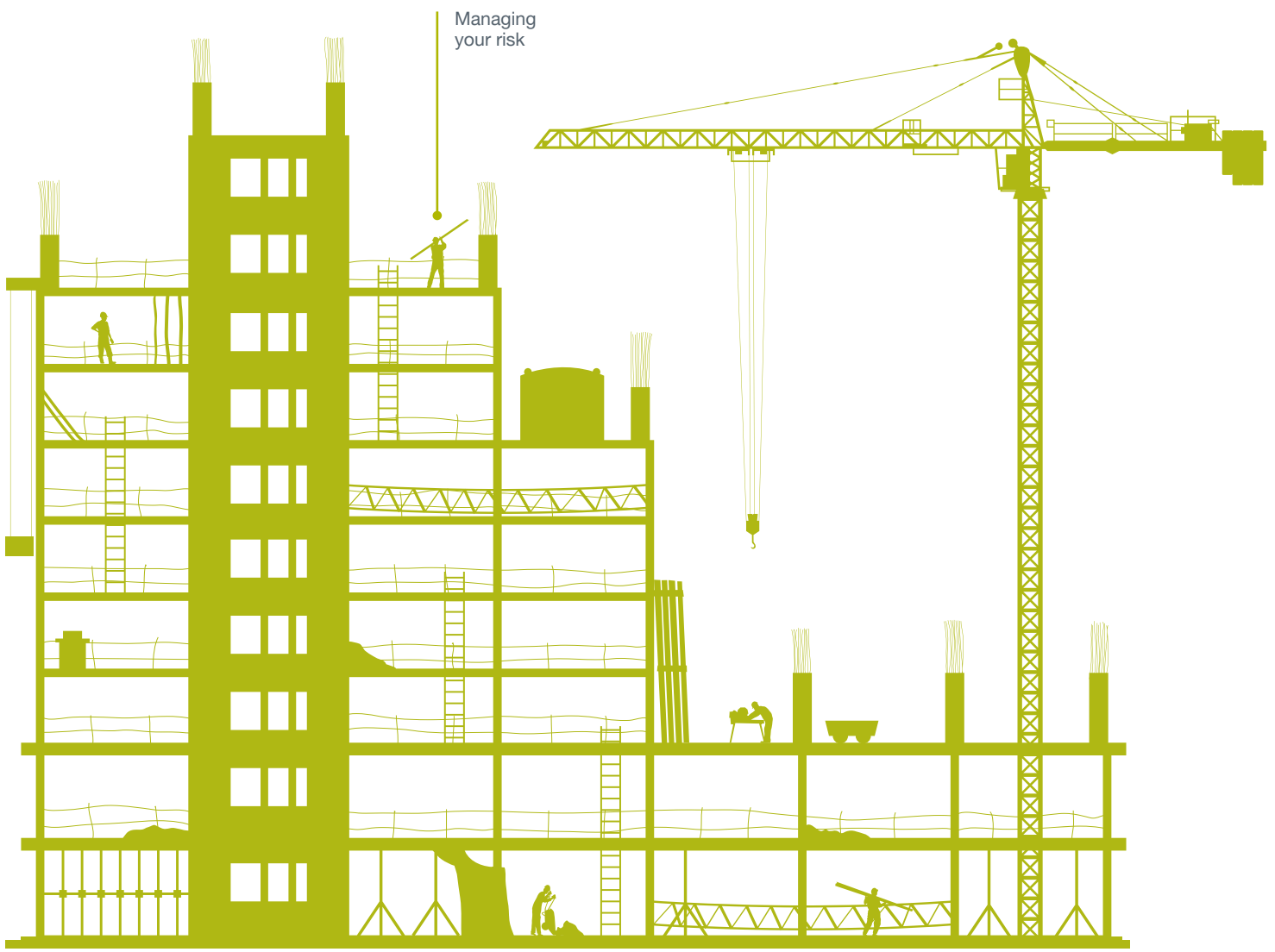
