

# A Guide to the Transfer of Undertakings (Protection of Employment) Regulations 2006

Business Information Factsheet  
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## Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended), known as TUPE, protect employees' rights when the organisation they work for or the service they provide transfers to a new employer, for example as the result of the sale of a business.

Under TUPE, an employee whose organisation or work role is transferred to another organisation automatically becomes an employee of the new organisation. The new employer may not dismiss the employee or vary their existing terms and conditions (Ts and Cs) of employment for reasons that arise solely or principally from the transfer.

This factsheet explains the scope of TUPE and the obligations it imposes on employers.

Employment law is a complicated area of business and this factsheet is intended as a starting point only. Professional advice should be sought before any decisions are made.

## What is the scope of TUPE?

TUPE places obligations on both the 'outgoing employer' (the employer who is transferring an employee) and the 'incoming employer' (the employer who is accepting the transferred employee). Employer obligations under TUPE vary depending upon whether they are the incoming or outgoing party.

TUPE applies to:

- All employers situated in the UK, including business organisations of all sizes, not-for-profit organisations and public sector organisations.
- All employees who are working under a contract of employment. TUPE does not cover self-employed workers such as freelancers and contractors.
- The rights, obligations, powers and liabilities of transferring employees, including their Ts and Cs of employment (with some exceptions for occupational pensions), accrued benefits (such as holiday entitlement) and continuity of service.

## When does TUPE apply?

TUPE applies to 'relevant transfers' of any organisation that is situated in the UK and has employees, regardless of the size of the organisation, the legal status of the organisation and whether it operates as a business or as a not-for-profit organisation. A relevant transfer will be created in either of the following circumstances:

- **Business transfers:** These occur when a business, or part of a business, is transferred from one employer to another.
- **Service provision changes:** These occur when an organisation engages a contractor to take over specific work activities (outsourcing), takes over specific work activities from a contractor (in-sourcing), or reassigns specific work activities to another contractor.

A relevant transfer will never take place in the following situations:

- Transfers outside the UK (although in European Union member states, there is legislation that is broadly similar to TUPE).
- When shares are sold, but the business employing the staff remains the same. (In this situation, the employer has not changed, but the ownership of the business has.)
- When the transfer consists of a contract to supply goods only. This type of contract will never be considered a transfer of a business or service provision.

## Business transfers

The majority of 'relevant transfers' will be business transfers. A business transfer is the transfer to a new employer of a whole business or a part of a business, either as the result of a sale or as the result of a merger of two or more businesses.

To count as a relevant business transfer, there must be an 'economic entity which retains its identity' before and after the transfer. This is judged by the business assets that have been transferred and what use is made of the transferred assets. If core business assets have been transferred to the new employer and are being used in the same kind of business activity as previously, then it is likely that a relevant business transfer has occurred, and TUPE will apply.

Assets that are taken into account when determining whether a business transfer has occurred include premises, equipment, intellectual property, employees and 'goodwill' (for example a customer base or a brand reputation). If only shares or limited assets (for example, equipment) of a business are transferred, and not employees or customers, TUPE will not apply. If, for example, the majority of employees have transferred, as well as equipment and a customer list, this is likely to be regarded as a relevant transfer and TUPE will apply.

Go to [www.acas.org.uk/media/pdf/d/r/Handling-TUPE-Transfers-The-Acas-Guide.pdf](http://www.acas.org.uk/media/pdf/d/r/Handling-TUPE-Transfers-The-Acas-Guide.pdf) for more details about which transfers count as relevant business transfers. Employers should always seek legal advice to determine whether TUPE applies to their specific situation.

## Service provision changes

Service provision changes concern relationships between contractors and the organisations who hire their services. A service provision change occurs when:

- A service which was usually provided for in-house (by the organisation) is outsourced to a contractor. This could occur, for example, where an internal legal department is closed down and the work activities of the department are contracted to a local legal firm.
- A service contract is assigned to a new contractor.
- A service is brought in-house where previously it was carried out by a contractor.

For TUPE to apply to the change in service provision, the following conditions must be met:

- The transfer must involve a supply of services, not just a supply of goods.
- Prior to the change, there must have been an organised group of employees whose principal employment purpose was to supply the services for the organisation.
- Prior to the change, and following the change, the organisation intends that the service will continue to be provided by the incoming employer. The employment activities carried out following the transfer should be fundamentally the same as before the transfer.

TUPE's regulation of service provision changes is intended to protect the rights of an identifiable team of employees who may be affected by their employer choosing to outsource an ongoing work role or altering the provision of an ongoing service by the employee to the organisation. Examples of the types of service activities that may be affected by these provisions include contracts for office cleaning, catering and security. TUPE does not apply to single-event or short-term services, such as the delivery of a conference or the repair of an office roof.

