

## Transfer of a business: A practical guide for schools

This guide is meant to help school governing bodies (SGBs), principals and school management teams understand and correctly apply section 197 of the Labour Relations Act 66 of 1995 (LRA) when transferring part of the school's operations to another entity or service provider. It provides both legal context and practical steps to ensure that schools act fairly, lawfully and transparently in performing such a transfer.

### 1. Understanding the legal framework

#### 1.1 The gist of section 197

Section 197 of the LRA provides that when a business (or part of it) is transferred as a going concern, all employees automatically become employees of the new employer, on the same terms and conditions as before the transfer. This means that if a school transfers one of its existing activities or services to another party, the employment relationship automatically moves along with it. The new employer may neither select which employees to take over, nor change terms unilaterally. The purpose of section 197 is to protect employees against job loss and ensure continuity of employment when operational control changes hands.

#### 1.2 'Business' in a school setting

The term 'business' includes any trade, undertaking or service. In the school setting, it may include:

- a school-run hostel, aftercare centre or pre-primary section;

- a tuck shop, canteen or school uniform shop operated by the SGB;
- security, cleaning, maintenance or transport services managed internally or by contract; and
- any school-based operation or activity transferred from one SGB to another.

If the activity continues under new management, but largely remains the same, section 197 may apply.

## **1.3 The meaning of a transfer “as a going concern”**

A transfer “as a going concern” implies continuity, and not the mere sale of assets. Indicators of such a transfer, and therefore, of the applicability of section 197, include continuity of the same service, retention of most employees, use of the same premises or equipment, and serving the same learners or community.

## **1.4 Legal consequences of section 197 for schools and the new employer**

- Employees transfer automatically by operation of law.
- Their salaries, benefits and working conditions remain unchanged.
- All years of service are recognised for legal and benefit purposes.
- The new employer inherits the previous employer’s obligations, unless agreed otherwise.
- Dismissal solely because of the transfer is automatically unfair.

## 2. Practical application for schools

### 2.1 Step 1: Determine whether section 197 applies

Assess whether the intended transfer meets the test of a business transfer as a going concern. Is the school transferring an ongoing service? Will the service continue substantially in the same form? Are the same staff, premises or equipment involved? If so, section 197 applies. When in doubt, assume that section 197 applies and obtain legal advice through FEDSAS.

### 2.2 Step 2: Plan and consult properly

Consultation is both a legal obligation and an essential requirement to build trust. Consult the affected employees, unions (if any) and the new employer. Communicate the reasons for the transfer, the planned transfer date, the legal implications, and the measures envisaged. Keep a written record of all meetings and notices.

### 2.3 Step 3: Draft and sign a transfer agreement

The SGB and new employer must conclude a written agreement that sets out:

- the effective date of transfer;
- the employees to be transferred (list the names and details in a schedule);
- how benefits, leave and service continuity will be handled;
- the allocation of liabilities (describe details in a schedule); and
- that the transfer will be performed in terms of section 197.

Annexure A contains a sample transfer agreement.

### 2.4 Step 4: Communicate clearly with employees

Employees must receive a written notice that confirms:

- that the transfer will be performed under section 197;
- the date of transfer, and the details of the new employer;
- that affected employees' employment and benefits will continue without interruption; and
- that their place of work will remain the same, unless this is changed at a later stage for operational reasons, though only after consultation.

Annexure B contains a sample notice to employees.

A meeting should also be held to explain the process and answer employees' questions.

### 2.5 Step 5: Prepare for handover

A proper handover ensures compliance and protects all parties. Provide the new employer with employment contracts, payroll data, leave records and relevant operational information. Ensure compliance with the Protection of Personal Information Act 4 of 2013 (POPIA) when transferring personal data.

### 2.6 Step 6: Implementation and follow-up

From the transfer date, the employment relationship is deemed to continue seamlessly under the new employer. The new employer must recognise continuity of service and maintain all conditions of employment. Any future changes require fair consultation.

## Annexure A: Sample transfer agreement

### TRANSFER AGREEMENT IN TERMS OF SECTION 197 OF THE LABOUR RELATIONS ACT, 1995

entered into between

the school governing body of \_\_\_\_\_ (*enter school name*)  
("the transferor")

and

\_\_\_\_\_ (Pty) Ltd/NPC/Trust/other entity (*enter details of new employer*)  
("the transferee")

#### 1. BACKGROUND AND PURPOSE

1.1 The transferor conducts the business known as \_\_\_\_\_  
(e.g. aftercare, hostel, tuck shop, etc.).

1.2 The transferor wishes to transfer this business to the transferee with effect from  
\_\_\_\_ 20\_\_ ("the effective date").

