

NCVO WORKFORCE DEVELOPMENT

'TUPE': TRANSFERRING EMPLOYMENT RIGHTS TO AND FROM YOUR ORGANISATION

Revised January 2012

1. Introduction

In the voluntary sector, funding for particular projects is often of limited duration. At the end of the funding period, the funding may be renewed, may cease, or the funding and responsibility for the project may pass to another organisation.

Third sector organisations may also change in other ways. For example, one organisation may be taken over by another, or two organisations with similar charitable objectives may merge.

In situations where the transfer of a project, organisation or part of an organisation takes place, The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') may apply.

Where TUPE applies a number of legal obligations arise. Responsibility for employees assigned to the project, organisation or part of the organisation transferring, and most employment rights and liabilities relating to those employees, will pass to the new employer.

2. Scope of this fact sheet

The aim of this fact sheet is to:

- Describe the TUPE Regulations which govern staff transfers.
- Explain what you will need to do should TUPE apply.
- Include information on good practice, in respect of dealing with the staff affected by TUPE.
- Outline some points of detail that you may need to be aware of.

The fact sheet gives introductory guidance. However, the TUPE Regulations are complex and their application will be different in each circumstance. It is therefore recommended that employers involved in the transfer of an undertaking seek legal or HR advice.

Please note that the TUPE Regulations only cover employees and not volunteers or agency workers.

Section 6.7 below gives advice on how to manage volunteers in a project that is transferring.

3. Summary of the TUPE regulations

The purpose of TUPE is to protect the employment rights of employees who are affected by the transfer of a business or service. TUPE applies regardless of whether an organisation operates to make a profit or has purely charitable objectives and regardless of the size of the organisation. A transfer can involve just one employee. The party who is transferring the business or service is called the 'transferor' and the party who is taking on the business or service is called the 'transferee'.

Below is a summary of the effects of TUPE where the regulations apply:

- All employees employed in the undertaking to be transferred automatically become employees of the transferee. An employer cannot pick and choose which employees to take on.
- Employees must transfer on the same terms and conditions of employment as those they had with their former employer (except for certain occupational pensions rights, see section 6.1). Length of service with the transferor is preserved and must be taken into account by the transferee.
- Any liabilities (e.g. employment tribunal claims) relating to transferred employees that arose prior to the transfer will pass to the transferee, except for criminal liabilities.
- Any liabilities relating to employees who were dismissed before the transfer for a reason connected with it will also transfer to the transferee. So if the transferor were to dismiss an employee immediately before the transfer, to avoid the employee having to transfer, the liability for unfair dismissal would pass to the transferee.
- Any collective agreements made with recognised trade unions and any recognition agreements where the business retains a distinct identity following the transfer will also transfer (see section 6.2).
- Employees are protected against dismissal where the reason for dismissal is because of the transfer or for a reason connected to the transfer that is not an economic, technical or organisational reason (see section 6.3).

- Employees may object to the transfer, this has the effect of terminating their contract of employment. They may then claim unfair dismissal if there has or will be a substantial change in working conditions to their material detriment and can claim constructive dismissal where there has been a repudiatory breach of contract by the employer.

4. How do I know if TUPE applies?

TUPE will apply to what is known as a 'relevant transfer'. The two broad categories of relevant transfer are 'business transfers' and 'service provision changes'. In the third sector, most TUPE transfers will be service provision changes.

Business Transfers

A relevant transfer can occur when a business or undertaking or part of a business or undertaking is transferred from one employer to a new employer as a going concern i.e. there is a transfer of an economic entity which retains its identity after the transfer. An 'economic entity' means an organised group of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. If a project transfers from one organisation to another in the voluntary sector and its activities are broadly similar after the transfer, the TUPE Regulations will normally apply.

It is important to note that a transfer can include the situation where a lessor grants a new lease of business premises to a third party lessee and the lessee then continues to run the existing business in the same way without any interruption. Similarly, where businesses are operated on franchise, the transfer of the franchise may invoke the operation of TUPE.

