Are employees statutorily protected in the event of a business transfer or service provision change?
Pursuant to Section 613a German Civil Code (Bürgerliches Gesetzbuch – BGB), which implemented the provisions of the European Acquired Rights Directive into German law, all employees affected by a business transfer are statutorily protected. Whether a service provision change is considered a business transfer (with the consequence of statutorily protection) depends on the circumstances of each individual case and in particular on whether all conditions according to Section 613a German Civil Code are fulfilled.

When will this statutory protection apply?
The applicability of the statutory protection depends on the fulfilment of the statutory requirements pursuant to Section 613a BGB, which are (i) a business or part of a business, (ii) transfers to another legal owner (iii) by legal transaction.

Do employees automatically transfer?
Yes – all employees’ employment agreements affected by the business transfer will automatically transfer, taking into account the employees’ full length of service and all previous employment conditions (e.g. remuneration, notice periods) including applying collective bargaining and shop agreements. However, every employee is granted an objection right for the time period of one month after the employee has received the proper information letter regarding the business transfer by the transferor and/or the transferee. In case of such objection the employment agreement remains with the transferor (retrospectively, as the case may be).

Are employees protected against dismissal?
Yes – employees are protected from being dismissed because of the transfer (pre and post transfer). However, employers (transferee and/or transferee) remain entitled to dismiss employees on other grounds, such as misconduct, frustration of contract or redundancy (on transferor’s side especially in case of employees making use of their objection right).

What are the employer’s obligations to inform and consult?
The transferor and/or the transferee are obliged to inform the affected employees in writing prior to the business transfer (i) of the date or planned date of the transfer, (ii) of the reason for the transfer, (iii) of the legal, economic and social consequences of the transfer for the employees and (iv) of measures that are being considered with regard to employees. There is no obligation to consult with the employees.

What do outgoing employers have to tell incoming employers?
There are no statutory requirements for the information to be provided. In general, most of the details are regulated within the asset purchase agreement.

Can employees refuse to transfer?
Yes – as stated above, every employee is granted an objection right for the time period of one month after the employee has received the proper information letter regarding the business transfer by the transferor and/or the transferee. After the objection the employment agreement remains with or (if already transferred) falls back to the transferor.

Can employers harmonise existing and new employees’ terms of employment post-transfer?
Generally, transferred employees’ terms and conditions of employment as well as rights and duties derived from a works agreement or a collective bargaining agreement continue to apply post-transfer and harmonisation is limited to harmonisation via mutual agreement with each employee for good reason. Dismissal with the option of altered conditions of employment if socially justified for the purposes of the Unfair Dismissal Act (Kündigungsschutzgesetz – KSchG) are possible.

However, such terms and conditions of employment derived from a works agreement or a collective bargaining agreement may not be changed to the disadvantage of the employee before one year after the transfer.

This does not apply, if such terms and conditions of employment are governed by the legal provisions of another collective bargaining agreement or by another works agreement at the transferee. Additionally, prior to expiry of the period of one year, the terms and conditions of employment (derived from a works agreement or a collective bargaining agreement) may be changed, if the collective bargaining agreement or the works agreement no longer apply or, where the employee and the transferee are not bound by a collective bargaining agreement (in the scope of applicability of another collective bargaining agreement), the application of that collective bargaining agreement is agreed between the transferee and the employee.
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What other practical steps can employers take?
It is advisable to check if other co-determination rights of the works council (e.g. due to a change in operations) or information rights of the economic committee or the European works council are applicable. Even if this is not the case, as a result of the "principle of good faith cooperation" between the employer and the works council, one may consider that the employer informs the works council of the upcoming business transfer.

Are there any anticipated reforms to the legislation?
No – however, the entire complex legislation is under continuous review by German and European jurisdiction.

What Government guidance is available?
None – due to the principle of freedom of contract and autonomy of every citizen the government may not interfere or aid in case of any business transfer.

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