

What the Heck is TUPE and Do I Need to Care?

The following is as a rough and ready overview of TUPE ('Transfer of Undertakings (Protection of Employment) Regulations') and an attempt to help CVS members understand when or if it will apply to them! This summary is written from the perspective of a 'lay person' – someone with no legal expertise, who is struggling to get to grips with the subject themselves – and as it is a reasonably complex subject, with lots of 'grey areas', this factsheet is certainly not a substitute for proper, skilled advice on the subject.

Do I need to read on?

You may not. If none of the following apply to you, go and have a cup of tea instead....

My organisation employs people and:

- is thinking of **taking on/ bidding for a contract to deliver a service** which is currently being delivered by another organisation;
- is **currently delivering a service** which is funded through a contract with our Local Authority or other statutory body and this contract is going to be **put out for tender; given to another provider; or taken back 'in house'**;
- is **considering outsourcing** part of the work that it does;
- is **setting up part of the existing organisation as a social enterprise** or 'trading arm';
- is **changing its legal structure** (i.e. incorporating)
- is **merging with another organisation**

What is TUPE and when does it apply?

TUPE is an acronym for 'Transfer of Undertakings (Protection of Employment) Regulations'. These are rules that apply when either:

- a) a business or undertaking, or part of one, is transferred to a new employer; or
- b) when there is a 'service provision change'.

Examples of when 'b' might occur include:

- When a service is 'outsourced' – e.g. the Local Authority decide to find another provider for a young offenders mentoring service that they have been delivering themselves.
- When a service is 'insourced' – e.g. the NHS decide to bring HR services 'in-house' which had previously been delivered by contractors.
- When there is a 're-tendering' process – e.g. existing contracts for adult social care provision are transferred to new providers following a tender process.

The Regulations can apply regardless of the size of the transferred undertaking. Thus the Regulations equally apply to the transfer of a large business/service with many thousand employees or of a very small one with only one or two. The regulations apply to all sectors.

It is not always obvious whether or not TUPE applies, particularly in the area of service provision, which is why legal advice may be needed. Generally though, TUPE will apply if there is:

- a) an 'organised grouping of employees' whose
- b) 'principle purpose' is to provide the services to the client/contractor and
- c) the client/contractor intends that the service will be carried out by a new provider.

Why is it?

The point of TUPE is to protect employees when these circumstances occur. Individuals employed within an undertaking when it changes hands automatically become employees of the new employer on the same terms and conditions. It is as if their contracts of employment had originally been made with the new employer. Thus employees' continuity of employment is preserved, as are their terms and conditions of employment (except for certain occupational pension rights).

An employee cannot be dismissed for a reason connected with the transfer (this would be 'unfair dismissal') and if an employee is dismissed by the new employer after the transfer, it can only be done through the same rules that govern any redundancy or dismissal – i.e. it has to be for a legitimate reason (these are normally classes as economic, technical or organisational) and done using the proper process.

Some liabilities relating to an employee are also transferred under TUPE. For example, if there is an ongoing claim for sex discrimination or personal injury, the new employer will automatically inherit this liability unless they are given protection under the terms of their service contract.

An employee does not have to accept TUPE transfer, but if they don't and there is no other role for them with their current employer, they cannot claim to be redundant. This is because the role is continuing, even if the employer is different, so redundancy does not apply.

When does TUPE not apply?

As mentioned, identifying whether or not TUPE applies can be difficult, but some examples of when it doesn't apply include:

- transfers by share take-over because, when a company's shares are sold to new shareholders, there is no transfer of the business - the same company continues to be the employer;
- transfers of assets only (for example, the sale of equipment alone would not be covered, but the sale of a going concern including equipment would be covered);
- transfers of undertakings situated outside the United Kingdom;

Help! I think TUPE applies to me, what should I do next?

If you are in a position where you are likely to be taking on new employees via a TUPE transfer or your own employees are likely to be subject to TUPE transfer, you have a number of responsibilities that you need to be aware of. In the case of the latter, these are generally around providing specific information to both the new service provider and the affected staff members within a required timeframe. In the case of the former it is more complicated as it involves a) being aware that TUPE applies to the service you wish to undertake b) to gather relevant information about staff members involved in the delivery of this service and c) to consult with/provide appropriate information to affected staff members. Organisations can be fined for failing to meet their obligations with regards to TUPE.

If you think TUPE applies to you, you need to do some more research and take some advice. The following are good sources of information and advice, but if the situation is not straightforward and/or you feel unclear about your responsibilities or the implications of TUPE for your organisation, seeking legal advice may be the best option. For a general discussion or for information about this issue, please contact either Penny Mason at Torridge CVS on 01237 420 134 or Deborah Fisher, Teignbridge CVS on 01626 215 916.

ACAS Helpline 08457 47 47 47 or www.acas.org.uk

BIS (Department of Business, Innovation and Skills):
A Guide to the 2006 TUPE Regulations for employees, employers and representatives

Business Link www.businesslink.gov.uk

Chartered Institute of Personnel Development (CIPD) www.cipd.co.uk

Department of Trade and Industry www.dti.gov.uk

Direct Gov www.direct.gov.uk

NCVO www.ncvo-vol.org.uk