

## HR Guidance

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# TUPE transfers

This business development briefing explains when TUPE applies and sets out the different obligations a business involved in the transaction may owe under the legislation.

## TUPE transfers

*This HR business development briefing only provides an overview in this area. For a complete understanding of how it may affect your particular circumstances in the workplace please contact one of our Consultants.*

### What is TUPE?

TUPE is an acronym for the Transfer of Undertakings (Protection of Employment) Regulations 2006. Where TUPE applies, employees automatically transfer from one employer to another with their terms of employment and continuity of service intact.

### When does TUPE apply?

TUPE applies to a “relevant transfer”. A relevant transfer can be where:

- A business or part of a business is sold.
- Work is outsourced from a client to a contractor.
- Outsourced services are transferred from the original contractor to another contractor.
- A client brings the outsourced services back in-house.

### Which rights are automatically transferred under TUPE?

- Employees transfer to the new employer on their existing terms of employment and with all related employment rights, powers, duties and liabilities. Old age, invalidity and survivors’ benefits under occupational pension schemes are excluded.
- The new employer steps into the shoes of the transferring employer in relation to the transferred employees. Any acts or omissions committed by the transferring employer are treated as having been done by the new employer.
- Employees who object to the transfer do not automatically transfer to the new employer. Their contracts will instead terminate on the transfer date unless they resign sooner.

## Changing terms of employment

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- Any changes to an employee's terms of employment are void if the main reason for the change is the transfer itself, unless there is an economic, technical or organisational reason requiring changes in the workforce (ETO reason) for the change.
- However, it is possible to make changes to transferring employees' employment terms if the reason for the change is permitted by the terms of the contract.

## Protection against dismissal

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- Employees are entitled to enhanced protection against unfair dismissal. Any dismissal of an employee with the qualifying period of service is automatically unfair where the main reason for the dismissal is the transfer itself unless there is an ETO reason for the dismissal.
- This enhanced protection also applies if:
  - »» an employee resigns in response to a serious breach of their contract; or
  - »» the new employer makes a substantial change in the employee's working conditions which is detrimental to them.
- Employers can be ordered to reinstate, re-engage or compensate the dismissed employee if their complaint is upheld by an employment tribunal.

## Obligations to inform and consult

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- Both parties involved in the transfer are obliged to inform and (if appropriate) consult recognised trade unions or elected employee representatives in relation to their own employees who may be affected by the transfer. If there are no existing representatives, they must be elected by the affected employees for the purposes of consulting over the transfer.
- An individual employee has the right to bring a claim for breach of these requirements if an employer:
  - »» fails to take any steps to invite employees to elect representatives; or
  - »» in the absence of election, fails to give information to the affected employee.
- Certain information (for example, the reason for the transfer and where it is expected to take place) must be provided to the representatives long enough before the transfer to enable the transferring employer to consult with them about it. Although the duty to inform always arises, the duty to consult only arises where an employer envisages taking measures in relation to affected employees.

## Obligations to inform and consult

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- Employers that use agency workers should provide certain information on their use, for example, the:
  - »» number of agency workers the employer uses;
  - »» parts of the business in which agency workers operate; and
  - »» type of work agency workers carry out.
- Failing to comply with these obligations can expose both parties involved in the transfer to up to **13 weeks' uncapped pay for each affected employee**. In certain circumstances, both parties can be held to be jointly and severally liable.

## Employee liability information

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- The transferring employer must provide information (for example, the disciplinary and grievance records of the transferring employees) to the new employer not less than 28 days before the transfer takes place
- If the transferring employer fails to comply with this duty, the new employer can apply for compensation based on the losses suffered, with a minimum award of **£500 for each employee** that the information was not provided for.

## Insolvent businesses

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To help the rescue of failing businesses, some key TUPE employment protections are relaxed if the transferring employer is insolvent. The extent of these modifications depends on the type of insolvency proceedings the transferring employer is involved in.