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Academies Network

# **Transfer of Undertakings Protection of Employment (TUPE) Policy and Procedure**

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## 1. Transfer of Undertakings of Protection of Employment (TUPE) Overview

TUPE is an acronym for the “Transfer of Undertakings (Protection of Employment) Regulations 2006”. The rules simply aim to protect employees if the business they work for changes hands. ELAN could be involved in a TUPE transfer process either as the outgoing employer (the “transferor”) or incoming employer (the “transferee”) where services, department/teams or certain roles are being transferred either in or out.

ELAN will present a business case for the TUPE and plan out and communicate the necessary steps as outlined in this policy.

While going through the process, it’s helpful to keep the following basic legal implications of TUPE front of mind:

- All employees are automatically transferred to the buyer/new employer.
- Employees are protected against having their terms and conditions changed in connection with the transfer.
- Employees can claim automatically unfair dismissal if they are dismissed on account of the transfer.
- The seller and the buyer both have an obligation to inform and consult representatives of affected employees.

## 2. Transfer of Liabilities

The employee’s contract of employment automatically transfers to the new employer, as if the contract was originally made between them. Liabilities that transfer from the outgoing employer to the new one include all statutory and contractual rights. So, if the old employer did something to trigger claims, liability will pass to the new employer, including claims of, for example, unfair dismissal and discrimination.

Responsibilities that transfer include:

- current terms and conditions of employment
- continuity of service
- redundancy payments, both statutory and contractual
- arrears of pay, holiday pay and sick pay, and any accrued holiday entitlement
- liabilities accruing prior to the date of transfer under employment protection legislation, including liability for unfair dismissal and discrimination
- the terms of any collective agreement incorporated into the employment contract
- some other existing liabilities that are non-employment-related, such as the old employer’s liability for other wrongdoings known as tort (for example, for personal injury)
- share options that will be lost and that should be compensated by an equivalent provision or payment
- similar private medical insurance and health insurance
- Indemnities under employer’s liability insurance.

There are special provisions for dealing with occupational pensions as these do not necessarily transfer under TUPE however some limited rights e.g. early retirement rights on redundancy may transfer. ELAN will seek specialist TUPE pension legal advice if needed. Criminal liability and liability to third parties for civil wrongs will not automatically transfer.

### **3. Key Steps of a TUPE Transfer**

#### **Step One: Establish the TUPE**

TUPE regulations apply if a business or part of a business moves to a new owner or merges with another business to make a brand new employer.

From an ELAN perspective, TUPE would typically apply in the following situations:

- Mergers and acquisitions
- Contracting in and out of services e.g. cleaning, catering etc.

#### **Step Two: Early Preparation**

ELAN, before deciding to take on a TUPE transfer, will carefully consider things like:

- the benefits and risks – do the benefits outweigh the risks?
- how we will manage the transfer
- costs, for example staff employment or redundancy costs
- how the transfer will affect existing staff
- how to integrate new employees when they transfer
- whether trade union recognition will transfer
- how to manage staff who may have different terms and conditions
- any changes to working practices ('measures') we may need to take which relate to the transfer and how these will be communicated to staff
- any risk of redundancies after the transfer

#### **Estimating costs**

ELAN will consider any staff employment costs before they decide to take on a transfer. For example, costs of buying new equipment, any new work premises and staff wages.

ELAN will also consider whether we would have too many staff once the transfer happens and if so, the potential need to make redundancies after the transfer and pay redundancy costs. Normally if we take on a new school the school will have its own budget.

#### **Identifying Impacted Employees**

ELAN will identify impacted employees (if employees are being TUPEd out).

Whether or not staff are part of the team who transfer under TUPE depends on the specific facts of who worked where prior to each transfer but in general: -

- Employees on short-term absences, holiday and parental leave are likely to be included in the transferring group.
- Employees on fixed-term contracts are included in those who may transfer, but agency workers are not.
- Seconded employees and those on sick leave may transfer but it will depend on the circumstances, including the length of the secondment or absence.

### **Step Three: Information and Consultation**

Before a TUPE transfer, both the old and new employers must inform and consult\* with staff and their representatives (trade union or employee representatives) to explain why the transfer is happening and any changes that are being proposed.

\*'Inform' is when you tell affected employees or their representatives the facts about the transfer. 'Consult' is when you talk and listen to affected employees or their representatives on the changes to working practices ('measures') and genuinely consider their views.

The new employer may also have plans to make changes to non-contractual employment arrangements after the transfer, and under TUPE these changes are called "measures". In a transfer, "measures" can include:

- redundancies
- change in location of work
- changes to staff pay dates
- new working patterns, for example hours of work
- different occupational pension arrangements
- changes to trade union recognition or collective bargaining

The old employer must inform their affected staff about any measures the new employer might make, but they cannot consult on these changes because they have no control over them.

If ELAN are the outgoing employer, we will consult with all affected employees, well in advance of the transfer, communicating the fact that the transfer is happening and how they can object should they wish to do so.

ELAN will provide our recognised unions with: the fact that the transfer is to take place, the date or proposed date of the transfer, the reasons why it is to take place, the legal, economic and social implications of the transfer for the affected employees and any measures proposed in connection with the transfer that will affect the employees; if there are no measures to be taken, this must be made clear too.

There is no fixed time period for employers to inform and consult employees and their representatives in a TUPE transfer but ELAN will ensure enough time to inform and fully consult before the transfer.

