

GUIDE TO BUSINESS TRANSFERS, TAKEOVERS AND TUPE

Overview

When a business changes owner, its employees may be protected under the Transfer of Undertakings (Protection of Employment) regulations (TUPE).

TUPE protection

When TUPE applies:

- the employees' jobs usually transfer over to the new company
- their employment terms and conditions transfer
- continuity of employment is maintained

There are 2 types of transfer protected under TUPE regulations:

- business transfers
- service provision changes

Business transfers:

This is where a business or part of a business moves from one employer to another. This can include mergers where 2 companies close and combine to form a new one.

The identity of the employer must change, to be protected under TUPE during a business transfer.

Service provision changes:

- a service provided in-house (eg cleaning, workplace catering) is awarded to a contractor a contract ends and is given to a new contractor
- a contract ends and the work is transferred in-house by the former customer

Employees aren't protected under TUPE if the contract is:

- for the supply of goods for the company's use (eg a restaurant changing food suppliers)
- for a single event or short-term task (eg a catering company being used for a large corporate event)

Only the employees who can be clearly identified as providing the service being transferred are protected.

Example

A courier collects and delivers for a business, but the packages are picked up or delivered by a number of different couriers on an ad hoc basis. The courier isn't protected under TUPE.

A cleaner is employed by a company that decides to use an outside cleaning company instead. They're likely to be protected under TUPE.

Consulting and informing

Before a transfer of ownership happens, employers must tell the trade union or employee representatives:

- that the transfer is happening, when it's happening and why
- how the transfer will affect them
- whether there'll be any reorganisation
- how many agency workers they're using and what types of work they are doing

Employers can be penalised if they don't do this.

Employers must consult employee representatives about anything to do with the transfer that would affect the employees (eg reorganisation). They should try to gain agreement about these changes.

Trade union representatives

If there's a trade union in the workplace, the employer must inform and consult with the representatives from the union.

Employee representatives

If there's no trade union the employer must inform and consult other employee representatives. There might already be representatives, or new ones can be specially elected.

If an election is needed

The employer should:

- make sure the election is fair
- decide how many people are needed to represent the interests of everyone affected
- decide if affected employees should be represented as one workforce or in groups
- decide how long the representatives need to be in place

They should also make sure that:

- the employee representatives are people who are affected by the transfer
- no affected employee is unreasonably excluded from standing for election

- all affected employees at the time of the election are entitled to vote
- employees can vote for as many candidates as there are positions to be filled
- if possible, voting is done in secret
- votes are accurately counted

Employers with less than 10 employees can inform and consult directly with employees if there aren't any appropriate representatives and the transfer will take place on 31 July 2014 or later.

Transfers of employment contracts

Under TUPE, the new employer takes over employees' employment contracts, including:

- all the previous terms and conditions of employment
- any failures of the previous employer to observe employees' rights (so employees could make a claim for discrimination against the new employer, even if it took place before the transfer)
- holiday entitlement
- period of continuous employment - an employee's start date is the same as before the transfer, so continuous employment isn't broken
- any collective agreements previously made

It's a breach of contract if the new employer doesn't meet the terms of the employment contract.

If an employee doesn't want to work for the new employer

Employees can refuse to work for the new employer. This is the same as resigning - they won't normally be able to claim unfair dismissal or redundancy pay.

Notice isn't required. The employee simply tells the employer, or the new employer, before the transfer happens. Employment then ends at the time of transfer.

If an employee's working conditions are significantly worse because of the transfer, they can object to the transfer, or resign and claim unfair dismissal.

Changing an employment contract

TUPE regulations mean employees shouldn't lose their existing employment rights.

Before the transfer

If the employer knows an employee is transferring to another company, they can't normally change the employee's terms and conditions to make them the same as those of the new company - even if the employee agrees to the change.

After the transfer

The new employer can't change an employee's terms and conditions if the reason is the transfer itself.

The new employer can change an employee's terms and conditions if the reason is an 'economic, technical or organisational reason' (ETO) involving changes in the workforce or workplace, such as a result of redundancies or a move from a managerial to a non-managerial position. The employee needs to agree to this change.

'Economic' reasons are to do with how the company is performing.

'Technical' reasons are to do with the equipment or processes the company uses.

'Organisational' reasons are to do with the structure of the company.

Employers can make changes if the employee's existing contract allows for those changes. But the transfer itself can't be the reason for change.

Positive changes

Employers can improve employees' terms and conditions if they agree. For example, they might want to increase the amount of holiday so that it's the same for everyone.

An employer can't normally impose changes - they have to be agreed by the employees or their representatives.

Dismissals

Employers can dismiss employees for an ETO reason involving changes in the workforce, eg redundancies. The normal rules around fair dismissals will still apply.

Collective agreements

Collective agreements in place before the date of the transfer will apply.

Collective agreements from the date of transfer won't apply if the new employer hasn't taken part in the process.

Employers can renegotiate terms and conditions in collective agreements after 1 year if the change isn't less favourable to the employee.

Pension rights

Employees' company pension rights earned up to the time of a transfer are protected, but the new employer doesn't have to continue an identical pension.

After the transfer

When the transfer is complete, employees should make sure they get an up-to-date written statement of employment, giving the name of the new employer and saying that their terms and conditions haven't changed.

Employees might get a P45 if their tax records are being updated.

Redundancy

The new employer can't make employees redundant just because they were transferred from another employer.

The new employer can consult about redundancies before the transfer if the old employer agrees.

If an employee is made redundant for an 'economic, organisational or technical' reason involving changes to the workforce, they may be entitled to a redundancy payment.

Example

After a transfer, a new employer has to close down part of a company because it's not performing. This means the business doesn't need people with a certain specialist skill, and therefore makes an employee redundant. The employee could be entitled to a redundancy payment.

Information about employees during transfers

An employer must provide the new employer with information about employees. This normally includes:

- name
- age
- main details of employment
- disciplinary action taken against employees in the last 2 years
- grievances raised by employees in the last 2 years
- legal action taken by employees against the employer in the last 2 years
- potential legal action the employer thinks employees might raise

This information has to be provided 4 weeks before the transfer and should help the new employer understand employees' rights and their duties.

Insolvent businesses

If the employer is insolvent and the business is being transferred or taken over by another company, the protection employees get is different from in a normal transfer.

The employees are unlikely to be protected under TUPE if the business is closing down. However, TUPE regulations will normally apply if it's being rescued and taken over or transferred.

If employees are owed money

Employees have rights if their employer is insolvent and owes them money. Employees can claim for this whether they're protected under TUPE or not.

In a TUPE-protected transfer, the new employer must pay any amount left over after employees have been paid from the government's National Insurance fund.

Changes to employees' terms and conditions

Employees' pay can be reduced or their other terms and conditions changed after the transfer. This is allowed if it will prevent job losses.

Any changes must be agreed with employee or trade union representatives.

Any agreement can't break statutory employment rights. For example, employees can't be paid below the National Minimum Wage.

Employees working abroad

Employees of a UK business who are based outside the UK could still be protected by TUPE.

In business transfers, if a business has an 'undertaking' in the UK (eg building, assets, fixtures and fittings, employees) but an employee spends most of the working week outside the UK, it's likely they're protected.

In service provision changes, there must be an organised group of employees in England, Scotland or Wales to qualify for TUPE protection.

Example

A team is doing website maintenance under a contract that's coming to an end and someone else is taking it over:

If the contract is performed in the UK, but one team member works from home in a country other than England, Scotland and Wales, it's likely they're protected.

If the whole team works from home in a country other than England, Scotland or Wales, the members wouldn't be protected as there's no organised group of employees in one of those countries.