



A-Z OF EMPLOYING

Employee Protection Provision

Our guide for Employers and Managers

**SUPPORTING,
FACILITATING &
REPRESENTING
BUSINESS**

Business**Central** 

Employee Provision Protection

Our guide for Employers and Managers

Contents

This is only a guide.
It should not be a
substitute for
professional advice.

Please seek advice
from our AdviceLine
Team if you require
specific assistance.

Employee Protection Provision	3
Sample Employee Protection Provision	4

Employee Provision Protection

Our guide for Employers and Managers

Employee Protection Provision

An employee protection provision must be included in employment agreements.

The employment agreements (both new and existing) of all employees who are not in the specified category of vulnerable employees must contain an employment protection provision relating to negotiations between the employer and any new employer about the transfer of affected employees to the new employer. See the A-Z Guide on Vulnerable Employees for a list of employees for whom an employee protection provision is not required.

In this context, restructuring means:

Contracting out: or

Selling or transferring the employer's business (or part of it) to another person.

To avoid doubt does not include:

- ▶ subsequent contracting
- ▶ contracting in
- ▶ the sale or transfer of any or all of the company's shares
- ▶ any contract, arrangement, sale or transfer made while the employer is bankrupt, or in receivership or liquidation

The employee protection provisions must include:

- ▶ A process that the employer must follow in negotiating with a new employer about restructuring to the extent that this relates to affected employees; and
- ▶ Matters relating to the affected employees' employment the employer will negotiate about, including whether the transfer will be on same terms and conditions; and
- ▶ The process to be followed at the time of restructuring to determine what, if any, entitlements are available to employees who don't transfer.

Note: A sample clause is provided below. You should take care in drafting a clause to ensure that it does not place any requirements on you that are too restrictive, or indeed even impossible to comply with when looking at the realities of the transactions associated with, for example, the sale of a business. The Employment Relations Act 2000 requires good faith dealings with employees in terms of inserting this provision in their employment agreements meaning that you should consider and respond to issues that arise in the process of reaching agreement.

An affected employee is one whose employer's business is either being restructured or where proposed restructuring means the employee will no longer be required to perform his or her work (whether specified in the employment agreement or not) and the type of work is, or is to be, performed by or on behalf of another person. An affected employee may choose whether or not to transfer even though his or her current employer may have arranged a transfer.

Employee Provision Protection

Our guide for Employers and Managers

Sample Employee Protection Provision

Below is a sample of a simple employee protection provision that deals with the issues required by the Act. You need to think carefully about what you do or do not want to include. When adding an employee protection provision in an Individual Employment Agreement an employer must comply with the requirements of s63A of the Act. Under section 63A of the ERA An employer must:

- ▶ provide the employee with a copy of the intended agreement or part of the intended agreement under discussion; and
- ▶ advise the employee that they are entitled to seek independent advice about the intended agreement; and
- ▶ give the employee a reasonable opportunity to seek that advice; and
- ▶ consider any issues that the employee raises and respond to them.

Employee Protection Provision

In the event of a restructure, as defined in the Employment Relations Act 2000 (being the sale, transfer, or contracting out of all or part of our business) that may affect your employment, the [Company name] will:

- a) As soon as is reasonably practicable, taking into account the commercial requirements of the business, commence discussions with the potential new employer concerning the impact of the restructuring on your position.
- b) Discuss with the potential new employer regarding whether or not it proposes to offer employment to you, and if so the terms and conditions it proposes to offer employment to you, and the proposed date for commencement of employment with the potential new employer.
- c) Inform you of any relevant outcome(s) from discussions with [company name] and the potential new employer.

In the event you are not employed by the potential new employer, for whatever reason, and you are declared redundant, notice will be provided as per this agreement and [you will not have any entitlement to redundancy compensation or refer to the any redundancy provisions in the agreement]

Alternatively, if your agreements currently do not mention redundancy at all, you could deal with the issue in this provision. You could state unequivocally that there is no redundancy and that only notice (as per the agreement) will be provided, or you could provide for a redundancy entitlement. There is no compulsion to do so.

© Business Central Inc.

[Reviewed: November 2020]