

Q. What constitutes a transfer of undertaking under the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE)?

A. As a general guide, a TUPE transfer is said to have taken place when the whole or part of a business or undertaking is sold or transferred as a going concern to another employer or when performance of an ancillary function is either taken in-house or out sourced.

The issue of whether TUPE applies at all can be a complex one and those involved in a transaction should always take detailed advice from HR&OD and Legal & Governance should always be sought on whether or not TUPE applies in any situation.

Q. In a TUPE situation, who is the 'transferee' and who is the 'transferor'?

A. For the purposes of this document, the old employer is the transferor, while the new employer is the transferee.

Q. Can employers avoid TUPE altogether, or at least minimise its impact?

A. No. The purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE 2006) is that they apply to protect the employees, regardless of whether the transferee wants the employees or not.

Q. Who transfers under TUPE?

A. If the whole undertaking transferred, the employees employed in the undertaking immediately before the transfer will transfer to the new employer. This includes full-time, part-time and fixed term employees. If just part of an undertaking is to transfer, only those employees dedicated to that part of the undertaking will transfer. Consideration must be given to a number of factors including the work that an employee does and the amount of time that the employee spends in dealing with the part of the undertaking that is being transferred in determining whether the employee will transfer.

Q. Are employers obliged to consult with employees about a TUPE-transfer?

A. Employers contemplating a transfer must inform appropriate employee representatives long enough before the proposed transfer to enable meaningful consultation to take place. The obligation is to consult with union representatives. It is also important to recognise that in some circumstances employees within scope of transfer may not be a member of a trade union. In such a situation consultation of employees needs to be achieved and it is suggested that the employees concerned determine between themselves a representative and such an employee is consulted. This obligation extends to all employees affected by the transfer, which could include employees of the transferee employer as well as the transferor.

Q. What is the purpose of any consultations that take place upon the transfer of a business covered by TUPE regulations?

A. Consultations must take place 'with a view to seeking agreement'. Just keeping the trade union posted at monthly meetings on the progress of a transfer is not sufficient. The employer must be receptive to the points made on behalf of affected employees and must give them proper consideration before deciding on how to respond to them.

Q. What is the time period over which the employer must consult upon the transfer of a business covered by TUPE regulations?

A. Unlike in the provisions governing collective redundancies, there is no specified minimum period over which consultations must be conducted prior to the transfer taking place.

Q. What information should be given by the transferor and the transferee to the employees affected?

A. The employer of employees affected by the transfer (i.e. either the transferor or the transferee) must inform the appropriate representatives of any affected employees of the following:

- The fact there is a transfer happening
- Date or approximate date when it is happening
- The reasons why it is happening
- The legal, social and economic implications for the affected employees

- The measures which the employer intends to take in relation to those employees
- If no measures will be taken, the fact that there won't be any such measures
- If the employer is the transferor, the measures which he envisages the transferee will take in relation to any affected employees, or if he envisages no measures, that fact. The new employer must give the transferor the necessary information so that the transferor is able to meet this requirement.

Additional point to note:

- The transferor and transferee are jointly liable for any award of compensation for failure to inform and consult made by an employment tribunal for failure by the transferor to comply with these information and consultation requirements.

Q. What happens if the transferor or transferee fails to consult or inform adequately upon the transfer of a business covered by TUPE regulations?

A. Both the transferor and the transferee can be liable for a failure to inform or consult with the appropriate representatives. A failure to inform or consult may lead to each affected employee being awarded a protective award of up to 13 weeks' pay. The employer can use a "special circumstances" defence, but the circumstances have to be exceptional.

Q. Where only a few employees will transfer to a new employer under TUPE regulations, does the obligation to inform and consult still apply?

A. The obligation to inform and consult under TUPE Regulations applies irrespective of the number of employees involved in the proposed transfer.

Q. What happens to employees during a transfer of undertakings?

A. Employees employed immediately before the transfer automatically become employees of the new employer, unless they inform either employer that they object to being transferred. If they refuse to transfer, they will be treated as having resigned from employment. The continuity of employment of the transferring employees is not broken and they keep all the rights and obligations under their contracts of employment with their previous employer.

Q. Does the transferee inherit the contracts of employment from the transferor?

A. When a TUPE transfer takes place, the transferee inherits the contracts of employment of the persons employed by the transferor immediately before the transfer took place. The transferee also inherits the transferor's rights, powers, duties and liabilities (other than any criminal liabilities) in connection with those contracts.

