



Guide to NHS PFI Schemes and the TUPE Regulations

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Amicus Guide
for members



2005


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the union

Introduction

From the outset, it is important to recognise and acknowledge the Government's efforts to improve standards in the NHS, with billions being pledged on its modernisation. In order to carry out their modernisation programme, the Government has said it will invest £90.2bn by 2007/8.

The Health Secretary has also informed MPs that the extra money will be used to provide a better, more personalised service for patients and one of the core elements of the Government's program has been a massive hospital building campaign. The Government has made it clear that the private sector will continue to play an integral role in the future of the NHS, with many new hospitals being built under the Private Finance Initiative (PFI).

Whilst Amicus will continue to campaign for public funding, inevitably some members will have their contracts of employment transferred to private contractors under PFI schemes. For many, the intricate details of PFI and PPPs remain a complete mystery and as the Prime Minister told the Labour Party conference, most people 'don't care' who builds and services public projects 'so long as they're on cost, on budget and helping deliver a better NHS and schools'. That may or may not be the case, but for thousands of our members employed in the NHS, PFI is one of the biggest issues affecting them, along with Agenda for Change.

The union's position is clear - we will do everything in our power to ensure that Amicus members win enhanced terms and conditions after any transfer that may take place. Amicus is committed to supporting our members and we will use every protection available to defend our members' welfare before, during and after any transfer process.

This guidance aims to give you an insight into the law relating to the transfer of undertakings and aims to answer the question 'What happens to my contract if my employer changes?'

Most recently we have seen the 'Warwick agreement' reported in the press, which saw the Labour Party agreeing to end the two-tier workforce. The Warwick agreement is a statement of Labour Party policy, agreed at its National Policy Forum in July 2004, and subsequent conference in September.

Amicus played a significant role in influencing this policy at the National Policy Forum, and while we did not achieve everything we would have wanted, significant commitments were made in terms of extending the two tier work force agreement beyond local authorities. Amicus is now campaigning to ensure the Labour Government turns the Warwick agreement into action. We are also trying to ensure that contractors, who have signed up for TUPE Plus, implement Agenda for Change.

This guide also endeavours to answer your questions on what the Warwick agreement actually means, as well as looking at other relevant issues including pensions and the NHS pension scheme review, 'new starters' and 'subsequent transfers'.

Also included are references on where to go for further information and advice. One final point, the TUPE regulations are a complex and changeable piece of legislation. Whilst this guide will give you a brief introduction to the regulations, you are advised to contact your full-time official if you need specific guidance or help with how the Regulations apply.

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National Officer, Health Sector

■ What are PPP and PFI?

Public Private Partnerships (PPP) is the umbrella name given to a range of initiatives which involve the private sector in the operation of public services. The Private Finance Initiative (PFI) is the most frequently used initiative.

PFI involves the private sector in the design, build, finance and operation of public services. It mainly affects hospitals and schools.

A typical PFI project will be owned by a company, which has been set up specifically to run the scheme. These companies are usually a consortium including a building firm, a bank and a facilities management company.

Under PFI the Government awards a long-term contract to the private sector to finance the building of a new facility and run some of the 'non-clinical' services. It is worth highlighting that how PFI affects staff in the NHS largely depends on whether they are designated as providing 'clinical' or 'non-clinical' services.

In the type of PFI used in the NHS, 'clinical' services are excluded from the PFI scheme and continue to be operated by the NHS.

As far as 'non-clinical' services are concerned, it is no longer an automatic requirement for staff, who provide ancillary services (e.g. catering, portering, laundry services) to be transferred to the private sector partner. The Department of Health has published a list of 'non-clinical' support services, which may be provided under contract by the private sector. In general, all hard FM staff, estates and maintenance are transferred, whilst the majority of ancillary staff in PFI schemes remain NHS employees and are merely seconded to the PFI provider for the duration of the contract (known as the 'Retention of Employment' model or RofE).

