



TUPE



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What is TUPE?

TUPE is a complex piece of UK employment law which gives effect to the EU Acquired Rights Directive. Its full title is the Transfer of Undertakings (Protection of Employment) Regulations 2006, albeit the most recent changes to the legislation date back to 2014.

TUPE's primary purpose is to safeguard the position of affected employees in situations where either there is a transfer of an economic entity from one party to another (for example, the sale of a business from one party to another) or where one party either sub-contracts part of its function to a third party, changes service provider or brings the function back in house (a service provision change).

To achieve this TUPE introduced 3 concepts into UK law: the automatic transfer principle, the right not to be dismissed in connection with a TUPE transfer and the obligation to consult with representatives of affected employees ahead of the transfer.

What is the Automatic Transfer Principle?

The Automatic Transfer Principle means that employees assigned to the organised grouping of resources that is transferring from one party to another will transfer on their existing terms of employment to the new owner of the business (or the new service provider as the case may be).

Save for a few exceptions, all of the former employer's rights, powers, duties and liabilities will transfer with the employees, thus preserving the employees' rights and

providing them with high levels of protection (including the right not to be dismissed as a consequence of the transfer) in what is generally an uncertain time for the workforce.

Changes to employees' terms (including the removal of their role) can, however, be made where there is an economic, technical or organisational reason ("ETO reason") entailing changes in the workforce. If such a reason exists, the new employer may be able to dismiss the employees fairly and/or make changes to their terms of employment.

Common examples of ETO reasons include the fact that the work will be done from a new location or where the new employer will carry out the business' operation using different roles or functions than those used by the original employer. Determining whether an ETO reason exists can be a complex issue which carries a high level of risk (including automatically unfair dismissal claims where a valid ETO reason is found not to exist), so expert advice should be sought in advance of implementing any plans.

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Informing and Consulting

The information and consultation requirements under TUPE are relatively complex and (save where the transferring entity is small and has under 10 employees) require the election of representatives to receive information about the transfer on behalf of all affected employees. Where there are changes envisaged to the employees' current terms of employment, there is also a need to consult with those representatives about the changes.

Both buyer and seller must consult with their own affected employees and there is a clear need for co-operation between the 2 parties involved in the transfer to ensure that the consultation process is thorough and meets the statutory requirements detailed within TUPE.

This can be especially challenging in service provision changes where one party has lost a contract to a competitor. However, as the liability for failing to comply with the consultation requirements under TUPE is up to 13 weeks' pay per employee, it is important that both parties co-operate in the process to avoid that risk.

What to look out for

When buying a business or other economic entity both buyers and sellers should be conscious of the fact that TUPE may apply and that individuals may have the right to transfer with that business (NB this does not apply to a straightforward change in ownership of the share capital of a company

as there is no transfer in and out of assets from the company itself, just a change in ownership of the overall body).

Similarly, when a business wins or loses a contract with a key client to whom it was providing a specific service or when a business sub-contracts out a specific function, the rules of TUPE may well apply to any organised grouping of employees servicing that contract.

Whilst the subsequent analysis as to whether TUPE will in fact apply, which employees will be affected and in what way requires a good knowledge of the legal issues, being mindful of the types of scenario in which TUPE may apply and seeking expert guidance at an early stage in that process will save employers on both sides of the transfer significant uncertainty, risk and potential costs.

Brachers act for a broad range of employers in both the public and private sector providing advice on TUPE and how it affects their business whether as a consequence of a transfer of an economic entity or a service provision change. If you require assistance please contact Antonio Fletcher at antoniofletcher@brachers.co.uk or call 01622 776516.

The information contained in this document provides background information only. The document may be misleading if relied upon as an exhaustive list of the legal issues involved. If any matter referred to in this document is sought to be relied upon, further information should be sought.