to buy or sell businesses operating in one or more of the ten countries surveyed.

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This publication does not purport to provide legal advice in relation to any aspect of employment law in any of the countries dealt with, it should not to be regarded as a substitute for legal advice that is pertinent to the particular needs of a client at a particular point in time.
Our Firm

We help our clients overcome legal complexity and unlock opportunity in Africa.

We have an enviable track record of providing legal services to the highest professional standards in Africa. We work for clients across numerous African jurisdictions on corporate, finance, competition, taxation, employment, technology and dispute resolution matters.

With eight offices in six African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market, and an understanding of their businesses. Our aim is to assist clients to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include domestic and foreign corporates, multinationals, funds and financial institutions, across almost all sectors of the economy, as well as state-owned enterprises and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, we won three IFLR Africa Awards (2021) including National Firm of the Year for South Africa and for Zambia. At the 2021 Africa Legal Awards, we won five practice awards, more than any other law firm. In the 2020 Dealmakers East Africa Awards we ranked first for number of M&A transactions, among which was the East Africa Deal of the Year. In 2020, Mergermarket identified us as the number one legal adviser in Africa by number of completed deals.

Our Presence in Africa

Recognising the size and enormous diversity of Africa, our approach to providing legal services across the continent is intended to offer on-the-ground advice in the countries that matter for our clients. Our presence in Africa is always evolving to meet the changes that are shaping the future of this vast continent.

Currently, we have our own offices in six African countries: Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our Bowmans Alliance firms in Ethiopia (Aman Assefa & Associates Law Office) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have special relationships with competent practitioners in Malawi and Mozambique. We also have a non-exclusive co-operation agreement with French international law firm Gide Loyrette Nouel that provides our clients access to assistance in francophone west and north Africa and Gide’s. The arrangement provides complimentary access for Gide’s clients and lawyers to markets in central, southern and eastern Africa.

We ensure that, whenever our clients need legal advice in other parts of Africa, we can assist them by tapping into our comprehensive database of contacts of the best firms and practitioners across the continent.

On the global front, Bowmans has long-standing and excellent relationships with a range of international law firms with whom we often work on Africa-focused client mandates. We are also a member firm of Lex Mundi, a global association of more than 160 independent law firms in all the major centres across the globe. Lex Mundi gives us the ability to connect our clients with the best law firms in each of the countries represented.
1. When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

Employment rights in business transfer situations are protected by the provisions of section 28 of the Employment Act (CAP 47:01) (the Employment Act).

2. Is business outsourcing or insourcing treated in the same way as the transfer of business?

Business outsourcing or insourcing are deemed to be a contractual agreement entered into by the employer for the provision of services to, or by the employer, not a sale of the business.

3. How are employment rights protected in these situations?

When a business is transferred as a going concern, the transfer does not interrupt an employee’s continuity of employment. Section 28 of the Employment Act provides as follows:

“If a trade, undertaking, business or enterprise (whether or not it be established by or under any written law) is transferred from one person to another and an employee in the trade, undertaking, business or enterprise continues to be employed therein, the period of continuous employment immediately preceding the transfer shall be deemed, for the purposes of this Act, to be part of the employee’s continuous employment with the transferee immediately following the transfer.”

Whilst most commentators are of the view that section 28 of the Employment Act amounts to an automatic transfer of employment contracts in the event of a business transfer, some commentators are of the view that this is not what is contemplated by section 28 of the Employment Act and, consequently, that there is no automatic transfer of employment contracts in Botswana.

In practice, the majority of purchasers take on all employees involved in the transferring business on the basis that a business transfer does not constitute a valid reason for retrenchment. However, the Court is yet to adjudicate on this issue.

4. Is there any specific protection against the dismissal of employees who the new owner of a business does not want to take on?

If subsequent to a sale of business, a new owner does not wish to continue with certain contracts of employment, these contracts can only be terminated under certain circumstances and upon satisfying the stringent requirements of the Employment Act. This includes situations where the sale of business results in a restructuring process, and based on the operational requirements of the business, certain positions are made redundant. Note that the term “redundancy” is not defined in the Employment Act. It has often been loosely understood to mean the same thing as “retrenchment”. Redundancy is attributable wholly or mainly to the fact that the employer has ceased or intends to cease carrying on business, or that, as a result of some reorganisation, a particular post is no longer necessary.

The general rule is that when employers form the intention to terminate an employee’s employment, employers are only entitled to do so if they have a valid reason. Terminations/dismissals for any reason whatsoever, including as a result of a sale of business, are deemed unfair unless the substantive and procedural requirements are satisfied.

In the event of a sale of business, where the new employer’s operational needs require a reduction in the workforce, the new employer must meet the equitable requirements for a fair redundancy exercise. The requirements are as follows:

- employers must give sufficient prior warning of the impending redundancy to a recognised or representative trade union and to employees likely to be affected by the redundancy;
- employers must consider ways to avoid or minimize redundancies;
- employers must consult with a trade union or other employee representative (if any) prior to the redundancy exercise;
9. Is there a penalty for breach of a statutory consultation or similar process requirement?

There is no penalty for breach. However, in the event a contract of employment is terminated without meeting the substantive and procedural requirements, the new owner may be deemed to have terminated the employment contract unfairly. In such circumstances, compensation or reinstatement may be enforced.

10. Are any other approvals or notifications required?

No.

11. Are there any proposals for reform?

There are no current proposals for reform.

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7. What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

The Employment Act does not provide for consultation with employees prior to a sale of business. Presumably, the Industrial Court would deem consultation and engagement with employees necessary only under very rare circumstances and only to the extent that the sale of business might adversely affect the employees’ terms of employment or where a collective labour agreement so stipulates.

Disclosure of information is an important aspect of procedural fairness, as no meaningful consultation can take place when one of the parties lacks the necessary information to meaningfully engage in the process. However, consultation should not be deemed a deterrent to employers when making a decision to sell their business. Consultation is meant to facilitate a process in terms of which employers consider representations from employees, prior to making such a decision, in instances where employees would be adversely affected.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no statutory prescribed process.

