



GUIDANCE NOTE G10

EMPLOYMENT OF ESTATE STAFF

Revised – June 2016

ARMA-Q Standards

The Standards have been written to apply to residential long leasehold properties (a lease of a term in excess of 21 years when originally granted) in England and Wales where a service charge, which varies according to expenditure, is payable.

They represent the core of good practice for managing agents. We believe they are achievable by any well-run company. The applicable (if any) Standards related to this Guidance Note are stated below.

Standards in RED: An obligation to adhere to the Standard

Standards in GREEN: An obligation to adhere to the Standard unless there is a justifiable reason not to comply that the Managing Agent must be able to demonstrate

5.3 Staff Employment & Staff Management

The Managing Agent Must clearly define who the employer of any on-site staff is and all documentation issued should reflect this. Where agency staff are employed there Should be an appropriate agency contract.

When the Managing Agent is the employer of staff, the Managing Agent Must:

- a) consider and follow TUPE Regulations if applicable;
See: The Transfer of Undertakings (Protection of Employment) Regulations 2006
- b) fully comply with the requirements of the Equality Act 2010 and other relevant legislation;
See: Equality Act 2010
- c) issue all staff with a contract of employment and job description which clearly defines their duties and responsibilities as agreed with the Client;
- d) put procedures in place and follow these to induct and provide on-going training to ensure staff are professionally competent to undertake their defined duties;
- e) display a copy of its current 'certificate of employers' liability insurance' at each place of business at which staff are employed;
See: S.4 Employers' Liability (Compulsory Insurance) Act 1969 See: Employers' Liability (Compulsory Insurance) regulations 1998 (SI 1998/2573) See: Employers' Liability (Compulsory Insurance Amendment) regulations 2008 (SI 2008/1765)
- f) ensure that all employees are trained and competent before undertaking duties with health and safety implications and have access on site to a copy of the employer's health and safety policy;

ARMA-Q Standards (continued)

- g) ensure a safe working environment for all staff at all times as far as reasonably practicable.

See: Health and Safety at Work etc Act 1974 See: Management of Health and Safety at Work Regulations 1999 (SI 1999/3242)

6.2 Statutory Compliance

The Managing Agent Must have regard to and comply with:

- a) legislation relating to equality and discrimination;
- b) legislation relating to employment;
- c) legislation relating to data protection;
- d) legislation relating to tax and VAT;
- e) relevant legislation to ensure the health and safety of employees;
- f) obligations under the regulations regarding fire safety;
- g) health and safety regulations relating to buildings under their management;
- h) all other relevant legislation.

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Overview

- This Guidance Note considers the advantages and disadvantages of clients and managing agents employing estate staff.
- It also explains the impact of TUPE, the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- This guidance can only be of a general nature and managing agents should seek their own detailed advice.

The Client Employs Estate Staff

This is the most common method adopted by managing agents. The client, whether a traditional landlord or RMC, is the employer of any porter, caretaker, concierge, cleaners etc.

This should provide a long-term solution to possible changes of managing agent because the employer does not change even if the managing agent does. VAT is not chargeable on the payroll cost because the staff work for the landlord. But what if the client wishes the managing agent to take over the role of supervising the estate based staff? There is a danger that the courts or employment tribunals may take the view that the effective employer is the managing agent, not the landlord or RMC.

Managing agents should consider the following:

- Make sure that the employment contract is between the member of staff and the client and that it is signed by the client. Not by the managing agent on behalf of the client;
- All documents, circulars and letters issued in relation to employees should be on the letter-headed paper of the client and signed by the client or clearly by the agent ON BEHALF OF the client;
- The client should be responsible for setting pay and conditions. Letters about these matters should be signed by the client, not the managing agent on behalf of the client;
- Payslips should refer to the client as the employer even if the managing agent arranges the payroll function;
- The client should be part of any appraisal and disciplinary procedures and interviews;
- Matters relating to employee insurance and health insurance should include the name of the client as the employer; and
- Make a provision in the managing agent's contract that the managing agent does not replace the management company, that direction from the directors is required and will have to be given, and make sure that there is a sufficient provision for management reports such that there is evidence that the management company itself has not ceased activity.

The courts and tribunals will always look at the conduct of the parties not just the documentation when deciding who was acting as the employer.

What If The Client Will Not Employ Estate Staff?

Some client landlords do not want to employ estate-based staff because of the risks associated. The managing agent can choose to employ the staff on its own payroll but should explain to the client the consequences of doing so.

Firstly, VAT may be chargeable on top of the payroll costs because the provision of staff by the managing agent is a service to the landlord.

Secondly, if the client wished to dismiss the managing agent then the estate-based staff will have the right to TUPE and stay at the scheme if that is their wish.

Thirdly, the client has no right to give any instructions or supervision to the estate staff unless the managing agent expressly agrees to this; to do so will only make life difficult for all concerned.

What If The Managing Agent Provides Agency Estate Staff?

Some managing agents have associated or subsidiary companies that provide estate based staff to schemes that they manage or, indeed, schemes they do not manage. In this situation the managing agent should have a separate agency contract with the client to provide staff and the employees should sign documents to confirm that they are acting as agency staff. VAT may again be chargeable to the client and so through to the service charge.

There is a body of law for agency staff and the government announced in 2009 further changes to give normal employee rights to agency workers in certain circumstances.

TUPE Regulations

The TUPE regulations were introduced to guarantee that employment contracts and rights would be preserved on a company takeover. In essence all employees and contract rights would transfer to the buyer of a company. In 2006 TUPE was also extended to the transfer of service provisions and so now also applies to contracts for services. So for a landlord or managing agent TUPE may apply to the staff of a cleaning contractor who work wholly or mainly at a particular estate. TUPE applies to service provisions of all kinds including when there is only one employee. It will not apply to a short-term activity; for example a one-off builders clean.