In deciding whether there has been a relevant business transfer all the factual circumstances will be considered, including:

- The type of business.
- Whether tangible assets such as premises, assets and equipment are transferred –although a relevant transfer may still take place even where no property is transferred to the transferee by the transferor.
- Whether intangible assets such as goodwill and customer lists are transferred.
- Whether the majority of employees are taken over by the transferee and, if not, the motive of the transferee in not taking them on.
- The degree of similarity between the activities carried on before and after the transfer.
- Whether there has been any break in the performance of the activities.

Whether TUPE applies to a particular business transfer is not an easy question to answer since each case will turn on its own facts.

Service Provision Changes

The 2006 TUPE Regulations have broadened the circumstances where TUPE will apply to cover service provision changes. A service provision change includes

contracting-out exercises, changes of service provider and contracting-in exercises, with limited exceptions.

To qualify as a relevant transfer on a service provision change, there must be an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client and the client must intend that the activities will, following the service provision change, be carried out by the transferee.

TUPE does not apply in the following situations:

- The transfer of shares.
- The transfer of empty premises or assets.
- A single specific event or task of short-term duration.
- Arrangements between a client and contractor which are wholly or mainly for the supply of goods for the client's use.

5. So, I believe TUPE applies in my situation – what do I do next?

What you do next depends on whether you are the transferee or the transferor.

5.1. Obligations on the transferor to provide information to the transferee

If you are a transferor you are obliged to provide the transferee with information about the employees who are to transfer. This is known as 'employee liability information'. The information must be provided in writing or in a readily accessible form. The following information must be provided:

- The identity and age of the employee;
- Information contained in the written statement of terms and conditions of employment provided under section 1 of the Employment Rights Act 1996 (generally the employee's contract of employment);
- Information relating to any disciplinary procedure taken against an employee within the previous two years where the ACAS Code of Practice on Disciplinary and Grievance Procedures applies;
- Information relating to any grievance procedure taken by an employee within the previous two years where the ACAS Code of Practice on Disciplinary and Grievance Procedures applies;
- Information relating to any legal actions brought by an employee against the transferor, within the previous two years;
- Information relating to any legal actions that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and

- Information of any collective agreement which applies to the employees.

The information should be provided at least 14 days prior to the transfer or as soon as is reasonably practicable. The information must be no more than two weeks old.

Clearly, it would be good practice, and helpful to the transferee, if the information is provided earlier than 14 days before the transfer is due to take effect.

Once the relevant information has been provided, you must, as transferor, provide written notification of any changes which occur up until the actual completion of the transfer.

If, as transferor, you do not provide this information, the transferee may apply to an employment tribunal for compensation. Compensation will be no less than £500 for each employee in respect of whom the information was not provided or was defective, unless the tribunal considers that such an award would be unjust in the circumstances.

The parties should be absolutely clear which employees are to transfer. Particular note should be taken of those employees who are temporarily assigned to the service or undertaking to transfer. Advice should be taken if you are not sure which employees should and should not transfer.

5.2. Obligations on both transferor and transferee to inform representatives of affected employees

The Regulations place a duty on both the transferor and transferee employers to inform and consult representatives of their own employees who may be affected by the transfer (see 5.4 for further information about representatives). There is no fixed date for informing and consulting with employees but information should be provided long enough before a relevant transfer to enable the employer to consult with the employees' representatives.

Affected employees might include:

- Those individuals who are to be transferred;
- Employees who will not transfer but whose jobs might be affected by the transfer; or
- Existing employees of the transferee whose jobs might be affected by the transfer (such as a manager who will be required to manage the transferee employees).

The information that must be given is as follows:

- The fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
- The legal, economic and social implications of the transfer for any affected employees;

- The measures which the employer envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact;
- If the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer, if he envisages that no measures will be so taken, that fact; and
- Information relating to the use of agency workers (if any) by the employer including the number of agency workers working temporarily for and under the supervision and direction of the employer; the parts of the employer's undertaking in which those agency workers are working; and the type of work those agency workers are carrying out.

The transferee must give the transferor the necessary information to enable the transferor to carry out his duties.

