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What US Lawyers Should Know About the Transfer of Undertakings Regulations 2006 ("TUPE")

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What is TUPE?

TUPE serves to protect employees and their rights in the UK when their employment transfers to a new employer. TUPE implements the EU's Acquired Rights Directive which applies to all EU Member States; therefore whilst the information set out below applies to the UK, similar provisions will apply across the EU (albeit with some differences in some Member States).

The key point to be aware of is that **you cannot contract out of TUPE, but you can apportion the risks and liabilities arising from it** in the applicable contractual documentation.

When does TUPE apply?

TUPE will operate in two circumstances:

1. When there is a **business transfer** pursuant to which there is a transfer of an economic entity (meaning an organised grouping of resources) based in the UK from one company to another as a going concern.

   Example: A US company has a subsidiary in the UK (Company A) that produces mobile computer games. Company B, which is based in the UK, also produces computer games. It has three separate divisions focussed on the production of (i) games for consoles; (ii) web-based online games; and (iii) mobile games. Company A is going to acquire Company B's mobile game division. TUPE would apply to transfer the employees assigned to Company B's mobile game business to Company A. Therefore, Company A will become the new employer of the transferring employees.
2. When there is a **service provisions change** pursuant to which a company outsources the provision of a service to a contractor, reassigns already outsourced services to another service provider or brings outsourced service back in-house.

   Example: Company C, which is based in the UK, has decided to outsource its IT support function to Company D, which is a subsidiary of a US company. TUPE will apply to transfer the employment of the IT support employees from Company C to Company D provided that the IT support service to be provided by Company D will be "*fundamentally*" the same as those carried out by Company C whilst the service was in-house. If it is, Company D will become the new employer of the transferring employees.

TUPE does not apply to share sales/purchases because in these circumstances the identity of the employer will remain unchanged; employees' employment contracts will simply remain in force. However, TUPE may apply if there is an intra-group reorganisation after a share deal.

What is the effect of TUPE applying?

The main consequences of TUPE applying are set out below. It is important for businesses to limit the risks and liabilities arising from TUPE so far as possible under the terms of their commercial agreements.

1. The current employer must provide certain information known as "*employee liability information*" to the new employer prior to the transfer. Essentially this information relates to the basic terms and conditions of employment of the transferring employees and any claims, grievances or disciplinary issues relating to them. This information needs to be provided at least 28 days before the transfer date.
2. There is an obligation on the parties to inform and consult with "*appropriate representatives*" of their own affected employees about the transfer in good time before the transfer takes place:

   (a) If there are no "appropriate representatives" in place, an election process will need to be carried out to

appoint them (although employers with fewer than 10 employees can directly inform and consult with their affected employees rather than carry out the election process).

(b) The current employer will need to inform and consult with both the transferring employees and any other of its employees that would be affected by the transfer (e.g. if their responsibilities may change). The new employer would need to inform and consult with its own employees if they would be affected by its purchase of the business/services.

(c) As part of the information and consultation process, a new employer has to fully inform the current employer of all "measures" it may take in relation to the transferring employees (such as any proposed changes to employee benefits, redundancies etc.).
Failure to comply with the obligation to inform and consult is punishable by a protective award which is equivalent to 13 weeks' gross pay (uncapped) per affected employee. This liability is joint and several between the parties. Therefore, each party may want indemnities from the other that they will not be liable for the other's failings.

3. On the transfer date, the employment of anyone assigned to the business or service that is transferring will automatically transfer to the new employer. Each employee will be deemed by their new employer to have commenced employment on the date on which they started employment with their old employer. In other words, continuity of service is preserved.
4. The new employer will inherit all rights, liabilities and obligations in relation to the transferring employees, including any actual or potential claims. For example, if there was litigation between the old employer and a transferring employee then the new employer will have to step into the shoes of the old employer and defend the proceedings. The new employer will not want to be liable for anything in connection with the period before the transfer and so indemnities to that effect are key.
5. If an employee is dismissed (either before or after the transfer date) by reason of the transfer then their dismissal can be automatically unfair. Compensation for unfair dismissal is potentially up to approximately £80,000 so it is important to minimise risk and get indemnities if possible.
6. The employees will transfer on their existing terms and conditions of employment. There are limited circumstances in which the new employer will be able to amend employees' contracts which may mean immediately harmonising terms can be tricky.
7. If the new employer is proposing to make transferring employees redundant, it may be able to consult with the transferring employees about this situation before the transfer date, provided the current employer agrees.

What actions should you take in relation to TUPE?

On a practical level you should consider the following:

1. Does TUPE actually apply? There are lots of legal tests to determine whether TUPE applies and, if so, which employees are in scope to transfer.
2. Ensure that the appropriate contractual documentation and protections are in place. For example, when acting for a purchaser we will want to ensure that we have conducted due diligence and obtained indemnities in respect of employment liabilities arising pre-transfer and any failure of the seller to comply with its TUPE obligations. When acting for a seller, we will want indemnities for all post-transfer issues (including redundancies) and indemnities in respect of any failures by the purchaser to comply with its TUPE obligations.
3. Make sure clients are aware of their duties to inform and consult with employees who will be affected by the transfer and that there is sufficient scope in the transaction timetable for this process.
4. Consider whether there will be any redundancies/restructuring post-transfer. If so, this will trigger further information and consultation obligations, and a failure to have a legitimate redundancy situation and follow a fair process could result in employment tribunal claims from dismissed employees. Consideration should also be given to starting the redundancy consultation process before the transfer date.
5. Consider whether there will be any requirement to change employees' terms and conditions of employment post-transfer. This may be possible in some circumstances; however we need to ensure that the necessary protections are in place.

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