1.3 The parties acknowledge that this transaction constitutes a transfer of a business as  
a going concern in terms of section 197 of the Labour Relations Act 66 of 1995  
("the LRA").

1.4 The purpose of this agreement is to give effect to the automatic transfer of employees on fair and lawful terms.

## 2. TRANSFER OF THE BUSINESS

2.1 The business being transferred comprises \_\_\_\_\_.

2.2 All tangible and intangible assets, goodwill, licences and other components necessary to continue the business will be transferred on the effective date.

2.3 The business will continue to operate from the same premises, unless agreed otherwise in writing.

## 3. TRANSFER OF EMPLOYEES

3.1 The employees listed in schedule A are identified as those engaged in the transferred business immediately prior to the effective date ("the affected employees").

3.2 In terms of section 197(2) of the LRA, the transferee shall automatically become the employer of the affected employees on the effective date.

3.3 All existing rights and obligations continue uninterrupted, including remuneration, benefits, leave and service continuity.

3.4 The transferee undertakes to maintain each employee's place of work, unless operational changes are introduced at a later stage in compliance with section 189 of the LRA.

3.5 No employee shall be dismissed or prejudiced because of the transfer.

#### **4. ALLOCATION OF RIGHTS AND LIABILITIES**

4.1 Except as specifically provided for in schedule B:

- (a) the transferor remains liable for all employee obligations that arose before the effective date; and
- (b) the transferee assumes all rights and obligations that arise on and after the effective date.

4.2 Any outstanding statutory payments (Unemployment Insurance Fund, tax, pension, medical aid) up to the effective date shall be finalised by the transferor.

4.3 The parties agree to cooperate to resolve any dispute or claim arising from the period prior to the transfer.

#### **5. RECORDS AND CONFIDENTIAL INFORMATION**

5.1 The transferor shall deliver to the transferee employment contracts, payroll data and operational records relevant to the business.

5.2 All personal information shall be transferred in accordance with the Protection of Personal Information Act 4 of 2013 (POPIA).

5.3 The transferee undertakes to maintain confidentiality and process such personal data solely for employment-related purposes.



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### 6. INDEMNITY

Each party indemnifies the other against any claim or liability resulting from a breach of their obligations under this agreement, or arising from acts or omissions occurring in their respective periods of responsibility.

### 7. SIGNATURES

Signed at \_\_\_\_\_ on \_\_\_\_\_ 20\_\_.

\_\_\_\_\_  
**For the transferor:**

**Name**

**SGB chair**

\_\_\_\_\_  
**For the transferee:**

**Name**

**Capacity**

## Annexure B: Sample notice to employees

Date: \_\_\_\_\_

To: All employees of \_\_\_\_\_

Dear colleagues

### **Subject: Notice of transfer of business in terms of section 197 of the Labour Relations Act 66 of 1995**

This serves to inform you that the school governing body (SGB) will be transferring the school's \_\_\_\_\_ (*enter business to be transferred*) (e.g. aftercare centre/tuck shop/hostel/cleaning service/transport division/pre-primary section) to \_\_\_\_\_ ("the new employer") with effect from \_\_\_\_\_ 20\_\_.

This constitutes a transfer of a business as a going concern in terms of section 197 of the Labour Relations Act 66 of 1995.

The purpose of the transfer is \_\_\_\_\_ (*school to insert applicable option(s)*) (e.g. to ensure the more efficient management and the sustainability of the service/to align the service with the school's educational mandate/to improve safety, maintenance or operational standards/to respond to capacity or resource constraints, etc.).

In terms of the law, the following will apply:

- Your employment will automatically transfer to the new employer.
- All existing terms and conditions of employment will remain unchanged.

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- Your place of work will remain the same, unless this is changed at a later stage for operational reasons, though only after consultation.
- Your years of service will continue uninterrupted.
- No employee may be dismissed or treated less favourably because of the transfer.

The effective date of transfer is \_\_\_\_\_ 20\_\_, when the new employer will assume responsibility for your employment. Your salary, benefits and working arrangements shall remain unchanged. You will receive written confirmation of employment from the new employer once the transfer takes effect.

Should you have any questions or require clarification, please contact \_\_\_\_\_ *(name and contact details)*.

Kind regards

\_\_\_\_\_  
SGB chair