One other 'service' that needs to be highlighted at this stage is the 'National Decontamination Project', involving the decontamination of surgical instruments. The project takes the form of a series of local procurements by 'clusters' of Trusts. These Trusts have existing decontamination services departments, which will be outsourced to private sector service providers (one per cluster). These are not PFI projects, although the PFI guidance with respect to staff is being followed.

■ What are the key stages in the PFI Process?

There are several key stages in the PFI Process, which can be summarised as follows:

1. Pre-procurement process, identifying that a Trust wishes to pursue a PFI scheme
2. Determining the outline business case to ensure that this equates to value for money
3. Putting the proposal to the Department of Health PFI Unit for approval
4. Advertising the scheme in the Official Journal for European Construction (OJEC).
5. Selection process of bidders employed to build the scheme.

■ How are NHS staff terms and conditions protected when they have to transfer to a private sector partner?

Basically ministers will now not approve a PFI scheme unless the terms and conditions of staff are protected under TUPE (see below) and they are offered 'broadly comparable pensions' by the new employer, at primary and subsequent contracting rounds.

TUPE - or the Transfer of Undertakings (Protection of Employment) Regulations - protects employees' terms and conditions when the business in which they work is transferred from one employer to another. It outlines basic rights regarding the transfer of employees.

Amicus has negotiated additional terms and conditions over and above the basic rights afforded by TUPE, known as '**TUPE plus**'. These are highlighted in more detail later on.

■ When does TUPE apply?

The mere sale of assets does not fall under the scope of the TUPE regulations. To decide whether a transfer has taken place, a public sector service must:

- amount to an identifiable economic entity and
- retain its identity after it changes hands i.e. it should carry on the same or similar activities.

Different courts and tribunals have interpreted the TUPE Regulations differently. Case law on the regulations has therefore changed frequently.

As a result the Cabinet Office issued a Statement of Practice on Staff Transfers in the Public Sector¹ to offer some clarification. This clearly states that public private partnerships (PPP) such as PFI and contracting exercises, including re-tendering should be conducted on the basis that staff who have to transfer employment to the private sector will be covered by TUPE.

This statement is no more than an expression of the Government's approach to staff transfers, but whilst it is not legally binding, it has set the climate for transfers to the private sector.

¹ *'Staff Transfers in the Public Sector: Statement of Practice'*

Cabinet Office (January 2000)

http://www.hmtreasury.gov.uk/media/7BB/E3/staff_transfers_145.pdf

■ Are there any circumstances when TUPE does not apply?

The Cabinet Office Statement of Practice acknowledges that there may be a number of genuinely exceptional circumstances where TUPE does not apply. It lists the following examples:

- a contract which provides both goods and services, but the provision of services is ancillary to the provision of goods;
- the activity for which the public sector organisation is contracting out is essentially new or a one-off project;
- services or goods are essentially a commodity bought 'off the shelf' and no grouping of staff are specifically and permanently assigned to a common task;
- the features of the service or function being contracted are significantly different from the features previously performed. For example administrative functions, which may now be delivered electronically may require different skills, experience and equipment.

■ What does TUPE do?

Basically, if a TUPE transfer applies, terms and conditions of work and continuity of employment should all be preserved. This includes the method adopted for pay structures, in accordance with local and national agreements. This happens automatically. There should be no dismissal and there is no right to a redundancy payment.

Failure to preserve the terms and conditions (apart from the occupational pension scheme) may result in potential claims of unfair (constructive) dismissal from those with the 1-year requisite qualifying period.

The dismissal will be automatically unfair for a reason connected with the transfer unless it is for an Economic, Technical or Organisational (ETO)² reason.

The employee must of course be employed in the undertaking or part of the undertaking transferred immediately before the transfer. Employees on sick leave, maternity leave, study leave or holiday should also transfer provided they are regarded as remaining employed in the undertaking or part of the undertaking being contracted-out.

Workplace representatives will have an important role in clarifying which employees the NHS employer regards as working in the part to be transferred. If needs be, job titles, duties, or descriptions can be clarified by agreement in sufficient time before the transfer.

