Key Considerations for Employers Managing a Business Transfer or TUPE Process

Considering the employment implications early can help employers plan an effective transfer, allocate risk appropriately and avoid delays later in the transaction.

Does TUPE Apply
Establish whether the arrangement involves the transfer of a business or a relevant service provision change. The facts of the proposed transaction and the organisation of the affected workforce will need to be reviewed carefully.

Which Employees Will Transfer
Identify the employees assigned to the business or service being transferred. This may require a detailed review where employees work across several contracts, sites or functions.

Employee Liability Information
The outgoing employer should prepare accurate information about the transferring employees, including their employment terms and relevant claims or workplace procedures. This must normally be provided to the incoming employer at least 28 days before the transfer.

Employment Due Diligence
Review contracts, policies, pay, benefits, absence, disputes and potential liabilities before committing to the transaction. Buyers and incoming service providers should understand the workforce costs and risks they may inherit.

Information and Consultation
Both the old and new employers have duties to inform affected employees or their representatives, and consultation is required where measures are proposed. The process should begin early enough to allow genuine and meaningful engagement before the transfer.

Proposed Measures
Identify any changes the incoming employer expects to make, such as changes to working practices, location, pay dates or reporting structures. This information will need to be communicated as part of the TUPE process.

Third-Party Relationships
Identify employees who appoint or manage agents, consultants, introducers and other intermediaries. Appropriate due diligence and contractual controls can help manage risks arising through people acting on the organisation's behalf.

Employee Representatives
Check whether consultation should take place with a recognised trade union, existing employee representatives or newly elected representatives. Direct consultation may be permitted in certain smaller organisations or transfers.

Employment Terms
Understand that transferring employees will normally retain their existing employment terms and continuity of service. Changes made because of the transfer itself can be legally restricted, even where the employer wishes to harmonise terms.

Redundancy and Restructuring
Consider whether the transaction may lead to duplicated roles or other workforce changes. TUPE and ordinary redundancy requirements will need to be considered together before any decisions are made.

Transaction Documents
Ensure that employment liabilities are addressed through appropriate warranties, indemnities and information obligations. Clear drafting can help allocate responsibility between the parties if employee claims arise.

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