

TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT REGULATIONS)

TUPE PROCEDURE

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AUTHOR	██████████ Associate Director of Human Resources	
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PROCEDURE SUMMARY		
This procedure defines what constitutes a TUPE transfer and the steps that need to be followed when transferring staff either out to a new employer, or transferring staff into the Trust from another employer. It sets out the responsibilities of the respective employers around consultation, notice and information requirements.		
The Trust monitors the implementation of and compliance with this procedure in the following ways:		
This policy is subject to monitoring and review as set out in the Organisational Change Policy and through review and agreement with the Trust's Partnership Committee.		
Services	Applicable	Comments
Trustwide	✓	

The Director responsible for monitoring and reviewing this procedure is the Executive Director of People & Culture

ESSEX PARTNERSHIP UNIVERSITY NHS FOUNDATION TRUST

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CONTENTS

THIS IS AN INTERACTIVE CONTENTS LIST – PLEASE CLICK ON THE SECTION HEADINGS TO GO TO THE SECTIONS

1	Assurance Statement	4
2	Introduction	4
3	Responsibilities	5
4	Consultation	6
5	Information to be Included	6
6	Process	7
7	Appeals Process	8
8	Support and Advice for Staff	8

SAMPLE ONLY

ESSEX PARTNERSHIP UNIVERSITY NHS FOUNDATION TRUST

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PROCEDURE**

1. ASSURANCE STATEMENT

- 1.1 The Organisation seeks to promote fair, reasonable and consistent employment practices and aims to manage Organisational Change Procedures efficiently and effectively.
- 1.2 This procedure details the Organisation's principles and processes regarding the management of Transfers of Undertaking (Protection of Employment) Regulations 2006. These are more commonly known as TUPE, and will be referred to throughout this document as such.
- 1.3 TUPE Regulations contain a number of legal provisions that relate to employees' rights and employers' responsibilities when services (or parts of services) are transferred. This procedure establishes the Organisation's responsibility in managing TUPE processes
- 1.4 The Organisation will seek legal advice where appropriate through the Human Resources Department regarding possible / planned service transfers. If advice is provided stating that a situation does not fall within TUPE then the Trust's Organisational Change Policy and Procedure will be followed.
- 1.5 Where there is a TUPE transfer the Procedure below must be followed.
- 1.6 Employees may seek advice from the HR Department and/or a trade union representative at any point of this procedure.
- 1.7 The Trust will ensure that in its management of this policy and procedure it will behave in a way that is consistent with its values and behaviors, in doing so being:
 - Open
 - Compassionate
 - Empowering

2. INTRODUCTION

- 2.1 The term "TUPE" refers to the Transfer of Undertakings (Protection of Employment) Regulations 2006, the term "TUPE transfer" is a transfer of a business to which these regulations apply.

The purpose of the regulations is to protect employees when the ownership of the business for which they work changes hands by ensuring that their contracts of employment (and therefore terms and conditions of employment),

transfer automatically to the new employer.

All terms and conditions within the transferring employee's contract of employment (including any contractual policies and procedures) and any collective agreements will transfer with them and should not be changed as a consequence of the transfer. Non-contractual elements do not transfer,

The Regulations apply when the whole or part of the business or undertaking is transferred as a going concern to another employer.

- 2.2 The TUPE regulations can also apply to a service provision change (i.e. the transfer of a contract to provide a service), where a contract for the performance of a function is outsourced, brought back in-house or transferred to a new contractor.

For a service provision change to be covered by the TUPE Regulations, there must be an organised grouping of employees whose principal purpose is carrying out activities on behalf of the employer.

- 2.3 A service provision change occurs where:

- a service that has previously been carried out by the Trust is contracted out to a third party;
- a contract to provide a service is awarded to a different contractor following tendering; or
- a service that has previously been carried out by a contractor is brought back in-house by the Trust.

For example, if a contract to clean Trust premises is retendered and awarded to a different contractor, if there is a team of employees (or one particular employee) dedicated to carrying out the cleaning at those premises, those employees will be transferred automatically to the new contractor.

- 2.4 When a staff member is in a split post the Human Resources Department will assess their post in conjunction with the appropriate manager in order to advise whether they believe that the post qualifies as a TUPE position. They make seek relevant legal advice or guidance to confirm this.

3. RESPONSIBILITIES

- 3.1 The manager leading the TUPE will be responsible for:

- Informing the staff who may be affected and their relevant representatives at the earliest opportunity of the potential TUPE;
- Managing regular communications to the staff affected;
- Advising staff and their representatives of any market testing exercises upon their commencement;
- Ensuring that all affected staff have been identified;
- Providing information to the staff (with the support of the appropriate other departments).

3.2 The Human Resources representative supporting on the TUPE will be responsible for:

- Supporting the manager in managing the TUPE;
- Ensuring that the relevant information has been collected from the Workforce Department;

3.3 The Human Resources Department will be responsible for:

- Collating the due diligence information regarding staff members due to transfer via TUPE out of the Trust;
- Inputting the Due Diligence information regarding staff members transferring in via TUPE to the Trust.

They should be supported in this process by the Workforce Department.

4. CONSULTATION

4.1 The Trust undertakes to openly communicate with Trade Unions and identified staff at the earliest opportunity regarding any potential TUPE process.

4.2 Unlike in the provisions governing collective redundancies, there is no specified minimum period over which consultations must be conducted prior to the transfer taking place.

Regulation 13 of the TUPE regulations stipulates that consultation must begin long enough before a relevant transfer to enable the employer to consult the staff affected and their appropriate representatives.

4.3 Best practice indicates that a proposed timetable for TUPE should be provided as early as possible to the affected staff and regular updates should be undertaken to ensure full and open communication.

