

Overview

What is TUPE?

TUPE stands for the **Transfer of Undertakings (Protection of Employment) Regulations**. It is a set of UK regulations based on European Union legislation from the 1970s designed to safeguard jobs and protect employees' rights when the business in which they work changes ownership.

When does it apply?

TUPE can apply in two scenarios:

- the first is the transfer of an economic entity which retains its identity—most obviously, the straight sale of a business; and
- secondly, on a 'service provision change'. This is where a business outsources an activity such as catering or security, switches to a new contractor or takes a service back in house.

TUPE does not apply on a share acquisition of a company.

What effect does TUPE have?

TUPE operates to transfer employees' contracts of employment automatically to the new employer on the same terms and conditions. It is as if the new employer has simply stepped into its predecessor's shoes. No new paperwork needs to be signed to make this happen, although, in practice, new contracts often are drawn up.

The new employer inherits any and all pre-transfer liabilities even before it became the employer, such as a failure to pay salary or contractual bonuses, or liability in respect of an employment claim, such as discrimination.

The parties cannot contract out of TUPE and staff whose employment is terminated because of the transfer can claim that their dismissal is automatically unfair. It also can be tricky for employers to implement changes to terms and conditions whenever TUPE applies.

Informing and consulting

Prior to a TUPE transfer, the parties (seller and buyer; or outgoing service provider and incoming service provider) have information and consultation obligations. These can be complicated and time-consuming to comply with in practice. One impact on the timetable is that employees must be given the chance to elect representatives through whom the employer channels information about the transfer. The transferring employer has an obligation to consult with these representatives if the new employer is planning to make any changes connected with the

transfer—referred to as 'measures'. Technically, it is not possible to inform and consult with the employees directly.

Failure to follow these obligations can lead to an Employment Tribunal awarding up to 13 weeks' pay per affected employee. Depending on the size of the workforce, that can add up to a lot of money.

Coping with TUPE in practice

In practice there are tried and tested ways and means of getting through TUPE. It is particularly important to plan ahead and important to build into the timetable the fact that TUPE will apply. That is a key factor in ensuring that your proposed transaction or service provision change runs smoothly.

Documentation

It is typical for the parties to agree reciprocal (depending on bargaining power!) indemnification provisions in the Asset Purchase Agreement or agreement for the provision of services. A service provision agreement ought also to deal with what the parties intend to happen in terms of the apportionment of liabilities at the 'front-end' (i.e. on the commencement of services) as well as the 'back-end' (i.e. on the termination of services/commencement of services by a new service provider or by the client if it takes the services back in-house). It also is typical for a service provision agreement to contain additional 'back-end' provisions, such as a moratorium on changes to employee terms and conditions in the agreement notice period, as well as HR provisions during the life of the agreement, e.g. dealing with the qualification and quality of employees assigned to the services to carry out the role.

How Katten can help

We advise on the full range of contentious and non-contentious UK employment law matters—from advising on senior executive employment, to partnership and investment documentation, managing disputes and exits as well as team moves, advising businesses on restructurings involving TUPE, and advising on all the employment issues associated with a corporate transaction or outsourcing, as well as managing the above in an international context.



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