TUPE, PENSIONS AND AUTOMATIC ENROLMENT: UNDERSTANDING THE INTERACTIONS

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Employers involved in TUPE transfers often have to comply with both TUPE and automatic enrolment legislation. We provide an adviser's guide to the essentials.

This article covers the interactions between pension entitlements under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and the automatic enrolment legislation.

The TUPE provisions protect employees' terms and conditions when they're compulsorily transferred from one employer (the 'old' employer) to another (the 'new' employer). The TUPE rules oblige the old employer to provide details of the affected employees' terms and conditions to the new employer. In the private sector, the TUPE rules normally apply when one employer takes over another. In the public sector, the TUPE rules often apply when a public sector body outsources work to a contractor.

The automatic enrolment legislation under Pensions Act 2008 applies to an employer from its staging date.

PENSIONS, TUPE AND TEPP

The TUPE provisions protect employees' entitlements (whether taken up or not) to employer contributions to group personal pensions (GPPs), individual personal pensions (PPPs) including self invested personal pensions, and group or individual stakeholder pensions (GSHPs/ISHPs). TUPE applies to both contractual and automatic enrolment. In this context, contractual enrolment covers any method of arranging membership of a workplace pension scheme apart from automatic enrolment under the Pensions Act 2008 legislation.

Trust based occupational pension schemes (OPSs) are exempt from TUPE, but are covered by the Transfer of Employment (Pension Protection) Regulations 2005 (TEPP). The TEPP regulations apply even if the TUPE'd staff were still in a waiting period for the OPS or had access but hadn't bothered to join. TEPP applies to automatic enrolment under Pensions Act 2008 and any other methods of arranging membership of a workplace pension scheme.

Special rules protect pension entitlements for outsourced public sector employees, under the New Fair Deal or similar provisions. These rules often oblige the new employer to join the relevant public sector scheme. If so, this will be set out in the outsourcing tender document.

As a further complication, some employers will have groups of TUPE'd staff with differing pension rights derived from various original employers.

TUPE AND PENSIONS IN THE PRIVATE SECTOR

The new employer must offer either a TUPE or TEPP compliant pension, depending on the type of pension entitlement the TUPE'd workers had with their old employer.

GPP, PPP, GSHP, ISHP with old employer New employer must offer TUPE compliant pension	
Old employer	**New employer**
Entitlement to employer contribution to GPP, PPP, GSHP, ISHP.	Must match existing entitlement to employer contributions.
Examples:	
5% employer contribution, no requirement for employee contribution.	5% employer contribution, no requirement for employee contribution.
Match employee contributions up to 10%.	Match employee contributions up to 10%.
1% employer contribution, conditional on 1% employee contribution.	1% employer contribution, conditional on 1% employee contribution.

Trust based OPS with old employer New employer must offer TEPP compliant pension	
Old employer	**New employer**
Defined benefit OPS.	Defined benefit OPS which meets specified criteria.
	Money purchase OPS – matching employee contributions of up to 6% of basic pay.
	Offer to contribute to a GSHP or ISHP – matching employee contributions of up to 6% of basic pay.*
Money purchase OPS. (NEST, NOW Pensions and The People's Pension are all trust based money purchase OPSs.)	Any of the above three options.
	Money purchase OPS – matching level of contributions the old employer was required to make.
	Offer to contribute to a GSHP or ISHP – matching level of contributions the old employer was required to make.*

* The new employer could establish a GPP instead of a GSHP/ISHP with the TUPE'd workers' agreement. This is because OPSs are covered by TEPP, not TUPE.

TUPE AND PENSIONS IN THE PUBLIC SECTOR

TUPE often applies to staff employed in the public sector who are compulsorily transferred to a new employer under outsourcing. The outsourcing contract normally specifies the pension provision requirements for TUPE'd employees not only for the original contractor, but also on a secondary transfer to a new contractor. If a new employer is uncertain how to meet its obligations, it should seek specialist advice.

Summary of usual requirements for staff TUPE'd out of the public sector		
Public sector employer		**New employer**
New Fair Deal	Mainly central government bodies, NHS, some schools.	Become participating employer in public sector scheme.
Other	Local authorities, other public sector bodies in England, Wales, Scotland.	Make OPS provision broadly comparable to public sector scheme. Or obtain admitted body status to public sector scheme.