Where the proposal is to transfer services and staff from the Trust to a different employer, the Trust will be mindful of the consultation periods set out for statutory collective redundancy purposes i.e. a minimum of 45 days (unless otherwise agreed), and where 100 or more staff are affected a minimum of 90 days where reasonably practicable.

4.4 The Regulations place a duty on both organisations to consult but only if the employer (transferor or transferee) envisages that it will as a result of the transfer, be taking any 'measures' in relation to affected staff. Measures are defined quite broadly and include any proposed changes.

The organisation from which the employees are transferring, (the transferor) needs to consult with staff and trade union representatives.

The organisation employees are transferring to, (the transferee) are obliged to provide the transferee with the information they require to effectively

consult with their staff. In addition they must consult with their own employees whose jobs might be affected by the transfer.

4.5 Affected employees may include:

- Those employees who are to be transferred;
- Their colleagues in the transferor employer who will not transfer but whose jobs may be affected by the transfer, or;
- Their new colleagues in employment with the new employer whose jobs might be affected by the transfer.

5. INFORMATION TO BE INCLUDED

5.1 The Employee has a right to be provided with pertinent information regarding the proposed change as soon as this is available. They should be informed of:

- Reason that the TUPE is due to take place
- Details of the proposed transfer including the lead manager;
- The legal, economic and social implications of the transfer for any affected employees;
- Timescales for the proposed transfer, which must include the proposed date of transfer.
- The measures, which the Organisation envisages it will take in connection with the transfer, take in relation to any affected employees or if the Organisation envisages that no measures will be taken, that fact.

5.2 If the Trust is the transferor, (i.e. the outgoing employer), it will set out the measures it envisages that the transferee, (i.e. the incoming employer) will take in connection with the transfer.

These proposed measures would be in relation to any affected employees who are due to become employees of the transferee after the transfer, and by virtue of the transfer.

Alternatively if the Organisation envisages that no such measures will be taken, it will set out that fact.

5.3 The employer should also prepare and share information regarding agency workers who are currently working in the teams that are due to transfer:

- The number of agency workers working temporarily for and under the supervision and direction of the employer;
- The parts of the undertaking in which they are working;
- The type work they are carrying out.
- Agency and bank workers do not have the right to transfer under TUPE regulations

5.4 The Trust is required to share employee liability information 28 days prior to the date of transfer.

6. PROCESS

6.1 In all of these circumstances, for the purposes of the consultation that will be carried out, the manager will identify the services, posts and individual staff that will transfer or be affected.

6.2 The manager will write to the staff affected and recognised Trade Union representatives (local and full-time officials) setting out the information described previously informing them of the intention that staff will transfer, the implications of the transfer and any measures which will be taken in connection with the transfer.

6.3 The manager will hold one-to-one meetings with individual staff and their trade union representative.

This will be the purposes of discussing the implications of the transfer, measures to be taken in connection with the transfer, to answer any concerns or queries, discuss possible options if appropriate, and consider personal circumstances.

6.4 A joint approach to consultation may be agreed between the transferor and transferee (new employer) to allow the new employer to have an input into the information and consultation process. This approach provides an opportunity for the new employer to discuss its future plans and proposals and allay concerns on the part of transferring employees.

This will be communicated to staff where this is considered appropriate, and having sought HR advice.

6.5 Consultation will be with a view to seeking agreement to any intended measures. The manager will consider any representations made by the employee representatives, and reply to those representations. If any of those representations are rejected by the Organisation it will state the reasons for the rejection

6.6 These discussions will be documented and confirmed in writing. Every possible support will be given to staff to understand the reasons for, and implications of the transfer, and to ensure they have the necessary information with which to prepare themselves.

6.7 Facilities and time out will be provided to staff-side representatives in accordance with the Trust's provisions for Time for Trade Union Duties and Activities. Staff-side representatives will be allowed access to any affected employees as appropriate.

6.8 Formal notice of a transfer will be issued as long before the date of the transfer as possible in order to comply with the obligations of TUPE and this policy. As set out earlier in this policy, the Trust will make every effort to give up to 3 months' notice of a transfer where possible.

Where this is not possible because, for example, of the timing of external announcements or decisions of approval, a shorter notice period will be provided after consultation with recognised trade unions.

7. APPEALS PROCESS

- 7.1 An employee whose contract is assigned under TUPE can object to their employment being transferred to a new employer under TUPE and need not give a reason. Any objection must be made clear and unequivocal in writing before the date of the transfer.
- 7.2 If an employee objects to the transfer their employment will simply be treated as coming to an end on the date of the transfer. This will be treated as a resignation and not either a dismissal or a termination by the employer. The employee is not therefore entitled to a redundancy payment.
- 7.3 Objecting to a transfer means that their employment ends on the date of the transfer, so they do not need to work out their notice period and are free to go to work elsewhere immediately.
- 7.4 An employee may raise a concern about the *application* of this policy and this should be as per the Trust Grievance policy and procedure.

8. SUPPORT AND ADVICE FOR STAFF

- 8.1 The Trust recognises that organisational change can be a difficult time for all concerned and therefore will undertake to provide support and guidance as is possible to all employees identified as “at risk” of either change or redundancy.
- 8.2 Advice and support will be available from managers, Human Resources, recognised Trade Union representatives and Professional Leads.
- 8.3 Additional advice and counselling will be available through Occupational Health.
- 8.4 Employees can also access confidential support/career advice/counselling through the Trust’s Employee Assistance Programme.
- 8.5 The Trust may also consider the appointment of an external agency to provide more specific support to staff as appropriate and where necessary.

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