There is no requirement of approval of a transfer of employees by any labour or other statutory authority in a business transfer situation.

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• employers must consult with affected employees and consider any representations made on their behalf by the trade union or other employee representative (if any); and
• the decision to make posts redundant must be reasonable, made in good faith and there must be a commercial rationale for the exercise.

In terminating, the FILO (first in last out) principle should be used unless this is not warranted in the circumstances. In addition, in the event a similar post becomes available within six months of the redundancy exercise, priority must be given to employees who were retrenched.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The new owner can change the terms of the employment contract, provided that employees consent to the change in instances where such a change introduces terms that are less beneficial to employees or are more onerous.

Section 38 of the Employment Act provides that where a contract of employment provides for conditions of employment less favourable to employees than the conditions of employment prescribed by the Employment Act, the contract shall be null and void to the extent that it so provides.

6. Can employees choose not to transfer to the new owner of a business?

There is no statutory entitlement to object to a transfer under these circumstances. However, employees can elect not to continue under the employ of the new owner, in which event, they would need to resign and be paid their terminal benefits.
1. When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Employment rights in business transfer situations are protected by article 42 of the Cameroonian labour code (the labour code).

2. Is business outsourcing or insourcing treated in the same way as the sale of a business?

There are no specific employment law requirements associated with outsourcing arrangements. However, the labour code may treat a business outsourcing or insourcing in the same way as the sale of a business, if it involves the transfer of employees.

3. How are employment rights protected?

If a going concern is transferred, the transferee (new employer) is automatically substituted in the place of the transferor (old employer) in all contracts of employment in existence on the date of the transfer. Any modification or termination of employment contracts can only occur in accordance with the conditions provided by the labour code or a collective agreement, if any, as if the substitution of employer did not happen. Employee work conditions must remain the same. All rights and obligations between the old employer and employees continue in force as if they had been rights and obligations between the new employer and employees. This means that employees retain their contractual rights and obligations, accrued individual benefits, acquired seniority while working for the old employer, and for protected employees, the protection resulting from their mandates. Anything done before the transfer by or in relation to the old employer, including dismissal or the commission of an unfair labour practice or act of discrimination, is considered to have been done by or in relation to the new employer. The transfer does not interrupt continuity of employment.

Employees may be transferred to a new or different pension, retirement or similar fund provided that their accrued pension rights are adequately protected. However, the employer must notify and get employee approval for any proposed substantial changes to their employment contracts. Any proposed changes, which are refused by employees, may trigger termination of the employment contract. Such a termination is considered to be initiated by the employer and will be considered an unfair termination if the proposed changes are not justified as being in the company’s interest. Employees are then entitled to a severance payment.

The new employer is bound by collective agreements, if any, that were binding on the old employer “in respect of” transferred employees.

4. Is there any specific protection against dismissal of employees who the new owner of a business does not want to employ?

Employees cannot be dismissed by the new employer as a consequence of the substitution. A dismissal is characterized as “automatically unfair” if the reason for the dismissal is a transfer or a reason related to a transfer. Dismissal or termination of employment contracts can only occur in accordance with the conditions provided by the labour code or a collective agreement, if any, as if the substitution of employer did not happen. In terms of the labour code, dismissal can only happen through mutual consent of the parties, for gross misconduct or as a result of force majeure. There is no qualifying period for the protection against unfair dismissal, and remedies for unfair dismissal include reinstatement or payment of damages.
5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The employer must notify employees and get their consent for any proposed, substantial changes to their employment contracts. Any proposed changes, which are refused by employees, may trigger the termination of their employment contracts. This termination is considered to be initiated by the employer and it will be considered an unfair termination if the proposed changes are not justified as being in the company’s interest. Employees are then entitled to a severance payment.

French case-law defines substantial changes as those changes considered important enough to require employee approval. The employer cannot impose substantial changes unilaterally. Non-substantial changes are those changes considered sufficiently unimportant and can be imposed unilaterally by the employer. This said, any changes that have the effect of changing the nature of the contract, such as a change to salary, job title or workplace, are considered to be substantial, and require the prior employee approval. The payroll date, for example, could be considered an internal company process and, as such, employee approval is not required.

In sum, harmonisation is permissible only with employee approval and the employees’ terms and conditions with the new employer should not be less favourable than those on which they were employed with the old employer.

6. Can employees choose not to transfer to the new owner of a business?

Employees can decline to transfer to the new owner and request the termination of the work relationship. The labour inspectorate should be notified of an employee’s decision to resign and employees are entitled to a severance payment.

7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

Employees must be notified of and consulted with regarding the planned/ proposed transfer. The notification and consultation should take place in advance of the transfer. Although the labour code does not provide specific timing for the notification and consultation, it is advisable that the notification is made as early as possible.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no statutorily prescribed process, but it is customary for employees to be notified and consulted about the planned/ proposed transfer as early as possible, unless a collective agreement, if any, provides otherwise.

There is no requirement for approval of a transfer of employees by any labour or other statutory authority in a business transfer situation. However, the labour inspectorate must be notified, in writing and in advance, of the planned/ proposed transfer. There is no specific timeline for the notification, other than it must be made before closing.

The social security fund must also be notified of the transfer and terminated employees, if any. This notification should be made after closing.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

There is no penalty for breach. However, if employees decline to transfer, they will be entitled to severance pay, payment for accrued leave, compensation in lieu of their notice period and any other payments accrued, but not yet paid, at the date of transfer.

10. Are any other external approvals or notifications required?

No.

11. Are there any proposals for reform?

There are no current proposals for reform.

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1. When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Kenya does not have a law that specifically protects employment rights in the event a business is transferred from one employer to another as a going concern.

2. Is business outsourcing or insourcing treated in the same way as the transfer of a business?

Section 2 of the Transfer of Businesses Act, Chapter 500 of the Laws of Kenya (the ToBA) defines a business as any trade or occupation, other than a profession, carried on with a view to profit. Outsourcing and insourcing are not therefore treated as a transfer of a business.