Some transfers will be considered both a business transfer and a service provision change.

## **Obligations that apply to both outgoing and incoming employers**

Outgoing and incoming employers are both obliged to inform and consult employees affected by the transfer, and their representatives (such as trade union representatives), about the transfer and any changes that may be proposed. The two employers should meet and discuss how they will work together to ensure that they give affected employees all the necessary information regarding the transfer.

This information must include:

- The fact that the transfer is going to take place, when it will happen, why it is going to happen and how it will happen.
- The legal, social and economic implications of the transfer for the affected employees, for example a change of work location.
- The measures connected to the transfer that the employers are likely to take and how they will affect employees, for example reorganisation plans that the new employer may have for the organisation. Outgoing employers must ensure that the measures they think the incoming employer is likely to take are explained fully to affected employees. The incoming employer must give the outgoing employer all the information they need to meet this requirement.

This information must be provided to employees, and their representatives, long enough before the transfer date to enable the employers to consult with the employees and the employees' representatives. The consultations should be undertaken in order to seek agreement to the changes from employees or their representatives.

There may be situations in which there are no existing representatives for employers to hold a consultation with. In these circumstances, employers in organisations with ten employees or more must arrange for the election of employee representatives who will speak on behalf of the whole workforce. Organisations with fewer than ten employees do not need to elect employee representatives and can simply consult with employees directly.

If the employers fail to inform or consult with employees or the employee representatives, they may be found liable to pay compensation of up to 13 weeks' gross pay to each of the employees involved in the transfer. The outgoing and incoming employers are jointly and severally liable in relation to this provision. In practice, employees are entitled to recover this compensation from either the outgoing employer or the incoming employer. This means that one employer will be left to recover their share from the other employer.

### **Obligations of the outgoing employer**

At least 28 days before the transfer, the outgoing employer must provide the incoming employer with specified 'employee liability information' relating to the employees to be transferred. This is intended to help the new employer understand the rights of the transferring employees and the employer obligations which will be imposed upon them. The information which needs to be provided by the outgoing employer includes:

- Details of employees' identity and age.
- Information contained in the statements of employment particulars for all transferring employees.
- Information relating to any collective agreements that apply to the transferring employees.
- Details of any disciplinary action taken by the outgoing employer, relating to the transferring employees, in the previous two years.
- Details of any grievances which have been raised by transferring employees in the previous two years.
- Details of any legal action which has been taken by transferring employees against the outgoing employer in the previous two years.
- Details of any likely or anticipated legal claims from transferring employees.

If an outgoing employer fails to provide this information, the incoming employer may claim against the outgoing employer for any compensation which a tribunal may consider 'just and equitable'. The amount of compensation will vary depending upon the circumstances which the incoming employer may be forced to contend with.

When providing this personal information about employees, the outgoing employer must ensure that they comply with data protection principles. The Information Commissioner's Office (ICO) has published guidance for employers about disclosing employee information under TUPE without violating the Data Protection Act 1998. Go to <https://ico.org.uk/media/for-organisations/documents/1063/disclosure-of-employee-information-under-tupe.pdf> to view this guidance.

### **Obligations of the incoming employer**

The incoming employer must:

- Take over the contracts of all staff employed in the 'organised grouping of resources or employees' immediately prior to the transfer. This includes those who would have been employed if they had not been unfairly dismissed for a reason connected to the transfer.
- Take over all rights and obligations connected with those contracts of employment. There are some exceptions to this, including criminal liabilities and certain benefits under an occupational pension scheme.

- Take over and manage specific pension obligations under the Transfer of Employment (Pension Protection) Regulations 2005. An employee's rights relating to an occupational pension scheme which relate to benefits for old age, invalidity or survivors do not transfer. However, rights relating to redundancy and early retirement benefits which are linked to an occupational pension scheme will likely transfer to the new employer. The incoming employer may need to provide new pension schemes for some employees who are transferred. The rules give incoming employers reasonable flexibility. They are not obliged to replicate the precise pension arrangements offered by their predecessor, but they do have to offer access to either an occupational pension scheme that must meet certain conditions, or a defined contribution workplace pension scheme where the incoming employer can match contributions paid by the outgoing employer immediately before the transfer.
- Take over any collective agreements made on behalf of employees and in force immediately before the transfer. However, incoming employers can renegotiate the Ts and Cs agreed in a collective agreement one year after the transfer, providing the overall change is no less favourable to the employees involved.
- Recognise a trade union or unions if they were recognised by the outgoing employer.

## **Employees' rights under TUPE**

Transferred employees retain all the rights and obligations that exist under their contract of employment with the outgoing employer, other than the exceptions relating to occupational pension schemes.

