

Navigating TUPE- An Employer's Guide

The Transfer of Undertakings (Protection of Employment) Regulations 2006 exist to protect employees' rights in circumstances where the control of the business they are working for changes hands. This can happen where there is a transfer of ownership of the business- through a direct sale- or where the services the employee provides are outsourced. TUPE applies to all businesses no matter their size or sector and businesses cannot contract out of the provisions.

Employers need to know when TUPE applies and how to navigate and implement the rules. A failure to adhere to the provisions can lead to claims and liabilities that could otherwise have been easily avoided. Where TUPE does apply, the implications for a business can be hugely material. For example, following a sale, all employees employed immediately before the transfer automatically transfer to the buyer on the same terms and conditions of employment. Having a clear plan to navigate TUPE from the outset will help the business to manage these legal and financial liabilities and allow for a smooth transition with minimum disruption to operations.

We set out below the fundamental questions and practical steps transferors (the old employer) and transferees (the new employer) need to take when TUPE applies to their business.

When will TUPE apply to your business?

TUPE will apply when there is either a transfer of a business or a service provision change.

A business transfer means the transfer of 'an economic entity which retains its identity'. The essential test is whether the business or the part of the business being transferred retains its identity through continuing the same operations. Common examples might include the sale of a restaurant which goes on to operate as a restaurant or the sale of an accountancy business which goes on to continue to provide financial services. TUPE can also apply to mergers, to changes to the identity of franchisees and also where partnerships are sold or transferred.

A service provision change will occur in circumstances where contracts for service are reassigned. This can happen when a business decides to outsource work by using a new contractor to provide the services, by reassigning an existing outsourcing agreement or by bringing outsourced services back in-house.

What are the implications when TUPE does apply?

Where TUPE applies the transferor essentially takes on all the rights, duties and liabilities the transferee originally had in regard to the affected employees. On a transfer of the business or where there is a service provision change, the affected employees of the transferor will all automatically become employees of the transferee. The terms and conditions of their existing contracts of employment will remain in full force and there will be no break in their period of continuous employment. All liabilities under their contracts will pass to the transferee and this will also include matters such as grievances against the transferor or any ongoing legal claims.

TUPE operates to provide the affected employees with enhanced employment protection. If there are dismissals because of the transfer then those dismissals will be automatically unfair unless the transferor can prove that it was for an economic, technical or organisational reason that necessitated a change in the workforce. Changes to the terms of the affected employees' contracts by the transferee will also be void if the reason for the change was the transfer itself.

Both the transferee and the transferor will have an obligation to inform and consult with the affected employees. The transferor will also have a specific duty to provide employee liability information to the transferee.

The Obligation to Inform and Consult

The legislation obliges both the transferee and transferor to inform and consult with the elected representatives of the affected employees or the relevant trade union representing them.

The parties will need to inform the employees of the fact of the transfer, the expected timeline and the reasons for the transfer. They will also have to explain the envisaged legal, economic and social implications of the transfer as well as detailing any measures they expect to take as a result of the transfer.

Affected employees will have the right to bring an employment tribunal claim if there is a failure to inform and consult. Such a failure will leave the business open to a potential liability of up to 13 weeks' gross pay for each affected individual.

Employee Liability Information

A transferor is obliged to provide a transferee with the necessary employee liability information and due diligence at least 28 days before a transfer takes place. The purpose of this is to detail the rights and obligations of the affected employees who will transfer to the transferee.

Employee liability information will include details such as the age and identity of affected employees, their employment contracts and roles, HR records, collective agreements, and any employment tribunal claims.

A transferee will have the right to bring a claim in the employment tribunal against the transferor for a failure to provide the information. Where appropriate the Tribunal has the power to award compensation subject to a £500 minimum for each employee whose information the transferor failed to provide.

Mitigating TUPE risks

Although businesses cannot contract out of TUPE they can however, through contractual agreement mitigate their liabilities under TUPE by agreeing warranties and indemnities between themselves.

Commercially, transfers and the reassignment of services can at the point of agreement be structured in ways to mitigate the risks under TUPE.

The process for your business

When managing a TUPE transfer much of the procedure to be followed will be dependent on the specific facts of the transfer, whether the business is the transferee or transferor and the commercial objectives of the business. No two TUPE transfers will be the same. As the legal process to be followed is so fact dependent specialist legal advice is always advised to interpret the legislation and how it might apply to your business's specific circumstances.

Broadly, however businesses will need consider the following process in a TUPE transfer, whether they are the transferor or transferee.

For the Transferor

Stage 1 – before committing to the transfer

- Inform representatives/employees of a potential sale
- Whether to bid or re-bid for a contract or service

Stage 2- preparing for the transfer

- Inform/consult about the transfer and any measures
- Identify who will transfer
- Provide Employee Liability Information to the new employer (transferee)

Stage 3: The Transfer

The transfer occurs and the transferor loses the transferring staff.

- Informing/consulting the remaining staff about the transfer
- Ensuring that all remaining employees are managed, settled and clear about their duties.

Stage 4: After the Transfer

- Inform/consult about potential redundancies if applicable.
- Inform/consult in general to ensure good morale between staff
- Address any concerns to ensure that productivity is not affected.

For the Transferee

Stage 1: Before committing to the transfer

- Consider informing trade unions and employee representatives/ employees of a potential purchase
- Consider the advantages and disadvantages of committing to a transfer/service provision
- Begin to construct a TUPE plan

Stage 2: preparing for the Transfer

- Inform/consult about the transfer and any measures
- Identify who will transfer
- Request Employee Liability Information from the transferor.

Stage 3- The transfer

The transferee takes on the transferring staff and must consider:

- Informing/consulting staff about the transfer
- Ensuring that all employees are managed and are clear about their duties

Stage 4: After the transfer

- Inform/consult about potential redundancies (if applicable)
- Inform/consult in general and assist employees to adjust and integrate within the organization
- Review the effectiveness of procedures with the organisation.

Davenport Solicitors regularly provides specialist advice to companies from a broad spectrum of sectors on the employment aspects of corporate transactions.

If you have any questions or would like to speak to an expert employment lawyer, please [contact us](#) via email at contact@davenportsolicitors.com or telephone on [02079036888](tel:02079036888).