



A Problem Solved is a Problem Outsourced?



Beware the new TUPE Regulations! Pharma businesses often look to outsourcing in order to achieve efficiencies and cost savings, but changes brought into effect in April are already causing serious problems, reveals Nicola Walker of Hogan & Hartson

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The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) aim to protect employees by providing a consultation process and automatically transferring employment contracts across. The Regulations were recently updated to comply with a European Directive. During this process, the Government deliberately extended the application of TUPE and the way in which it applies to outsourcing. This has caught many employers unaware.

WHAT ARE THE CHANGES?

The 2006 TUPE Regulations deal with "service provision changes". This phrase has been coined to describe the three stages of outsourcing. The three specified situations are outsourcing, secondary outsourcing and in-sourcing. Outsourcing is the first stage when an operation may be contracted out from a business to a contractor. The second stage – secondary outsourcing – applies whenever one contract ends and another contractor is appointed. The third stage – in-sourcing – applies where the original employer decides to bring the operation back in house. The legislation clearly stipulates that any of these stages will all be a TUPE transfer. In order for TUPE to apply to any of these steps, three points need to be considered. First, before the transfer, there was an organised grouping of employees situated in the UK. Second, its principal purpose is carrying out activities on behalf of a client. Finally, the client intends that those activities will be carried out by the new contractor on a continuing basis.

A single specific event or a transfer of short-term duration is excluded. Similarly, the supply of goods for the client's use only is also excluded.

In the past, the 1981 TUPE Regulations have been interpreted to apply to service provision changes of this nature, but only where there was some degree of similarity in the operation before and afterwards. A detailed analysis had to be carried out to investigate whether the operation was labour-intensive or whether assets and equipment were involved, and at what point the facts triggered a TUPE transfer. These new Regulations can apply where a new contractor is appointed, even when there are substantial differences from the old contract. This extension can be extremely surprising for an employer who simply terminates

a contract with an outside provider, or an employer who decides to rearrange the way in which they organise aspects of certain outside contracting. Employers need to think long-term when considering this option.

WHAT ARE THE CONSEQUENCES?

First, there is a consultation process that must be followed. Under the old Regulations, liability for failure to consult fell on the new operator of the business. There is now joint liability between the old and new employer, so there is a far greater incentive for the outgoing employer to consult. Although consultation need not be limited to the outgoing employer's staff, the majority of issues that arise require consultation with those staff.

Additionally, the new employer is now entitled to receive certain information about the employees called the Employee Liability Information. This new requirement means that the outgoing employer has to collect together the key elements of information about the employees and pass this on to the new employer at least two weeks before the transfer. If the information is provided earlier, it may need updating to ensure that it is correct. The new Regulations also address insolvency scenarios and provide a special regime for these cases.

Matters can be particularly complicated when secondary outsourcing has taken place, or an operation is brought back in-house. At that stage, all the liabilities of the old contractor move on to the new contractor. Recent case law demonstrated this fact when an employee who had been dismissed for misconduct was, on appeal, reinstated by his previous employer. The result was that because his employment was deemed to have been continued through the transfer, he became an employee of the new contractor.

Pharmaceutical businesses must be alert to the possibility of the Regulations applying and consider it whenever there is any outside contracting underway. The analysis of TUPE should occur as soon as a possible outsourcing transaction is identified. This should ensure that the correct procedures are followed and potential liabilities minimised. ♦

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