



Camberley House
1 Portesbery Road
Camberley, Surrey
GU15 7JQ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

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Transfer of Undertakings (TUPE) for Labour Providers

1.1 Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) plays an integral role in the labour provider industry. It is vital that all labour providers are fully aware of the impact it will have upon them.

1.2 What does TUPE mean to you as a labour provider?

In a TUPE transfer the “transferor” is the company from which the transferring employees are transferring and the “transferee” is the company to which the transferring employees are transferring.

TUPE covers three main things:

1. It transfers employment relationships and all rights and liabilities in connection with the transferring employment relationships to the transferee.
2. Transferring employees automatically become the employees of the transferee and their existing terms and conditions of employment are preserved subject to some limited exceptions e.g. in relation to occupational pensions with their period of employment unbroken.
3. The transferring employees are protected from being dismissed in connection with a TUPE transfer.
4. It imposes obligations to inform and to consult with representatives of employees affected by the TUPE transfer.

1.3 When does TUPE apply?

TUPE generally applies:

1. When a business or undertaking (or part of one) is transferred and the business retains its identity after the transfer (“a business transfer”); or
2. When a “service provision change” takes place.

A “service provision change” will usually be the most relevant type of transfer to labour providers. A service provision change can occur in the following situations:

1. A company decides to contract a labour provider to take over defined functions on their premises i.e. outsourcing.
2. A labour provider wins the tender for labour provision on a given premises from another labour provider or umbrella company, which directly employs its workers i.e. a retender exercise.
3. A company decides to no longer employ a labour provider to service defined functions on their premises and opts to manage it themselves i.e. taking it in house.

TUPE only applies to employees, specifically any individual who works for the transferor under a contract of employment. Agency workers would not normally transfer under TUPE from the client/existing service provider to the new service provider, as a result of not being employees of the client/existing service provider i.e. because typically they may be working under a contract for services. However, where agency workers are directly employed by the transferor immediately prior to any of the situations described above, then TUPE will generally apply. Examples may be where an agency worker has a contract of employment with a labour provider or an umbrella company, for the purposes of a travel and subsistence scheme, or to make use of the Swedish Derogation (i.e. a Regulation 10 Agency Workers Regulations 2010 contract of employment).

1.4 Which employees will transfer on a service provision change?

- The client/outgoing service provider must have had in place an identifiable team of employees that are "essentially dedicated" to carrying out the activities that are to transfer.
- The transferor can not "cherry pick" the employees they want to keep by moving employees onto or off the service prior to the transfer taking place.
- It is important to examine whether an employee is assigned to the service being provided or not e.g. by analysing what they do and how often they do it. If a contractor/client uses different employees each day to provide the service, or the employees provide their services to a number of different clients, they may not fall into the "organised group of employees" who will transfer to the new provider.
- It is not usually sufficient that employees carry out the majority of their work for a particular client by luck rather than design; the employees must be organised by reference to the requirements of the client and be identifiable as members of that client's team. In other words, there must have been some conscious decision to put the employees into a team which provide a direct service to that client.

2. Overview of Rights and Obligations

2.1. Obligations of the transferor e.g. the labour provider that has lost the contract to provide services to the client:

Providing employee liability information (ELI)

- The transferor must provide certain information (ELI) about the transferring employees to the transferee not less than 14 days before the transfer occurs (even if not specifically requested by the incoming provider). On or after 1st May 2014 this deadline will increase to 28 days before the transfer date. The type of information that must be provided is set out in Appendix 1 of this Member Brief.

- If special circumstances make it not reasonably practicable to provide the ELI within the deadline (e.g. because the identity of the incoming contractor is not yet known), it should be done as soon as is reasonably practicable.
- The ELI must be provided in writing or in other forms which are accessible to the incoming provider.
- If any of the ELI changes between the time when it is initially provided and the completion of the transfer, then the transferor is required to give written notification of those changes.

Potential penalties

- The transferee may seek redress in an Employment Tribunal for failure to provide employee liability information about the transferring employees. Compensation is assessed with regards to losses suffered by the transferee, with a minimum award of £500 per employee (no upper limit).
- If you are the incoming provider and the outgoing provider is failing to co-operate in providing ELI, it may be worth highlighting the potential liability they may face.

