

TUPE 2006 - THE NEW LAW

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On 6 April 2006, the new Transfer of Undertakings (Protection of Employment) Regulations (or “the 2006 TUPE Regulations”) came into force. These new Regulations replace the old law contained in the 1981 TUPE Regulations and reflect the extensive developments in case law since 1981.

THE MAIN CHANGES

The purpose of the 1981 TUPE Regulations was to protect employees’ rights when the business in which they work changes hands and the 2006 TUPE Regulations continue this protection.

However, the 2006 TUPE Regulations introduce the following important changes:

- a widening of the scope of the TUPE Regulations to cover cases where services are outsourced, re-tendered or in-sourced (described as “service provision changes”)
- a new duty on the transferor employer to supply information about the transferring employees to the new transferee employer by providing “employee liability information”
- provisions which clarify the ability of employers and employees to agree to change terms and conditions of employment on a relevant transfer
- provisions which clarify those circumstances in which it is unfair for employers to dismiss employees for reasons connected with a relevant transfer
- provisions which confirm that the transferor and transferee are jointly and severally liable for failing to inform and consult under the TUPE Regulations (unless the failure is because the transferee failed to provide the transferor with the necessary information)
- special provisions making it easier for insolvent businesses to be transferred to new employers

EFFECT OF THE NEW LAW FOR EMPLOYER CLIENTS

The Good News ...

- Increased certainty: parties should know where they stand and should be able to apportion risks accordingly
- Clarification of the law should, in turn, mean less scope for litigation over the application of TUPE and as a result transaction costs may also be reduced
- Less likelihood of being undercut on employment costs in a competitive tendering situation
- The changes increase the incentive to buy an insolvent business

The Bad News ...

- Employers will continue to face problems when seeking to change terms and conditions of transferring employees and harmonisation of terms will still not be permitted if introduced mainly for reasons connected with the transfer
- There are serious consequences if a transferor employer fails to provide the new transferee employer with employee liability information. The transferor may be ordered to pay a minimum award of £500 per employee
- The duty to provide employee liability information is likely to mean that transferors err on the side of caution and disclose everything. Transferees risk being swamped with too much information and overlook key points

- It is likely to be easier for employees to claim constructive unfair dismissal in relation to substantial changes in terms and conditions as a result of the transfer (even if the changes do not amount to a repudiatory breach of contract)

HOW CAN BOODLE HATFIELD ASSIST?

Although the purpose of the new law was to clarify the legal position on business transfers and service provision changes, this is still a complex area of law.

The changes are important if you are the seller or purchaser of a business, if you are party to an outsourcing or in-sourcing arrangement, or if you are involved in a re-tendering process.

You should contact the Employment Team directly if you would like to know whether the 2006 TUPE Regulations apply to your transaction.

We can also assist transferor clients to ensure compliance with the new disclosure obligations. If you are an employer and want to make changes to terms, such as changes to rates of pay and/or pay dates, sickness entitlements and holiday, we can help you negotiate your way through this legal minefield.

EMPLOYMENT CONTACT

This document is intended to provide a first point of reference for current developments in aspects of the law. It should not be relied on as a substitute for professional advice. If advice on a particular circumstance is required please contact your Boodle Hatfield lawyer or of partner listed below:

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