In reality, the transferring employees may wish to know a lot more than the above information. For example, they may want to meet the managers of their new organisation and their new colleagues. The more the transferor and transferee can co-operate, the smoother will be the transfer.

It would be good practice for the transferring employees, their representative(s) and their manager, to meet with the managers of the transferee organisation, to discuss the above. This direct communication with employees could be in addition to the statutory information that needs to be provided to employee representatives. However, you should discuss and agree this approach with employee representatives first, so that there is no miscommunication.

5.3. Obligations of both transferor and transferee to consult

Where measures are proposed in relation to affected employees, the present employer of these employees must consult with the appropriate representatives in 'good time' before the transfer. Actions, or 'measures' means any alteration to the status quo, such as proposals to change work location or to restructure. A measure might include a proposed change of rota arrangements or management structure, for example. No exact time is specified in the Regulations, although from an employee relations point of view, it is good practice to consult at the earliest opportunity.

If no measures are envisaged, then there is no obligation to consult, only to inform (see above). However, if no measures are proposed, this should be confirmed to employee representatives.

The consultation on any measures to be taken must be with a view to seeking agreement. During the consultation, the employer must consider and respond to any representations made by the representatives. If the employer rejects these representations, the employer must also give reasons.

5.4. Appropriate representatives

The Regulations state that consultation should be with 'appropriate representatives' of employees.

If your organisation recognises an independent trade union, the appropriate representatives will normally be trade union representatives. In the event there is no recognition agreement, or any other elected employee representatives, you are required to make arrangements for employees to elect representatives for consultation purposes. This may seem inappropriate to you if the project to transfer only has, say, 3 employees. However, in practice, it is not as complicated as it seems.

If there is no recognised union and there are no employee representatives, you must invite employees to elect a representative or representatives for the purpose of conducting the information and consultation process. If the employees then fail to do so within a reasonable time, you must consult all the employees potentially affected by the transfer on an individual basis. So in the above case of 3 employees, the options are either that the employees elect one of themselves to be a representative, or if they fail to do so, you will consult with all 3 of them individually.

Employers can determine the number of representatives to be elected, provided that there are sufficient to represent the interests of affected employees. Employers can also determine the term of office and whether representatives will be elected for a particular class of employees or for the whole group.

Further information about electing representative and about the rights of representatives is contained in the Department of Trade and Industry's publication: 'A Guide to the 2006 TUPE Regulations for Employees, Employers and Representatives', available from the DTI website at: www.dti.gov.uk.

5.5. Failure to comply with the information and consultation regulations

The transferor and transferee are jointly and severally liable for any award of compensation made by an employment tribunal for failure to inform and consult. Any possible award of compensation would be triggered by an employment tribunal claim raised by employee representatives or, in some cases, individual employees. The award is of up to 13 weeks' pay per employee.

6. Practical Considerations of TUPE

Below are a number of practical issues that can arise in TUPE situations.

6.1. Pensions

Occupational pension rights earned up to the time of the transfer are protected by social security legislation and pension trust arrangements. Strictly speaking, ongoing pension provisions do not transfer under TUPE although this provision is restricted to benefits for old age, invalidity and survivors. Redundancy and early retirement pensions, for example, will not be covered by this exclusion and so would transfer under the regulations.

For pension provisions after the transfer, the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005 provide for certain minimum requirements. They provide that, where there is a relevant transfer and the transferred employees were either active members of an employer-contributed occupational pension scheme, or were not active members but were eligible to join the scheme either immediately or on completion of a period of continuous service with the employer, the transferee must offer them a prescribed level of pension provision after the transfer.

This prescribed level of provision is membership of:

- a non-money purchase (defined benefit) occupational pension scheme satisfying the statutory standard referred to in s.12A of the Pension Scheme Act 1993, or a scheme that provides benefits of equivalent value to those provided by the transferor's scheme; or
- a money purchase (defined contribution) occupational or stakeholder pension scheme to which the transferee must make contributions in respect of each period for which the employee contributes to the scheme, provided that the amount contributed by the transferee equals the employee's contribution to the scheme, subject to an upper limit of 6% of the employee's basic pay.

