

THE TRANSFER OF UNDERTAKING (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 OR TUPE

The regulations apply to an 'employee' ie someone who works under an employment contract. The employment contract sets out the employee's terms and conditions of employment such as working hours, duties, rights and responsibilities.

TUPE, in simple terms, states that when an individual buys a business all existing employment contracts are transferred too and these are protected. They cannot be varied at the time of transfer and dismissals related to transfer are automatically unfair. As you would expect, it is incumbent on both the old and new employers to consult with those affected directly or indirectly by the transfer.

TUPE applies when there is a 'relevant transfer'. There are two types of relevant transfer; a transfer of an economic entity which retains its identity (ie a business or part of a business) and a service provision change.

It is a matter of law whether or not TUPE applies and businesses should seek their own legal advice on this complex question. Alternatively, in some situations, the Cabinet Office Statement of Principles (COSOP) can be applied if there is a dispute over whether or not TUPE applies. COSOP is not a legally binding document but allows transfers to take place as if TUPE applied in situations where the precise means by which ownership changes is not covered by TUPE. This ensures protection for employees and avoids potentially costly legal challenges.

The Society and College of Radiographers (SCOR) believes that where TUPE applies, it must be observed but that where there is doubt, COSOP should be used thus affording employees the protection they would have received under TUPE.

Where there is no transfer of ownership of a business but the award of a contract that does not involve the transfer of employees then TUPE and COSOP are not relevant.

1. Business Transfer

Consider what happens when a hospital is 'taken over' by an independent sector company. What would happen to the employment contracts of the NHS staff? Under TUPE, you would expect the new employer to protect the employment terms as transferred from the previous employer. That is, of course, assuming the staff were being transferred to the new employer.

In 2010 Circle Health Partnership won the franchise for running Hinchingsbrooke Hospital. It was made clear that Hinchingsbrooke would remain an NHS hospital, its buildings and assets would remain in the NHS and its staff would continue to be employed by the NHS thereby retaining their NHS terms and conditions including their pension rights. In this case the 'Retention of Employment' (RoE) model was used. RoE is a procedure designed to ensure that staff do not transfer out of the public sector thereby retaining all of their terms and conditions of employment, with continuity of service preserved.

2. Service Provision Change

This requires there to be a change in the identity of the service provider, a clearly identifiable group of employees who provided the service before the transfer and the transferred activities to remain unchanged. This could apply when some activities are brought in-house, outsourced or the provider changes.

When services are outsourced, any prospective employer must understand that if an identifiable group of employees is going to provide a specific service in fundamentally the same way as before the transfer, then TUPE may apply.

Consider a situation where a group of radiographers are transferred from the NHS to an independent service provider. At the time of transfer, their NHS Terms and Conditions will be honoured although, importantly, the occupational pension does not transfer. Any later contracts changes will be subject to the usual employment law rules.

3. Pensions

A separate guidance note is available regarding pensions. TUPE requires a broadly equivalent pension scheme to be put in place under TUPE and the guidance note covers in detail the options available including remaining a contributor to the NHS pension scheme in relation to work carried out for the NHS.