Informing and consulting

- The transferor must inform “affected” employees’ representatives about certain information about the transfer. The information which must be provided is set out in Appendix 2 of this Member Brief.
- There is no specific time limit for when this process should take place, although it must be done “in good time” to allow meaningful consultation to take place (if required).
- An employee is “affected” if they are going to transfer to the new service provide or their job will be otherwise affected by any measures taken in connection with the transfer.
- The transferor must also consult with the employee’s representatives if it envisaged that any measures will be taken concerning the affected employees.
- The obligation to inform and (if required) consult is in relation to “appropriate representatives” i.e. a recognised trade union, existing employee representatives whose remit covers TUPE consultation, or employee reps especially elected for the relevant TUPE consultation.
- If there are not already appropriate representatives in place, then you must hold an election to appoint them. TUPE sets out a prescribed process for holding elections, the detail of which should be read and understood prior to holding the elections.
- From 31st July 2014 onwards employers with fewer than 10 employees may consult directly with affected employees rather than via representatives.

Potential penalties

- Employees may have a right to submit a claim to the Employment Tribunal for up to 13 weeks’ pay (gross) if the employer has failed to inform and (if required) consult with the employee (via their rep) about the TUPE transfer.

2.2 Obligations of the transferee e.g. the company successful in winning the contract on a retender

Recognition of transfer of rights and liabilities

- The transferee effectively steps into the transferor's shoes with regard to the transferring employees. They take the transferring employees on under the same terms and conditions of employment. The new employer cannot pick and choose which employees to take on.
- Liability will also transfer in relation to any employees who would have been employed in the grouping immediately before the transfer, but who were dismissed prior to the transfer because the sole or principal reason for the dismissal was the transfer itself (unless the reason for dismissal was for an economic, technical or organisational (ETO) reason, in which case liability for the dismissal remains with the transferor (see section 3 below). This means that even if the outgoing provider has not paid all salary and holiday pay that is outstanding to the transferring employees at the date of transfer, the incoming provider will need to pick up the cost of this. If a contractual agreement exists between the incoming and outgoing provider, the incoming provider may want to seek a contractual commitment from the outgoing provider that they have paid all outstanding remuneration accrued and owed to the transferring employees up to the transfer date (as well as an indemnity that the outgoing provider will reimburse the incoming provider if the incoming provider has had to meet those costs instead).
- The transferee will take on all rights and obligations arising from the transferring employees' contracts of employment (including outstanding liabilities from the previous employer e.g. outstanding salary; holiday pay), except for some types of benefit under an occupational pension scheme.
- If the transferring employees were eligible to participate in an occupational pension scheme prior to the transfer, the new employer must establish a minimum level of pension provision for the transferred employees. This minimum 'safety net' requires the new employer to match employee contributions, up to 6% of salary, into a stakeholder pension, or offer an equivalent alternative.
- The terms and conditions of transferring employees including their rights to remuneration/expenses reimbursement/participation in a travel and subsistence scheme will transfer, and the incoming provider will be obligated to preserve those rights. It may be that the incoming provider does not benefit from a HMRC dispensation for the purposes of running a travel and subsistence scheme, but in fact a travel and subsistence scheme can be run without a HMRC dispensation (it is just that most companies that do run one tend to do so only where they have the benefit of the dispensation). These types of contractual terms would have to be honoured by the incoming provider in order to comply with TUPE, and thus the incoming provider may be under an obligation to try and set up and replicate the travel and subsistence scheme which the transferring employees enjoyed with their previous employer (hence the need for agencies to carry out proper due diligence before tendering for contracts).
- Any acts or omissions of the transferor before the transfer are treated as having been done by the transferee.
- The transferee will take on any collective agreements made by or on behalf of the transferor employer in respect of any transferring employees, which were in force immediately before the transfer. However, changes to collective agreements which are

agreed after the date of the transfer will not apply to the transferred employees' terms, if the transferee is not a participant to the collective bargaining process.

