

Transfer of Undertakings (Protection of Employment)

The **Transfer of Undertakings (Protection of Employment) Regulations**, more commonly referred to as **TUPE**, protect employees' terms and conditions of employment when a business is transferred from one owner to another. **TUPE** also establishes obligations that both sellers and purchasers of businesses (new employers) must adhere to when transferring a business.

This Employment Law Summary provides an overview of employees' rights under TUPE and highlights what employers must do to comply with the regulations.

WHEN TUPE APPLIES

TUPE's protections apply to all 'relevant transfers' in the United Kingdom, regardless of the size of business involved in the transfer, and apply to both public and private undertakings.

Under **TUPE**, relevant transfers include:

- When a 'business transfer' takes place; or
- When a 'service provision change' occurs.

Additionally, the business involved could have its head office located in another country, but the part of the business that is transferred to a new owner must be in the United Kingdom in order for **TUPE** to apply.

Business Transfer

A business transfer occurs when a business or part of a business moves from one employer to another. This can include mergers where two companies close to form a new company. In order to be protected under **TUPE** during a business transfer, the identity of the employer must change.

Service Provision Change

'Service provision changes' (SPC) concern the relationships between contractors and the clients who hire their services. In general, SPCs apply in three principal forms:

- When a service provided in-house is awarded to a contractor;
- When a contract ends and is assigned to a new contractor; or
- When a contract ends and the work is transferred in-house by the former client.

DISCLOSURE OF EMPLOYEE INFORMATION

An employer must provide information to the new employer about the employees who are being transferred. The information that must be provided includes:

- The identity and ages of employees who will transfer;
- Main details of employment contained in an employee's statement of employment particulars;
- Details of any collective agreement that applies;
- Disciplinary action taken against employees in the last two years;
- Grievances raised by employees in the last two years;
- Legal action taken by employees against the employer in the last two years; and
- Potential legal action that the employer thinks employees might raise.

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This information must be provided to the new employer no less than 28 days before the relevant transfer. If any of the specified information changes between the time it is initially provided to the new employer and the completion of the relevant transfer, then the transferor must provide the new employer written notification of those changes.

CONSULTING AND INFORMING

Before a relevant transfer occurs, employers are required to inform and consult the appropriate workplace representatives of the employees affected by the transfers. Appropriate representatives include existing trade union representatives or employee representatives. If there are no representatives in place, new ones may be specially elected.

The appropriate representative must be informed of:

- The fact that the transfer is going to take place, the approximate time it will take place, and why;
- The legal, economic and social implications of the transfer for the affected employees;
- Whether the employer envisages taking any action in connection with the transfer that will affect the employees, and, if so, what actions are envisaged;
- Where the previous employer is required to give the information, he or she must disclose whether the prospective new employer envisages carrying out any action which will affect the employees, and, if so, what that action is. The new employer must give the previous employer the necessary information so that the previous employer is able to meet this requirement.

Employers with less than 10 employees can inform and consult directly with employees if there are not any appropriate representatives.

TRANSFER OF EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT

Under **TUPE**, new employers are responsible for taking over an employee's employment contract from the former employer. New employers must take responsibility for:

- All the previous terms and conditions of employment;
- Any failures of the previous employer to observe employees' rights;
- Holiday entitlements;
- Period of continuous employment—an employee's start date is the same as before the transfer, so continuous employment is not broken; and
- Any collective agreements previously made.

If the employer knows an employee is transferring to another company, they cannot normally change the employee's terms and conditions to make them the same as those of the new company—even if the employee agrees to the change.

After a transfer, a new employer cannot change an employee's terms and conditions of employment if the reason is the transfer itself. However, employers may, by agreement, change an employee's terms and conditions of employment if the changes are positive.

The new employer may change an employee's terms and conditions of employment if the reason is an 'economic, technical or organisational reason' (ETO) involving changes in the workforce or workplace. Although there is no statutory definition of ETO, the Department of Business Innovation & Skills has indicated the term is likely to include:

- 'Economic' reasons – reasons related to the profitability or market performance of the new employer's business;
- 'Technical' reasons – reasons related to the nature of the equipment or production processes which the new employer operates; and
- 'Organisational' reasons – reasons related to the management or organisational structure of the new employer's business.

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Employers can dismiss employees for an ETO reason involving changes in the workforce, including redundancies. However, in these circumstances the normal rules around fair dismissals still apply.

Pension Rights

Employees' company pension rights earned up to the time of a transfer are protected, but new employers do not have to continue identical pensions. However, under the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005, the new employer must provide a new pension scheme when certain employees are transferred. Employees that are eligible for a pension on transfer are those that are:

- Already in an occupational pension scheme with their current employer;
- Not in an occupational pension scheme but could join one with their current employer; or
- Not in an occupational pension scheme but could join one after they had worked for their current employer for a longer period.

New employers will need to ask the previous employer for this information before the transfer in order to identify which employees should be offered the right to join a new pension scheme after the transfer.

TRANSFERS OF INSOLVENT BUSINESSES

If an employer is insolvent and being transferred or taken over by another company, the protections **TUPE** provides employees differ from a normal transfer.

In circumstances where an employer is transferring a business that is subject to insolvency proceedings and employees are owed money, the responsibility to pay the full amount of money owed is not transferred to the new employer. The new employer is only responsible for the amount left after employees have been paid from the National Insurance Fund.

In transfers involving an insolvent business, new employers may reduce employee pay and establish other inferior terms and conditions of employment after the transfer occurs. This type of variation is referred to as a permitted variation. Certain conditions must be met when executing a permitted variation:

- The permitted variation must be agreed to with the employer, new employer—or the insolvency practitioner—and the appropriate representatives;
- The agreement must be in writing and signed by each of the representatives or another authorised person; and
- Before the agreement is signed, the employer must provide all the affected employees with a copy of the agreement and any guidance the employees may reasonably need in order to understand it.

Additionally, employers must consider that:

- Any new terms and conditions agreed to must not breach other statutory entitlements. For example, any agreed pay rates must not be set below the national minimum wage; and
- Any permitted variation must be made with the intention of safeguarding employment opportunities by ensuring the survival of the business or the part of business being transferred.

MORE INFORMATION

For additional information on **TUPE**, employers may consult [guidance](#) prepared by the Department for Business Innovation & Skills.

Additionally, both employers and employees may receive confidential help and advice on employment rights from [ACAS](#).