

What is TUPE and how will it apply to a property transaction?

Introduction

TUPE (full name; the Transfer of Undertakings (Protection of Employment) Regulations 2006) is designed to ensure that employees' employment is protected when a business is purchased or when a contract for services changes hands.

Terms of art

TUPE refers to "transferors" and "transferees".

A buyer of a business and incoming contractors are described as transferees. A seller of a business and outgoing contractors are described as transferors.

Business sale

The 'classic' example of when TUPE applies is when a business or undertaking, or part of one, is sold.

Broadly speaking, the effect of TUPE is to transfer the employment of the employees employed by the transferor in the business being sold to the transferee. In other words, if you are buying a business, TUPE says that you must take on the seller's employees too. This will happen automatically by operation of law when the purchase completes.

TUPE preserves the continuity of employment and terms and conditions of those employees who are transferred. This means that transferring employees become employees of the transferee on the same terms and conditions (e.g. pay, holiday) as they enjoyed with the transferor, except for certain occupational pension rights.

TUPE also contains specific provisions to protect employees from dismissal before or after the transfer; if the sole or principal reason for the dismissal of a TUPE protected employee is the TUPE transfer itself, the dismissal will be automatically unfair in law.

Service provision change

The second scenario where TUPE will apply is where there is a change in service provider.

Known as a service provision change (SPC), this often takes place where a contractor takes on a contract to provide services to a client, either to replace an existing contractor or to take over an in-house provision of service. The latter scenario is often described as outsourcing.

Where a SPC takes place, TUPE applies to transfer the employment of the transferor's employees to the transferee, in the same way as on a business transfer.

Only those employees of the transferor whose principal purpose was the provision of the services changing hands will transfer to the transferee.

Obligation to inform and consult

TUPE obliges the transferor to provide prescribed information about the transfer to the transferring employees. They must be given a chance to elect employee representatives to receive such information, unless the transferor employs less than 10 people in its business.

The transferring employees must also be consulted about any measures which the

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transferor or transferee employers envisage taking in connection with the transfer.

Where there is a failure to comply with the obligations to inform or consult, an employment tribunal can award compensation of up to 13 weeks' gross pay per employee.

TUPE in property transactions

TUPE may apply even where it is not immediately obvious that a business has transferred or that a service provider has changed.

Depending upon the circumstances, a TUPE transfer could occur:

- on the grant, assignment or termination of a lease or where there is a change to lease ownership;
- on the sale or lease of a property where the property itself constitutes an economic activity;
- the termination of a property management agreement and the appointment of a new agent;
- the sale of part of a business; and
- a change to the contractor providing security services at a building.

TUPE does not normally apply where there is a transfer of the shares of a company.

It is essential to take advice before entering into a property transaction where TUPE could apply. Whether TUPE applies could substantially alter the value of a business or contract and require enhanced due diligence and negotiation of employment warranties and indemnities.

Further information

This information sheet has been given as a brief overview of TUPE. It is intended to be for general guidance only and it is not a substitute for specific advice. It is based upon our understanding of the legal position as at March 2019 and may be affected by subsequent changes in the law. For more information please contact Ben Stepney in the Employment Team on 01322 623709 or by email at:

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