3. How are employment rights protected in these situations?

There is no automatic transfer of employment in Kenya. In practice, on a transfer of a business, there are two options available to deal with employees, namely:

• terminating their employment and declaring them redundant and thereafter the transferee (new employer) offering fresh employment; or
• the transferor (old employer), the new employer and each employee enter into a tripartite agreement pursuant to which the employment of the employee is terminated and the new employer offers employment to such employee. In these circumstances, the employees would agree to waive the right to receive redundancy payments in consideration of the new employer recognising accrued entitlements (including recognition of the original start date of the employee’s initial employment). Affected employees in a transfer must give their individual consent or, where unionized, with the representation of their union.

4. Is there any specific protection against the dismissal of employees who the new owner of a business does not want to take on?

The employment of employees in these circumstances is deemed to have been terminated on account of redundancy. The Employment Act, 2007 (the Employment Act) defines redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

Section 40 of the Employment Act provides that employers shall not terminate a contract of service on account of redundancy, unless employers comply with the following conditions:

• if an employee is a member of a trade union, not less than a month prior to the date of the intended date of termination on account of redundancy, the employer notifies the union to which the employee is a member and the labour officer in charge of the area in which the employee is employed, of the reasons for, and the extent of, the intended redundancy;
• where an employee is not a member of a trade union, the employer provides the employee and the labour office with at least one month’s prior written notice;
• the employer has, in the selection of employees to be declared redundant, had due regard to the seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
• where there is a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being, or not being, a member of the trade union;
• when an employee is declared redundant, the employer has paid the employee in respect of any accrued leave, as well as not less than one month’s notice or one month’s wages in lieu of notice and severance pay at the rate of not less than fifteen (15) days’ pay for each completed year of service.
All notifications should be in the form of a letter and ideally the letter should be in the English language. Kenyan courts have held that consultations must be held with employees before the notification of intended redundancy is issued. However, there is little guidance on the frequency and length of such consultations.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The general rule is that the terms of employment of employees with the new employer are required to be no less favourable than their terms of employment with the old employer. However, if the termination is on account of redundancy, the terms can be changed as the employment by the new employer is deemed fresh employment. If the employment with the old employer is terminated by mutual consent, the terms can be changed as long as the informed consent of the employee has been procured.

6. Can employees choose not to transfer to the new owner of a business?

Employees can reject an offer to transfer. If the transfer is by way of a tripartite agreement, employee consent is required before employees can be employed by the new employer. It is possible for employees to reject the terms of the new employment contract. In such a case, the employee’s employment with the old employer is terminated on account of redundancy and the conditions in the Employment Act, related to redundancy, should be complied with. Even if redundancy dues are paid in the first instance, the employee can refuse to enter into a new employment contract with the buyer.

7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

If employees are being declared redundant, then the old employer must follow the redundancy procedure outlined in the Employment Act and give the required notifications.

Although not a statutory requirement, if the parties enter into a tripartite agreement, in order to facilitate discussions, notification and consultation with employees is required.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

If employees are being declared redundant and they are members of a trade union, then the notification of intended redundancy has to be given to the trade union and the labour officer at least one (1) month prior to the intended date of redundancy. If employees are being declared redundant and they are not members of a trade union, then notification must be given to the employees and the labour officer at least one (1) month prior to the date of intended termination on account of redundancy. The requirement is to notify the labour office. There is no requirement for approval by the labour office.

In both cases, consultations need to occur prior to issuing the notices. As mentioned above, there are no clear guidelines for the consultation process. Notice should be given in the form of an actual written notification letter and cannot be substituted with payment.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

This may amount to the termination being deemed procedurally unfair and an employee who successfully makes such a claim, would be entitled to the following remedies:

- an interim court order stopping the redundancy; or
- the court declaring that the termination of employment was unfair and unlawful and requiring that due notice be provided, that employees be re-engaged or that employees be paid up to 12 months’ salary.

Penalties for non-compliance may also be outlined in a collective bargaining agreement to which the employer is bound.

10. Are any other external approvals or notifications required?

Other than the notification to a trade union (where applicable) and a labour officer (in the case of a redundancy), there are no other external approvals or notifications required.

11. Are there any proposals for reform? If so, what is their likely timeframe?

The Draft Employment Act (Amendment) Bill, 2015 (the Bill) has been proposed and may amend the Employment Act. The relevant proposed amendments are:

- The Bill provides terms whereby salaried employees (who earns their salary on a monthly basis), whose contracts of service have been terminated, shall be entitled to service pay for every year worked. These terms are:
  - Upon normal termination, employees shall be entitled to a gratuity as provided for in the contract, provided it is not less than or equivalent to fifteen (15) days’ pay for each completed year of service.
  - Where employees who work on a contract, have worked for an aggregate of one (1) year, irrespective of whether their wages are paid monthly or weekly, these employees shall be entitled to service pay for every year worked.
  - Terminal dues shall be calculated with reference to the last earned basic salary.
- The Bill proposes to include mediators and arbitrators as parties that can hear disputes that arise when:
  - employers or employees neglect or refuse to fulfill a contract of service;
  - any question, difference or dispute arises as to the rights or liabilities of either party; or
  - there is any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service.
- Currently, the power to hear such disputes is limited to labour officers and the Employment and Labour Relations Court (the ELRC).
- The Bill proposes to oust the exclusive jurisdiction of the ELRC to hear employment disputes and seeks to, in addition to the decisions of the ELRC, strengthen agreements and awards given by labour officers, mediators and arbitrators.

The Bill is currently at stakeholder consultations stage. After stakeholder consultations, the Bill will be published, and thereafter presented to Parliament for debate. In Parliament it shall be subject to three readings before being assented to as law by the President. Its imminent implementation is therefore not foreseen.
1. When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Employment rights in business transfer situations are regulated by the provisions of Article 12 of the Law No. 2003-044 dated 28 July 2004 (the Labour Code). The provision is very broadly modelled on the EU Acquired Rights Directive. The section applies when there is a change in the legal status of the employer (including succession, sale, merger, conversion of funds or incorporation), and the employment contracts existing on the day of the change subsist between the new employer and employees.

The Article does not apply to share sales.