Q. What happens to pay under TUPE?

A. Any pay award taking effect up to the date of transfer will be applicable. If a pay award agreement is reached after the transfer affected employees will receive backdated payment covering the period from the date of implementation up to the date of transfer.

Annual increments relating to the employee's grade will normally continue based on the salary scale in place at the date of transfer.

Q. So is it correct that occupational pensions do not transfer under TUPE?

A. Strictly speaking, obligations relating to provisions about benefits for old age, invalidity or survivors in employees' occupational pension schemes do not transfer under TUPE. However, the provisions of the Pensions Act 2004 sections 257 and 258 do apply to transfers taking place after 6 April 2005. In effect, this means that provisions equivalent to the TUPE regulations apply to pension rights from that date. In essence, if the previous employer provided a pension scheme then the new employer has to provide some form of pension arrangement for employees who were eligible for, or members of the old employer's scheme. It will not have to be the same as the arrangement provided by the previous employer but will have to be of a certain minimum standard specified under the Pensions Act.

Q. Is there any obligation on employers to increase the holiday entitlement of TUPE-transferred staff to match that of their existing workforce?

A. No. When a TUPE-transfer takes place, the transferee inherits the contracts of employment of the employees employed by the transferor immediately before the transfer took place.

Q. Where an individual is TUPE transferred does his or her continuous service start from the date of the transfer or from the start of employment with the transferor?

A. The transferee is obliged to honour the past continuous service with the transferor.

Q. Under the TUPE legislation, where an employee has a bad attendance or disciplinary record, is the transferee obliged to accept the employee?

A. Yes. Where there is a TUPE transfer, employees who were employed by the transferor immediately before the transfer, automatically become employed by the transferee, from the moment of the transfer. The transferee cannot therefore pick and choose which employees it takes on.

Q. Is the transferor required to obtain employees' consent before passing on information about them to the transferee?

A. Consent is not required before passing on information as specified in Section 3 of the guidance, although the transferor must consider

the implications of the Data Protection Act 1998 when disclosing information in the context of a TUPE transfer.

The Employment Practices Data Protection Code recommends that wherever practicable transferors should ensure that information handed over to another organisation in connection with a prospective acquisition, merger or business reorganisation is made anonymous, and that workers are advised that their employment records are to be disclosed to another organisation before an acquisition or merger takes place.

Consent is required before the release of personal information such as payroll and bank account details.

Q. What if an employee in a TUPE situation refuses to transfer?

A. Where an employee informs either the original employer or the new employer that he or she objects to becoming employed by the new employer, this will have the effect of terminating the employee's contract and he or she is not to be treated for any purpose as having been dismissed. This means that a refusal to transfer will mean that the employee has in effect resigned.

There is no right to redundancy as the job continues with the new employers. It follows that there is no entitlement for the employee to claim a redundancy payment.

There is no right to redeployment as their employment is not at risk since the job carries on as before with the new employer and therefore the redeployment policy will not apply.

Q. If an employee refuses to transfer, to which employer should they submit their resignation?

A. Any resignation before or at the time of the transfer is best submitted to the original employer. If, on the other hand, the transfer has already taken place when the employee resigns, the resignation will have to be notified to the new employer, as the individual's employment will in fact have transferred before the resignation is submitted. Any changes to the transfer list must be communicated in writing to the new employer.

Q. What happens with any outstanding Job Evaluation Appeals?

A. If a JE Appeal has not been dealt with before the transfer date it will normally only progress if employees from the relevant group will remain in Council employment. In such cases it will be for the transferee to decide whether or not to apply any subsequent outcome.

Q. What is an ETO reason?

A. A dismissal of an employee by either the transferor or transferee because of the transfer will be automatically unfair unless there is an economic, technical or organisational (ETO) reason entailing changes in the workforce.

Examples include:

- Economic reasons - where the demand for output has fallen to such an extent that profitability of the entity is unsustainable without dismissing staff.

- Technical reasons - where the transferee wishes to use new technology and the staff employed by the transferor in the entity do not have the requisite skills.
- Organisational reasons - where the transferee operates at a different location and it is not practical to transfer staff.

Q. Can amendments be made to terms and conditions of employment?

A. A variation to a contract is void if the sole or principal reason for the variation is the transfer or is not an economic, technical or organisational reason entailing changes in the workforce. However employees may agree to a variation it is for an ETO reason or another reason unconnected with the transfer. Employees cannot pick and choose which of the transferor's conditions they wish to keep and which of the transferee's conditions they wish to acquire in terms.