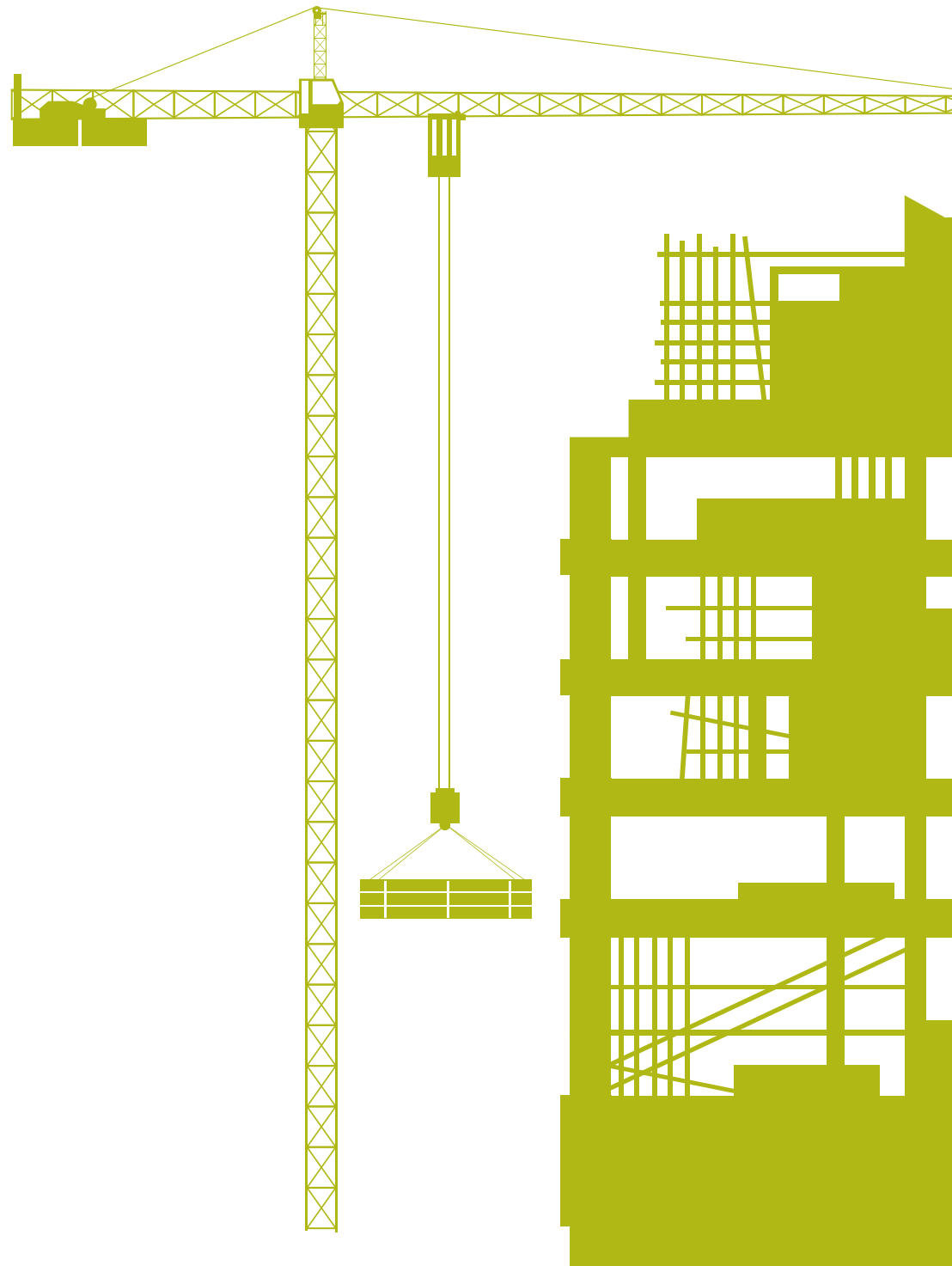


