



Business Transfers & TUPE

What is TUPE?

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is the main piece of legislation governing transfers of businesses and its purpose is to protect employees when a business changes hands. In a transfer situation, TUPE preserves transferring employee's continuity of employment and their terms and conditions of employment.

When Does TUPE Apply?

TUPE can apply in many situations and to a huge amount and variety of business transactions, but the most common types of situation when it can apply are when employers:

- Buy or sell all or part of a business
- Make a 'service provision change' by :-
 - a) outsourcing a service they used to carry themselves to an external contractor
 - b) changing the operator of a service from one external contractor to another
 - c) insourcing a service by bringing it back in house

The question of whether TUPE does or does not apply is a very complex one and you should always seek specialist advice on this.

Why Do I Need to Know About TUPE?

As well as protecting employee's rights, TUPE also has the effect of transferring most liabilities with regards to employees to the new company. TUPE also imposes specific obligations on employers in transfer situations and there are penalties on employers for failure to comply.

In order to protect your business it is therefore important to know when TUPE applies so that you can understand what liabilities you are inheriting and can also ensure that you comply with your obligations under the regulations.



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What Does TUPE Mean Legally?

TUPE states that 'all the transferor's (old employer) rights, powers, duties and liabilities under or in connection with the transferring employees' contracts of employment are transferred to the transferee (new employer)'.

This means that in a transfer situation to which TUPE applies, employees have the legal right to transfer to the new company on the terms and conditions which they enjoyed with the old company with all of their existing employment rights and liabilities intact.

TUPE also states that the dismissal of any employee will automatically be unfair if the sole or principal reason for the dismissal was the transfer or a reason connected with it unless there is an economic, technical or organisational reason (an ETO reason) entailing changes in the workforce. It is very difficult in practice to rely on this defence as it is very narrow in its application and you should seek specialist advice before taking any action which could result in the dismissal of an employee.

Employers are also prevented from making any changes to the terms and conditions of employment of the transferring employees if the sole or principal reason for the change is the transfer or a reason connected with it unless there is an ETO reason entailing changes in the workforce.

What Must You Do to Comply With TUPE?

Inform and consult

Both the old and new employer are obliged to and have responsibility for informing and consulting with appropriate representatives of employees affected by the transfer about the transfer and any proposed 'measures'. In order for the information and consultation process to be meaningful, certain information must be given to the appropriate representatives in good time.

If the new employer envisages wanting to make any changes after the transfer, then they will have to let the old employer have this information in order that the old employer can ensure that the appropriate representatives know about the proposals. Again this information should be provided in good time in order to ensure that consultation is meaningful.

There are penalties on employers who fail to inform and consult properly under TUPE and each employee can claim up to 13 weeks pay as compensation for the failure. The old and new employers are both liable for any award of compensation made by an employment tribunal for failure to inform and consult.



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Employee Liability Information

The old employer must also provide the new employer with employee liability information (ELI) about transferring employees, which includes giving details of their name, age, particulars of employment and disciplinary and grievance records.

There are penalties on the old employer for failure to comply with the duty to provide ELI and the new employer can seek compensation in the employment tribunal, where a minimum of £500 per employee in respect of whom the information was not provided for or was defective will be awarded.

Practical Considerations

It isn't possible to prevent TUPE applying as the law prevents employers and employees from 'contracting out of' the effects of TUPE. However it is common practice for old and new employers to negotiate on how to divide up any liabilities which arise in a contract by including 'indemnities' in the agreement. You should take specialist legal advice at the earliest possible stage in order to consider options for the inclusion of such indemnities which could either partially or totally shield you against the financial impact of any claims resulting from the application of TUPE.

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