- The transferee must recognise any union agreement(s) entered into by the previous employer, provided the business/service provision that transfers maintains a distinct identity after transfer. If the transferring employees become fully integrated into the new provider e.g. provides services to other clients, there may not be a requirement to recognise the trade union.
- Some benefits may not, by their nature, be easily transferable e.g. continued participation in a profit and share scheme of the transferor; staff discounts. The entitlement of the transferred employees is to participation in a scheme of substantial equivalence. A cash buy out may need to be considered if this is not possible.
- Restrictive covenants transfer but will be interpreted by reference to the activities and customers of the transferor who the employee originally made the agreement with. Transferees may therefore want to consider amending restrictive covenants to make them more relevant to their business (payment to/agreement of the employees may be required for this).
- Liabilities that do not transfer to the transferee include: any employees who object to the transfer; employees dismissed for an ETO reason; criminal liabilities (e.g. health and safety breaches in relation to transferring employees); occupational pension scheme rights (except for certain early retirement benefits); responsibility for pre-transfer outstanding PAYE and NICs.

Providing information for consultation purposes

- The transferee must consult with its own affected employees about any measures which it envisages taking concerning the affected employees (e.g. if it is contemplating making redundancies immediately after the transfer).
- The transferee is under a duty to inform the transferor about any measures it intends to take in respect of the affected employees to allow the transferor to conduct meaningful consultation with its own employees. There is no definition of what constitutes a measure but it is given a wide interpretation by courts. Examples include a change in work location; a change in duties; a change in provider of life/health insurance; a change in pay day; a proposed restructure.

2.3 Employees

Right to information and consultation

- Affected employees have the right to be represented by appropriate representatives (e.g. trade unions or elected reps) during the information and consultation process. The employer must allow the elected representatives access to the affected workforce; accommodation and facilities to assist them with their rep duties (e.g. use of a telephone and photocopier) and reasonable time off with pay during normal hours to carry out representative duties.
- Affected employees should be informed of certain information prior to the transfer (set out in Appendix 1), via their reps.
- Affected employees should be consulted with prior to the transfer, about any anticipated measures that will be taken in respect of their employment.

Preserving terms and conditions of employment

- Transferring employees are entitled to keep the same terms and conditions of employment they had before the transfer and to have their continuity of service preserved.
- Any purported variation to a transferring employee's contract of employment will be void if the sole or principal reason for the variation is the TUPE transfer (even if the variation is to the benefit of the employee and/or is agreed).
- Contractual variation will be permitted if the sole or principal reason for the variation is an ETO reason and the employer and employee agree the variation.
- Variation of terms incorporated into an employee's contract of employment from a collective agreement will also be permitted if: (a) the variation takes effect more than one year after the date of the transfer; and (b) following the variation, the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.
- There is no time limit after which it is automatically permissible to change a transferred employee's terms and conditions of employment; the rules in this section will always apply to a transferred employee's employment.

Right not to be dismissed

- A transferring employee has the right not to be dismissed for the sole or principal reason of the transfer. Any such dismissal will be automatically unfair (or will be *potentially* unfair if there was an ETO reason for the dismissal).

Potential penalties

- If the dismissed employee has reached the two year qualifying period of service, they would be entitled to bring a claim of unfair dismissal in the Employment Tribunal. If successful, the employee could be entitled to compensation. Generally, this would include a basic award (calculated by reference to a set formula according to their age, length of service and weekly pay), plus up to 12 months' loss of pay and benefits.
- The time limit for the employee bringing a claim is generally 3 months from the date of dismissal.
- Employees with less than 2 years' service do not have the qualifying period necessary to bring a claim for unfair dismissal due to a TUPE transfer or a reason connected with the transfer. However they may be entitled to a remedy in respect of any alleged failure to inform and consult about the transfer (see section 2.1 above).

Right to object to transfer

- Employees have a right to object to being transferred to the new employer. They are treated as resigning in these circumstances and their employment does not transfer.
- There are two exceptions to this rule: (a) where the employee resigns in response to a fundamental breach of the employer and claims constructive dismissal; and (b) the reason for the resignation is a substantial change to the employee's working conditions to their material detriment (e.g. a significant increase in travel time/cost to a new work

location). In these circumstances the employee is treated as “dismissed” and will have preserved their right to potentially bring an unfair dismissal claim.

3. What is an ETO reason?

- An employer may avoid liability for an unfair dismissal claim if it can show both that the reason for the dismissal of the employee was an ETO reason and that it was procedurally fair.
- Changes to terms and conditions post-transfer may also be permitted if they are for an ETO reason (and done by agreement with the employee).
- ETO stands for “economic, technical or organisational reason”. There is no statutory definition of this term.
- BIS guidance states that an ETO reason is likely to include either:
 - (a) a reason relating to the profitability or market performance of the transferee's business;
 - (b) a reason relating to the nature of the equipment or production processes which the transferee operates; or
 - (c) a reason relating to the management or organisational structure of the transferee's business.
- The ETO reason must also entail changes in the workforce. This mean either changes to (a) the number of employees employed; (b) the functions performed by the employees; or (c) the place of work.
- The burden of proof is on the employer to show that there was ETO reason.