In calculating the amount of a transferee's pension contributions in the case of a money purchase occupational pension scheme, only payments made in respect of basic pay need be taken into account. Bonus, commission, overtime and similar payments should be disregarded.

Further information on these aspects of the Pensions Act can be found on the Department for Work and Pensions (DWP) website at: www.dwp.gov.uk.

6.2. Trade union recognition

There are a number of scenarios that may occur with trade unions:

6.2.1. Neither employer recognises a trade union.

There are no particular TUPE issues that arise in this scenario. The transferee continues to deal directly with employees and/or elected representatives.

6.2.2. Both employers recognise the same trade union.

The same trade union will continue to be recognised post-transfer, for the service that is transferring. Note, however, that there will be two different recognition agreements (that of the transferor and that of the transferee). It is appropriate to review the agreements and consider whether a single agreement can be reached.

6.2.3. The transferor does not recognise a trade union, but the transferee does.

In this case, the transferee employer can invite employees in the transferring service to join the trade union and, if they wish, to be covered by collective bargaining.

6.2.4. The transferor recognises a trade union, but the transferee either does not recognise a trade union or recognises a different union.

Where the transferor voluntarily recognises an independent trade union in respect of some or all of the transferred employees, then at the point of transfer and subsequently, the transferee employer will also be required to recognise that union to the same extent. It is, however, open to the transferee employer to later initiate a process of derecognition, in the same way that any employer could derecognise a trade union. However, this requirement to recognise the union of the transferring employees only applies if the organised grouping of transferred employees maintains an identity distinct from the remainder of the transferee's business. If there is no distinct identity, the previous trade union recognition lapses, and it will then be up to the union and the employer to renegotiate a new recognition agreement.

6.3. Dismissal of employees for a reason connected with the transfer

A dismissal of an employee by either the transferor or transferee because of the transfer will be automatically unfair unless there is an 'economic, technical or organisational' reason entailing change in the workforce (an 'ETO reason').

This means that a dismissal may only occur before or after a transfer where the sole or principal reason for dismissal is either:

- Unconnected with the transfer; or
- Connected with the transfer, but for an ETO reason.

Examples of ETO reasons for dismissal include:

- Economic reasons - where the demand for a service has fallen to such an extent that the service becomes unsustainable without dismissing staff.
- Technical reasons - where the transferee wishes to use new technology and the staff employed by the transferor in the undertaking to be transferred do not have the requisite skills to use that technology.
- Organisational reasons - where the transferee operates at a different location and it is not practical to transfer staff.

As with any dismissal, an employer must act reasonably and follow a fair procedure in dismissing an employee. Please note that employees with less than one year's service cannot present unfair dismissal claims. Claims for discrimination however can be presented.

6.4. Changing an employee's terms and conditions of employment

Variation of an employee's terms and conditions of employment for a reason related to the transfer is prohibited under TUPE. A desire to harmonise the terms and conditions of existing and newly-transferred staff in your organisation is therefore NOT a legitimate ground for changing terms and conditions.

If there is a need to change the terms and conditions of employees for a reason related to the transfer, this is only possible if there is an ETO reason that also entails changes to the workforce.

The change might be a change to the numbers of employees employed or their functions. For example, a functional change might be a new requirement on an employee who held a managerial position to move to a non-managerial position – or vice-versa. This may be considered to be a valid ETO reason justifying the change of terms and conditions.

In the event that there is a valid ETO reason, an employer will still need to seek the employee's agreement to a variation of the contract prior to any changes being made. This is because the employment contract, as with any other contract, is an agreement made between the parties to the contract. Consent of all parties is required to enter into the contract and likewise to vary the contract unless agreed otherwise. In practice, an employee may only agree to a change in terms and conditions if the new terms are equal to, or better than, his/her existing terms. Consequently if you are contemplating changing terms and conditions of employment for an ETO reason as outlined above, then you will need to consult with the employee to seek the employee's agreement to the change.