TUPE AND AMENDING TERMS AND CONDITIONS

Many attempted variations of a TUPE'd employee's contract of employment will be void and therefore unenforceable by the new employer, even if it has the employee's consent. A variation is void if it arises solely or principally by reason of the TUPE transfer, unless there is a legitimate 'economic, technical or organisational (ETO) reason entailing changes in the workforce'. An ETO reason is normally taken to cover post-TUPE redundancies.

Therefore, the new employer might have to offer better pension provision to its TUPE'd workers than its existing employees. Under TUPE, harmonisation in the sense of attempting to move TUPE'd workers onto the same, less favourable terms as the new employer's staff is straightforwardly prohibited. It's also difficult for the new employer to worsen some TUPE'd terms and conditions in exchange for levelling up improvements in others.

Employers considering changes to TUPE'd workers' terms and conditions should normally seek specialist professional legal advice.

INTERACTION BETWEEN TUPE/TEPP AND AUTOMATIC ENROLMENT

New employer has not staged

An employer doesn't have any automatic enrolment duties until it reaches its staging date. If the old employer had staged, but the new employer hasn't, the new employer cannot automatically enrol any TUPE'd employees until it reaches its own staging date. In the meantime, it has all the normal TUPE duties from the date the TUPE'd staff are transferred to it.

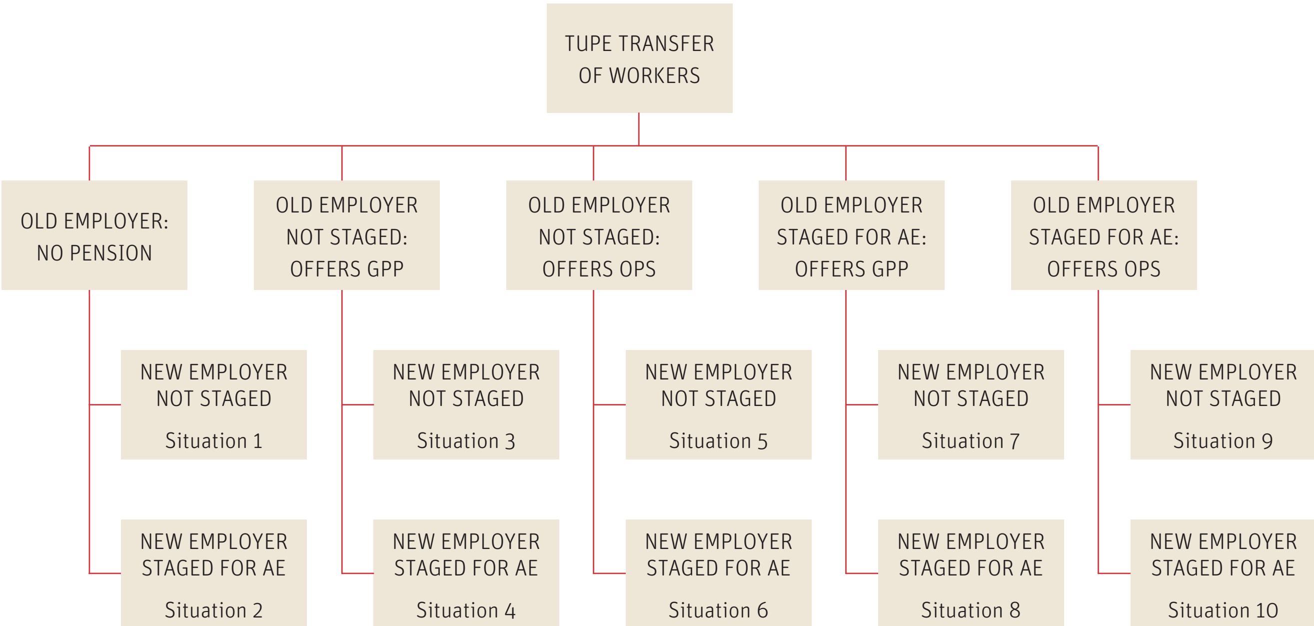
New employer has staged

If an employer taking on TUPE'd staff has passed its staging date, it must comply with both the TUPE provisions and the automatic enrolment legislation. Ideally, any pension provision for TUPE'd employees will be both TUPE compliant and also a qualifying scheme under the automatic enrolment legislation. Otherwise, the employer has to provide a TUPE compliant scheme while also automatically enrolling eligible jobholders into a qualifying workplace pension scheme and offering opt in rights to non-eligible jobholders – potentially contributing to both.