TRANSFER OF UNDERTAKINGS PROTECTION OF EMPLOYMENT

Considerations for companies when transferring employees





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INTRODUCTION

Transfer of Undertakings Protection of Employment (TUPE) regulations create risk and insurance implications for contractors whenever an employee is transferred. It is important to ensure your company is protected.

BE TUPE AWARE

If your business is considering taking on another company's employees, don't get entangled in TUPE-related issues.

Avoid expensive, complicated claims by applying due diligence when dealing with transferred contracts.

HOW THIS TECHNICAL PAPER CAN HELP

This whitepaper examines the TUPE-related challenges that arise from the transfer of employees.

Topics covered include:

- Understanding the background to TUPE legislation
- Topical issues surrounding TUPE
- Risk and insurance issues faced by companies
- Actions companies can take to protect themselves.



WHAT IS TUPE AND WHO DOES IT PROTECT?

TUPE legislation applies to companies of all sizes.

It is designed to preserve employees' terms and conditions and protect employees' rights (such as employment terms and conditions and length of service) when the business or service they work for transfers to a new employer.

The legislation impacts both the employer who is making the transfer (the transferor) and the employer who is taking on the transfer (the transferee).

The transfer may occur as a consequence of:

- A sale
- A merger
- A change of ownership
- Outsourcing
- Insourcing
- A contract to provide goods and services being transferred.

When TUPE applies, the transferee automatically becomes the employer of the transferred employees from the point of transfer. Each transferred employee's service is deemed to be continuous.

Employees have the right to the same terms and conditions as previously enjoyed in their employment prior to the transfer. This includes protection from dismissal and redundancy, unpaid wages, bonuses and holidays as well as the benefits of any collective agreements that were in place at the time of transfer.



WHY TUPE IS TOPICAL

For several years, both the public sector and parts of the private sector have outsourced key functions to the private sector, engaging construction, facilities management and support services companies in particular.

When this occurs, it is customary for existing employees to be transferred to the new private sector employer (and also to any subsequent employers) as the service contracts move between different providers. Some employees will therefore have been involved in many of these transfers.

HIGH PROFILE CASUALTIES

The recent high profile collapse of Carillion has brought into sharp focus many issues within the construction industry, but one of those issues which is less well understood is the potential impact of TUPE transfers.

Carillion was a major outsourcing provider to the public sector with 450 public sector contracts including public private partnership (PPP) contracts constructing roads, hospitals and schools, as well as support services to these and other sectors. As a result, TUPE transfers would have been a common aspect of Carillion's business and potentially may continue to be so following its liquidation.

HOW WILL TUPE AFFECT TRANSFERS?

The industry is responding. Some construction companies have been stepping in to take on contracts though companies involved in joint ventures are faced with additional issues when a partner collapses, such as having to take over contracts in their entirety.

TUPE issues will arise in some circumstances, in relation to movement and redeployment of the workforce, although the manner in which TUPE legislation applies to an insolvency situation requires specialist legal advice (and is therefore outside the scope of this paper).

Businesses that are nimble in their approach to capitalise on market opportunities may do so at their own peril if they do not appreciate the potential consequences of TUPE. Regardless of the reason for the transfer, the issues and potential pitfalls are never far below the surface.



EMPLOYER'S LIABILITY CLAIMS

APPORTIONING LIABILITY

At each transfer under TUPE, the new employer accepts responsibility for all historic legal liabilities owed to the transferred employees, including those for work-related injury or disease.

Effectively, if legal proceedings are issued in connection with an employer's liability (EL) claim, they should name the new employer, even though they were not the employer at the time of the loss or exposure.

Claimants' solicitors, however, often make mistakes and issue against the wrong defendant. It is essential that processes are in place for these to be promptly struck out and the correct defendant sued in their place.

LEGAL PRECEDENTS

Fortunately, in most instances, the claim will still be dealt with by the insurers of the original employer, as set out in the case of *Bernadone v Pall Mall*. This case clarified that, in addition to the transfer of liability in tort for personal injury, the transferor's right of indemnity under its EL insurance also transfers to the transferee.

An employee's claim will therefore attach to the transferor's policy in respect of the relevant years of the injury or disease, even though the claim will effectively be the responsibility of the transferee.

From the transferor's perspective it is also important to note that the transferee may have limited interest in co-operating with mitigation of the claim, such as in relation to the completion of enquiries.