²It is not automatically unfair to dismiss someone for a reason connected with the transfer, provided the employer can show that the dismissal was due to an Economic, Technical or Organisational (ETO) reason entailing changes in the workforce. This requires a reason that, although in some way linked to the transfer, can be detached from it.

■ Will my occupational pension automatically transfer to the new employer?

Occupational pension rights were not protected under the TUPE regulations³ until April 2005 and even now protection is very limited. TUPE does not give the right to continued access to the previous employer's pension scheme (i.e. the NHS pension), though accrued pension rights in that scheme are protected at the time of transfer.

The new employer is still not required to provide a comparable occupational pension for employees to become members of, even if the old employer provided such a scheme, they need only provide either an occupational scheme of minimum quality or offer to match any employee contributions to a stakeholder pension up to a maximum level of 6% of salary.

However, HM Treasury has published guidance to Departments and Agencies on the treatment of Staff Pensions upon transfer, 'A Fair Deal for Staff Pensions'⁴ which in practice generally over-rides TUPE and aims to require new employers to provide comparable pensions.

This Treasury Statement of Practice applies to all NHS bodies, and NHS business cases will only be approved if these measures have been observed in full.

So far as PFI is concerned, the Treasury statement requires that:

- transferring staff should be offered a 'broadly comparable pension' by the new employer, both on initial transfer and at second and subsequent contracting rounds (this applies also if staff are transferred back in to the NHS under TUPE as this is simply another transfer)
- the new employer's pension scheme should allow transferring staff the option of moving their accrued credits into that scheme on a fully protected basis
- the Government Actuary's Department (GAD) must be involved in assessing 'broad comparability', GAD certification and bulk transfer agreement.

Further information and a prescriptive approach on how bulk transfers and GAD certification should be handled in relation to pension provisions for transferring staff is available in the NHS PFI guidance.

In reality, circumstances have arisen where pensions have either not been transferred in a 'broadly comparable' manner or where contractors have initially offered pension guarantees but subsequent changes in circumstances have proved these guarantees not to be sound.

One example saw a GAD approved pension falling into deficit just a couple of years after the transfer. Employees were given the option of reducing their pension benefits or increasing their employee contributions. Employees who have joined comparable schemes offered by contractors but later returned to the NHS have lost out when they have tried to transfer benefits back in to the NHS scheme.

³See the revised chapter 13 '*Fair Treatment of Staff*' issued by the Department of Health in April 2003 which supersedes the original chapter in '*Private Public Partnerships in the National Health Service: The Private Finance Initiative*' NHS Executive (1999)
<http://www.dh.gov.uk/assetRoot/04/03/56/43/04035643.pdf>

⁴'*A Fair Deal for Staff Pensions: Procurement of Bulk Transfer Agreements and Related Issues*'
Guidance Note published by HM Treasury (June 2004)
http://www.hm-treasury.gov.uk/media/37611/pensions_bta_guidance_290604.pdf

■ How are recognition and collective agreements affected?

Just as terms and conditions transfer automatically to the contractor, a current NHS trade union recognition agreement also transfers automatically to the new employer. However in reality this can become very complicated, so the following advice is our strong recommendation which should help safeguard agreements.

Following a TUPE transfer, collective agreements are not normally enforceable unless the terms of the collective agreement are incorporated into an employee's contract of employment. This incorporation must be an express or implied agreement between the employer and employee, and will only cover those terms which are suitable for incorporation. An express agreement is where the individual employment contract expressly states that certain of its terms are regulated by a collective agreement. For example a contract might contain the clause: "the terms of this contract are subject to the terms of Collective Agreement X". This clearly incorporates at least some of the terms of Collective Agreement X into the employee's contract of employment.

Furthermore even if an individual employee's contract meets these criteria, the terms and conditions of future collective agreements are only incorporated if there is a specific reference to future collective agreements in the contract. So what this means is that workplace representatives and officials must pay attention prior to the TUPE transfer to these necessary changes to individual contracts. Without these changes our members maybe unprotected

NHS Trusts must ensure that their private sector partners acknowledge in their contract that an existing NHS trade union recognition agreement must transfer under TUPE.

