

TUPE transfers



What is TUPE?

TUPE is the common name 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?

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 however 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 can object to the transfer, meaning they will not then automatically transfer to the new employer. Their contracts will instead terminate on the transfer date, unless they resign sooner.

Changing terms of employment

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 (known as an “ETO reason”) for the change.

In some circumstances 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

Under TUPE, employees are entitled to enhanced protection against unfair dismissal. Any dismissal of an employee with two years’ qualifying service is automatically unfair where the main reason for the dismissal is the transfer itself, unless there is an ETO reason for the dismissal.

The 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

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 (except in the case of a micro-business, where consultation can be with the employees directly). If there are no existing representatives they must be elected by the affected employees for the purposes of consulting over the transfer.

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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 (such as 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.

Employers using 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

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.

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

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.

We're here to help...

This note gives a general overview of some key TUPE considerations. Care should be taken with a transfer, and advice sought early enough to ensure businesses comply with their obligations.

If you would like any further information about our specialist employment law and HR services, please contact a member of the team.

KEY CONTACT



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Kevin is experienced in all aspects of employment law, both claimant and respondent, from drafting contracts and procedures, through to providing representation before tribunals in cases involving multiple claimants, and advising on dismissal and re-engagement procedures in relation to contract variations for 500 plus employees. He has worked across the public and private sectors, for high street practices, local authorities and RSLs. This diverse range of experience has given him a very good understanding of the different pressures and considerations that apply when providing advice to individuals, businesses and public bodies. Kevin is admired for his pragmatic approach to most problems, and for finding solutions which minimise both cost and risk to clients.

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