

DEREGULATION ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 96: NHS foundation trusts and NHS trusts: acquisitions and dissolutions etc

443. This section amends sections 56A, 57 and 65LA of the National Health Service Act 2006. These provisions are all concerned with the transfer of property and liabilities between NHS bodies.
444. *Subsection (2)* amends section 56A so as to give Monitor an order-making power to make provision for the transfer of staff where it is proposing to grant an application for an acquisition under section 56A. Under section 56A, a joint application by the acquiring trust and the trust to be acquired (“the target trust”) is made to Monitor which is required to grant the application if it is satisfied that the necessary preparatory steps have been taken. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) make provision for staff, and their contracts of employment, to transfer from their current employer to a new employer in circumstances where a ‘relevant transfer’ takes place. However, it is not certain that TUPE will apply to protect staff in every transaction that arises in consequence of section 56A. The Cabinet Office Statement of Practice on staff transfers in the public sector (COSOP) says broadly, that if TUPE does not apply to a staff transfer in the public sector, then the staff should nevertheless be transferred, with appropriate protections, as a matter of practice. Subsection (2) enables Monitor to make an order putting TUPE like protection in place should TUPE not apply.
445. *Subsection (3)* inserts a new section 56AA, a supplementary provision that clarifies what happens where an application for an acquisition is granted under section 56A. The new section 56AA provides that Monitor’s grant of the application has the effect that all property and liabilities of the acquired trust transfer to the acquiring trust and that the target trust is dissolved. Section 56AA(4) makes it clear that “liabilities” include “criminal liabilities” and “property” includes “trust property”. Section 56AA(1) also provides that any order made by Monitor under the new section 56A(4A) (inserted by subsection (2) of the new section) takes effect.
446. *Subsection (4)* amends section 57, a provision that supplements substantive powers set out in section 56 (mergers) and section 56B (separations). It extends Monitor’s existing order making power to make provision for the transfer of staff. Section 56 enables an NHS foundation trust to merge with another NHS foundation trust or an NHS trust. The two NHS foundation trusts, or the NHS foundation trust and the NHS trust, applying for the merger are dissolved in order to create a new NHS foundation trust. Section 56B enables a foundation trust to separate into two or more NHS foundation trusts.
447. As mentioned above, the Transfer of Undertakings (Protection of Employment Regulations) 2006 (TUPE) make provision for staff, and their contracts of employment, to transfer from their current employer to a new employer in circumstances where a ‘relevant transfer’ takes place. However, it is not certain that TUPE will apply to protect staff in every transaction that arises in consequence of section 56 or 56B. COSOP states

*These notes refer to the Deregulation Act 2015 (c.20)
which received Royal Assent on 26 March 2015*

broadly, that if TUPE does not apply to a staff transfer in the public sector, then the staff should nevertheless be transferred, with appropriate protections, as a matter of practice. This amendment enables Monitor to make an order putting TUPE like protection in place should TUPE not apply.

448. *Subsection (6)* amends section 65LA to extend the types of NHS organisation to which Monitor can transfer the property and liabilities of an NHS foundation trust dissolved following special administration. Currently, Monitor is only able to transfer the property and liabilities of a dissolved NHS foundation trust to another NHS foundation trust or the Secretary of State. This section amends section 65LA to give Monitor powers to make a transfer to an NHS body, or to the Secretary of State, or between more than one NHS body, or between one or more NHS bodies and the Secretary of State. An order could include provision to transfer the dissolved NHS foundation trust's criminal liabilities to an NHS body.
449. The new section forms part of the law of England and Wales. It will come into force on a day to be appointed by the Secretary of State by a commencement order.