Employees may not be dismissed or subjected to changes to the Ts and Cs of their employment contracts if the transfer is the sole or principal reason for the dismissal or the change in Ts and Cs.

However, dismissals may be considered fair if:

- The sole or principal reason for the dismissal is an 'economic, technical or organisational reason' requiring changes in the workforce. Dismissals which are made for these reasons must be made fairly and the employers should ensure that they comply with other existing employment legislation.
- The dismissal can be shown to be for genuine redundancy reasons and the employers followed a fair dismissal procedure.

Changes to the Ts and Cs of the employees' employment contracts may be considered fair if:

- The sole or principal reason for the changes is an 'economic, technical or organisational reason' requiring changes in the workforce, and the employee agrees to the change.
- The terms of the contract would have allowed the employers to make the change anyway.
- A new development arises. For example, the organisation wins a new contract and is required to make changes to employee contracts in order to fulfil the contract.

Employees who are dismissed can bring a claim of unfair dismissal to an employment tribunal. Their claim may be made against both the outgoing and incoming employers. Any dismissal which occurs solely or principally as a result of the transfer will automatically be considered unfair by the tribunal.

If either the incoming or the outgoing employer attempts to vary an employee's Ts and Cs, the employee can bring a claim of constructive dismissal to an employment tribunal. If it is found that the changed Ts and Cs are solely or principally due to the transfer, the tribunal will uphold the employee's claim. An employment tribunal would usually assess TUPE-related constructive dismissal cases under the normal principles of unfair dismissal legislation.

As well as going to an employment tribunal, any employee who believes that their employment or contractual rights have been infringed under TUPE may bring a claim through the civil courts. A tribunal or civil claim can also be made by an employee representative on behalf of one or more employees.

## **Insolvent companies**

Special provisions apply if the outgoing employer is subject to relevant insolvency proceedings. These are as follows:

- Some payments owed to employees by the outgoing employer, such as statutory redundancy pay, arrears and holiday pay, are met by the Secretary of State through the National Insurance Fund. Any debts such as these will not become the responsibility of the incoming employer. However, existing debts which cannot be met by the National Insurance Fund will be passed over to the new employer.

Incoming employers will be afforded more flexibility in relation to changing employees' employment Ts and Cs. Incoming employers will be able to change employees' Ts and Cs following the transfer, so long as the suggested changes will prevent job losses. Any changes must still be agreed to by the employees or trade union representatives.

## **Hints and tips**

- Both incoming and outgoing employers should ensure that employees and their representatives are kept informed at each stage of the transfer process.
- Outgoing employers should ensure that they provide the incoming employer with all of the relevant employee information in sufficient time, prior to the transfer.
- Employers should be aware that any agreements (including contracts of employment) that are formed in an attempt to exclude or limit employee rights provided under TUPE will be considered invalid.
- Incoming and outgoing employers should consult Acas (or, in Northern Ireland, the Labour Relations Agency) for advice and guidance about the scope of TUPE.
- Professional advice about TUPE should always be sought from a legal adviser or human resources expert before an employer takes any employment-related decisions.

## **Further information**

BIF 42 Written Statements of Employment Particulars

BIF 120 A Guide to Buying a Business

BIF 150 An Introduction to Selling Your Business

BIF 168 An Introduction to Redundancy Legislation and Procedures

## Useful publications

'Transfer of undertakings (TUPE)'

Acas

Website: [www.acas.org.uk/index.aspx?articleid=1655](http://www.acas.org.uk/index.aspx?articleid=1655)

'Redundancy handling'

Acas

Website: [www.acas.org.uk/index.aspx?articleid=747](http://www.acas.org.uk/index.aspx?articleid=747)

'Disclosure of employee information under TUPE: Data Protection Act'

Information Commissioner's Office (ICO)

Website: <https://ico.org.uk/media/for-organisations/documents/1063/disclosure-of-employee-information-under-tupe.pdf>

## Useful contacts

Acas helps employers, employees and their representatives by providing information and advice, preventing or resolving disputes and settling complaints about employees' rights without the need for an employment tribunal hearing.

Tel: 0300 123 1100 (Helpline)

Website: [www.acas.org.uk](http://www.acas.org.uk)

The Labour Relations Agency (LRA) provides a confidential employment relations service and advice on employment issues in Northern Ireland.

Tel: (028) 9032 1442

Website: [www.lra.org.uk](http://www.lra.org.uk)

The Chartered Institute of Personnel and Development (CIPD) is a professional body for those working in personnel and development. It provides information, advice and training.

Tel: (020) 8612 6200

Website: [www.cipd.co.uk](http://www.cipd.co.uk)

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