

TUPE regulations in relation to outsourcing services

Over the years many employees have benefited from the protection afforded by the existing Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE Regulations). However, the question of whether and when TUPE applies has become very complicated in situations where what is being proposed does not sit comfortably with the definition of 'transfer'.

The Regulations amending TUPE came into effect on 6 April 2006. These govern employees' rights in cases where the business for which they work is transferred to an outside contractor. If a company transfers services to or from another service provider (the 'second tendering round'), the affected employees' terms and conditions of employment are protected. The new regulations provide more clarity and certainty for purchasers.

Major changes in TUPE Regulations

- TUPE will now apply to the second tendering round as well as most service contracts being outsourced for the first time;
- The outgoing service provider is obliged to provide the incoming provider with details of all transferring employees;
- There is a requirement for both outgoing and incoming service providers/employers to be jointly liable for any failure to consult with and inform affected employees;
- There is greater clarification of when and how employers may lawfully dismiss employees or change their terms and conditions of employment in connection with a transfer;

- It will no longer be possible for an incoming employer to claim that TUPE does not apply on the grounds that it will be performing the services in a substantially different way to the outgoing employer. The Regulations will still require there to be a transfer of an economic entity on a 'service provision change transfer'. There will be no requirement for the transferring business to retain its identity. It will be enough that the activities carried out by the outgoing service provider cease and are then carried out instead by the new provider;
- The legislation contains a new two-part definition of the transfer of undertakings. The first part incorporates existing case law into the regulations. The second part attempts to clarify current ambiguity about the difficulty in defining that which constitutes a transfer, and therefore makes it difficult to determine precisely when TUPE should apply. This ambiguity has now been removed and the changes allow for a more consistent approach. The aim is to create a more level playing-field, particularly, for those considering ICT service providers and maximising continued employment for affected employees;
- There is a new statutory requirement to provide certain information about employees, such as the age and identity of those who would be included in the scope to transfer, as well as their main terms and conditions of employment - for example, salary and holiday entitlement. This clause is very useful for organisations in labour-intensive service sectors such as cleaning services, where incoming providers are often faced with having to agree costings and deals with little or no knowledge of the number of employees for whom they may become responsible;
- There is a requirement for any transferor or incoming employer to accept joint liability for any failure to consult with and inform affected employees. Both parties can be offered incentives to co-operate in their obligations to employees;
- The existing transferor will be obliged to provide liability information, such as any records of disciplinary action taken against, or grievances made by, an employee within the last two years. The transferor will also be obliged to make known any legal proceedings brought by the employee against the transferor and any information on legal claims which the transferor has reasonable grounds to believe an employee may make. The existing transferor must provide this information to the future employer a maximum of two weeks before the transfer;
- There is a clearer definition of when employers can make changes to employment contracts. There is some scope legitimately to change employment terms as long as they do not exceed the scope outlined in the new regulations. The transferor and the new employer must always consult with, and inform, relevant staff throughout the whole process. Failure to do so could mean that both organisations would incur a financial penalty under the new system.

Application of the new regulations

The new regulations will apply:

- when contracting or outsourcing is taking place for the first time;
- when the second tendering round occurs or when a procurement department wants to bring previously outsourced services back in-house.

Exemptions to the legislation

The two main exemptions from TUPE are:

- The legislation will not apply to those organisations that are buying in services for a one-off short-term event rather than two parties entering an ongoing relationship for the provision of those services;
- where the activities consist wholly or mainly of the procurement or supply of goods and the procurement of professional services for the sole use of the client.

Clarity

Unfortunately, the legislation is not as prescriptive as anticipated. The information contained in the legislation is simply not detailed enough and there are still dichotomies relating to certain choices. It is clearly in the interest of all parties to ensure that the supply of employee information is covered throughout the contracting process. An organisation considering outsourcing is now required to collect this information and ensure it is passed to the new employer. When gathering data about affected employees, one benefit emanating from a stringent tendering process, will be that outgoing and incoming employers can be made to co-operate in their obligations to consult with employees and to divulge relevant information to them.

Indemnities

Parties to first generation outsourcing contracts will probably want to seek indemnities in respect of any liability they incur for the other party's failure to comply with these obligations (e.g. failure to comply with the new information and consultation obligations). However, such contractual indemnities will not be possible in 'second tendering round' situations where expiring and new service providers have no contractual relationship with each other.

Penalties for non-compliance

Failure to comply with the new information and consultation obligations will result not only in potentially high protective awards but also in fines of up to £70,000. This will apply to both initial outsourcing and second tendering round situations.

Summary

The changes will:

- extend TUPE to cover 'service provision charges', in other words service contracting operations, such as HR, finance and procurement services - so employers and employees know where they stand from the outset of an ownership transfer. This will not apply to services bought in on a 'one-off' basis;
- increase the transparency of the transfer process by requiring the existing contractor to provide the new contractor/employer with details of any employment liabilities - failure to do so can result in compensation being awarded against the existing contractor;
- give a significant boost to the promotion by the Department of Trade and Industry of a rescue culture for bankrupt firms by introducing new flexibility into the approach in the regulations to deal with the transfer of insolvent businesses;

- clarify the circumstances in which employers and employees can change the terms and conditions of employment for economic, technical or organisational reasons;
- clarify the circumstances under which it is unfair for employers to dismiss employees for reasons connected with a relevant transfer.

The regulations may seem frightening, but in fact, they are a step in the right direction. Whilst it is vital to know what the regulations entail, your service provider should be able to guide you through the process.

It is advisable that all those parties outsourcing services for the first time, or committing these to a second tendering round, outsource to an organisation that provides a dedicated team competent in understanding and applying these complex TUPE regulations. Both organisations should aim to create a communications/implementation strategy that is compatible with the requirements of both parties' HR and ICT services.

Further information can be found on the Department of Trade and Industry (DTI) website.

<http://www.dti.gov.uk/er/individual/tupeguide2006regs.pdf>