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# Transfer of undertakings (TUPE): an introduction

Looks at the law governing transfers of undertakings and gives introductory guidance on managing a TUPE situation

## Introduction

A transfer of undertakings occurs in one of two situations - either a business transfer or a service provision change. When a business moves to a new owner in one of these 'relevant transfers', the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) currently protect the entitlement of UK employees to the same terms and conditions, with continuity of employment, as they had before the transfer.

This factsheet provides introductory guidance on the law governing the transfer of an undertaking. It lists the types of circumstances in which TUPE has been found to apply and where it doesn't, and provides a checklist to help determine whether it applies in a particular situation. It also gives brief guidance on managing a TUPE situation, particularly when it comes to dismissals, consultation and notification, pensions, and required written information.

## What is a transfer of an undertaking?

A transfer of an undertaking falls into one of two broad categories, either a business transfer or a service provision change. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to protect UK employees when one of these 'relevant transfers' takes place and the business changes to a new owner.

### Business transfers

TUPE applies if there is a transfer of an 'economic entity that retains its identity'. This can be determined by asking:

- Is the type of business being conducted by the 'transferee' (the new owner, or the employer who is receiving staff) the same as the 'transferor' (the old owner, or the employer who is transferring staff)?
- Has there been a transfer of tangible assets such as building and moveable property (although this is not essential)?
- Are there intangible assets (such as patents, trademarks, copyright, goodwill or brand recognition) transferred at the time of the transfer?
- Have the majority of employees been transferred?
- Have the customers been transferred?
- Is there a high degree of similarity between the activities carried on before and after the transfer?

If the answer to several of the above questions is 'yes', then TUPE is likely to apply. In some cases just one of these factors has been enough for TUPE to apply.

## **Service provision changes**

A 'service provision change' occurs when a client who engages a contractor to do work on its behalf involves either:

- Reassigning such a contract (whether by contracting out, outsourcing or re-tendering and in some cases subcontracting); or
- Bringing the work 'in-house' (where a contract ends with the service being performed in-house by the client themselves).

In addition, the activities undertaken must be essentially the same after the transfer as they were before it.

It won't be a service provision change if:

- The contract is wholly or mainly for the supply of goods for the client's use; or
- The activities are carried out in connection with a single specific event or a task of short-term duration.

## **The UK legal position**

The Transfer of Undertakings (Protection of Employment) Regulations 2006, as updated by various statutes and regulations, cover the transfer of an undertaking, or part of one, from one business to another. TUPE protects employees by entitling them to the same terms and conditions, with continuity of employment, as they had before the transfer.

TUPE applies to all relevant transfers, including situations where services are assigned to a new contractor, for example in labour-intensive services such as office cleaning, catering, security and refuse collection.

The [Government](#) and [Acas](#) have both published guidance on complying with the law for employers, employees and their representatives. CIPD members can find out more in our [Tupe law Q&As](#).

Our [Brexit hub](#) has more on what the implications of leaving the EU might be for UK employment law.

## The situations where TUPE applies

TUPE has been found to apply to:

- Mergers.
- Sales of businesses by sale of assets.
- A change of licensee or franchisee.
- The gift of a business through the execution of a will.
- Transfers out of companies in administration.
- Contracting out of services.
- Changing contractors.
- Situations where all or part of a sole trader's business or partnership is sold or otherwise transferred.

TUPE doesn't apply to:

- Transfers by share take-over.
- Transfers of assets only (for example, the sale of equipment alone would not be covered, but the sale of a going concern including equipment would be covered).
- Buying in services from a contractor on a one-off basis - rather than entering into an ongoing relationship for the provision of the services.
- A situation where there is a change of business identity, for example if the nature of the work or the organisational structure changes radically.
- The supply of goods for the client's use (for example, supplying food to a client to sell in its staff canteen, rather than a situation where the contractor runs the canteen for the client).
- Transfers of undertakings situated outside the UK (although these may be covered by similar regulations of EU member states).

It's important to remember that, overall, TUPE only applies to situations where a business

or part of it retains its identity after the transfer; if it doesn't, there's no transfer as envisaged by the regulations.

Changes of contractors for labour intensive activities, such as security, catering, refuse collection and cleaning, have caused confusion in the past, but TUPE usually applies in these situations. TUPE may also apply where an organisation, such as an advertising agency or a law firm, takes over a client from another firm following a tender process. The new firm may be under an obligation to take on the staff working on the client account for the previous firm.

## **Managing a TUPE situation**

TUPE transfers are often complex and it's essential for employers (both the transferor and the transferee) to plan well and seek legal advice at the earliest possible stage. This should include identifying key risks and holding a genuine dialogue with employees throughout the process. All employees employed in the organisation (or part of the organisation) that is transferring will be entitled to carry on working for the new organisation with their existing terms and conditions of employment. Their continuity of service is also preserved.