### **How to hold consultation meetings**

Consultation must be genuine and meaningful so ELAN will:

- enable representatives to contact the affected employees
- provide facilities for meetings and time to meet up with the affected employees
- seriously consider any responses and suggestions from the representatives
- try to reach agreement
- evidence this consultation for legal process

ELAN do not have to make the changes suggested by employees and their representatives during the consultation but we will demonstrate that we have:

- discussed any changes with all affected employees and their representatives
- listened to their suggestions and fully considered them
- tried to reach an agreement

If we cannot reach an agreement, ELAN will provide the staff representatives (or the affected employees if there are no representatives) with the reasons for rejecting their suggestions and explain why in writing.

#### **Step Four: Employee Liability Information (ELI)**

At least 28 days before the sale or transfer of contract but ideally well before this, if ELAN is the outgoing employer ELAN will make the incoming employer aware of key employee information. This is known as 'employee liability information' (ELI) and must be provided in a data-secure way at least 28 days before the agreed transfer date:

- the identities of the transferring employees and their ages
- all the information contained in the transferring employees' written contracts of employment (also known as statements of particulars)
- information about any collective agreements with trade unions (if any)
- details of any formal disciplinary action taken against any transferring employees in the previous two years
- details of any formal grievances raised by any of the transferring employees in the previous two years
- details of any legal action brought against the old employer by any of the transferring employees during the last two years
- details of any potential legal action that the old employer reasonably believes may be brought.

If any employees decide they do not want to transfer, the old employer must update ELI as soon as possible and inform the new employer.

After the new employer receives this information, they must tell the old employer about any 'measures' they're thinking of taking after the transfer. These measures are usually changes to working practices, for example changes to the affected employees' pay dates or working patterns. The old employer must inform affected employees about these proposed changes.

In addition to the ELI above, incoming employers often carry out a more in-depth investigation of the business or contract by seeking additional information. It is not a TUPE requirement but it will help to provide the basis for any indemnities and warranties which are normally required as part of a business deal.

#### **Step Five: Preparation for the TUPE transfer**

##### **Make a transfer plan**

Both the old and new employers should have a transfer plan and share it with all employees. A plan can help to reduce any staff concerns and make sure we follow the process outlined.

ELAN will identify who will manage the transfer and make sure we have enough time to make, follow and change any plans as the transfer progresses.

##### **After the transfer**

On the transfer date, the affected employees will transfer from the old employer to the new employer.

For a smoother transition process, it's good practice for both old and new employers to continue talking to employees and their representatives about the transfer, to help:

- new staff settle in
- reassure all staff, not just those who transferred
- integrate the new employees with existing staff

### **Information employers must provide**

Both old and new employers must inform the affected employees in writing about the details of the transfer, including why it's happening.

The new employer must inform the old employer of any changes to working practices ('measures') that they are planning to make to staff transferring in. The old employer must pass this information on to the appropriate representatives or affected employees.

The information given to the impacted employees in writing must include:

- confirmation that the transfer is happening, when it is expected to happen and why
- how we plan to carry out the transfer
- whether there will be any restructuring
- any measures the new employer is planning which may affect staff transferring in – for example, changes to working hours, job descriptions, salary payment dates or risk of redundancies
- any legal, economic and social implications. Legal, economic and social implications may include:
  - legal – effect on contracts, statutory rights and collective agreements
  - economic – the new employer's financial worth and pay and benefits
  - social – pensions and changes to start and finish times

### **Keeping staff informed**

ELAN will use the most appropriate internal communication channels to keep our employees informed, for example:

- staff/trade union representatives
- video calls
- noticeboards
- staff portal/intranet
- emails, letters or leaflets given directly to affected employees

ELAN will ensure this information is available for all employees, including:

- those needing reasonable adjustments - for example, easy read formats for staff with learning difficulties
- any absent employees who are on sick leave and maternity, adoption or paternity leave

We will also put feedback channels in place to answer questions and address employee concerns throughout the process.

### **If staff do not want to transfer**

If the transfer has not yet taken place, ELAN may if we choose and if it is a viable business option, to offer alternative employment to an employee objecting to the transfer. In this case, the employee's service continuity would remain and they would start in their new role with ELAN.



If the employee resigns after the transfer date, their new contract would end as they have effectively resigned.

For any employees who have chosen to resign prior to the transfer, ELAN will:

- confirm the notice period and agree a leaving date
- pay them any outstanding wages and holiday they've built up ('accrued') but not yet taken when their employment ends

Their employment will end on the date the transfer takes place. If the transfer happens before their notice period ends, ELAN will not pay them for the remainder of their notice period.

### **Step Six: Managing staff after a TUPE transfer**

ELAN recognises that a TUPE transfers can be stressful for our employees and their representatives. We are committed to ensuring that they are provided with quality support during the process and help to adjust to the changes.

### **Steps the old employer should take following a transfer**

If ELAN is the old employer, ELAN will talk regularly with, and listen to, our impacted staff i.e. those remaining after the TUPE to make sure:

- any reorganisation of teams or working practices has been successful
- they can manage the workload

In addition, we will:

- reassure remaining affected employees through regular meetings and updates
- listen and respond to their concerns, and help to maintain performance and quality of work
- check they are coping well after the transfer
- look at introducing team building activities and recognition to boost morale

### **Steps the new employer should take following a transfer**

Employees who have transferred into ELAN may have different ways of doing the same job.

To help the transferred employees settle in, ELAN will:

- welcome them to our organisation, including introducing them to any new team members and their line manager
- use the induction process to introduce ELAN values, strategy, vision, policies and standards so they know what is expected of them and how things should be done
- ensure they have received any initial training required
- hold regular team meetings to integrate any new employees with their line managers and existing staff
- put in writing any changes to their terms and conditions of employment, for example the name and address of their new employer and what is happening to their pension arrangements
- check they understand the terms which transferred over with them
- make sure any reasonable adjustments have been successfully implemented for any employees requiring this.