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. Where a business is potentially going to take on the employees of an incumbent business, it is a good idea to carry out a detailed examination of the incumbent business before embarking on the TUPE process.

For TUPE purposes, a business is judged by the use made of assets – meaning premises, equipment, work-in-progress, goodwill, intellectual property and employees, not by a change of name.

Once the TUPE process has been engaged:

- Parties to a TUPE process need to engage as early as possible with each other to carry out due diligence and exchange employee liability information (ELI) (where necessary). It is advisable to inform employees (unless Stock Exchange rules apply) about exactly who is transferring, and discuss how the transfer will be handled.

- There are four stages in a TUPE process which both parties (outgoing and incoming employer) should follow (see Appendix A for details):
  
  STAGE 1 – Before committing to any TUPE
  STAGE 2 – Preparing for the transfer
  STAGE 3 – The transfer
  STAGE 4 – After the transfer

- Crucial tasks are carried out in the first two stages, including due diligence and ELI exchange, following this stage 3 should be straightforward. But stage 4 is also important to ensure employees settle into their new roles / teams easily and that any difficulties are quickly resolved.

- Where employees do transfer, they take with them all their existing contractual entitlements, live disciplinary proceedings and redundancy rights.

- An employees’ refusal to transfer may be considered a resignation, in which case they will have surrendered their right to redundancy payment.

NOTE

TUPE can be a complicated process, before you commence it we recommend that you contact ISME for advice and support.

For more information, download the ISME guide from www.isme.ie or call 01 662 2755.
**STAGES OF TUPE**

### Outgoing Transferor Employer

**STAGE 1 – Before Committing**
At this stage the outgoing employer should consider whether to:
- Bid or rebid for a contract or service (in service provision changes).
- Inform employee representatives / employees of a potential sale / expiry of business contract.

**STAGE 2 – Prepare for the transfer**
At this stage it is advisable that the outgoing employer:
- Inform employees about the transfer.
- Identify who will transfer.
- Provide ELI to the incoming employer.

**STAGE 3 – The Transfer**
At this stage it is advisable for the outgoing employer to:
- Transfer employees and inform remaining employees about the transfer of employees.
- Ensure that all remaining employees are managed, settled and clear about their duties.

**STAGE 4 – After the transfer**
At this stage it is advisable for the outgoing employer to:
- Consult with employees in general as good practice to address any concerns and preserve good morale.
- Consult employees about redundancies (if any).

### Incoming Transferor Employer

**STAGE 1 – Before Committing**
At this stage it is advisable for the incoming employer to:
- Weight up the pros and cons of committing to a transfer.
- Construct a TUPE process plan.

**STAGE 2 – Prepare for the transfer**
At this stage it is advisable that the incoming employer:
- Inform employees about the transfer.
- Identify who will transfer.
- Request ELI from the outgoing employer.

**STAGE 3 – The Transfer**
At this stage the incoming employer gains the transferring employees and:
- Needs to inform existing employees about the incoming employees.
- Needs to ensure that all employees / teams are managed, settled and clear about their duties.

**STAGE 4 – After the transfer**
At this stage the incoming employer needs to:
- Consult employees in general and ensure reasonable allowances are made while employees adjust and integrate.
- Review the transfer process.
- Consult employees about redundancies (if any).
APPENDIX A: ACTIONS TO BE TAKEN DURING TUPE STAGES

STAGE 1: Before committing to the transfer
Where an incoming employer has the opportunity to take on a business or service, there are a number of considerations to help inform them whether or not it is the right decision.

Weigh up the pros and cons
Employers thinking about acquiring a business or contract might consider the following questions:
- Do the benefits of the transfer outweigh the risks?
- Do I have sufficient work for two sets of staff?
- How much do I bid for the contract or the business?
- Will I have to make redundancies?
- What are the actual and potential employment liabilities, and who should be responsible for them under the transfer agreement, the outgoing or the incoming employer?
- What is the total employment cost of the transfer?
- Will TUPE apply to this transfer or not?
- Will I have to take any measures after the transfer and can I make those changes?
- Who will be responsible for managing the TUPE transfer process?
- Is there already an appropriate channel for employee information and consultation or does one need to be created?

Seek advice and information
Employers looking to buy all or part of a business need to gather information to determine whether it will be worthwhile and to get a clearer picture of what they will be taking on. This can start by checking out the business, looking at the books and speaking with as many people in the business as possible, as part of a due diligence exercise. In some transfer situations it is beneficial to keep employees and representatives fully informed of any developments before a commitment to the transfer has been made, whereas in others (such as how tender prices are calculated or if customers could be lost to competitors) it may not be. Employers need to judge each transfer on its own merits and take advice where unsure.