4. TUPE on insolvency

Where the exiting employer is subject to insolvency proceedings, TUPE is relaxed in certain ways to protect incoming employers. The idea is that companies will be more inclined to "rescue" insolvent businesses, where the inherited liabilities are not so onerous. For example, the liability for certain payments due to the transferring employees (e.g. statutory redundancy and statutory notice) will be met by the National Insurance Fund. Also, if it is agreed with the trade union/employee representatives, certain terms and conditions of employment can be changed (e.g. to salary and benefits) if the change is designed to save safeguard employment. Specific legal advice should be sought where insolvency proceedings apply.

5. Essential steps for the outgoing labour provider to take when a contract has been taken over by a new provider

- 1) Identify which employees fall within the part of the business/service that is transferring.
- 2) Collate ELI about the transferring employees and give this to the incoming provider.
- 3) Update the incoming provider of any subsequent changes to this information.

- 4) Ask the incoming provider to inform you if they intend to take any “measures” in respect of the transferring employees’ employment.
- 5) Identify appropriate representatives of the affected employees (or hold elections to appoint them).
- 6) Inform the appropriate reps about the transfer.
- 7) If measures are envisaged consult with the appropriate reps about the transfer.

6. Essential steps for the incoming labour provider to take when services are being outsourced to them or they have won a second generation contract to be the new provider of services

- 1) Obtain the identity of the outgoing provider.
- 2) Request ELI from the outgoing provider about the transferring employees.
- 3) Consider requesting additional information that will assist with your HR operations post-transfer e.g. copy of staff handbook and other policies; details of sick leave, holiday and maternity leave already taken this year by transferring staff members.
- 4) Seek confirmation from the outgoing provider that they will meet liabilities such as accrued holiday pay and salary, up to the transfer date.
- 5) If you disagree that any of the employees identified should form part of the transferring group (e.g. because you do not think they were assigned to the contract you are taking over), seek clarity from the outgoing provider e.g. regarding the job content and the time the employee spent delivering the contract.
- 6) Inform the outgoing provider of any measures you intend to take in respect of the transferring employees’ employment.
- 7) If you intend to take any measures in respect of your own employees as a result of the transfer (e.g. changes to their duties), identify appropriate representatives of your own affected employees (or hold elections to appoint them) and consult about the measures with a view to reaching agreement.
- 8) Be aware that any agreed extended hire periods with the hirer in relation to transferring employees must continue to be honoured after the transfer.

7. Business protection against TUPE liabilities

It is not possible to contract out of TUPE. Therefore it is recommended that you carry out due diligence before entering into a business transaction where TUPE may apply, so that you can understand what obligations and liabilities may attach to your business. The due diligence may reveal that the potential financial liabilities in relation to employees transferring under TUPE, will significantly reduce the profitability of the contract. In some cases the incoming provider may therefore wish to reconsider whether to proceed with the contract.

It is possible for the outgoing and incoming provider to contractually agree to divide up TUPE liabilities between them in a different way to which the law provides. This may be done by way of contractual indemnities. For example, if the ELI shows that there is an ongoing Tribunal claim in respect of a transferring employee, although the liability for that ET claim will pass the transferor with the employee’s employment, the incoming provider may want the outgoing provider to indemnify them against any costs incurred by the transferee in

defending that ET claim. This would however be a matter of negotiation between the outgoing and incoming provider and in many cases the outgoing provider may not agree to so indemnify. This highlights the need for incoming providers to carry out due diligence.

If this is something you think would be useful for your business, you should always take specialist legal advice.

Further Advice

This Brief has been prepared with the extensive support of the ALP Legal Support Partners, Brabners LLP.

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Please contact the ALP if you would like to discuss any of the points raised in this Brief.

Appendix 1

Precedent letter requesting employee liability information

Dear Sirs,

We understand that you have been successful in bidding for the contract for provision of [X] services to [CLIENT]. We are the previous provider of these services and have a number of employees essentially dedicated to providing that service to [CLIENT]. We believe that the loss of the [X] contract amounts to a “service provision change” under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) and therefore that the employment of our employees who are essentially dedicated to providing that service will automatically transfer to you under TUPE.