2. Is business outsourcing or insourcing treated in the same way as the transfer of a business?

As a consequence of the sale of a business, all the transferor’s assets, liabilities and employees are transferred immediately to the transferee and the transferor is dissolved. However, in respect of outsourcing or insourcing, employees may not be transferred. If employees are to be transferred, the outsourcing or insourcing is treated in the same way as the transfer of a business.

3. How are employment rights protected?

If a going concern is transferred, the transferee (new employer) is automatically substituted in the place of the transferor (old employer) in all contracts of employment in existence immediately before the date of the transfer.

- All rights and obligations between employer and employee continue in force as if they had been rights and obligations between the new employer and each employee;
- Anything done before the transfer by or in relation to the old employer, is considered to have been done by or in relation to the new employer;
- The transfer does not interrupt an employee’s continuity of employment.

Employees may be transferred to a new or different pension, provident, retirement or similar fund provided that their accrued pension rights are adequately protected.

The new conditions should be more favourable than provided by the old employer.

If an employment contract is terminated as a result of a business closing or becoming insolvent, article 24 of the Labour Code provides that the employees are entitled to severance pay.

4. Is there any specific protection against dismissal of employees who the new owner of a business does not want to employ?

The Labour Code provides for the categories of unfair dismissal and wrongful termination of contract. The court assesses whether or not a dismissal is unfair and can order damages not exceeding 18 months of wages.

This protection does not preclude dismissal on the grounds of genuine operational requirements i.e. the true reason for the dismissal is based on the economic, technological, structural or similar needs of the new employer.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Substantial changes to the employment contract, like changes to salary, working times and job title, require employee consent. French case-law defines substantial changes as those changes considered important enough to require employee approval. Substantial changes to the conditions of employment trigger the payment of severance pay.

Non-substantial changes are those considered sufficiently unimportant and can be imposed unilaterally by the employer. Furthermore, changes to conditions of work that fall within the scope of the employer’s management powers may be made unilaterally and employees can be disciplined for refusing to accept these changes.

6. Can employees choose not to transfer to the new owner of a business?

There is no statutory right to object to a transfer. The substitution of the new employer for the old takes place automatically as a matter of law. Employees may choose to resign to avoid the consequences of the transfer.
7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

Although the Labour Code does not require the employer to give employees information or consult with employees, an individual negotiation with employees is recommended. The employer should inform and consult with employees and the staff representatives regarding the proposed reorganisation.

The staff representatives should inform the Labour Inspectorate, in writing and before closing, of the business transfer and reorganisation. In addition, after closing, the Social Security Funds, where the employer is registered, should be notified.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no statutorily prescribed process.

There is no requirement of approval of a transfer of employees by any labour or other statutory authority in a business transfer situation.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

There is no penalty for breach.

10. Are any other external approvals or notifications required?

No.

11. Are there any proposals for reform?

There are no current proposals for reform.

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1. When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

By way of background, the Labour Act, chapter L1, Laws of the Federation of Nigeria 2004 (the Labour Act) creates two categories of employees. The first category, “Workers” are defined as employees who perform manual labour or clerical functions; and the second category, “Non-workers” are defined as other employees who exercise administrative, executive, technical or professional functions. The scope of the Labour Act is fairly limited, and it prescribes the minimum standards and conditions of employment for Workers and expressly excludes Non-workers as well as representatives, agents and commercial travellers in so far as their work is carried on outside the permanent workplace of the employer’s establishment. The terms of employment of all Non-workers are governed primarily by their respective contracts of employment and the principles of labour law as decided by Nigerian courts.

A contract of employment is a contract of personal service and cannot be transferred from one employer to another without the consent of the employee. Where employees sought to be transferred are Workers, in addition to obtaining the individual consent of each employee, an authorised labour officer must endorse the transfer on the contract of each transferred employee.

The effect of a transfer of a business as a going concern from one employer to another on the employment rights of employees will depend on the structure of the transfer. Where the transfer is carried out by way of a share sale, employees would automatically remain in the company (irrespective of the change in the share ownership) as there would be no change to the employer of record. The only change will be in respect of the beneficial ownership of the shares of the company. If however, the transfer is implemented by way of an asset sale, in order for the employees to transfer to the new owner, each employee’s consent must be obtained to novate their contracts of employment in favour of the new owner. A novation will have the effect of transferring all the rights and liabilities of employees from the old employer to the new owner.

In addition, where such a transfer results in the termination of contracts of employment, such terminations may give rise to a redundancy and require the parties to comply with the relevant provisions of the Labour Act. Section 20(3) of the Labour Act defines the term “redundancy” as an “involuntary and permanent loss of employment due to an excess of manpower”. The provisions of Section 20 of the Labour Act oblige the employer to notify employees or their trade union representatives, of the reasons for and the anticipated extent of the redundancy, negotiate redundancy payments for the Workers and implement the principle of “last in, first out” (subject to other factors of relative merit including skill, ability, and reliability) in determining the persons to be declared redundant. With respect to Non-workers, the terms of their respective employment contracts will apply.

2. Is business outsourcing or insourcing treated in the same way as the transfer of a business?

Business outsourcing or insourcing are, under Nigerian law, contractual arrangements entered into by a company for the provision of services to, or by the company, and do not amount to a sale of a business.
3. How are employment rights protected in these situations?

Where an outsourcing or insourcing leads to the termination of the contracts of a number of employees, such terminations could be classified as a redundancy and lead to the implementation of the provisions of section 20 of the Labour Act.

In an outsourcing, employees would remain employees of the company that directly employs them and to which a service is outsourced, but employees will be required to provide their services to another company or person.

4. Is there any specific protection against the dismissal of employees who the new owner of a business does not want to take on?

None, except the requirement for the new owner to comply with the redundancy provisions set out in section 20 of the Labour Act, if the number of employees whose contracts are sought to be terminated, is significant.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

A new owner can propose changes to the terms of employment of its employees which each individual employee is entitled to accept or reject. Where the employees sought to be transferred are, however, members of a trade union, the new owner is required to negotiate with, and agree the proposed changes with the representatives of the trade unions.