POTENTIAL ISSUES

EL EXEMPTIONS

What happens when there is no insurance cover to transfer? It is compulsory for the majority of employers to carry EL insurance. There are a few notable exemptions however; these include:

- Most public organisations including government departments and agencies
- Local and police authorities
- Health service bodies including the NHS
- Many organisations that are financed through public funds.

In cases where the transferor did not insure, there is effectively no benefit to transfer and the transferor might resist taking over the case.

Often, legal advice will be needed to consider the contractual obligations and insurance coverage available and whether, for example:

1. The exempted transferor can be joined into the action under the Civil Liability (Contribution) Act 1978 as being jointly and severally liable for the injury/disease caused.

The Act states that the transferee may recover a contribution from 'any other person liable in respect of the same damage'. The relevant time to determine the liability of that other person to make contribution is the time when the damage is suffered. Plainly when the employee suffered his injury, the Local Authority as his

employer was liable. The fact that the liability of the Local Authority may thereafter cease to be enforceable by the employee, or may even cease to exist, is irrelevant, unless it ceases for example by virtue of the expiry of a period of limitation.

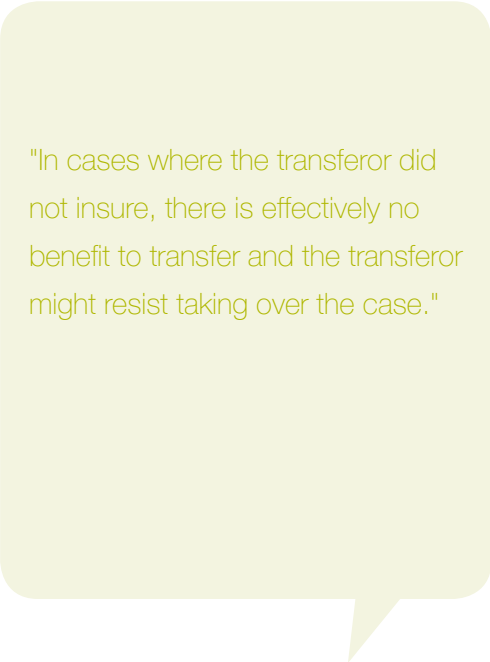
2. Where the transfer has occurred after 2006, section 17 of TUPE 2006 makes the exempted transferor jointly and severally liable under the Civil Liability (Contribution) Act 1978 when they are uninsured. If the transfer was made before that time, the 1981 regulations will apply and are silent on this point.

REIMBURSEMENT AGREEMENTS

Complications may also arise where the inherited EL insurance policy requires that the original policyholder is subject to a large reimbursement condition (similar to an excess).

While EL law states that insurers must deal with - and pay for - the claim in the first instance, the transferor who was originally required to reimburse the insurer may argue that the reimbursement obligation has also passed to the transferee at the point of transfer.

In the case of an insolvent transferor, the insurer may also attempt to directly enforce the contractual reimbursement against the transferee. As this remains a serious point of contention, legal advice may be needed to consider what can be technically challenging issues.



"In cases where the transferor did not insure, there is effectively no benefit to transfer and the transferor might resist taking over the case."



EMPLOYEE BENEFITS

Whilst the key focus of this paper is the issues relating to EL insurance it is worth noting that the softer employee benefit issues – which are often overlooked - can also create some unknown costs.

Personal accident benefits might have featured in previous employment contracts. For example, a transferor might have agreed to 24-hour coverage at a multiple of annual salary, or they might have included free holiday insurance for the employee and/or family.

Pensions, medical, permanent health insurance (PHI) and other employee benefits also need to be carefully considered. In the event of an incident, the new employing company could incur a significant additional cost if not offset by relevant insurances.





“I’M CONCERNED ABOUT TUPE. WHAT DO I DO NOW?”

DUE DILIGENCE – BE PROACTIVE

It is essential that companies intending to take on staff where a TUPE situation may apply carry out thorough and detailed due diligence.

For transfers taking place on or after 1 May 2014, the transferor has a duty to provide information about the transferring employees to the transferee not less than 28 days before the transfer.

