What is TUPE?
Pensions and wider employee benefits are often a thorny issue in mergers and acquisitions. What are transferring employees entitled to and how does this affect harmonisation of benefits with those already employed? The Transfer of Undertakings (Protection of Employment) Regulations were created in order to protect the interests of employees in such circumstances.

Transferring employees’ terms and conditions
The Regulations require that employees’ terms and conditions, including their remuneration and benefits packages, must be retained when their employment is transferred under TUPE. So if the acquired business provided a Life Assurance benefit of four times annual salary, the same benefit should continue to be offered.

Non-occupational pensions
Where the previous employer made contributions to non-occupational pension schemes such as stakeholder or Group Personal Pensions (GPPs), those contribution levels must be maintained. However, the new employer is normally perfectly entitled to direct those contributions into a GPP or stakeholder arrangement of their choosing.

Occupational pensions
Under TUPE the new employer is not required to continue identical occupational pension arrangements for transferring employees. Instead, transferring employees must be provided with access to one of the following:

- a defined benefit scheme, provided it meets certain statutory standards (the reference scheme test) or an alternative standard; or
- a scheme which provides benefits based on an employer contribution of at least 6% of pensionable pay plus member contributions; or
- a money purchase scheme (including GPPs) where the employer matches employee contributions up to at least 6% of basic pay.

However, employers and transferring employees are able to validly opt out of these obligations and agree alternative arrangements at any time after the transfer has taken place.

Harmonising pensions and wider benefits
Normally it makes sense to harmonise benefits across equivalent grades and types of employee. However, “according to the way in which the courts have interpreted the Acquired Rights Directive, the desire to achieve ‘harmonisation’ is by reason of the transfer itself”…meaning that such moves can be challenged. In time, harmonisation can be achieved, although the regulations are silent as to how much time must elapse for the link to the transfer to have disappeared.

Of course, no one is likely to challenge moves to harmonise to the highest common denominator and this may be a sensible path to follow, perhaps over a year or two if the costs of harmonisation are significant.

More information
Transfer of Undertakings (Protection of Employment) Regulations 2006

Scheme reference tests

Guidance on TUPE from Dept. for Business, Innovation & Skills
PDF document available to download from this page