6. Can employees choose not to transfer to the new owner of a business?

A contract of employment is a contract of personal service and cannot be transferred from one employer to another without the consent of the employee. An employee can therefore choose not to transfer, but then may have to be dealt with under the redundancy provisions of the Labour Act if the old employer does not have a suitable role for her/him.

7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

Subject to the provisions of the relevant contracts of employment, any general conditions of employment set out in an employees’ handbook or any collective agreements with trade unions, the old employer is not obliged to give employees any information in a business transfer situation.

There is generally no legal requirement that provides for a mandatory consultation with employees. In practice, however, employers usually inform employees of a business transfer.

Note that section 122 (7) of the Investment and Securities Act 2007 empowers a Nigerian court, before sanctioning a merger and granting an order for dissolution without winding up of any transferor company, to be satisfied that “adequate provision by way of compensation or otherwise has been made with respect to the employees of the company to be dissolved”.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

The Labour Act provides that the transfer of any contract from one employer to another shall be subject to the consent of the Worker and the endorsement of the transfer on the contract document by an authorised labour officer. Before endorsing the transfer, the labour officer is required to ensure that the Worker has freely consented to the transfer and that his/her consent has not been obtained by coercion or undue influence or as a result of misrepresentation or mistake. For any investor in Nigeria’s petroleum (oil and gas) industry, it is essential to note that a transferor-employer must, also, obtain the consent of the Department of Petroleum Resources (the DPR) if it intends to terminate contracts of any of its employees.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

Section 21 of the Labour Act provides that any employer who enters into any agreement or contract contrary to any provisions of the Labour Act shall be guilty of an offence and liable on conviction to a fine not exceeding NGN 800 or, for a second or subsequent offence, to a fine not exceeding NGN 1 500.

In our view, any employer who purports to transfer or accept the contract of employment of any Worker without his/her consent, and the endorsement of the transfer by an authorised labour officer, may be indicted for a criminal offence under the Labour Act. A court of law in Nigeria could, in addition, invalidate any such transfer for being a breach of the provisions of Section 34 of Constitution of the Federal Republic of Nigeria (Promulgation) Act, Chapter C23, Laws of the Federation of Nigeria 2004 as amended (the 1999 Constitution) on prohibition of forced or compulsory labour, and could award damages against any such employers.

Where the transferor-company fails to obtain the DPR’s consent prior to the transfer, the old employer will be liable to pay a penalty in the sum of NGN 10 million and also runs the risk that its leases, licences or permits may be suspended or cancelled. In addition, the DPR has the power to recall such employees until it arrives at a decision on whether or not to grant its consent to the transfer.

10. Are any other external approvals or notifications required?

In situations where employees of a company have formed or joined a trade union, the new employer will have to comply with the provisions of the relevant collective bargaining agreement executed between the union and the old employer. Such agreements will usually contain a provision to the effect that the employer must consult with unions in the event of the transfer of a business or the change of employment, which gives rise to job losses. The extent of the consultation, length of notice required and sanctions for failing to consult with the union would, also, be contained in the collective bargaining agreement.

11. Are there any proposals for reform?

There are no known proposals for reform in the area of labour and employment law discussed above.
1. When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Employment rights in business transfer situations are regulated by the provisions of articles 66 and 67 of the Law no. 97-17 of 1 September 1997 on Labour Code (the Labour Code). Articles 66 and 67 provide that the employment contracts entered into between the old employer and employees continues between the new employer and employees in the event of a succession, sale, merger, alteration of business, or a transformation of a company.

2. Is business outsourcing or insourcing treated in the same way as the sale of a business?

The Labour Code may treat a business outsourcing or insourcing in the same way as the sale of a business if it involves the transfer of employees. This remains the same if such transfer is between a company and its affiliate and vice versa.

3. How are employment rights protected?

If a going concern is transferred, the transferee (new employer) is automatically substituted in the place of the transferor (old employer) in all contracts of employment in existence, immediately before the date of the transfer.

- All rights and obligations between employer and employee continue in force as if they had been rights and obligations between the new employer and each employee;
- Anything done before the transfer by or in relation to the old employer is considered to have been done by or in relation to the new employer;
- The transfer does not interrupt an employee’s continuity of employment.

Employees may be transferred to a new or different pension, provident, retirement or similar fund provided that their accrued pension rights are adequately protected.

Articles 66 and 120 of the Labour Code provide that, in the event that employment contracts are terminated as a result of a business closing or becoming insolvent, employees are entitled to severance pay.

4. Is there any specific protection against dismissal of employees who the new owner of a business does not want to employ?

Employees cannot be dismissed by the new employer as a consequence of the substitution. Dismissal or termination of employment contracts can only occur in accordance with the conditions of the Labour Code or a collective agreement, if any, as if the substitution of employer did not happen. In terms of the Labour Code, a fair dismissal can only occur through the mutual consent of the parties, gross misconduct by an employee or in the event of force majeure.

There is no qualifying period for protection against unfair dismissal, and remedies for unfair dismissal include reinstatement (the primary remedy if requested) or payment of damages for unfair dismissal.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The employer must get employee consent for any proposed, substantial changes to employment contracts. French case-law defines substantial changes as those changes considered important enough to require employee approval. The employer cannot impose substantial changes unilaterally.
Non-substantial changes are those changes considered sufficiently unimportant and can be imposed unilaterally by the employer. Changes to conditions of work that fall within the scope of the employer’s managerial powers can also be made unilaterally and employees can be disciplined for refusing to accept these changes. This said, any changes that have the effect of changing the nature of the contract, such as a change to salary, job title or work place, are considered to be substantial, and require prior employee approval.

Any proposed, substantial changes, which are refused by employees, may trigger termination of the employment contract and employees are then entitled to a severance payment.

Furthermore, harmonisation “downwards”, so that terms and conditions are on the whole less favourable, is not permitted, and may constitute a dismissal.

6. Can employees choose not to transfer to the new owner of a business?

The substitution of the new employer for the old takes place automatically as a matter of law. Employees who refuse to transfer can resign.