The new employer has TUPE duties from the date the TUPE'd staff are transferred to it. It treats any TUPE'd workers as new starters for automatic enrolment purposes. The new employer could use worker postponement while it contractually enrols the TUPE'd employees into a TUPE compliant pension with effect from the date their employment contracts are transferred to it. If so, the pension should also be a qualifying scheme under the automatic enrolment legislation. In this situation, the new employer assesses the TUPE'd workers at the end of postponement in the normal way. If the old employer had also staged, the new employer must ignore any existing automatic enrolment opt outs. As TUPE can apply to internal reorganisations of businesses, this last point might not always be obvious to the new employer.

POTENTIAL INTERACTIONS – PRIVATE SECTOR

The chart summarises the possible interactions between the TUPE/TEPP and automatic enrolment obligations for private sector transfers. Summaries of the new employer's duties in each situation follow. As explained above, different rules generally apply to TUPE transfers involving public sector staff and the tender document will specify the new employer's duties.



1. TUPE TRANSFER OF WORKERS

Old employer offers no pension
New employer has not staged yet

- The new employer has no TUPE or TEPP obligations to provide a pension to the TUPE'd workers.
- The new employer won't have any automatic enrolment duties to the TUPE'd workers until it reaches its own staging date. It will then have the same automatic enrolment duties to its TUPE'd and non-TUPE'd workers.
- The new employer can offer to enrol the TUPE'd workers into a workplace pension scheme with their consent. For example, if it offers a pension to its existing employees. Ideally, the new employer should offer a pension that's capable of being a qualifying workplace pension scheme (QWPS) under the automatic enrolment legislation once it reaches its staging date.

2. TUPE TRANSFER OF WORKERS

Old employer offers no pension
New employer has staged for automatic enrolment

- The new employer has no TUPE or TEPP obligations to provide a pension to the TUPE'd workers.
- The new employer has all the normal automatic enrolment obligations from the date of the TUPE transfer. The TUPE'd workers are new starters for automatic enrolment.

3. TUPE TRANSFER OF WORKERS

Old employer has not staged yet
Old employer offers GPP (or contributions to PPP/SHP)
New employer has not staged yet

- The new employer must offer the TUPE'd workers a TUPE compliant pension from the date their contracts of employment are transferred to it. It must have each TUPE'd worker's consent to enrol them.
- The new employer won't have any automatic enrolment duties to the TUPE'd workers until it reaches its own staging date.
- Ideally, the new employer should offer a pension that's both TUPE compliant and capable of being a QWPS once it reaches its staging date.

4. TUPE TRANSFER OF WORKERS

Old employer has not staged yet
Old employer offers GPP (or contributions to PPP/SHP)
New employer has staged for automatic enrolment

- The new employer must offer the TUPE'd workers a TUPE compliant pension from the date their contracts of employment are transferred to it.
- The new employer also has all the normal automatic enrolment obligations from the date of the TUPE transfer. The TUPE'd workers are new starters for automatic enrolment.
- The new employer can use automatic enrolment worker postponement. If so, it must offer to enrol the TUPE'd workers into a TUPE compliant pension with their consent with effect from the TUPE transfer date. Provided this is also a QWPS, the TUPE'd workers who join should already be active members of a QWPS by the end of the automatic enrolment postponement period.
- To avoid having to offer the TUPE'd workers two pensions, the new employer should offer a pension that's both TUPE compliant and a QWPS.

5. TUPE TRANSFER OF WORKERS

Old employer has not staged yet
Old employer offers OPS
New employer has not staged yet

- The new employer must offer the TUPE'd workers a TEPP compliant pension from the date their contracts of employment are transferred to it. It must have each TUPE'd worker's consent to enrol them.
- The new employer won't have any automatic enrolment duties to the TUPE'd workers until it reaches its own staging date.
- Ideally, the new employer should offer a pension that's both TEPP compliant and capable of being a QWPS once it reaches its staging date.

