



## WHAT DO I NEED TO KNOW ABOUT TUPE?

### When does TUPE apply?

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“**TUPE**”) apply on the sale of a business (or part of it) and where there is a service provision change, e.g. where a company engages a contractor to undertake services on its behalf.

### Main principles

- Employees of the business being sold will transfer automatically to the buyer on the terms and conditions they were on immediately before the transfer.
- All rights and liabilities relating to those employees will also transfer (with some exceptions e.g. certain benefits under occupational pension schemes).
- If employees are dismissed because of the transfer or a reason connected to it, the dismissals will be automatically unfair, unless the employer can show the main reason was an “economic, technical or organisational” reason entailing changes in the workforce (known as an ETO reason).

### Who transfers?

- Only employees assigned to the business immediately prior to the transfer will transfer. Various tests exist to help identify these employees.
- Employees can object to transferring in which case their contracts will terminate at the point of transfer.

### Changing terms and conditions

- Any changes to employees’ terms and conditions as a result of the transfer will be void unless changes are for an ETO reason.
- There is no particular time frame after which changes to terms and conditions are permissible. Terms and conditions can be harmonised if there is a reason which is not related to the transfer, e.g. all the employees move on to new terms and conditions.

### Employment Liability Information

The seller must provide to the buyer employee liability information not less than 14 days before the transfer. This includes:

1. the name and age of the transferring employees;
2. the particulars of employment of the transferring employees, e.g. job titles, place and hours of work;
3. information about any disciplinary or grievance procedures brought by any of the transferring employees within the previous two years;
4. information about any court or tribunal case, claim or action brought within the previous two years, or that it is reasonable to believe may arise; and
5. information about any collective agreement.

Often more information than this will be sought, and earlier than 14 days before the transfer, as part of the buyer's due diligence exercise.

## Information and Consultation

Both the seller and buyer have an obligation to inform and, if appropriate, consult with recognised trade unions or elected employee representatives in relation to their respective employees who may be affected by the transfer or any measures taken in connection with it.

## Duty to inform

The duty to inform arises in every TUPE transfer. The following should be given to representatives, long enough before the transfer to ensure effective consultation takes place:

The fact that the transfer is to take place, when it will occur and the reasons for it;

- A failure to comply with the requirement to inform and consult exposes the parties to liability of up to 13 weeks' uncapped pay for every affected employee;
- The legal, economic and social implications of the transfer for the affected employees;
- Any measures that it is envisaged will be taken in connection with the transfer;
- The number of agency workers working for the seller, including the parts of the business in which those agency workers are working and the types of work carried out by those agency workers.

## Duty to consult

- The duty to consult only arises if the employer envisages taking measures in respect of affected employees. If no measures are proposed, the obligation is merely to provide the information dealt with in "Duty to Inform" above to the representatives.
- It is common for both buyer and seller to co-operate in providing information and details of measures. "Measures" are broadly proposals affecting the transferring employees, including minor or non-contractual changes.
- The employer must consult with representatives with a view to seeking agreement to the measures envisaged. The employer must listen to the elected representatives' arguments and give reasons if it does not accept them. Ultimately the employer does not require their consent before proceeding.
- This note refers to the sale of a business, involving the seller as the transferor and the buyer as the transferee. Where there is a service provision change and TUPE applies, this involves customers and suppliers rather than a buyer or seller.

For more information, or if you have any questions, please contact Bernadette Daley or Purvis Ghani on 020 3130 3667 and 020 3130 3689 respectively.

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