7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

The Labour Code does not require the employer to provide information to employees for consultation. The employee representatives must be provided with information regarding the change of the legal status of the company or the proposed re-organisation and the impact this will have on the terms and conditions of employment. The employee representatives should then inform the Labour Inspectorate, in writing before closing.

At closing, the Social Security Funds, where the employer is registered, should be notified.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no statutorily prescribed process.

There is no requirement of approval for the transfer of employees by any labour or other statutory authority in a business transfer situation.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

There is no penalty for breach.

10. Are any other external approvals or notifications required?

No.

11. Are there any proposals for reform?

There are no current proposals for reform.

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1. When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Employment rights in business transfer situations are regulated by the provisions of section 197 of the Labour Relations Act, 1995 (the LRA). The provision is very broadly modelled on the EU Acquired Rights Directive, but it establishes its own specific employment transfer regime. The section applies when a business is transferred as a going concern.

The section does not apply to share sales.

2. Is business outsourcing or insourcing treated in the same way as the transfer of a business?

In section 197 of the LRA, a "business" includes the whole or a part of any business, trade, undertaking or service. This broad definition extends the application of the section to service provision changes that satisfy the "going concern" requirement.

3. How are employment rights protected?

If a going concern is transferred, the transferee (new employer) is automatically substituted in the place of the transferor (old employer) in all contracts of employment in existence immediately before the date of the transfer.

- All rights and obligations between employer and employee continue in force as if they had been rights and obligations between the new employer and each employee;
- Anything done before the transfer by, or in relation to, the old employer, including dismissal or commission of an unfair labour practice or act of discrimination, is considered to have been done by, or in relation to, the new employer; and
- The transfer does not interrupt an employee’s continuity of employment.

Employees may be transferred to a new or different pension, provident, retirement or similar fund, provided that their accrued pension rights are adequately protected.

The new employer is bound by collective agreements and arbitration awards that were binding on the old employer “in respect of” the employees who are transferred.

All of these employment consequences of a business transfer can be varied, but only by a written agreement concluded between one or both of the employers (old and new) on the one hand and qualifying employee representatives on the other.

Separate provisions regulate the transfer of a business in insolvent circumstances (sections 197A and 197B). The primary difference in circumstances of insolvency is that accrued liabilities to employees will not be passed on to the new employer.

4. Is there any specific protection against dismissal of employees who the new owner of a business does not want to employ?

A dismissal is characterized as “automatically unfair” if the reason for the dismissal is a transfer, or a reason related to, a transfer contemplated in section 197. There is no qualifying period for protection against unfair dismissal, and remedies for unfair dismissal include reinstatement (the primary remedy, if requested) or compensation capped (in the case of automatically unfair dismissals) at two years’ remuneration.

This protection does not preclude dismissal on the grounds of genuine operational requirements, that is, if the true reason for the dismissal is based on the economic, technological, structural or similar needs of the new employer.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

There is flexibility in section 197 that facilitates harmonization to a limited extent. The new employer complies with its obligations under the inherited contracts of employment if it employs employees on terms and conditions that are “on the whole not less favourable” than those on which they were employed by the old employer. Harmonisation “downwards”, so that terms and conditions are on the whole less favourable, is not permitted, and may constitute a dismissal. Beyond this, harmonisation is permissible only by agreement.
6. Employees choose not to transfer to the new owner of a business?

There is no statutory right to object to a transfer. The substitution of the new employer for the old takes place automatically as a matter of law. Employees may choose to resign to avoid the consequences of the transfer, but in that event would not be entitled to severance benefits. If a resignation is prompted by repudiatory conduct by the new employer (such as providing conditions of employment substantially less favourable than those provided by the old employer) this may constitute a dismissal. Otherwise, employees may opt out only by agreement between one or both employers and qualifying employee representatives.

7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

Apart from what is stated below, section 197 prescribes no separate information sharing or consultation process. This means that a transfer may lawfully take place without prior notice or consultation unless notice or consultation is prescribed by a collective agreement binding on the employer or the parties seek to conclude an agreement to disclose relevant information to employees.

In terms of section 197(7), the old and the new employer should conclude an agreement on the value of amounts that have accrued to the transferring employees, such as their accrued annual leave pay, the severance pay to which they would have been entitled had they been retrenched by the old employer on the transfer date, and any other accrued amounts. The old and new employer must, in addition, specify which of them would be liable for the payment of these accrued amounts as and when they fall due and in the case of an apportionment, should set out the terms of that apportionment. The old employer must disclose the terms of this agreement to the transferring employees.

Should the old employer fail to conclude the agreement contemplated in section 197(7) with the new employer, the old employer remains liable, jointly and severally with the new employer, for a period of 12 months after the transfer date for payment of these amounts to any employee who becomes entitled to receive a payment as a result of her/his retrenchment or as a result of the liquidation or sequestration of the employer.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no statutorily prescribed process, but where a process is required by collective agreement or is voluntarily entered into, this would typically take between one and three months, depending on the complexity of the transfer and its implications for employees.

There is no requirement of approval of a transfer of employees by any labour or other statutory authority in a business transfer situation.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

There being no statutory consultation requirement, there is no penalty for breach. However, a failure to disclose (after the transfer) the consequences of the transfer for employees including any written agreement that determines which employer (old or new) is liable for the payment of accrued leave pay, severance pay and other payments accrued but not yet paid at the date of transfer, will result in the old employer remaining jointly and severally liable for any such payment for a period of 12 months following the transfer.

10. Are any other external approvals or notifications required?

None.

11. Are there any proposals for reform?

There are no current proposals for reform.
1. When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

There is no law that specifically protects employment rights in the event that a business is transferred from one employer to another. Employment related matters are generally governed by the Employment and Labour Relations Act No. 6 of 2004 (the ELRA). The ELRA recognises different types of termination of employment, including termination of employment on operational grounds. Terminations resulting from the transfer of a business are considered terminations on operational grounds or retrenchments.

The ELRA provides that any termination of employment must be for a lawful reason and must follow a fair procedure. Accordingly, and to protect the rights of employees, the ELRA provides for specific procedures to be followed during retrenchment.