6. TUPE TRANSFER OF WORKERS

Old employer has not staged yet
Old employer offers OPS
New employer has staged for automatic enrolment

- The new employer must offer the TUPE'd workers a TEPP compliant pension from the date their contracts of employment are transferred to it.
- The new employer also has all the normal automatic enrolment obligations from the date of the TUPE transfer. The TUPE'd workers are new starters for automatic enrolment.
- The new employer can use automatic enrolment worker postponement. If so, it must offer to enrol the TUPE'd workers with their consent into a TEPP compliant pension with effect from the TUPE transfer date. Provided this is also a QWPS, the TUPE'd workers who join should already be active members of a QWPS by the end of the automatic enrolment postponement period.
- To avoid having to offer the TUPE'd workers two pensions, the new employer should offer a pension that's both TEPP compliant and a QWPS.

7. TUPE TRANSFER OF WORKERS

Old employer has staged for automatic enrolment
Old employer offers GPP (or contributions to PPP/SHP)
New employer has not staged yet

- The new employer must offer the TUPE'd workers a TUPE compliant pension from the date their contracts of employment are transferred to it. Ideally, it should offer a pension that's also capable of being a QWPS once it reaches its staging date.

- The new employer must have each TUPE'd worker's consent to enrol them. It has no legal right to enrol workers without their consent outside the automatic enrolment legislation.
- The new employer won't have any automatic enrolment duties to the TUPE'd workers until it reaches its own staging date.
- When the new employer stages, it must ignore any opt outs from the TUPE'd workers in respect of the old employer's automatic enrolment pension.

8. TUPE TRANSFER OF WORKERS

Old employer has staged for automatic enrolment
Old employer offers GPP (or contributions to PPP/SHP)
New employer has staged for automatic enrolment

- The new employer must offer the TUPE'd workers a TUPE compliant pension from the date their contracts of employment are transferred to it.
- The new employer also has all the normal automatic enrolment obligations from the date of the TUPE transfer. The TUPE'd workers are new starters for automatic enrolment.
- The new employer can use automatic enrolment worker postponement. If so, it must offer to enrol the TUPE'd workers with their consent into a TUPE compliant pension with effect from the TUPE transfer date. Provided this is also a QWPS, the TUPE'd workers who join should already be active members of a QWPS by the end of the automatic enrolment postponement period.
- The new employer must ignore any opt outs from the TUPE'd workers in respect of the old employer's automatic enrolment pension.
- To avoid having to offer the TUPE'd workers two pensions, the new employer should offer a pension that's both TUPE compliant and a QWPS.

9. TUPE TRANSFER OF WORKERS

Old employer has staged for automatic enrolment
Old employer offers OPS
New employer has not staged yet

- The new employer must offer the TUPE'd workers a TEPP compliant pension from the date their contracts of employment are transferred to it. Ideally, it should offer a pension that's also capable of being a QWPS for automatic enrolment once it reaches its staging date.
- The new employer must have each TUPE'd worker's consent to enrol them. It has no legal right to enrol workers without their consent outside the automatic enrolment legislation.
- The new employer won't have any automatic enrolment duties to the TUPE'd workers until it reaches its own staging date.
- When the new employer stages, it must ignore any opt outs from the TUPE'd workers in respect of the old employer's automatic enrolment pension.

10. TUPE TRANSFER OF WORKERS

Old employer has staged for automatic enrolment
Old employer offers OPS
New employer has staged for automatic enrolment

- The new employer must offer the TUPE'd workers a TEPP compliant pension from the date their contracts of employment are transferred to it.
- The new employer also has all the normal automatic enrolment obligations from the date of the TUPE transfer. The TUPE'd workers are new starters for automatic enrolment.
- The new employer can use automatic enrolment worker postponement. If so, it must offer to enrol the TUPE'd workers into a TEPP compliant pension with their consent with effect from the TUPE transfer date. Provided this is also a QWPS, the TUPE'd workers who join should already be active members of a QWPS by the end of the automatic enrolment postponement period.
- The new employer must ignore any opt outs from the TUPE'd workers in respect of the old employer's automatic enrolment pension.
- To avoid having to offer two pensions to the TUPE'd workers, the new employer should offer a pension that's both TEPP compliant and a QWPS.

FURTHER INFORMATION

Employment rights on the transfer of an undertaking (Department for Business Innovation and Skills, January 2014)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf

The Pensions Regulator's Detailed Guidance for Employers, chapter two

http://www.thepensionsregulator.gov.uk/docs/detailed-guidance-2.pdf