

# DBULLETIN

## Hiving Off Care Operations: Managing the Process

Hiving off the care operations into a separate group company – or to a third party - can provide greater transparency for a registered provider. Regrettably, all too frequently, for those closer to the operations, managing the process of transferring the care division may feel like taking on a new job. That is – in addition to their existing day job! This note describes some practical steps to take at the outset to facilitate the transfer.

Unlike with an outright transfer, which ends with the post signing drink, the split only marks the start of the relationship between the two organisations. But the benefits cannot be guaranteed. For those contemplating hiving off care operations, forward planning is an essential part of the timetable. The object is to minimise disruption in the provision of the existing service.

Right at the outset, it is important to clarify the division of functions. It is also critical, at an early stage of discussions, to identify who, within the respective teams, is responsible for “managing” or “owning” the segregated division. Then having done that, assessing how much support he (or she) will have from colleagues during the negotiations.

### Employees

It will be necessary to identify the relevant employees engaged on care work.

As it is likely that the activity being transferred contains the necessary elements of a business and for service can be separated from the other activities of the registered provider (and, therefore, forms a discrete part of the business) – there is a strong likelihood that ‘TUPE’ (The Transfer of Undertakings (Protection of Employment) Regulations 2006), will apply. When TUPE applies to a transfer of a business (or part of a business) or service, those employed in the business, at completion of the transfer, will transfer automatically to the recipient on the same terms and conditions of employment.

Accordingly, it will be necessary for both the transferee entity and the registered provider to

consider the following:-

- will any of the key staff involved in running the care business, who would otherwise automatically transfer need to be retained by the registered provider? For example, will the registered provider retain management of the homes? If so, steps need to be taken for the buyer, the registered provider and the relevant staff to agree that certain key staff on the housing management side will be retained by the registered provider so that it does not lose the “brains” or corporate memory;
- are there any relevant staff who also work for part of their time elsewhere in the registered provider? If so, where are they to end up?;
- in future will the care operations want to contract out certain services which means that some of the registered provider’s existing staff may not be required?

Another result of the application of TUPE is that the transferor has an obligation to inform and consult collectively with employee representatives. While this may just sound like good HR sense, it is important because it affects the project’s timetable. Information must be supplied long enough before a relevant transfer” to enable proper consultation to take place.

If there is a failure to consult, any affected employee may obtain what is known as a “protective award” of up to 13 weeks’ actual pay (unlike redundancy and unfair dismissal compensation, there is no statutory limit on the amount of the week’s pay). Consultation

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takes place with “appropriate representatives” who will be recognised trade unions where they exist or in other cases representatives elected by the workforce.

A potential difficulty in consultation is confidentiality in the very early stages of the project. Regrettably, this is not addressed in TUPE – but does need to be considered in advance. In practice, the registered provider may be willing and able to agree to impart information to the representatives on a confidential basis before the proposal is made public. There are potential difficulties with this. For example, there can be no guarantee that the representatives will not breach the confidence. What is more, if they do so there will be no obvious recourse.

## Retention of Key Staff

If, as part of the reorganisation a sale is to be negotiated, consideration may need to be given to putting in place some incentive arrangements at the outset to facilitate marketing and the negotiation process.

This can give rise to Schedule 1 issues so the reasons for providing any incentive arrangement are carefully documented at the outset of preparing the timetable.

## Pensions

This may become a commercially very significant area, although TUPE does not operate to transfer pension rights and obligations under occupational pension schemes unless such benefits are not related to old age, invalidity or survivorship. In practice, it is only public sector schemes that offer pension benefits outside of this such as early retirement or a redundancy. However, it is important that pension issues are identified at an early stage particularly if exit charges may be triggered.

## Information Technology and Communications

- Has any consideration been given to the structuring of such shared use/access (such as

hiring of shared systems prior to completion of a disposal, transitional services arrangements, sub-licensing of software)?

- Have any steps been taken:
  - to locate all relevant IT and telecommunication contracts; and
  - to arrange third party consents to the transfer of any computer systems or software.

## Property

Apart from identifying what properties will be sold and the location of the relevant deeds, consideration will need to be given to whether the registered provider want to retain all the properties – or will the transferee be allowed to pick and choose?

## Local Authority Contracts

It will be critical to any funder of the purchase of care that the current contracts with the care division of the registered provider will be capable of assignment to the transferee.

## Preparation for a transfer to a third party

Before assembling materials for disclosure or information packs, ensure that the HR, Finance, IT and other departments of the registered provider are each given time to review them so that their views can be taken into account. This procedure is to minimise the risk that important issues which may affect price are not ignored, or key points causally “thrown away” at the outset.

## Internal Project Management Issues Checklist

We set out below in a checklist to assist in project managing the early stages of the transaction.

- Who is moving? Who are in the core management team and who is going “over the wall”.

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- Who is in charge? Identification at an early stage who is responsible for “managing” or “owning” contract and assessing how much capacity they will have during the deal then get them to:
  - identify among themselves who will resolve internal “turf wars”, so any external lawyers involved do not get involved in internal issues.
  - establish an umpiring procedure to settle any internal issues between departments.
- Storing key documents – Will there be a central repository of key documents (such as property documents, contracts with customers, specimen terms of employment, pension information)?
- Preparatory work
  - consider data protection issues.
  - identify assets (and liabilities) to be transferred.
  - ensure other departments understand what’s wanted from them and why.
  - identify a “chaser” and verify that adequate internal resources are available in the different departments.
- Business issues
  - Funding and cashflow
  - Services to be provided, if required by the transferee, on a transitional basis by other departments of the registered provider (including costs and standards) – for example accounting, IT (hardware and software) and vehicles (the ‘umbilical cord’)
- Measuring existing service levels
- Employees
  - Identifying staff in the care division; for example
  - seconded staff.
  - relevant employers in other divisions.
  - ensuring proper consultation (for example with the unions and staff representatives).
  - maintaining confidentiality.
- Accommodation
  - what sites will be transferred.
  - will there be a licence or deskpace agreement for the use of any shared buildings (particularly offices).
  - are there sharing provisions for any sites where the buyer and seller sharing accommodation in the relevant Landlord’s leases.
- Legal document handling – aim to cut down legal fees
  - get as full as possible initial drafts.
  - Put in system for ensuring that each team leader gets comments from relevant initial commercial colleagues and “stakeholders” (either a signing off procedure or “speak up or shut up”)
  - Ensure that internally all are “on side” before the documents go out.

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