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A Guide to TUPE

Transfer of Undertakings (Protection of Employment)

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A Guide to TUPE Transfer of Undertakings (Protection of Employment)

Including valuable information on:

- **Who is affected by TUPE**
- **Employer Duties to Inform and Consult**
- **Transferred Rights, Powers, Duties and Liabilities**

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A Guide to Transfer of Undertakings (Protection of Employment)

TUPE

If your business is being taken over by another organisation – or you are buying a business that has staff – the rights of all the existing employees are protected by the Transfer of Undertakings (Protection of Employment) Regulations, known as TUPE for short.

This means that all affected employees transfer automatically to the new owner and their contracts of employment are protected and remain unchanged by TUPE.

Who is affected by TUPE?

The definition of 'employees' within TUPE includes anyone who works for the business, other than independent contractors or temporary staff.

TUPE is intended to safeguard employees' interests – regardless of their length of service – as any significant change to their terms and conditions, victimisation or dismissal that follows as a result of the transfer of ownership could be regarded as unfair dismissal.

If you are taking over a business, existing employees could have case against you as their new employer. It is therefore important that you are aware of your legal obligations under TUPE, to avoid any potential claims against you.

Employers' duty to inform and consult

Before the ownership of a business is transferred, the seller and the buyer have a duty to provide information and engage in a meaningful consultation with the affected employees about the potential transfer.

As well as the duty to consult with employees individually, the seller must confer with staff as a group if they have more than 10 employees, explaining:

- Why the transfer is happening
- Any dispute between the seller and the buyer as to whether the TUPE regulations apply
- How the transfer will affect staff being transferred
- If there will be any reorganisation, such as likely redundancies
- Details of any agency workers being used.

The existing employer must consult with employee representatives about anything related to the transfer that might affect employees, and try to agree any changes.

Information about employees during the transfer

The seller must provide the new owner of the business with information about their employees – including names, ages and main details of employment – plus any details of disciplinary action taken against them, any grievances they have raised or legal action they have taken against the employer within the last two years. They must also inform the new owner of any potential legal action that they think employees might raise.

This information must be provided four weeks before the transfer and should help the new owner understand their duties and their new employees' rights.

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How do you decide which employees transfer?

TUPE applies to anyone employed in the business immediately before the transfer.

If part of the business transfers, and employees spend some time working for the transferring part but also work elsewhere in the business, a decision has to be made as to whether an employee has been 'assigned' to the transferring part.

That depends on factors such as the amount of time spent by the employee in the transferring part of the business, the terms of the employee's contract, how much value the employee gives to each part of the business and how costs are allocated.

How would TUPE affect the transferring employees?

The whole purpose of TUPE is to provide employees with greater job security, should their employer decide to sell or transfer the business. Once the business transfers, the new owner takes over the employment contracts of the existing staff, including:

- All their previous terms and conditions, including holiday entitlement.
- The date their employment started, which remains unchanged by the transfer, so their period of continuous employment is not broken.
- Any collective agreements previously made.
- Any failures by the seller to observe their employees' rights.

It would be a breach of contract if the new owner failed to honour the terms of transferring employees' contracts of employment.

Can contractual terms be changed?

The seller cannot usually change their existing employees' terms and conditions before the transfer to bring them into line with the new owner's company, even if the seller's employees agree to the change. The new owner cannot change terms and conditions for transferred staff after the transfer, if the reason for the change is the transfer itself.

However, they can make contractual changes if the transferred employees' contracts of employment allow for it, or if there is an 'economic, technical or organisational reason' (ETO) for doing so. Economic reasons are those related to the company's performance, whilst technical reasons relate to the equipment or processes in use and organisational reasons relate to the company's structure. Changes to a contract for ETO reasons might include moving the transferred employees to work at a different location, or altering their position from a managerial to a non-managerial role.

Before any contractual changes can be made, the new owner must get the agreement of the transferred staff, even if the proposed changes are designed to improve their terms and conditions – for example, giving extra holiday to bring them in line with the new owner's existing employees.

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Can staff be dismissed after a transfer?

TUPE regulations protect transferring employees from any subsequent dismissal after the transfer and the new owner cannot simply make them redundant because they were transferred from another employer.

If an employee is dismissed before or after a transfer, this will be automatically unfair if the transfer is the main reason for their dismissal.

In order to dismiss staff following a transfer, the new owner would need a strong ETO reason requiring changes to their workforce – such as closing down part of the company because it is unprofitable, or addressing a significant overstaffing problem to remain solvent – once the transferred employees had joined their existing staff.

The new owner would have to follow normal rules regarding redundancies with all affected employees – including both the transferred staff and the existing employees in any redundancy consultation process, otherwise the transferring employees could bring unfair dismissal claims against the new owner.

What transfers under TUPE?

All the seller's rights, powers, duties and liabilities transfer to the new owner under TUPE. Liabilities can include unexpired notice periods, benefits, outstanding pay, bonuses and holiday pay, as well as outstanding legal claims – for example, a transferring employee could make a discrimination claim against the new owner, even if the incident happened before the transfer.

If the new owner cannot match the transferring employee's existing contractual entitlements, then they may be required to offer 'substantially equivalent' benefits.

The transferring employee's company pension rights earned up to the date of the transfer are protected by TUPE, but the new owner doesn't have to provide them with an identical pension.

What happens after the transfer?

Once the transfer is complete, the new owner should provide all the transferring employees with an up-to-date written statement of employment, setting out the name and address of their new employer and confirming that their terms and conditions have not changed.

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What if the transferring employees do not want to work for the new owner?

The transferring employees can refuse to work for the new owner if they wish, but this is the same as resigning and they will not be able to claim unfair dismissal or redundancy pay.

If the transferring employees' working conditions will be significantly worse than they had enjoyed previously, they can treat their contracts of employment as having been terminated and may be able to claim constructive dismissal against the new owner.

What other legal claims could an employee make?

If the buyer and the seller do not inform and consult with the affected staff, then the employees could make a claim in an employment tribunal for up to 13 weeks' uncapped pay per individual, depending on the seriousness of the failure to comply.

Liability for a breach of these duties may be shared between the buyer and the seller, unless the complaint is that the buyer failed to supply information, in which case they alone will be liable.

TUPE is a complicated area of law and the information provided here is intended to provide a brief overview. Delphi specialises in employment law and with extensive experience, we are highly qualified to assist you with any TUPE issues you might have.

Contact us today on 0113 867 2815