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***Employment issues in
Outsourcing
&
Contracted/Managed Services***

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Key Issues

- Assess whether the Transfer of Undertakings Regulations apply
- Identify In-Scope Employees
- Carry out Due Diligence
- Negotiate terms of Service Agreement
- Consider Termination Strategy

1. Transfer of Undertakings

TUPE or not TUPE.....that is the question!

- The EC (Protection of Employees on Transfer of Undertaking) Regulations 2003 “apply to any transfer of an undertaking, business or part of an undertaking or business from one employer to another employer as a result of a legal transfer (including the assignment or forfeiture of a lease) or merger.”
- Is the function that is being outsourced an undertaking or part of an undertaking?
- Is the undertaking being transferred?

The Effect of the Regulations

- The rights and obligations of the original employer (client company) arising from a contract of employment existing on the date of the transfer are, by reason of the transfer, transferred to the supplier/outsourcer provider.

Transfer Factors

1. The nature of the business
2. Has the entity retained its identity?
3. Will tangible assets (e.g. buildings, stock etc) transfer?
4. What will happen to intangible assets (e.g. goodwill, IP rights)?
5. Will some or all of the staff be taken over by the new employer?
6. Will the customer base transfer?
7. Are the activities to be carried out post-transfer similar to those carried out pre-transfer?
8. Will there be any interruption in operations?

Timing

- If the Transfer of Undertakings Regulations apply, it may impact on the timing of the transaction.
- Certain information must be provided to Employee Representatives at least 30 days before the transfer takes place.

Information to be provided

- A. The date or proposed date of the transfer
- B. Reason for the transfer
- C. The legal implications of the transfer for the employees and a summary of any relevant economic and social implications of the transfer for them
- D. Any measures envisaged in relation to the employees

Risks if Transfer Regulations not complied with

- Complaints for breach of Regulations are referred to a Rights Commissioner
- Time limit: 6 months from the date of the alleged contravention

Powers of a Rights Commissioner

1. Declare that complaint is or is not well founded
2. Require employer to comply with the Regulations
3. Require employer to pay compensation:
 - Cap of 4 weeks pay per employee for breaches of information and consultation
 - Cap of 2 years remuneration otherwise.

2. Identifying In-Scope Employees

Typically, the parties agree the in-scope employees.

If an employee divides time between functions, consider:-

- Is the employee assigned to the part being transferred?
- What do the provisions of his/her contract state?
- Where is he/she required to work?
- How much time does he/she spend in the undertaking?

3. Due Diligence

In relation to In-Scope Employees:-

- Identify all contractual entitlements
- Identify any verbal commitments given
- Review applicable policies
- Review Disciplinary Records
- Review Sickness Policy and Sick Leave Records
- Any threatened or outstanding litigation

4. Service Agreement Provisions

- Warranties
 - on existing terms and conditions
- Apportionment of pay and benefits
- Indemnities
 - pre-transfer liabilities
 - liabilities during term of agreement
 - termination and post-termination liabilities
 - failure to consult liabilities

Service Agreement Provisions

- Client control on hiring, firing and transfer of employees
 - May be limited to key employees
 - Right to remove employee for misconduct etc
- Compliance with confidentiality
- Compliance with client HR policies on client sites
- Moratorium on dismissals and changes to terms and conditions of employment.

5. Exit Plan

- Transfer of Undertakings Regulations may apply on termination.
- It is possible to negotiate and agree (a) what will happen to employees and (b) who will cover dismissal/redundancy costs.
- Consider whether employees will transfer back in house or to another provider.
- Supplier may seek an indemnity if replacement supplier fails to take on staff.

Exit Plan

- Detail termination assistance required from supplier towards termination (information, moratorium on in-scope employees etc).
- Consider how the provisions of Service Agreement may impact on tender for replacement provider on expiry.

Planning for successful Outsourcing

- Get advice early on whether Transfer of Undertaking Regulations apply.
- Identify who will transfer and their entitlements.
- Plan for consultation.
- Supplier will need to carry out due diligence, the results may impact on timing or pricing.

Planning for Outsourcing

- Supplier may seek moratorium on in-scope employees before the service start date.
- Does outsourcing involve off-shoring? If so, local advice will be needed in relevant jurisdiction.

Thank You

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