

A QUICK GUIDE TO TUPE 2006

Introduction

On 6 April 2006 the new Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) came into force. These have brought changes for not only employers but also for outsourcers and service providers.

TUPE 2006 replaces the existing 1981 Regulations (see "A Quick Guide to TUPE" for general information on business transfers) and it is intended to clarify uncertainties created by the 1981 Regulations and existing case law.

The main changes are as follows:

- ◆ A clearer definition for what is to be classed as a *relevant transfer*.
- ◆ TUPE 2006 applies to public and private undertakings *engaged in economic activities whether or not they are operating for gain*.
- ◆ The introduction of a new type of relevant transfer known as a *service provision change*. This occurs where services are contracted-out, brought back "in-house" or reassigned to a new contractor. Under TUPE 2006, 3 conditions must be fulfilled for such transfers to come within the definition of a relevant transfer:-
 - There must be an organised grouping of employees situated in the UK which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
 - The activities are not in connection with a single specific event or task of short duration; and
 - The activities carried out do not consist wholly or mainly of the supply of goods for the client's use.
- ◆ A new duty on the transferor to provide 'employee liability information' to the transferee. This includes:-
 - The identity and age of all transferring employees
 - The information contained in their statutory statement of particulars of employment
 - Details of any disciplinary action or grievances in the previous 2 years
 - Details of any actual or potential legal action brought by the employees in the previous 2 years
 - Details of any collective agreements applicable to the transferring employees

Failure to provide this information can result in an award of compensation for any loss suffered by the transferee (with a minimum award of £500 per employee unless it is unjust to do so).

There is still a duty to inform and consult, however transferors must now give employee representatives details of the *date or the proposed date of the transfer* rather than the expected date of the transfer. This may cause problems where a TUPE transfer happens over a series of transactions. Failure to inform and consult

will still give rise to a right for each affected employee to bring a claim for up to 13 weeks' actual pay. This liability passed to the transferee under the old Regulations. However, TUPE 2006 provides for such liability to be shared jointly and severally between the transferor and transferee (unless the parties agree otherwise in any business transfer or outsourcing agreement).

- ◆ Clarifying the ability of employers and employees to agree variation to contracts of employment, when the reason for the variation is an 'economic, technical or organisational reason'. Historically, all changes made in connection with a TUPE transfer were void (or voidable). The position now is that:-
 - Changes which are not connected to the transfer will be valid provided the former employer would have had the right to make these changes or the employee's consent is obtained;
 - Changes made in connection with the transfer for an ETO reason will be valid provided employee consent is obtained; and
 - All other changes made in connection with the transfer will be void (or voidable) whether or not consent is obtained.

However, under TUPE 2006, in addition to the right to object to the transfer, Regulation 4(9) introduces a new right for a transferring employee to resign if the transfer involves a *substantial change in his working conditions to his material detriment*. The employee will be treated as dismissed by the employer. He will not be able to claim pay in lieu of notice, but will still have other statutory rights, including the right to claim unfair dismissal. This is a change from the 1981 Regulations under which employees could only claim to have been constructively dismissed where there was a substantial change in their working conditions provided it amounted to a fundamental breach of contract.

- ◆ Special provisions making it easier for insolvent businesses to be transferred to new employers. There are essentially 2 new types of protection for transferees of insolvent businesses. The first is relief for the transferee of certain employment liabilities (including up to 8 weeks' back pay, 6 weeks' holiday pay, statutory notice pay and basic awards for unfair dismissal at the statutory amount). These no longer transfer to the transferee. However, the transferee will still inherit any other employee liabilities (including liability for back pay and notice pay over and above the statutory capped amount). The second relief is to allow the transferee of an insolvent business to make *permitted variations* to terms and conditions of employment in certain circumstances. These variations must be *designed to safeguard employment opportunities by ensuring the survival of the undertaking*.

This note is intended to provide general information about the TUPE Regulations 2006 in England and Wales. It is not intended to be comprehensive or provide any legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

If you would like any further information or specific advice, please contact Raymond Taylor or Belinda Lester.

Solomon Taylor and Shaw (incorporating Marsh Regan)
3 Coach House Yard ♦ Hampstead High Street ♦ London NW3 1QD
T. 020 7431 1912 ♦ F. 020 7794 7485 ♦ E. mail@solts.co.uk
www.solts.co.uk