This information includes details such as identity, age, employment particulars, disciplinary and grievance records, details of collective agreements and details of any outstanding claims the individual has against the transferor.

While useful in building a picture of the transferring workforce, the standard information provision requirements within TUPE do not go far enough to protect the transferee. Proactivity is important as it is the transferee who will potentially retain future liabilities.

The quality of information held by the transferor is therefore key. Where information is poor, additional detail may need to be requested, or the transfer (or not) of specific financial liabilities may need to be included in the wider contract before finalisation.

The transferor’s full EL insurance history must be requested and, where possible, information and documentation should be obtained and reviewed to understand the full employment history of each individual being transferred. This might be an onerous task, but it may save future costs.

A transferred employee could have worked at, and transferred between a number of different service providers. Information should go all the way back to the original organisation, be it public or private sector. Any liabilities incurred during these successive periods of employment will transfer to the new employer.

SEEK HELP FROM ELTO

Where records held are incomplete, the Employers Liability Tracing Office (ELTO) may be able to provide some assistance in tracing historic cover. However, the recording of EL policies only became compulsory from April 2011.

The previous voluntary tracing service, the Employers Liability Code of Practice (ELCOP), only came into effect in 1999 though usage and success rates were low. On historic and potentially expensive disease claims, such as those involving exposure to asbestos, the insurance period of interest may be decades prior to discoverable records. This therefore highlights the importance of collecting quality data prior to the transfer.

ENSURE CO-OPERATION FROM THE TRANSFEREE

It was previously noted that the transferee may have limited interest in co-operating with mitigation of the claim, such as in relation to the completion of enquiries.

To endeavour to ensure the transferee acts promptly to mitigate any claims that may attach to the transferor, the transferor may wish to consider additional contractual obligations at the point of transfer which require suitable co-operation from the transferee.



TUPE CLAIMS: HOW BEST TO INSURE YOUR COMPANY

Your EL insurance policy may offer little or no retroactive cover for TUPE liabilities.

If this is a risk for your business, bespoke extensions to standard EL policies are available which offer further protection against potential TUPE liabilities.

A TUPE extension provides additional security to a transferee, especially where gaps appear in an employee's insurance history from their past employment, as long as this falls within the same period of employment transference.

A typical TUPE extension will:

- Extend the policy to provide cover for injury sustained prior to the employee transfer
- Exclude cover to the extent that the insured (the transferee) is indemnified under any other policy of insurance
- Respond on a claims-made basis. This means that the policy responding is that which is in place at the time when the claim is made, rather than relying on the policy which was in operation at the time the injury occurred. This will impact on claim reporting requirements/timescales
- Exclude the extended TUPE coverage following any further transfer of the employee; in this circumstance the liability should then reside with the employee's new company

- Exclude cover provided under any joint ventures or automatic acquisitions clause unless formally agreed by insurers
- Typically exclude asbestos liabilities
- Be subject to an aggregated limit.

Given the uncertainty surrounding whether reimbursement provisions transfer with the policy, it is worth considering the extent of cover available under your TUPE clause. Is the wording broad enough to pick up the liability should it attach post transfer? This is an area in which your broker should offer advice.

However, the best way to avoid an issue is to review the transferor's EL programme in advance of the transfer and ensure the reimbursement provision risk is eliminated from the transfer agreement.



MANAGING YOUR RISK

There is no substitute for preventative risk management. Your actions should include:

- Seek the transferor's full EL history
- Obtain details of each individual employee's history of TUPE transfers, plus the relative EL insurance history (possibly from employers prior to the transferor).
- Make use of the EL Tracing Office (and potentially the ELCOP) where information is missing
- Seek specific details of the transferor's insurance coverage, especially any reimbursement agreements in place between the transferor and insurers. Where reimbursement provisions exist, seek to formally establish that reimbursement liabilities will remain with the transferor post transfer
- Seek an indemnity from the transferor or the client awarding your contract as part of the transfer agreement
- As the transferor, establish a contractual obligation to proactively cooperate in the management of transferee claims in order to mitigate claims costs
- Ensure your current insurance policy coverage is optimised with an up to date TUPE extension.



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