



# HANDLING OF EMPLOYEES IN THE TRANSFER OF A BUSINESS IN BANK- RUPTCY

*18 December 2020*

## **Introduction**

As a result of the COVID-19 pandemic, more companies may risk becoming insolvent and consequently may end up in bankruptcy or restructuring. Therefore, the possibility of acquiring companies in bankruptcy becomes relevant, actualizing the problems regarding how to handle the employees in connection with an acquisition.

This has been subject to comprehensive theoretical discussions, and the purpose of this article is to summarize some of the topics related to the handling of employees in the transfer of a business in bankruptcy.

## **Employees' Rights and the Danish Act on Transfers of Undertakings**

The Danish rules in the two following areas will be tightened:

1. The Act on Transfers of Undertakings will apply to transfers of undertakings from bankruptcy estates
2. The buyer of the undertaking must notify the relevant labour union within five weeks after the buyer becomes aware, or should have become aware, that the employees or some of the employees of the transferred business were covered by a collective bargaining agreement, and inform the labour union whether or not the buyer wishes to accede the agreement. If the buyer fails to notify the labour union, the buyer will be considered to have acceded the collective bargaining agreement.

In the following, we put focus on the first of these two areas.

### **For which Employee Claims is the Buyer of the Business liable?**

Pursuant to the Act on Transfers of Undertakings, Section 2(1), the buyer must assume the seller's rights and obligations at the time of the transaction in relation to the following:

1. Collective bargaining agreements;
2. Decisions on salary and working conditions which are settled and accepted by a public authority; and
3. Individual agreements on salary and working conditions.

The baseline assumption is that the buyer of a business is liable for all claims of the employees, irrespective of whether the claim was due for payment before or after the transfer of the business. If this assumption were to apply in the acquisition of a business from a bankruptcy estate, then the buyer would be liable for all claims by employees, irrespective of whether the claims were due for payment before or after the bankruptcy order. A potential consequence of this could be that the trustee would be unable to sell the business because it would become too costly for the buyer due to the cost of the "employee claims made prior to the bankruptcy order, and the buyer would then risk paying overprice for the business. Another consequence of the baseline assumption could be that the amount of the employee claims might exceed or be equal to the value of the business and thus eat any revenue from the sale of the business. As neither of these scenarios is desirable, a practical solution is that the Employees' Guarantee Fund accepts liability for all employee claims due for payment

before the bankruptcy order. This way, the buyer would only be liable for any employee claims becoming due for payment after the bankruptcy order.

This practice raises the question of when the business in fact is transferred, including whether the transfer has actually taken place before or after the bankruptcy order. The question is relevant as the Employees'

Guarantee Fund would only be liable for the employee claims that become due for payment before the bankruptcy order, if the business was in fact transferred from the bankruptcy estate.

Buyers must therefore be aware of when the business is in fact transferred, as the Employees Guarantee Fund will not be liable for the employee claims if the business is in fact transferred before the bankruptcy order.

### **Safeguarding the Employees in Transfers of Undertakings – also from Bankruptcy Estates**

Pursuant to the Act on Transfers of Undertakings, Section 3(1), termination of employees as a result of the transfer of a business is not considered to be a valid reason. Therefore, the baseline assumption is that all employees of the transferred business must be acquired along with the business. Termination due to financial, technical, or organizational reasons leading to occupational changes, however, is considered to be valid reasons. According to the legislative history of the Act on Transfers of Undertakings, Section 3(1), this wording covers the same reasons that can justify termination according to the collective bargaining agreement between the Danish DA and LO. Such conditions for termination also apply to a business in bankruptcy. Accordingly, the transfer of a business in bankruptcy does not in itself constitute a valid reason for terminating an employee, however, according to the Danish High Court, the burden of proof that termination is based on financial, technical, or organizational reasons leading to occupational changes is easier in such case.

### **The Case of the Danish Supreme Court**

With a business in bankruptcy, it is not unlikely that the need for all employees may be reduced. In case of the trustees' termination of all employees, the buyer must, however, be mindful of which employees to re-employ. In a case at the Supreme Court, a trustee of a bankruptcy estate had terminated an employee representative prior to the transfer, because the buyer did not wish to take on the employee in question. Due to the employees' qualifications and position as employee representative, the termination was deemed unfair, and the case thus concerned whether the terminated employee could make a claim against the buyer. The Danish Supreme Court found that unfairly terminated employees, who are

terminated prior to a transfer, can make a claim against the buyer, irrespective of whether termination took place before the transfer. Thus, the buyer risks becoming liable for claims due to unfair termination, irrespective of whether the buyer was aware of any such unfair termination.

Consequently, the buyer of a business in bankruptcy must pay specific attention to the risk of the trustee's unfair termination of employees, as the buyer risks becoming liable for claims, irrespective of whether such terminations take place prior to the transfer. However, if any employee is dismissed due to financial, technical, or organizational reasons – and termination is therefore considered as fair – the bankruptcy estate will be liable for any potential claims from the employee.

**If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:**



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