August 2015

EMPLOYMENT OF TES WORKERS FREQUENTLY ASKED QUESTIONS (FAQ)

During the course of the delivery of services it may be that a Client organisation may wish to employ directly a TES worker previously supplied to them by a TES provider. Because there are several considerations, ranging from legal to contractual, this FAQ seeks to provide the answers to some of the more common questions and in so doing highlight the potential risks that may arise for the parties involved.

Q: Under what circumstances might a TES worker move from the employment of the TES provider to the Client organisation?

There are many reasons why a TES worker may become employed directly by the client However it should be noted that whether the decision is unilateral (driven by one party, usually the Client) or consultative there are formal procedures that should be followed to ensure that all legal and statutory obligations are met. Failure to do this can lead to high risk for all parties – Client, TES and worker.

Q: Can the TES worker simply transfer from the payroll of the TES provider to the Client?

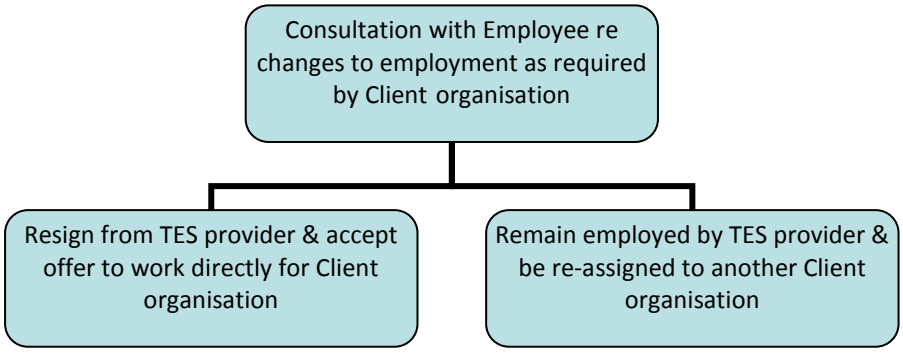
No. Employment records, employee registrations with bodies such as Bargaining Councils, SETA, UIF, COID, and others cannot simply be transferred to that of the client. A formal termination should take place to allow for a termination of employment with the TES and an employment/engagement by the Client.

Q: Would it always be considered to be a s197 transfer (in terms of LRAA) if the employee moves from working for the TES provider to working directly for the Client?

No. However, failure to manage the process correctly might lead to the process being deemed to be a transfer of a going concern and this carries risks for the Client. For example, the Client may be liable, in the event of future retrenchment, to pay severance for the entire duration of employment (from when the worker first joined the TES), and not simply from when they started working directly for the Client.

Q: Why must there be a formal resignation?

The law requires a formal termination of employment and this is recorded via a formal resignation and serving notice as per the existing employment contract. The TES worker is therefore required to formally resign from the TES and to serve their notice. After that they will be free to accept (or not) a new employment contract with the Client directly.



It should be noted that the TES provider may levy a placement/administration fee to the Client in this event, as per the terms of their commercial contract or custom and practice.

Q: What are the risks if a formal change of employment does not take place?

First and foremost there are risks associated with transfers under the LRA and the obligations for the incoming employer, in this case the Client. Further risks can arise in the event of injury, illness or death, if the employee is still registered as being an employee of the TES whilst actually being paid on the Client's payroll. All employee registrations and records, terms and conditions and employment contractual requirements – both formal and informal, must be updated, implemented and appropriately managed to mitigate risk. These could include:

- Bargaining Councils
- SETA
- COIDA
- UIF
- Employee benefits

Q: What are the statutory reporting implications?

Without a formal termination of employment, the TES provider will not be able to report accurately in terms of skills development (WSP & ATR) and employment equity. Reports to the various statutory bodies, including Bargaining Councils, will also not be accurate and may have both financial and punitive implications and non-compliance risks. Further, with the advent of the Protection of Personal Information (POPI) there are also potential risks associated with sharing of personal information of the TES worker. All information and records should be maintained in strict accordance with the law.

Q: Are their risks associated with a non-consultative process?

Yes. Without formal communication and consultation with the workers, it is possible that an allegation of constructive dismissal may be made. In this case the TES provider and the Client will be jointly & severally liable, once the TES worker has been on site longer than 3 months and earning under the threshold (currently R205433 per annum).

This is especially true in the case of more vulnerable workers who may have a limited understanding of the commercial and legal nature of the changes in operational requirements. The risks would be greater also in the event that only some of the existing workforce is going to be offered employment directly with the Client.

Q: Why must notice be served if they are going to carry on working on the same site doing ostensibly the same job?

Despite the fact that they will continue coming to the same site their employment relationship will be fundamentally different. The law requires that formal processes are followed, including the serving of notice as per the BCEA or employment contract. Further, the Client should also honour any notice periods contained within the commercial agreement with the TES provider in the event that they wish to terminate the services of the TES provider but retain the workers.

Q: What considerations should be made in terms of the administration of terminating – and then re-employing directly – a worker supplied by the TES provider.

Some of the issues to be considered include:

- Serving notice (as per employment contract)
- Calculation and pay out of any accrued statutory benefits, i.e. annual leave etc.
- Termination of benefits, i.e. pension/provident fund, funeral benefits, employee wellness etc.
- Termination of any deductions made for Trade Union membership, garnishees etc.
- Closing of employee file, including all records associated with discipline etc.
- Maintaining confidentiality of personal information in line with POPI requirements.