The Employment Relations Act 2004 provides that applications and awards of statutory recognition by the Central Arbitration Committee under the 1999 legislation also transfer.

■ Can liability be passed on to the incoming contractor?

Yes, if an employee has a claim against their NHS employer, this will also transfer e.g. unpaid wages, a personal injury case, a discrimination complaint. The exception to this rule applies to criminal liabilities and obligations relating to provisions about benefits for old age, invalidity or survivors in employees' occupational pension schemes.

■ What is meant by 'the two-tier' workforce?

The preservation of pay and conditions of incoming staff compared to the pay and conditions of the staff already employed by the private sector contractor may place managers in the position of managing a 'two-tier' workforce, at least for the protected period.

The most recent statement by the Government on this issue, the so-called 'Warwick agreement' said that measures would be drawn up to end what has become a fractious issue for trade unions - the 'two-tier' workforce.

■ Am I entitled to consultation?

The transferor has a responsibility to conduct a full and meaningful consultation of staff, through the recognised trade unions/staff associations, at the earliest practicable time. Failure to conduct consultation may result in liability for the payment of compensation by the transferor, which may be up to 13 weeks pay.

■ What if I object to being transferred?

An employee has the right to object to the transfer, but currently there are no legislative measures in place determining how this is to be communicated to the transferor or the transferee.

Moreover, an employee who objects to the transfer is treated as having resigned their job, especially if the objection takes the form of refusing to work for the contractor. Where this happens, the employee does not get a redundancy payment and has no right to complain of unfair dismissal, whether from the NHS or from the contractor.

This situation must be distinguished from where an employee objects because the transfer will involve a substantial change for the worse in their terms and conditions, or is not deemed 'suitable alternative employment', which should be followed up through their workplace representative.

■ Is there any protection for new starters under TUPE?

TUPE protection for terms and conditions applies only to employees that are transferred. As is detailed below, 'TUPE plus' aims to improve on these conditions for 'new starters'.

Previously negotiated collective agreements will only cover new employees if the employee's contract contains clauses such as 'The terms and conditions of this appointment will be the same as those staff of Employer B who transferred under TUPE from Employer A'. However, it is unusual to find such wording in a new starter's contract. Therefore, when negotiating terms and conditions for new starters, Union Officials should try to ensure that there is express reference made in the contract of employment to the incorporation of all collective agreements, including future agreements, so that the employee can sue in the event of a breach.

■ What is TUPE Plus?

Amicus has negotiated agreements, known as 'TUPE plus' agreements.

There are a number of elements to TUPE plus, but basically these agreements build on rights safeguarded under TUPE, whilst also guaranteeing that there is no deterioration in pay and conditions during the life of a contract.

As such, any improvements made to the terms and conditions of NHS staff are incorporated into equivalent improvements for those staff who have already been transferred. This includes any nationally agreed updates and amendments, including National pay awards, which occur subsequent to the transfer. For example, any improvements from Agenda for Change will be transferred into those employed on TUPE plus contracts.

As far as Trade Union Recognition and Representation are concerned, TUPE plus would negotiate to adopt the Trade Union Recognition Agreement in respect of transferring staff, which applies at the time of transfer. The same Recognition Agreement would be applied in respect of staff recruited after the date of transfer.

TUPE plus may also include commitments to prevent the operation of a two-tier workforce whereby the same pay and conditions would exist for incoming staff, staff already employed by the private sector contractor and new starters.

In addition, Government Actuaries Department (GAD) approved pensions for all new starters recruited after the transfer has taken place are often included as a key element in a TUPE plus agreement.

In particular TUPE plus aims to extend protection to groups of staff not covered by the TUPE, including those employed after transfer has taken place.

■ What about Agenda for Change?

From October 2004 Agenda for Change (AfC) replaced the General Whitley Council Maintenance Staff Pay and Conditions of Service. Amicus had expected contractors, who had signed up for TUPE Plus agreements, to automatically implement AfC. However, many contractors have failed to do this and are falsely using a letter from the Department of Health (DoH) to the British Services Association (BSA) as justification for not implementing AfC. The exact wording of the letter makes it clear that implementation of AfC is 'subject to any specific provision of the contract which might apply'.