Where managing agents suspect that TUPE applies they should seek advice. ARMA members have access to a Croner fact sheet on TUPE available from the members only area of the website.

Right To Manage And TUPE

TUPE will normally apply to estate staff if an RTMC is formed. Any estate-based staff have the right to be consulted and offered contracts of employment with the RTMC on similar terms.

Service Contract Changes

Managing agents and their clients may wish to change contractors for services such as gardening, cleaning and window cleaning if the performance of the contractor does not meet the standards expected.

However, if an employee cleaner or gardener of that contractor works wholly or mainly at one estate or on a group of estates that form the basis of a contract with the agent, then TUPE may apply to those employees.

So the managing agent can seek an alternative contractor but the same employees of the previous contractor will have the right to transfer to the newly appointed contractor. A change of contractor may not result in a change of person carrying out the service.

Changes Of Managing Agent And Tupe

What if a client sacks a managing agent from the management of a particular scheme or possibly a portfolio of schemes? Can TUPE apply?

If that sacked managing agent has staff that worked wholly or mainly on the particular scheme or portfolio then TUPE may apply to those staff. The managing agent should take advice and discuss the matter with the staff involved particularly if they are likely to be made redundant because of the loss of business.

VAT

ARMA cannot give definitive advice on VAT and the employment of estate staff.

Members should seek their own advice on this matter. In general the following seems to be the accepted position but this can vary according to particular circumstances.

Scenario 1 - Employment by the landlord

The landlord of long leasehold tenants employs a porter. The porter was recruited by the managing agent but the porter's employment contract is with the landlord/management company. The managing agent puts the porter on its payroll bureau register and deals with all tax and NI on behalf of the landlord.

The recovery of the porter's salary cost by the payroll bureau is a disbursement for VAT purposes and is therefore not subject to VAT. If a fee is charged by the payroll bureau for processing the payroll, this fee will be subject to VAT. For residential leaseholders the landlord/management company cannot charge VAT on the salary of the porter but it can pass on the VAT charged for the payroll bureau's costs.

Scenario 2 - Employment by the managing agent

The landlord of a block does not wish to take any responsibility for the employment of staff of flat blocks and so asks the managing agent to arrange and employ the staff. The managing agent provides a porter who is an employee of the managing agent.

There is a supply of staff to the landlord or management company by the managing agent so VAT is chargeable on the whole of the salary charged to the landlord/management company.

The recharge to the residential leaseholders as part of their service charge will not show VAT but will be the actual cost including VAT suffered by the landlord/management company.

Scenario 3 - Employment by a company associated with the managing agent

The landlord of a block does not wish to take any responsibility for the employment of staff of flat blocks and so asks the managing agent to arrange the staffing. The managing agent is a large company and has set up an associated employment agency company to supply staff to work in flat blocks. The managing agent's employment agency supplies the porter to the landlord on a full time contractual basis but the porter remains as an employee of the employment agency.

The supply of staff by the employment agency will be a standard rated supply and therefore the whole of the salary and any associated charges are subject to VAT with the cost being payable by the landlord/management company. The recharge to the residential leaseholders will not show VAT but will be the actual cost including VAT suffered by the landlord/management company.

Scenario 4 - Employment by an employment agency

The landlord of a block does not wish to take any responsibility for the employment of staff of flat blocks and so asks the managing agent to arrange the staffing. The managing agent approaches an employment agency to find the employee.

The managing agency's fees will be standard rated and VAT will be payable on the total cost. There is also a supply of staff to the landlord or management company by the managing agent so VAT is chargeable. The recharge to the residential leaseholders will not show VAT but will be the actual cost including VAT suffered by the landlord/management company.

Workplace Pensions

A workplace pension is a way of saving for your retirement that's arranged by your employer.

Some workplace pensions are called 'occupational', 'works', 'company' or 'work-based' pensions.

Pension auto-enrolment

The government's aim is for more people to have another income, on top of the state pension, when they come to retire.

To help people save more for their retirement, the government now requires employers to enrol their workers into a workplace pension scheme.

Employers are required to enrol their staff automatically into a scheme to make it easier for people to start saving towards their retirement.

- the Company and member of staff will both pay into the pension every month
- the government will also contribute through tax relief
- the pension belongs to the member of staff, even if at a later date they leave the Company's employment in the future.

This is called 'automatic enrolment'. Pension auto-enrolment applies to those who are not already in a company pension and who:

- earn more than the minimum earnings threshold, currently set at £10,000 a year (£833 a month) for tax year 2016/17
- are aged 22 or over; and
- are under state pension age
- work in the UK.

Staff can choose to opt out of the scheme if they want to, but if they stay in they will have their own pension which they will receive when they retire.

Pension Calculator

Employees can use the Pensions Regulator calculator to check if the new law applies to them and when they will be enrolled. The calculator is for employers but also works for employees: <http://www.thepensionsregulator.gov.uk/employers/staging-date.aspx>

Further Information

- In essence if the porter is employed by an entity other than the landlord, the entire salary and associated NI should be subject to VAT.
- www.gov.uk/workplace-pensions/about-workplace-pensions

Important note to reader:

Guidance Notes (GN) are produced for the use of members only; they should not be distributed to third parties unless the particular GN has a note to that effect.

Whilst every effort has been made to ensure the accuracy of the information contained in this GN, it must be emphasised that because the Association has no control over the precise circumstances in which it will be used, the Association, its officers, employees and members can accept no liability arising out of its use, whether by members of the Association or otherwise. The GN is of a general nature only and makes no attempt to state or conform to legal requirements; compliance with these must be the individual user's own responsibility and therefore should seek independent advice.



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