Employee Transfers In Acquisitions And Outsourcing: Is It All About The ARD?

Of course, it's great to have a thorough and detailed workforce plan for any international bid, project or transaction. But sometimes, the wide variety of transfer laws in countries around the world, can cause unexpected challenges.

In any cross-border business acquisition or disposal any outsourcing, any bid to deliver outsourced services, and any insourcing, it is essential to focus early upon how local employee transfer laws will apply, in the affected jurisdictions. An employer may be keen to receive employees to enable it to continue to operate the business satisfactorily or deliver the outsourced services. Or an employer might prefer to receive none of the existing workforce because the work will be relocated, performed in a radically different way, or needs significant cost savings. Either way, in some countries these aims are simple to achieve, but in others highly complex.

The European Union's Acquired Rights Directive (ARD) is the best known example of a set of principles for the automatic transfer of employees. Yet even when considering transfers in different EU jurisdictions, there are key differences in how national governments have implemented it. For example:

- In the UK, the local law of "TUPE" adds a whole new type of employee transfer, unique to the UK. It is known as a "service provision change". As a result, I estimate that up to 30% more situations fall within the UK's employee transfer laws, than elsewhere in the EU. These arise when a service is outsourced by a customer, or there is a change of service provider, or a customer takes services in-house. So sometimes in an outsourcing project across the EU, the only people whose employment transfers are the employees in the UK
- Another EU country whose employee transfer laws contain some surprises is Germany. Both employers are jointly liable for issues arising before the transfer, and for one year afterwards. Affected employees must be given thorough details of aspects of the transaction, and can object within the following month; if the data has errors or omissions, that deadline runs until much later. There are complex rules about collective bargaining agreements and works agreements, whether these continue, whether the transferee can replace them with its own existing arrangements, or whether they get subsumed into individuals' employment contracts. Many outsourcings will not trigger Germany's transfer laws; and a merger, splitting a company, or spinning off part of it, is more likely to trigger transfer laws than in some other EU countries. Finally, Germany's Works Council Constitution Act can give works councils the power to delay a business transfer, if the employers fail to consult and inform them correctly
- Another EU country with some surprises is The Netherlands. The transferor and transferee generally have to consult the works council, early enough for it to be able to influence the decision on whether and how to proceed with the transaction. This involves at least one meeting with the works council, providing follow-up information, and considering the points it makes. If the works council is against the transfer, the transfer must be delayed by at least a month. The works council can also apply to the Enterprise Chamber, which can rule against the transaction going ahead
- In France, the sanctions for breaching consultation rules are criminal as well as civil. The criminal sanction is usually a fine, though theoretically it can be a year's prison sentence - and the transaction may be put on hold until consultation is completed. Both employers' works councils must be informed and consulted on the proposed transfer, and this process must be completed before any decision is made or any binding document is signed. Consultation runs for at least 15 days (though often collective agreements specify longer), then each works council has up to one month to issue its response. So works councils can delay, but not veto, any employee transfer. Health & Safety committees may need to be consulted, and sometimes prior authorisation of the Labour Inspector is needed. Employees unlawfully dismissed as part of a transfer can achieve reinstatement as well as financial awards, and both employers can be held liable
- Finally, throughout the EU, treatment of pensions issues varies widely.

Outside the EU, some countries have their own employee transfer laws - and there is great variety in how these operate. Like the ARD, they might be triggered by the acquisition of a business, an outsourcing, a change of outsource provider, or an insourcing.

Some countries have closely shadowed Europe's ARD, others have introduced something which has similarities but radical differences too.

Although most countries have no transfer laws, this creates its own problems when a purchaser or a new service provider needs competent labour in place from day one. If there are no employee transfer laws, the new provider or owner has to recruit people - with unpredictable results. For example, some people would rather stay with their old employer, or wait to be dismissed and trigger a redundancy package.

Here are some summary examples of transfer rules outside the EU:

- In Singapore, the protection given to junior employees by the Employment Act has recently been extended and applies to many managerial and executive level staff too. These people have automatic transfer rights, similar to the ARD, so it's essential to work out who's covered, and who will not transfer and might therefore need to be recruited instead - perhaps receiving a contractual severance payment too. In some ways, transfer laws are tougher on employers than in many EU countries, as the Commissioner of Labour can delay or prohibit a transfer, or can set conditions; and unlawful dismissals can lead to reinstatement, as well as compensation
- South African law is similar to the ARD, unlawful dismissals can lead to reinstatement, and both employers have joint and several liabilities for a year after the transfer, and for events before the transfer. Consultation requirements are relatively mild, unless the employers want to agree a departure from the standard transfer laws
- Mexican law uses the concept of a voluntary 'employer substitution letter' signed by the employee, or a procedure

before the country's Labour Board, to achieve employee transfer. This applies in asset sales, but not outsourcings. The employers share liability for six months after the transfer

- In the US, there are no ARD-style transfer laws, so termination and re-hire is the method for the new owner in an asset purchase, or the new provider of outsourced services, to retain any of the workforce. But other laws might be triggered, such as those on notifying employees, unions and/or government about a mass layoff or business closure. It is also common for employment liabilities to pass to the purchaser of assets or stock, and collective bargaining agreements may pass too. Plus, there may be more cost issues to negotiate between employers.

These are brief summary indications of some transfer laws. Above all, don't assume that:

- The ARD is the same throughout the EU
- Outside the EU, there's nothing like the ARD; and
- Being free to use termination and re-hire will always make life easier.

The reality is far more complex. The ARD has lots of variety, and there are some similar laws elsewhere. Where there are no transfer laws, employers may use termination and re-hire, but this brings its own uncertainties, and the challenge of getting a good workforce in place, on day one.

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