6.5. Insolvency

Special rules apply which are designed to make it easier to rescue aspects of insolvent organisations so making them more attractive to buyers. In the event of 'terminal' insolvency proceedings, employment rights and liabilities do not transfer under TUPE, nor are employees protected against a dismissal that is connected with the transfer. Where the transferor is subject to 'non-terminal' insolvency proceedings there is a wider possibility to agree 'permitted variations' to terms and conditions of employment even in the absence of ETO reasons. There are however certain conditions that apply.

'Terminal' insolvency proceedings are proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.

'Non-terminal' insolvency proceedings mean insolvency proceedings which have been opened in relation to the transferor NOT with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner, for example administration proceedings.

The conditions in relation to 'permitted variations' are as follows:

- The transferee (or an insolvency practitioner) and appropriate representatives of transferred employees must agree to the variation;
- The sole or principal reason for the variation is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce; and

- The variation is designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business that is the subject of the relevant transfer.

6.6. Employees with public sector contracts of employment

There are a number of issues that are particular to transfers from the public to the private sector which are the product of government guidance and statutory provisions built upon the existing provisions of TUPE.

The first point of reference for public sector transfers is the Statement of Practice on Staff Transfers in the Public Sector. This was issued by the Cabinet Office in January 2000 and remains the main reference point for public sector transfers. It sets out a framework which should cover all public sector organisations where the public sector is the employer or the client in a contracting situation.

The guiding principles of the Statement of Practice are as follows:

- To ensure that the public sector is a good employer and a model contractor and client.
- The modernising of public services to include services being provided by or in partnership with the private sector.
- Clarity and certainty about the treatment of staff involved in the reorganisations.
- To ensure that TUPE applies except in truly exceptional circumstances and that where TUPE does not apply, its principles should still be followed.

In addition the Fair Deal for Staff Pensions was introduced in 1999 to address the problem of employees transferring out of the public sector with no protection in relation to their pension entitlement. The main points include that transferred employees must be provided with a "broadly comparable" pension scheme. What is "broadly comparable" is determined by the Government Actuary's Department.

On 13 December 2010, the coalition government withdrew the Code of Practice on Workforce Matters in Public Sector Service Contracts with immediate effect and replaced it with Principles of good employment practice. Compliance with the Principles set out in the Cabinet Office statement is voluntary. However the Code of Practice will continue to apply to public sector contracts in existence prior to 13 December 2010.

The Code of Practice on Workforce Matters in Public Sector Service Contracts, which was introduced in March 2005, was automatically incorporated into the service specifications and conditions of every public sector contract awarded to a service provider that involved a transfer of staff from the relevant public sector organisation, or from an outsourced public sector organisation to a new provider under a retender of contract. The Code required, among other things, that "where the service provider recruits new staff to work on a public service contract alongside staff transferred from the public sector organisation, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees".

In contrast, the Principles of Good Employment Practice provides that: "where a supplier employs new entrants that sit alongside former public sector workers, new entrants should have fair and reasonable pay, terms and conditions. Suppliers should consult with their recognised trade unions on the terms and conditions to be offered to new entrants."

Employers should therefore refer to any relevant statutory guidance in addition to ensuring that they comply with the provisions of TUPE 2006 when considering transfers involving the public sector.

These additional obligations can substantially increase the cost of such a venture and so it is important to be fully appraised of potential liabilities before any terms are agreed.

Relevant links:

Statement of Practice on Staff Transfers in the Public Sector and A Fair Deal for Staff Pensions:

http://www.hm-treasury.gov.uk/d/staff_transfers_145.pdf

The Principles of Good Employment Practice:

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/principles-good-employment.pdf>

The Code of Practice on Workforce Matters in Public Sector Service Contracts:

http://webarchive.nationalarchives.gov.uk/+/http://www.cabinetoffice.gov.uk/media/122496/code_of_practice.pdf

6.7. Volunteers

The TUPE Regulations relate to employment and therefore does not cover volunteers. However, if there are volunteers in the service that is to be transferred, consider the following:

- Ensure that there is an appropriate volunteer agreement in place confirming the volunteer's status.
- If you are the transferor, consult with the volunteers about what they want. Do they wish to continue volunteering in the service, once it has transferred, or do they wish to stay with your organisation? Speak with the transferee organisation about the wishes of the volunteers and arrange a meeting between the transferee and the volunteers.
- If you are the transferee, consider how you might welcome volunteers who wish to continue volunteering in the service. Make sure they know of any changes and feel valued for their contribution.

