

# TUPE

## Transfer of Undertakings (Protection of Employment) Regulations



### Overview

You may be in a situation where your employer's business, part of the business or the service provider you work for is transferring to another person or company. In these circumstances, your existing employment contract could be protected under the Transfer of Undertakings (Protection of Employment) Regulations 2006, which are commonly known as 'TUPE'.

### When could I be affected?

There are two types of transfers that are covered by the TUPE regulations:

- Business transfers
- Service provision changes

Consequently, TUPE can apply to various business situations, where you as an employee will have your employment rights protected.

### Business Transfers

A business transfer is when a business, undertaking, or part of a business or undertaking is transferred from one employer to another. This can include mergers where two companies combine to form a new company or one company takes over the business of the other. To be protected by TUPE during a business transfer the identity of your employer must change. A mere transfer of company shares does not qualify under TUPE because the same company would continue to be your employer.

However, TUPE will apply when there is evidence that the share transfer truly represents a change of day to day control of the business from one person or company to another; and not that there is not merely a change in corporate

ownership. Specialist advice would be needed in each case to determine whether TUPE applies.

### Service Provision Changes

A service provision change is more common in work contracts for example in IT, office cleaning, workplace catering, or security, but recent cases have shown that it can also apply in the advertising industry, where an employee only works on one particular account for one particular client. It normally happens in one of three situations, when:

- A service previously undertaken by your employer is awarded to a contractor (called 'contracting out' or 'outsourcing')
- A service contract is assigned to a new contractor during a retendering process
- A service contract ends with the service being performed 'in house' by the employer

However, TUPE will not apply in relation to contracts that relate just to the supply of goods or if a contract is awarded for a one off event, for example corporate catering for a one off event.

In order to be protected under a service provision change, you have to be assigned to the part of the

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business or contract that transfers. So for example, if you work in marketing on a project for one particular client, but this is on an ad hoc basis with a requirement that you work on other projects, it is unlikely that you will transfer in the event of a service transfer.

There are situations where they may be both a transfer of undertaking and a service provision change within the same transaction, or soon after, if a new employer decides to reorganise the business.

### What Rights do I have?

Under a TUPE transfer, you have certain basic rights, as your employment is effectively transferred to the new employer. In essence, your terms and conditions of employment and statutory rights transfer to the new employer. Consequently, as a result of TUPE, you retain your continuous employment and it will not have been broken by the transfer. Therefore, you will still be able to bring claims for unfair dismissal, redundancy,

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discrimination and other contractual claims to the same extent which you were previously entitled to do. However, you should note that there are complicated rules in respect of pensions, which you should seek specialist advice on. It is important to realise that the TUPE regulations do not protect the full transfer of occupational pension benefits.

**Dismissal** - If you transfer and then your new employer seeks to dismiss you, you may have a claim for automatic unfair dismissal, if you can show that the sole or principal reason for the dismissal was connected to the TUPE transfer, unless an employer can show and thereby justify that it was for an economic, technological or organisational (ETO) reason, requiring a change in the workforce. A 'change in the workforce' means either a change in the number of people in the workforce or a change to the place of work. An employer cannot justify TUPE related dismissals by reason to any other sort of change.

**Terms and conditions** - Your new employer is also prevented from altering your terms and conditions as a result of the transfer, unless the employer can demonstrate an ETO reason entailing a change in the workforce (i.e. workforce numbers or place of work) or unless the terms of your contract permit such alterations. It is a common misconception of employers that they can alter terms and conditions following a transfer if they simply wait for a period of time post-transfer. This is particularly common in the financial services industry, when there is a transfer and the new employer tries to alter contractual terms relating to bonuses. However, it is not this simple. The key question is whether any alteration was by reason of the transfer and that no ETO reason or contractual term permitting the

alteration is applicable. Changes that cannot be justified will be void and remain so after the transfer.

**Consultation rights** - Before the transfer takes place, employers involved with the transfer are required to consult with employees and are required to let them know if any measures have been proposed. These measures should be discussed with the employees' representatives, which are either trade unions or representatives elected by employees. Employers with fewer than ten employees may, in certain circumstances, consult with employees directly rather than through representatives. The incoming employers should supply the outgoing employer with certain information, so that they have the opportunity to inform and consult.

An employment tribunal may award up to 13 weeks' pay per affected employee if it considers that there has been a failure to inform and consult appropriately.

**Enforcement** - You can bring claims in the Employment Tribunal if you are dismissed, an employer alters your terms or consultation does not take place, but strict time limits apply; usually three months from the date of the act you are complaining about. You should seek specialist advice at an early stage if you are thinking of bringing a claim.

### Special employee status

There are certain rules covering employees who transfer from an insolvent business that are different from the normal TUPE rules. If you consider that you may fall in this category, you should seek specialist advice.

Transfers within government departments of administrative functions are generally not covered by TUPE. There have in the past

been several non-statutory Codes of Practice designed to supplement the rights of public sector workers (including those not covered by TUPE) but one such Code has already been scrapped and the future of the others is currently doubtful.

If you are employed by a UK employer but you are physically based outside of the UK, you could still be protected by TUPE. The key question is whether the transfer involves a UK business and in the case of business transfers, if the company you work for has an 'undertaking' in the UK. This may affect many senior employees, who have global roles and spend a large amount of their time abroad, for example in business development. However, the situation can be complex and you should seek further advice.

If you think a TUPE transfer is about to take place or has taken place, you should seek further advice if you are unhappy about the effect it has on you. Due to strict time limits that will apply to claims you can bring, you should not delay in seeking advice.



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