

Transferring Employees on an Outsourcing in the United States: Overview

Law stated as at 01 Jul 2017

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A Q&A guide to outsourcing in the United States.

This Q&A guide gives a high level overview of the rules relating to transferring employees on an outsourcing, including structuring employee arrangements (including any notice, information and consultation obligations) and calculating redundancy pay.

To compare answers across multiple jurisdictions, visit the [Transferring employees Country Q&A tool](#).

This Q&A is part of the multi-jurisdictional guide to outsourcing. For a full list of jurisdictional Q&As, visit www.practicallaw.com/outsourcing-guide.

For the general rules relating to outsourcing, visit [Outsourcing: United States overview \(3-501-5071\)](#).

TRANSFER BY OPERATION OF LAW

1. In what circumstances (if any) are employees transferred by operation of law?

INITIAL OUTSOURCING

In the US, employees are not transferred by operation of law, and parties have the freedom to contract for the rebadging of employees from a customer to an incoming supplier. However, many outsourcing

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transactions in the US have international scope for global customers, and in the EU (and certain other jurisdictions), employees located in such jurisdictions are transferred by operation of law, which contracting parties in the US must account for.

CHANGE OF SUPPLIER

Parties have the freedom to contract for the rebadging of employees from an incumbent supplier to an incoming supplier. However, suppliers are often hesitant to agree to rebadge employees to their competitors.

TERMINATION

Parties have freedom to contract for rebadging employees from an incumbent supplier back to a customer. However, suppliers are often hesitant to agree to give away employees, and suppliers generally request a percentage cap on any transfer, and the cap often does not apply to employees initially rebadged from the customer.

2. If employees transfer by operation of law, what are the terms on which they do so?

GENERAL TERMS

In the US, employees are not transferred by operation of law. For the transfer of employees by operation of law outside of the US, contracting parties in the US generally agree to allocate responsibility for this in advance.

At the front end of a transaction, customers generally indemnify suppliers for the transfer of any customer employees by operation of law outside of the US, and at the back end of a transaction, suppliers generally indemnify customers for the transfer of supplier employees by operation of law outside of the US.

PENSIONS

A customer's obligation to provide pension commitments to its employees generally terminates on the transfer, unless the employee has a vested right to a pension prior to termination. It is common for customers to indemnify a supplier for the transfer of any pension liabilities by operation of law outside of the US.

EMPLOYEE BENEFITS

A customer's obligation to provide benefits to its employees generally terminates on the transfer. However, it is common for customers to provide some severance benefits to its employees.

OTHER MATTERS

Customer employees may have a collective bargaining agreement with the customer, and if the customer employees are transferred to the supplier, this may be relevant for the supplier.

REDUNDANCY PAY

3. How is redundancy pay calculated?

Unless granted in a collective bargaining agreement or an employment agreement with the applicable employee, there is generally no redundancy pay in the US.

HARMONISATION

4. To what extent can a transferee harmonise terms and conditions of transferring employees with those of its existing workforce?

Suppliers are generally free to harmonise terms and conditions of transferring employees with those of its existing workforce. However, suppliers may agree to match existing employment terms to incentivise the transfer of employees.

DISMISSALS

5. To what extent can dismissals be implemented before or after the outsourcing?

Unless an employee has an employment contract or is subject to a collective bargaining agreement, employees in the US are generally employed at will and may otherwise be terminated without cause. However, the US also has robust employment laws on both a state and federal level (in relation to minimum wage, discrimination and medical leave).

NATIONAL RESTRICTIONS

6. To what extent can particular services only be performed by a local national trained in your jurisdiction?

The US does not have general requirements for work to be performed by local nationals. However, work for the US Government or its contractors (which require security clearances) may be required to be performed by a US citizen, and non-citizens must be authorised to work in the US. When outsourcing certain types of regulated services, there may be licensing requirements for personnel, and the staff would be required to qualify for and obtain such licences.

SECONDMENT

7. In what circumstances (if any) can the parties structure the employee arrangements of an outsourcing as a secondment?

Suppliers often provide staff augmentation services to customers. Unless there are regulatory reasons for an actual employee being required to perform select services, the parties are generally unrestricted in structuring such arrangements. In structuring a secondment, the parties should be careful to avoid any joint employment claims or issues.

INFORMATION, NOTICE AND CONSULTATION OBLIGATIONS

8. What information must the transferor or the transferee provide to the other party in relation to any employees?

Neither party is legally obligated to provide information to the other party regarding employees.

9. What are the notice, information and consultation obligations that arise for the transferor and the transferee in relation to employees or employees' representatives?

At federal level in the US, the Worker Adjustment and Retraining Notification Act requires most employers with 100 or more employees to provide at least 60 days advance notification of mass redundancies. This will apply to the extent where there are:

- 500 or more employees at a single site being laid off.
- 50 to 499 employees at a single site being laid off and where this constitutes at least 33% of the employer's total, active workforce at a single employment site.

On a state level in the US, some states have enacted similar legislation requiring advance notice or severance payments to employees being laid off as part of a mass layoff.

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Areas of practice. Outsourcing and technology; financial services; healthcare; insurance; life-sciences; manufacturing; telecommunications and utilities.

Non-professional qualifications. JD, University of Virginia School of Law, 1996; MA, Yale University, 1993; BA, College of William & Mary, Phi Beta Kappa, 1990.

Recent transactions

- Helped clients to structure, negotiate and document domestic, near-shore and off-shore, commercial relationships related to complex, global, outsourcing strategies in North and South America, Europe, Asia, the Middle East and Africa.
- Worked on hundreds of sole-sourced and competitively-bid sourcing transactions throughout the world, including business-process and information technology outsourcing arrangements, software licensing, support and distribution transactions, technology development and systems integration agreements, joint ventures, strategic alliances and cross-border technology transfers.

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Non-professional qualifications. Received JD from Columbia Law School; William Rainey Harper Fellow at the University of

Chicago, MA in English and American Literature; graduated magna cum laude from Carleton College.

Recent transactions

- Negotiated complex IT outsourcing services agreements involving cloud computing, IT infrastructure and software procurement, systems integration, software development and maintenance, voice and data services and disaster recovery and business continuity.
- Negotiated business process outsourcing (BPO) agreements for call centres and customer support services, finance and accounting services, HR administration, enterprise procurement services, government passport and visa services, research and development services and supply chain management. His work in this area includes advising clients on all stages of the contract process, including RFP preparation and evaluation, vendor diligence, negotiation of definitive agreements and ongoing advice concerning governance, dispute management and amendments.
- Represented clients in connection with risk and compliance assessments of data privacy policies and practices, data breach preparedness and response, regulatory investigations of data practices, behavioural advertising campaigns and “privacy by design” analyses of products and services in social media and mobile e-commerce, corporate information governance programs, international data transfers and compliance with US state and federal data privacy and information security laws.

Professional associations/memberships. Recently elected to The American Law Institute, the leading independent organisation in the US producing scholarly work to clarify, modernise, and otherwise improve the law.

Publications. Author of numerous articles on privacy and data security and since 2000 has co-chaired Practising Law Institute’s Annual Privacy and Data Security Law Institute. Bloomberg BNA recently published *Privacy & Data Security Practice Portfolio Series, Cybersecurity and Privacy in Business Transactions: Managing Data Risk in Deals*, March 2015.

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