Furthermore, the Transfer of Business (Protection of Creditors) Act, Cap. 327 (the ToBA) has a general clause which provides that neither the transferor nor transferee can be relieved of any liability.

3. How are employment rights protected in these situations?

In a sale of business transaction, employees are protected under the ToBA. Under section 6 of the ToBA, the old employer remains liable for any liability which existed before the sale of business. This provision also covers liability in respect of employees.

In practice, during the approval process for an acquisition, issues affecting employees are discussed and agreed upon, before the approval is granted. Sometimes, to gauge how issues such as employee rights have been addressed, before final approval is granted, conditional approval is granted.

There is no statutory obligation which compels the new owner to take on all employees. If the new owner does not wish to take on certain employees, these employees will need to be retrenched by the old employer. The retrenchment process is governed by the ELRA.

4. Is there any specific protection against the dismissal of employees who the new owner of a business does not want to take on?

Generally, in the event of a sale of business, the new owner of the business is not compelled by statute to take on the employees of the old owner of the business. The taking on of employees can be one of the conditions set by the relevant authority during an acquisition merger, or by agreement between the parties involved. It is the responsibility of the old employer to ensure that if employees are not taken on by the new owner, a retrenchment process is followed ie. employment is terminated on operational grounds.
The law prohibits an employer from proceeding with a retrenchment unless the parties have agreed on the basic terms and conditions for the retrenchment. In the event that the parties do not agree on such terms, the matter must be referred to the Commission for Mediation and Arbitration (the CMA). Before the retrenchment is concluded, if the matter is not settled through mediation, it will proceed to arbitration. This process protects employees against unfair termination/dismissal.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The new employer can change the terms of employment to harmonise these with its existing workforce, unless, a separate agreement is entered into, which provides to the contrary. During the sale of business, the old employer retrenches its employees and these employees are reemployed by the new owner. The new employment relationship can therefore be on different terms and conditions, unless there is an agreement to the contrary.

6. Can employees choose not to transfer to the new owner of a business?

Employees can choose not to transfer to the new owner of the business. However, it is worth noting that, if the transfer of employees to the new owner is one of the methods adopted to minimize the number of employees to be retrenched, and employees refuse to transfer, then such employees can no longer claim unfair retrenchment.

7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

For purposes of a transfer of business, there is no requirement to provide any information or conduct any consultation with employees. However, if the sale of the business will result in retrenchment, then a procedure must be followed. In terms of section 38(1)(c) of the ELRA, before any retrenchment, consultation with employees is required.

Furthermore, in terms of section 38(1)(b) of the ELRA, employers are obliged to disclose all relevant information for the purposes of proper consultation.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

In the event of a business transfer and resulting retrenchments, the law does not provide for a specific timeframe to complete the consultation process. However, it stipulates that the more urgent the need of the business to respond to the business transfer that gives rise to the retrenchment, the more truncated the consultation process may be. The parties are required to meet as soon as possible and as frequently as possible to ensure a proper consultation takes place in accordance with the provisions of Rule 23(7) of the Employment and Labour Relations (Code of Good Practice) Rules.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

If an employer fails to comply with the consultation requirements during a retrenchment exercise, the retrenchment shall be declared unlawful and the employer may be required to pay compensation of an amount equal to at least 12 months’ salary.

10. Are any other external approvals or notifications required?

For purposes of retrenchment, no external approval is required, except where parties fail to agree on the process, in which case, the matter has to be referred to the CMA.

11. Are there any proposals for reform?

No.

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1. When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Section 28 of the Employment Act 2006 (the Employment Act) and Regulation 29 of the Employment Regulations (the Employment Regulations) protect employment rights when a business is transferred from one employer to another as a going concern. This includes the transfer of the business or trade in part or in whole.

The protection accorded is principally that all rights and obligations between the employee and transferor (old employer) are automatically transferred and apply between the employee and transferee (new employer).

2. Is business outsourcing or insourcing treated in the same way as the transfer of a business?

The Employment Act defines business to include any trade, profession, undertaking, operation or establishment whether public, co-operative or private. To the extent therefore that an undertaking may be outsourced and may accordingly be affected by a transfer “in part”, the rules would remain the same as regards pre-existing arrangements, rights and liabilities.

3. How are employment rights protected in these situations?

The Employment Act applies to all employees employed by an employer under a contract of service. As a result of the automatic substitution of the employers, all rights and obligations previously existing are preserved and become applicable between the transferring employees and the new employer. The rights relate to and cover terms of service, processes and procedures as well as continuity of employment.

Any variation of rights or obligations ought to be consensual between employees and the new employer.

4. Is there any specific protection against the dismissal of employees who the new owner of a business does not want to take on?

The dismissal of any employee must follow the provisions of the Employment Act. The Employment Act guarantees a right to a fair hearing and demands that dismissal must follow a particular process and be based on sound reasons. There is no provision that specifically prohibits dismissal or termination where there are changes of this nature. Any dismissal must therefore be based on pre-existing rights and the provisions of the law. Dismissal must be lawfully carried out. It may be based on verifiable misconduct or the terms relating to termination, for example through notice. Employees are therefore protected to the extent that there is no verifiable misconduct, although the same contract can be terminated through notice.

Termination of employment can also be occasioned by economic or structural reasons and this could occur as a result of a transfer of business. In such cases, rights and obligations continue to exist and any person that is dismissed retains these rights and obligations.

Where termination is unfair, the Employment Act permits a complaint to be made to the District Labour Officer, who is empowered to investigate the issue and grant a variety of remedies including reinstatement and compensation.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Regulation 30 of the Employment Regulations permits portability of earnings and benefits.
It is also specifically provided that where employees give consent to the transfer of their contract, employees shall not suffer lower benefits and other conditions of service than they were enjoying. Their past service, earnings and benefits with the old employer are required to be ascertained and guaranteed in the new contract.

As such, changes to terms of employment should be consented to. Any positive changes for purposes of harmonisation, do not present a problem. Negative changes for purposes of harmonisation may, however, be problematic.

