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TUPE: Don’t Get Caught Out

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TUPE often comes to mind when considering transactions where a business is being sold. But this is not the only situation where a TUPE transfer may arise. Anyone who engages employees in their business needs to consider TUPE when there are any changes to the business structure, even those that are seemingly minor.

The application of TUPE to the sale of a business

Essentially, TUPE will be triggered upon the sale of a business (or other economic entity), or in other situations where it undergoes a transfer, and it retains its identity after the transfer. Where TUPE applies, the contracts of the staff employed by the business (or assigned to the part of the business that is transferring) automatically transfer to the new owner on their existing terms.

There is an obligation to inform staff of the transfer in every instance where TUPE is triggered, and also to consult with their elected representatives (or recognised union reps) if there are any changes envisaged to their terms and conditions as a result of the transfer.

Why you should be thinking about TUPE

If you get TUPE wrong, or neglect to deal with a TUPE transfer altogether, your business could be facing very expensive claims from your staff. Claims for a failure to comply with your obligation to inform and consult can result in awards of up to 13 weeks’ salary for each employee, which adds up to substantial payments very quickly!

In addition, any changes to staff contracts made in connection with a TUPE transfer will be void, unless they’re permitted by the contract or are for an economic, technical or organisational reason, and any dismissals made by reason of the transfer will be automatically unfair.

Other situations when TUPE may apply

Service provision change

This is the most common instance aside from a business sale where a TUPE transfer will arise. A service provision change will occur where the responsibility for carrying out a service has moved from one company to another (for example following a re-tendering process). In these situations, an organised grouping of employees who were assigned to the work would transfer to the new contractor, provided that the new contractor company is carrying out fundamentally the same activities. It goes without saying that you should be carefully considering the impact of TUPE when undertaking a tendering process to carry out services, as you may end up with more staff than you envisaged if the tender is successful.

Partnerships

It's likely to be the last thing that you're thinking about if there's a significant change to your business structure, but these are situations where a TUPE transfer commonly occurs. Even though on the face of it, the ownership of the business may not appear to have changed, circumstances such as the retirement of a partner that changes a business vehicle from a partnership into a sole practitioner or the conversion of a partnership into a limited company can trigger TUPE. This will be because the business is being transferred from one entity to another. It's in those situations that issues with a failure to inform and consult with staff are likely to arise.

Insolvent business

Although some of the fundamental TUPE employment protections are relaxed where a business is insolvent, you should still be considering the extent to which it applies, rather than dismissing it completely. There are different rules for non-terminal insolvencies (such as administration) and terminal ones (such as liquidation), and so it always pays to take legal advice to check which TUPE requirements apply.

If you have any questions about how TUPE may apply to any changes to your business, our employment specialists are here to help. You can get in touch by emailing online.enquiries@la-law.com or if your query is urgent, please call 01202 786135.

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