

OUTSOURCING

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This guidance brings together and summarises recent developments and deals with Personal Data Transfers, TUPE and Pensions

Data Transfers

Outsourcing often involves transferring personal data about employees, customers, suppliers or other contacts to service providers. In order to comply with the Data Protection Act 1998 ("the Act") in relation to such transfer, businesses must ensure that they adhere to the Act's principle of fair processing. This broadly involves ensuring that either the business has the consent of the individual to the transfer of their data; the transfer is necessary for the performance of a contract with that individual e.g. a travel agency booking a hotel at the request of its customer; the transfer is required by law; or the transfer is necessary for the legitimate purposes of the business. If the information is sensitive data, eg. health information, more stringent conditions apply and the individual's explicit consent to the transfer will generally be required.

When outsourcing to a third party, a business is required to remain in control of the personal data provided to that third party by ensuring that that third party processes it responsibly. The Act requires the outsourcing business to have a contract in place with that third party that requires them to use appropriate technical and organisational measures to protect the personal information that they are processing on its behalf. Where information is stored electronically, this may include having appropriate software and passwords in place to prevent unauthorised access to the information.

The contract should also require the third party to only use or disclose the information in accordance with the instructions of the outsourcing business. If the third party is outside of the EEA (European Union + Norway, Lichtenstein and Iceland), the outsourcing business has an additional responsibility to ensure that the information will be adequately protected in the recipient country. The Information Commission ("IC") has approved the following countries outside of the EEA as having legislation that adequately protects personal information: Argentina, Canada, Guernsey, Isle of Man, Switzerland and the USA's limited safe harbour policy. The Act and the IC's guidance further explain how to comply with the obligation in respect of transfer to other countries. In addition the IC recommends that, as a matter of good practice, businesses should select a reputable organisation, make sure that their contract with that service provider is enforceable, make sure that the service provider has appropriate security measures in place and that it carry out checks on its staff, audit the service provider and have procedures in place for the service provider to report security breaches and their handling.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 came into force on 6 April 2006 replacing the 1981 Regulations. There is no change to the primary aim of the legislation which is to transfer all employees engaged in a discrete activity, where that activity changes hands, on their existing terms and conditions of employment.

However, there are new provisions of particular significance to those involved in providing or receiving outsourced services. These are firstly to clarify that TUPE does apply in service provision cases where the service is labour intensive and does not involve the transfer of equipment or assets. The Regulations now specifically state that they will apply where:

- a) a client outsources an activity for the first time;
- b) a client ceases to outsource a service to a contractor and instead outsources the service to a different contractor; and
- c) a client ceases to outsource a service to a contractor and brings the activity back in-house.

The second clarification made by the Regulations is as to what information needs to be provided by the transferor to the transferee about the transferring employees and when, i.e. :

- i) identity and age of each employee;
- ii) basic particulars of employment;
- iii) details of disciplinary or grievance proceedings involving an employee in the previous 2 years;
- iv) details of any actual or likely court or tribunal case, claim or action outstanding or any case or action brought in the previous 2 years (whether or not concluded).