7. Some Hints and Tips

Below are some suggestions which, although not legally required, may help to ensure that the transfer progresses smoothly.

7.1. Resources required managing the transfer

Do not underestimate the resources required to manage a transfer. At the point of tendering for the transfer of a project to your organisation, make sure that the advantages of taking on the service outweigh the resource requirements, for example management time and costs of legal or human resources advice.

7.2. Transfer agreements and liabilities

Whether your organisation is a transferor or a transferee, you are strongly advised to enter into a legally-binding transfer agreement. This is particularly important if you are the transferee, since you will inherit all civil liabilities and obligations, including but not limited to:

- Liability for personal injury claims against the transferor.
- Liability for discrimination claims against the transferor.
- Liabilities for any breach of contract, such as arrears of overtime payments or salary.
- All statutory rights and liabilities, such as unfair dismissal claims.

It is a relatively common practice for the transferee to require the transferor to indemnify him against any losses arising from any pre-transfer breaches of contract or statutory breaches. A legal adviser may be able to negotiate an appropriate indemnity on your behalf to keep any potential loss to a minimum.

7.3. After the transfer

Once the transfer is complete, it might be tempting to sit back and consider the job done. However, there are further areas to consider:

- If you are the transferee remember that the transferring employees are moving to a new environment, with some new ways of doing things, new colleagues and perhaps different standards and expectations. Treat their induction as carefully as the induction of any new employee.
- If you are the transferor, consider the possible impact on morale of the loss of a service. Make sure you communicate with the remaining staff about the transfer, so that you are aware of, and can deal with, staff concerns.

8. Checklist

✓ Check whether TUPE applies to your particular transfer – note that the coverage of TUPE is wide and will apply to most service provision changes.

✓ If TUPE applies be aware that all employees assigned to the undertaking to be transferred will transfer to the transferee and that their existing terms and conditions of employment, including their length of service, will be preserved.

- √ If you are the transferor, ensure that you provide employee liability information to the transferee relating to the employees who are to transfer.
- √ Both the transferor and transferee must provide information relating to the transfer to the representatives of the employees who are affected.
- √ Consult with employees' representatives about any measures that are envisaged to be taken in connection with the transfer.
- √ Allow adequate time for investigation of information and consultation with employees.
- √ Take advice if you are considering dismissing employees or changing their terms and conditions of employment for a reason connected with the transfer – such actions are permitted in only limited circumstances.
- √ If you are the transferee, ensure that you have all the information you need to make an informed decision as to whether the transfer is going to be viable.
- √ Do not underestimate the resources required to manage a transfer. Remember that TUPE is a complicated area of law. You are advised to take legal or HR advice on any proposed TUPE situation.
- √ Remember the human element of TUPE. Staff may be anxious about a transfer. Do your best to reassure them.

FURTHER INFORMATION

1. 'Employment Rights on the Transfer of an Undertaking', available from the Department for Business, Innovation and Skills (BIS) website at:

<http://www.bis.gov.uk/files/file20761.pdf>

2. Information about pensions on the transfer of an undertaking and the Pensions Act can be found on the Department for Work and Pensions (DWP) website:

www.dwp.gov.uk.

3. Good Guide to Employment: Managing People in Voluntary and Community Organisations –helps voluntary and community organisations to successfully employ, manage and develop their staff.

Available from NCVO at: www.ncvo-vol.org.uk/publications.

4. The Acas advisory handbook on 'Employing people: handbook for small firms', available at www.acas.org.uk.

© TPP Law Ltd 2012

TPP Law Limited
53 Great Suffolk Street
London
SE1 0DB

t 020 7620 0888
f 020 7620 0778
e info@tpplaw.co.uk
w www.tpplaw.co.uk