We are therefore writing to notify you of the employee liability information that we are required to provide to you under regulation 11 of TUPE. Please find enclosed a spread sheet and documentation containing the following details:

1. The name and age of those employees who are essentially dedicated to the contract of services being transferred.
2. Information about any disciplinary procedure taken against, or grievance procedures brought by any of the transferring employees within the previous two years, in each case where the ACAS Code of Practice on Disciplinary and Grievance Procedures applied.
3. Information about any court or tribunal case, claim or action:
 - (a) brought by any of the transferring employees against us within the last two years; and/or
 - (b) that we have reasonable grounds to believe that an employee may bring arising out of their employment with us.
4. Information about any collective agreements affecting the transferring employees which will have effect after the transfer.
5. The particulars of employment of the transferring employees, as required under section 1 of the Employment Rights Act 1996, which includes details of their:
 - (a) Job title
 - (b) Whether role permanent or fixed term
 - (c) Notice period
 - (d) Place of work
 - (e) Basic pay rate
 - (f) Overtime rate
 - (g) Frequency of payment e.g. weekly/fortnightly
 - (h) Any bonus or commission entitlement
 - (i) Hours worked per week
 - (j) Normal working hours (if any)
 - (k) When holiday years runs from/to
 - (l) Annual holiday entitlement
 - (m) Holiday entitlement remaining after transfer date
 - (n) Sick pay entitlement
 - (o) Amount of sick pay entitlement remaining after transfer date
 - (p) Other benefits e.g. life assurance; permanent health insurance; childcare vouchers; car; mobile phone; etc.
 - (q) Pension entitlement including any employer contributions

This information is up to date as at [DATE].

Please acknowledge receipt and acceptance of this letter by signing, dating and returning the enclosed copy.

Yours faithfully,

[TRANSFEROR]

Appendix 2

Precedent letter setting out Information that must be provided to appropriate representatives

Dear [NAME],

I am writing to confirm that [X] will be taking over the contract for provision of the [X] services to [CLIENT].

We believe that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) will apply to the proposed transfer. Under regulation 13 of TUPE, we must provide certain information to appropriate representatives of any employees affected by the proposed transfer.

You are an appointed representative of the employees affected by the TUPE transfer and are therefore entitled to receive certain information about the proposed transfer, as follows:

- The proposed date of the transfer is [DETAILS]
- The reasons that the transfer is proposed are: [DETAILS]
- The proposed transfer would potentially affect [DETAILS OF AFFECTED EMPLOYEES]. Those employees would transfer to [INCOMING PROVIDER] under TUPE on their current terms of employment, except for those terms relating to their occupational pension scheme. It would not be possible for the transferring employees to continue to be members of the [NAME] occupational pension scheme following the proposed transfer, as they would no longer be employed by us. Their current pension arrangements would therefore have to cease and be replaced with [DETAILS OF PROPOSED NEW ARRANGEMENTS].]
- The transferring employees' period of continuous employment would be preserved.
- Transferring employees have the right under TUPE to object to their transfer. The legal effect of objecting would be that: (a) their employment would automatically terminate by operation of law with effect from the date of the transfer and they would not automatically transfer to [INCOMING PROVIDER]; and (b) there would be no entitlement to any compensation.
- The legal, economic and social implications of the transfer for the affected employees are as follows: [DETAIL OR CONFIRM IF NONE]
- The measures which [X] envisages it will take in connection with the transfer in relation to any affected employees (e.g. reorganisation) are as follows: [DETAIL OR CONFIRM IF NONE]
- The number of agency workers working temporarily for and under the supervision and direction of this company are as follows: [DETAIL]
- The parts of the undertaking in which those agency workers are working, and the types of work they are carrying out, are as follows: [DETAILS].

As [X] envisages taking potential measures in respect of the transferring employees' employment, we would like to hold a meeting with the appropriate representatives to discuss the proposed transfer in more detail and to consult with you about the proposed measures, with a view to reaching agreement. You will be entitled to make representations on behalf of the employees you represent.

Please confirm by return if you are able to attending a meeting on [DATE, TIME AND LOCATION].

Yours sincerely

[NAME]