

Handling a TUPE Transfer (Transferor)



The UK legislation known as "TUPE" ((Transfer of Undertakings (Protection of Employment) Regulations 2006) provides employment rights to employees when their employer changes from one entity (the "Transferor") to another (the "Transferee") as a result of the sale or purchase of a business, or where there is a change in service provider in relation to activities that employees have been carrying out.



TUPE implements the European Community Acquired Rights Directive (71/187/EEC, as amended by directive 98/50 EC and consolidated in 2001/23/EC), which ALL EU Member States were required to introduce legislation to implement.

Despite the UK's exit from the European Union on 1 January 2021, TUPE continues to be effective by virtue of the European Union (Withdrawal) Act 2018, which operates to preserve the effect of EU-derived domestic legislation.

When does TUPE Apply?

The law on whether TUPE applies is complex but, in broad terms, TUPE applies to "relevant transfers", which will occur when:

- A business undertaking (or part of one) is transferred from one employer to another as a going concern (known as a "business transfer").
- A client engages a contractor to do work on its behalf or re-assigns such a contract – including bringing the work "in house" (known as a "service provision change").

To qualify as a "business transfer", the identity of the employer must change. Therefore, subject to very limited circumstances, TUPE does not apply to transfers by share take-over because, when a company's shares are sold to new shareholders, there is not a transfer of a business or undertaking i.e., the same company continues to be the employer.

"Service provision changes" concern relationships between contractors and the clients who hire their services, and occur where activities are outsourced or are brought back in house, or where there is a change in the contractor engaged to perform those activities. Examples of the types of activities in which service provision changes can be common include those under contracts to provide labour intensive services such as IT support, office cleaning, workplace catering, security guarding, and refuse collection.

Issues for Transferor to Consider When Handling a TUPE Transfer

The following is a summary of the types of practical issues that Transferor businesses must consider before transfer:

Have a Plan in Place!

A Transferor employer must look at such matters as:

- What it is that the exercise hopes to achieve?
- What is the timescale over which this exercise is to be conducted?
- What is the timescale for the various steps which will have to be taken within the overall timescale?
- What are the employer's legal obligations and duties within this process?
- What contractual terms are in effect with the employees who are affected by the exercise?
- Who are the Management Personnel who will deal with the process and do they need training?
- What liabilities will the employer have if it gets it wrong?
- Does the exercise create a transfer under TUPE?
- What are the duties for giving information and consulting?
- Does the Transferor need external advice and assistance?

Employment Information

TUPE requires the Transferor employer to provide the incoming Transferee employer with certain information about its employees ("employee liability information"). The Transferor will be required to compile employment information as part of the Due Diligence exercise.

The Transferor may, as part of the Due Diligence exercise, be required to provide more employment information than is required under TUPE. Therefore, for the Transferor, it is always worth compiling all the information it has (e.g policies and procedures, anonymised details of the employees etc.).

The basic "employee liability information" under TUPE consists of:

- the identity and age of employees who will transfer (this may, depending on the circumstances, also apply to those who would have transferred if they had not been dismissed prior to transfer).
- information contained in the employees' written particulars of employment under Section 1 Employment Act 1996;
- information on any collective agreements which apply to those employees;
- any disciplinary proceedings taken against an employee or grievance brought by an employee in the previous 2 years where the statutory dispute resolution procedures or the ACAS Code of Practice on disciplinary and grievance procedures apply;
- any legal action taken by those employees against the Transferor in the previous 2 years, and instances of potential legal actions which may be brought by those employees where the Transferor has reasonable grounds to believe such actions might occur.

The above information should be given not less than 28 days before the transfer or, if special circumstances make this not reasonably practicable, the information must be supplied as soon as is reasonably practicable.

Once the relevant information has been provided the Transferor must provide written notification of any changes (even if they are just before the transfer!).

If the Transferor does not provide the information, the Transferee can bring a claim in the Employment Tribunal within 3 months of the date of the transfer (although the Tribunal has the authority to extend the time). The Tribunal can award what it considers just and equitable when awarding compensation subject to a minimum of £500 for each employee, unless the Tribunal considers that it would be unjust or inequitable to warrant the minimum payment.

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Disclaimer: This note does not contain a full statement of the law and it does not constitute legal advice. Please contact us if you have any questions about the information set out above.

Know whether Employees are "assigned" and should transfer

The Transferor needs to understand which employees are "assigned" and will transfer over.

Please note "assigned" cannot be established by reference to the percentage of the time an employee is engaged in working in the undertaking or part of the undertaking being transferred. Ultimately, it is essentially a question of fact for the Tribunal.

Don't forget to inform and consult

Under TUPE an employer must, prior to transfer, inform employees and/or their representatives of any measures it envisages taking in connection with the transfer (or if it envisages that no measures will be taken, inform them of this) and to consult with the employees and/or their representatives with a view to seeking their agreement to any intended measures.

Measures could include any action, step or arrangement done by the transferor or the Transferee over and above what necessarily occurs as a consequence of the transfer itself. For example, a change in payment date could constitute a measure.

Failure to comply with the application to inform and consult could result in an award of compensation payable to the relevant employees up to 13 weeks' gross pay for each employee. There is no limit on the amount of a week's pay.