6. Can employees choose not to transfer to the new owner of a business?

Generally, there is no statutory right to refuse a transfer of contract. Transfers are achieved in two ways – either with consent of the employee or automatically by law where there is a transfer of the trade or business in whole or in part.

In the case of the former, consent is required. The implication is that employees can reject a transfer and refuse to give consent. In such a case, the ultimate conclusion might be that the relationship is terminated and the employee is entitled to be paid his or her terminal benefits, unpaid wages, accrued leave and outstanding allowances in accordance with the existing terms of service.

In the case of the latter, the transfer is achieved automatically as provided by the Employment Act.

7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

Neither the Employment Act nor the Employment Regulations specify information that employers are required to give employees in a business transfer situation. In instances where employee consent is being sought, the employer is required to consult with employees. The extent and manner of consultation is unclear. However, in practice, it is always advisable that employees are made aware of anticipated changes to ensure orderly transition, harmony and calm nerves.

Where there is an intention to transfer ownership of a business or trade, the Commissioner of Labour should be informed at least 30 days before the transfer is affected.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

Neither the Employment Act nor the Employment Regulations specify any time periods for any compulsory information exchange or consultation process. The Employment Regulations however, oblige employers, where consent is being sought, to consult with employees to obtain employee consent for the transfer at least 30 days before the transfer.

The law does not provide for any approval by any labour or statutory authority. Instead, the Employment Regulations require employers, who intend to transfer ownership of a business or trade, to inform the office of the Commissioner of Labour at least 30 days before the transfer is affected.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

The Employment Act contains a general penalty provision. No specific penalty is provided for in this provision, but penalties range from a small fine, a caution, to, in extreme circumstances, and with repeat contraventions, a term of imprisonment.

10. Are any other external approvals or notifications required?

Notification must be given to the Commissioner of Labour, as stated above.

11. Are there any proposals for reform?

There are no current proposals for reform.
1. When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

The Employment Act, Chapter 268 of the Laws of Zambia (the Employment Act) requires that the rights arising under any written contract of service should not be transferred from one employer to another unless employees bound by such contracts consent to the transfer and the particulars thereof are endorsed upon the contract by the Labour Commissioner or any Labour Officer (a proper officer).

Prior to such endorsement of the written contract of service, it is required that a proper officer should be satisfied of the following:

- That employees have fully understood the nature of the transaction and have freely consented to the transfer and that employee consent has not been obtained by coercion or undue influence or as the result of misinterpretation or mistake; and
- That where there is any change to the nature of the work to be performed, or to the place where such work is to be performed, and a medical examination of employees is desirable, that employees have been medically examined in accordance with the requirements of the Employment Act.

2. Is business outsourcing or insourcing treated in the same way as the transfer of a business?

The Employment Act does not extensively regulate outsourcing of employment services, particularly in so far as stipulation of the terms that should be contained between a labour broker and the client contracting the services. The Employment Act however regulates the contract between the labour broker and an employee and requires a labour broker to be licensed in Zambia. In practice, the aforementioned obligation for consent in the circumstances of outsourcing will rest with the entity recognised as the substantive employer. Nonetheless, an outsourcing would not usually be treated in the same way as a sale of a business unless the terms of the arrangement state otherwise. Further, though outsourcing is not prohibited or regulated in Zambia, it is usually frowned upon by government, as it leads to the casualisation of labour.

3. How are employment rights protected in these situations?

Employment rights are protected by way of ensuring that the contracts are only transferred with consent, usually preceded by consultations.

4. Is there any specific protection against the dismissal of employees who the new owner of a business does not want to take on?

Where there is a sale of a business, employees do not automatically transfer as part of the sale/assets. Therefore, the new owner of a business can decide prior to the sale whether it requires any employees from the old employer. If it does not, there is no statutory obligation on the new owner to employ any of the employees. The old employer would therefore have to declare the employees redundant or find them alternative employment.

It is therefore prudent for the new owner, prior to full implementation of the sale of business, to make an informed decision as to which employees it wishes to retain, so that the old employer can implement the redundancy procedure, if required, in good time.

5. Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The new owner can change the terms of employment provided that:

- if this occurs after the transfer, employee consent has been obtained prior to effecting the changes; and
- if this is scheduled to occur concurrently with the transfer, employee consent and approval of the labour office has been obtained.
6. Can employees choose not to transfer to the new owner of a business?

Employees can choose not to transfer to the new owner, but in such a case, the employees may be declared redundant and paid the relevant package.

7. What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

Employers are obliged to provide relevant factual information highlighting the circumstances of the transfer situation. There is no pre-determined set of information that ought to be provided but, in practice, employers usually indicate the general scope of the reason necessitating the transfer. Once employee consent has been obtained (following consultations), and approval has been granted by the labour officer, no further engagement with employees is required.

8. How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no specific period during which the information and consultation process should take place. In practice, the length of time is largely dependent on the cooperation and willingness of the parties (subject to the existence of any red flag issues requiring substantive resolution or input from the labour office) and usually runs between one and six weeks. The approval of the labour office is required where there is a transfer of employment from one employer to another.

9. Is there a penalty for breach of a statutory consultation or similar process requirement?

The Employment Act does not specifically require a consultation or similar process. However, due to the fact that there is a statutory requirement for the employee to consent to the transfer and for the labour office to approve the transfer, a consultation process is inevitable. Therefore, there is no specific penalty applicable. However, if consent is not obtained in the manner provided for in the Employment Act, employees are deemed to have been declared redundant.

10. Are any other external approvals or notifications required?

Industry specific approvals or notifications and antitrust approvals may be required.

11. Are there any proposals for reform? If so, what is their likely timeframe?

The Employment Act does not currently prohibit the outsourcing of labour, however, the anticipated amendments to the Employment Act will prohibit labour broking. The proposed amendment to the Employment Act reads as follows:

64. “A person shall not, for reward, employ any person with a view to making that person available to a third party to perform work for the third party.”

The proposed changes will effectively prohibit labour broking activities in Zambia. We are not aware of when the proposed changes will take effect but we understand that they are currently being considered by the Ministry of Labour and Social Security and the Ministry of Justice before being presented to Parliament for enactment.
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