

# Changes to TUPE – will they impact on you?

Changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) will be implemented on 31 January 2014. These changes were originally anticipated to be the most significant changes since the regulations were first introduced in 1982. However, it is doubtful whether the changes will in fact impact on the day to day management of TUPE transfers for most organisations, except for those with less than 10 employees in total.

## What is a TUPE transfer?

A TUPE transfer of employees occurs where there is either:

1. A transfer of asset(s); or
2. A service provision change (i.e. the contracting out of services, bringing services back in-house or the transfer of services from one service provider to another).

On a TUPE transfer employees transfer to the new employer on their existing terms and conditions. TUPE is intended to protect the transferring employees from being dismissed, or having their employment terms changed. So for example hypothetically if a County FA were to outsource let's say its community coaching services to a charity or the local authority then those coaches would transfer with over their existing terms and conditions and continuity of service unaffected .

The dismissal of an employee in connection with a transfer is automatically unfair dismissal, unless the new employer has good reason normally called an ETO reason, justifying that dismissal. As the ETO reason must 'entail changes in the workforce' (i.e. numbers and functions of employees) it tends to only arise in circumstances akin to the business need to make redundancies. Equally changes to the transferring employees' terms and conditions of employment will be void, unless there is an ETO reason justifying the change. This has always created uncertainty for employers as to whether they can change terms and conditions after a TUPE transfer.

## How will TUPE change in 2014?

For some time there has been concern that the law around TUPE was too complicated and difficult to understand, particularly in respect of service provision changes. A major overhaul was anticipated but the changes which will be implemented on 31 January 2014 feel somewhat 'watered down' and are unlikely to be noticed by people other than HR professionals, lawyers and trade unions. TUPE situations will continue to be complex.

The main changes which will be introduced are mainly procedural and as follows:

1. An obligation for the existing employer to provide 'employee liability information' about the transferring employees to the new employer has increased from 14 days prior to transfer, to 28 days before transfer. This is intended to increase the communication between the parties but, in practice, parties tend to be disclosing HR information from as soon as the TUPE transfer is contemplated anyway.
2. The legal obligation on the parties to inform and consult 'appropriate representatives' has been removed for bodies employing 10 or less staff. This is a disappointingly narrower amendment than was expected. It was hoped that the amendment would apply to any TUPE transfer involving a small number of transferring employees, regardless of the size of the existing employer. Unfortunately the change has been limited to micro employers only, where there are less than 10 employees in total. Whilst this is helpful for small businesses, organisations and clubs, many employers will fall outside this amendment and still be required to inform and consult with appropriate representatives, even for small TUPE transfers.

### How will TUPE change in 2014?

3. A positive change is the recognition of the crossover between collective redundancies and TUPE transfers. This tends to occur when the new incoming employer announces that it will need to have a large restructure following transfer (with it proposing to dismiss 20 or more employees). This has caused difficulties for employers given that the legislation did not specify whether the old employer could start collective redundancy consultation (pre-transfer) from which the new employer (post-transfer) could benefit. They can now go on in parallel.
4. Another change is to the ETO reasons. The changes now formally recognise that change of location can fall within the ETO reason whereas previously it did not.
5. Finally, the new amendments will allow changes to terms and conditions of employees following a TUPE transfer (e.g. to harmonize terms). One year after transfer their terms will be capable of being changed, subject to consultation. However, the legislation appears to limit this to the ability to change collectively negotiated terms (i.e. those usually negotiated through trade unions) and does not extend to individually negotiated terms and conditions. This gives employers some help, but uncertainty will remain until case law settles down.

Overall, the changes do bring some welcome clarity in a very complicated area. Day to day management of TUPE transfers is unlikely to feel any easier or different for the majority of organisations. If it is likely that TUPE could affect your organisation then take advice at an early stage is likely to pay dividends in the longer term.

**For further information, help or advice on TUPE please contact :**



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