Business Sale or Purchase – Impact of TUPE Regulations – The Basics

What is TUPE?

The purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is to protect the rights of employees when a business or undertaking, or part of a business or undertaking, transfers to another undertaking, normally when the legal identity of the employer changes, "from one person to another". In other words, it requires the legal identity of the employer to change.

Does TUPE apply to all business transfers?

TUPE does not apply when the business transfer occurs by:-

- share takeover
- transfers of assets only without the business (e.g. sale of plant and equipment alone)
- supply of goods or services for clients own use (i.e. no business transfer)
- transfer outside the UK (Check legislation of destination country)
- some bankruptcy and insolvency situations

Most SME business sales are completed through a Share Sale or an Asset Sale but whether or not TUPE applies, there are still important issues to be considered where employment law is concerned.

What is the impact on a business purchase through a Share Sale?

When buying a business through a share takeover the TUPE regulations do not apply. This is because on the purchase of a company by way of a share, the legal identity of the company actually remains the same; it is just that the ownership of its share capital has changed hands. However it is important to be aware that, in addition to the employees, you will also be taking responsibility to honour all existing employment contracts and the employees terms and conditions of employment. You will also be taking responsibility for any on-going disputes, tribunal claims and collective agreements relating to the employees.

It is essential to conduct thorough "due diligence" in order to fully understand exactly what and who is transferring. Ask for detailed information on any existing disputes or claims, including public and employer liability claims against the current employer so that these can be reflected in the transfer contract.

You can, after the purchase, change employee terms and conditions as the TUPE regulations do not apply. It is important to realise that you cannot unilaterally change terms and conditions without a consultation process with the employees concerned.

Any staff reductions following the purchase will need to follow the formal redundancy dismissal process. You should follow any policies and procedures that are in place. The first step is to place the affected employees "at risk" of redundancy whilst you consult with them or the staff representatives on ways to avoid the redundancies. Remember that if more than 20 employees (even if this number is made up from staff employed at separate sites) are “at risk” you must hold collective consultation meetings with elected staff representatives, which must then be followed by individual consultation.

A fair process with formal correspondence and meetings must be followed to ensure that risk of unfair dismissal claims are minimised. If the employees cannot be redeployed or there are no acceptable alternatives then, unfortunately the redundancy must be confirmed and individual consultation completed. Any redundancy payments will be based on employees’ age and length of service and will take into account any enhanced redundancy terms that the individuals may be entitled to with the company including the time before your ownership, (these should of course, be known from the due diligence process).

Potential issues with an Asset Sale

A transfer of assets does not usually constitute a TUPE transaction as the sale of equipment, contracts, stock and WIP, goodwill etc takes place without a transfer of employees, liabilities and cash assets, debtors, creditors and bank debt/assets. However, if the assets for sale only form part of a business staff may be involved if they are solely employed on the work that the transferring assets was used for.

The main question is what happens to those employees that will not transfer with the assets? In most cases the staff will be redeployed to other work in the business. If not, a redundancy situation may arise. As the arrangements for the transfer of the assets continues the employer will need to consider a redundancy process. In the first instance, the affected employees should be placed “at risk” of redundancy. You should then begin consultation with the staff representatives or individuals on ways to avoid the redundancy situation. The consultation should explore all the redeployment options before any conclusion can be made regarding redundancy. If the employees are soley focused on the work involving the assets transferring there is a real risk of a tribunal claim for unfair dismissal.

Conclusions

If there is any doubt over whether TUPE is applicable to your situation it is essential to seek legal advice. Changes to employment terms and conditions and dismissals in any situation must be handled correctly in order to avoid any Employment Tribunal claims. An experienced HR advisor can help you to achieve your aims and to minimise the risk of claims.

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Stirling Business Solutions Ltd can provide further information, help and advice on selling a business. Contact details are:-

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