The transferee also takes over the liability for all statutory rights, claims and liabilities arising from the contract of employment, for example liabilities in tort, unfair dismissal, equal pay and discrimination claims. The exception to this rule is criminal liabilities. The law prevents employers and employees from 'contracting out of' the regulations, so it's not possible to prevent TUPE from applying.. It may be possible to negotiate warranties and indemnities which will provide a partial, or total, cushion against the financial impact of any claims resulting from the application of TUPE.

Our [practical guidance](#) for people managers on the requirements for transfers of staff provides a minimum set of standards for all parties and includes sections on service provision transfers, steps to follow when transferring staff teams, pension issues, and the challenges if employers want to try and dismiss or harmonise terms and conditions.

### **Dismissal**

If an employee is dismissed because of the transfer, their dismissal is automatically unfair. However, the dismissal will not be automatically unfair if the employer can show an 'economic, technical or organisational' (ETO) reason entailing a change in the workforce. ETO reasons are explained further below. Dismissal more generally is covered in our [dismissal factsheet](#).

## Consultation and notification

The transferor must conduct a full and meaningful consultation with employees at the earliest feasible time. Unlike collective redundancy consultation, there's no specified minimum period for consultations before the transfer. Employers must simply provide the required information to employee representatives "long enough before the relevant transfer to enable the employer of any affected employees to consult the appropriate representatives". Employers who failure to consult properly can be required to pay staff up to 13 weeks' pay in compensation. The transferor and transferee are both liable to pay this compensation.

If there are no trade union or employee representatives, then the law stipulates that representatives must be elected by the affected employees for the purposes of consulting over the transfer. The employer must facilitate the election process. Micro businesses (under 10 employees) can inform and consult with employees directly if there is no trade union.

The employer must provide the following information to the representatives:

- That a transfer is to take place.
- The reason for the transfer and when it is expected to take place.
- The implications for employees.
- The measures that the current employer expects to take in relation to the employees.
- The measures that the new employer expects to take in relation to the employees.

## Pensions

If the previous employer provided a pension scheme, the new employer has to provide some form of pension arrangement for employees who were eligible for, or members of the former employer's scheme. It will not have to be exactly the same as the arrangement provided by the previous employer but will have to meet the minimum standard required by the legal provisions relating to pensions.

Strictly speaking certain pension rights do not transfer under TUPE. However, other legislation means that some provisions equivalent to TUPE do apply to types of pension. Exactly what employees are entitled to if anything, will depend on the type of pension scheme offered by the original employer and whether the work is in the private or public sector. Where pension arrangements are in place, employers should assess the nature of the scheme and take advice to identify any pension benefits that may transfer.

## Information to the new employer

Transferors are obliged to give the transferee written information about the employees who are to transfer and all the associated rights and obligations towards them. This information includes, for example, the identity and age of the employees who will transfer, information contained in the employees' written particulars of employment (under section 1 of the Employment Rights Act 1996) and details of any tribunal claims that the transferor reasonably believes might be brought.

If the transferor does not provide this information, the transferee may apply to an employment tribunal for such amount as it considers just and equitable. Compensation starts at a minimum of £500 for each employee about whom information was withheld or defective.

## **The ETO reason**

The 'economic, technical or organisational' (ETO) reason for a change in the workforce is one of the few legitimate factors which may justify a transferee's refusal to take on the transferor's workforce. Some limited changes to terms and conditions may also be permitted by TUPE if there is an ETO reason for changes in the workforce. If an ETO reason is the main cause of a dismissal, then the dismissal may be justifiable provided that the transferee acted reasonably in all circumstances. Examples of ETO reasons may include a severe reduction in output that makes trading unsustainable without dismissing staff (economic) or new technology which means that far less staff are needed (technical). Even if there is an ETO reason, the normal law and practice on redundancies and unfair dismissals will still apply. If there was no real change in the job functions of the employees, nor a change in the number of employees making up the workforce, the economic (or other reasons) may be disputed. If the workforce was not taken on in an attempt to avoid TUPE, the transferee will be liable for potential tribunal claims.

CIPD members can find out more about ETO reasons in our [Tupe law Q&As](#).

## **Useful contacts and further reading**

### **Contacts**

[GOV.UK - Business transfers, takeovers and TUPE](#)

[Acas – Transfer of undertakings](#)

### **Books and reports**

BARNETT, D. (2019) *Deconstructing TUPE*. (Employment Law Library 5). London: Nielsen.

WYNN-EVANS, C. (2016) *The law of TUPE transfers*. 2nd ed. Oxford: Oxford University Press.

## Journal articles

HURST, M. (2021) How the allocation of employees under TUPE could affect employers. *People Management* (online). 14 May.

MORRISON, L. (2020) What happens when TUPE transfers are split between organisations? *People Management* (online). 5 October.

WEATHERHEAD, A. (2019) How to deal with tricky TUPE issues. *People Management* (online). 24 July.

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This factsheet was last updated by Lisa Ayling, solicitor and employment law specialist, and by Rachel Suff.