Employers bidding for a service need to gather as much information as they can from the client. This can help determine what is important to them, and establish whether they are looking for a good service, the lowest bid or a combination of both. This in turn gives an indication of the implications for the employer and any affected employees.

Bidding for a contract can involve making changes which make a service more efficient and affordable without disrupting the service. Under TUPE these changes are called “measures”. Employers often base their calculations for the bid on bringing in measures to run the contract more efficiently. Under the TUPE regulations, employers must consult with employees on any measures they anticipate taking as a result of the transfer in respect of their own employees.

STAGE 2: Preparing for the transfer
Once it has been decided that a transfer is to take place, the incoming and outgoing employers need to agree the way forward. In some transfer situations this may be difficult but it is beneficial for both employers to discuss the following:
- Whether TUPE applies to the transfer?
- Which employee are in the group to transfer?
- The transfer date.

Developing and investing time in a good plan at this stage is important. Acting on as many of the points as possible early on will free up time to spend dealing with issues which may arise at the point of transfer. The day of the transfer is the most demanding stage of the transfer to manage.

Actions for both incoming and outgoing employers
- Identify who will manage the transfer and make sure they have time to deal with it effectively.
- Engage with each other and set up a channel of communications to ensure a smooth transition.
- Inform staff about the transfer. This will answer questions and resolve any problems.
- Arrange for the election of employee representatives if appropriate representations is not already in place.
- Offer representatives training for their role, and provide facilities to enable them to carry out their duties.
- Use existing communication channels to provide information directly to employees. This can be through representatives, and in addition through FAQ’s put on noticeboards, or on the employer’s intranet, or circulars given directly to affected employees. Put feedback channels in place to answer questions and address employee concerns.
- Continue to consult with employees. If employers leave gaps in communications about transfers, employees might fill the lack of communications with rumours which may result in poor morale.
Actions for the outgoing employer

- If the business or service is to continue after the transfer, ensure that plans are developed to capture any knowledge/experience that may be lost with transferring employees. Similarly, identify any tasks that may need reallocating/adjusting after the transfer. It can also be useful to identify whether there are any existing vacancies in the organisation, and consider if staff with reduced duties after the transfer could be offered any of these roles.
- Employers need to consider speaking regularly with those who will not transfer as they will be unsettled too; they may be concerned about their job security, worry about how the work will get done, or what impact the transfer will have on the organisation.
- Provide employee liability and due diligence information to the incoming employer at least 28 days before the transfer. However, it is good practice and in all party's best interests if the information is delivered at the earliest opportunity.

Actions for the incoming employer

- Request employee liability and due diligence information from the outgoing employer. This will help determine the terms and conditions of the transferring staff and provide for accurate budgetary planning. The information will also allow human resource systems and adjustments for any disabled employees to be put in place.
- Identify any measures which may need to be taken in respect of transferring employees (if any).
- Provide the outgoing employer with information about the transfer and any measures they intend taking to allow them to consult with the affected employees.
- Inform the affected staff and their representatives about the transfer so they understand what is happening and why, particularly if they will be working with new employees.
- Consult with representatives of existing employees affected by the transfer about the measures which are being considered and may need to be taken in respect of the employees.
- Contact the client in situations where the outgoing employer refuses access to the affected employees before the transfer. This can occur in service provision transfers, so if the incoming employer makes this known to the client, they are usually able to help as there is often a clause in their contract which requires the outgoing employer to allow access to the affected employees in TUPE situations.
- Consider whether there will be sufficient work for all employees or whether change or redundancies might be required.

STAGE 3: The transfer

The actions for incoming and outgoing employers will be different at this stage but the emphasis should be on settling employees into work and getting them used to the change.

Actions for the incoming employer

The day of the transfer is likely to be stressful so incoming employers may want to consider greeting employees on the day of the transfer with an induction session about the company they are joining, its culture and how they will fit in. This should help to gain the trust of all affected employees and begin the relationship on a positive note.

On day one the incoming employer needs to:
- Welcome the new staff and introduce them to the organisation, for example by holding a full meeting of all affected employees. Incoming employers could give a presentation welcoming new staff, introducing the management team and sharing the culture/ethos of the organisation.
- Use the induction process to introduce rules, policies and standards so that employees know what is expected from them and how things are done.
- Talk to new employees to check their understanding of the terms which transferred across with them.

Actions for the outgoing employer

At this stage, the outgoing employer (providing that some of the business and employees remain) needs to continue to engage with any remaining employees on a regular basis to ensure that:
- The post transfer reorganisation has been properly and effectively implemented.
- They are coping well after the transfer.
- All work is covered.
- There are no problems arising from the transfer.
- They have sufficient work and support to perform their contractual requirements.

STAGE 4: After a transfer

Where good preparation and appropriate actions have been taken at stages 1, 2 and 3, more issues are likely to have been resolved early on. However, problems can still arise after the transfer and it's only when employees are working productively together (especially if there have been team reorganisations, merges or splits) that employers get to know of any remaining or developing contentions. There can even be teething problems where there is only one set of employees, so time is needed for everyone to adjust following a transfer.
Actions for both incoming and outgoing employers
Initiate any redundancy consultations where required (if not started earlier) and dismissal processes, giving full consideration to any suggestions for alternatives to redundancies. Bear in mind that sometimes unexpected changes arising from the transfer may mean that redundancies are no longer necessary.

Actions for the outgoing employer
Morale can sometimes drop at this stage as employees miss their colleagues or struggle with different work requirements and/or working for a different organisation. The outgoing employer needs to:

- Continue to engage with any remaining affected employees after the transfer.
- Listen to and address concerns to avoid drops/falls in performance and quality of work.

Actions for the incoming employer
New employees need time to adjust to the culture of their new organisation therefore the incoming employer might consider the following:

- Listen to employee suggestions and consider holding discussions to generate ideas to improve processes. This discussion will also help identify and resolve problems before they escalate.
- Ensure line managers make reasonable allowances during periods of adjustment. There is little or no benefit to reprimanding employees when they are trying to adapt to change and are likely to adjust in time with encouragement and support.
- Have an escalation route to get trickier questions and problems answered or resolved quickly by senior managers where consistency of approach is required.
- Document and send to transferred employees any changes in their employment particulars such as the name and address of their new employer and what is happening to their pension arrangements.
APPENDIX B: DETERMINING IF TUPE APPLIES

In Ireland, the Employment Appeals Tribunal (“EAT”) has generally applied the Suzen* case in Ireland and as a result the general legal principle emerging from Irish decisions is that loss of customer contract does not necessarily constitute a transfer. The rationale behind this is that the original undertaking does not necessarily cease to exist simply by losing a customer and part of the business belonging to it cannot be considered to have been transferred to the new awardees of the contract.

To decide whether or not TUPE applies in a second generation outsourcing situation, the question must be asked as to whether the business is asset reliant or labour intensive. The Suzen decision referred to above essentially means in a second generation scenario that, if the contract in question is:

“Labour intensive” then TUPE rules will apply where a major part of the workforce transfers to a new company.

Alternatively, where the contract is:

“Asset reliant” then TUPE rules will apply where major assets transferred to the new company.

Importantly, if a contract is “asset reliant” and no assets transfer, but all the employees transfer, then TUPE will not apply. Conversely, if a contract is labour intensive and assets transfer but no employees transfer, then again TUPE will not apply.

The EAT has applied Suzen in many decisions. For example, in Cannon –v- Noonan Cleaning Limited and CPS Cleaning Services Limited [1998], it was found that there was no transfer of an undertaking and the contract for the cleaning of a Garda station was lost to CPS Cleaning. No tangible assets transferred between the two contractors and when the Claimant turned up for work with the new contractor after the end of the first contractor’s contract, she was sent away by the second contractor who thereafter declined to employ her. Accordingly, the EAT had no alternative but to apply the Suzen case, finding also that the possible transfer of the intangible profit margin on the contract was not off sufficient significance of itself to be a major factor in the transfer.

*In 1997, the ECJ issued a decision directly relating to a change of service providers which greatly qualified the general understanding of previous decisions of the Court. The case of Suzen resulted in the following important points being made by the Court:

A. The Directive is to ensure continuity of employment relationships within an economic entity irrespective of any change of ownership.

B. For the Directive to be applicable the transfer must relate to a stable economic entity that activity is not limited to performing one specific works contract.

C. The mere fact that the service is provided by the old and new awardees of a contract are similar does not support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it.

D. The mere loss of a service contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the Directive. In those circumstances, the service undertaking previously entrusted does not, on losing a customer, cease fully to exist and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardees of the contract.