Consequently, we have recently logged 27 claims with 14 contractors regarding the implementation of AfC. Amicus is committed to campaigning and supporting our member's entitlement to fair treatment including talks with the Government and contractors, exploring legal routes and consulting members on industrial action if this proves necessary.

Amicus is now requiring to Regional Officers to help identify test cases by sending copies of contractual terms, collective agreements, PFI transfer documents, local agreements and relevant correspondence to our legal services department and the National Officer for Health.

With respect to negotiations with contractors and the application of AfC, Union Officials should point out that the letter from the DOH to the BSA does not constitute a general rule for not implementing AfC. Furthermore, attention should be drawn to any clauses in contracts that provide for the incorporation of future collective agreements. Officials should also make sure that terms and conditions for new starters include express references to the incorporation of all collective agreements (past and future).

PFI and TUPE are complex areas and it is essential to seek legal advice through your local regional official on individual circumstances. Further information on TUPE Plus is also available from your Regional Officer. In the meantime, the table on the page overleaf gives some

| DIFFERENT ELEMENTS UNDER PFI/TUPE | EMPLOYEE'S PERSPECTIVE |
|---|---|
| PFI PROCUREMENT PERIOD | <ul style="list-style-type: none"> ● NHS Trusts must involve staff and their representatives in a process of continuous dialogue during the PFI procurement period. They must have a genuine opportunity to express their opinions and views and to influence decisions |
| EVALUATING SHORT LISTED BIDDERS | <ul style="list-style-type: none"> ● Proposals must include plans with respect to TUPE, staff management, pay, terms and conditions including pension issues, training and labour relations ● Trade Union representatives should be invited to hold discussions, through interviews for example with all the short listed bidders |
| TUPE TRANSFER OF ASSETS | <ul style="list-style-type: none"> ● Request disclosure of the financial budgets/statements |
| TUPE TRANSFER OF EMPLOYEES | <ul style="list-style-type: none"> ● Ensure that the employer is not avoiding the application of TUPE by claiming budgetary restraints ● Employees with more than 2 years' service are entitled to redundancy payment, in the event redundancies are announced in line with ETO reasons ● Ensure that the terms and conditions of employees are preserved ● Ensure that full consultation takes place with recognised trades union/ staff association ● If only a specified number of staff are being taken on by the transferee then ensure that the selection is fair and objective ● Conduct negotiations prior to taking proceedings to reach an amicable settlement ● Attention should be drawn to any clauses in the contracts that provide for the incorporation of future collective agreements ● Officials should ensure that all terms and conditions for new starters include express references to the incorporation of all collective agreements (past and future) |
| CLAIMS TO AN EMPLOYMENT TRIBUNAL | <ul style="list-style-type: none"> ● To avoid costs and delays ensure that the correct respondent is named in the proceedings |

■ Revisions to TUPE

Measures to protect pensions in a TUPE situation are contained in the Pensions Act 2004. In addition, the Government is expected to produce new draft regulations soon. The following changes are envisaged:

- More comprehensive application of the TUPE regulations to service contracting operations that are labour-intensive services such as office cleaning, catering, security, refuse. Employees in these areas of industry tend to be lower paid and thus can seek the protection of the TUPE changes.
- The transferor to ensure that the transferee is aware of the employee's rights and obligations upon transfer.
- Clarification of the circumstances when ETO can be applied to change the terms and conditions of employment.
- Introducing greater flexibility to attract potential buyers. It has been suggested that to encourage the sale of the business, the liabilities incurred to its staff by the transferor are not automatically passed on to the transferee. The 'rescue' operation would be conducted by the payment being made out of the National Insurance Fund.
- The Government is committed to engaging with unions on workforce development through its public services forum, which Amicus is represented on.

■ Conclusion

If your contract has been transferred due to a change of employer the Transfer of Undertaking, Protection of Employment Regulations (TUPE) may apply.

In a transfer of an undertaking an employee's right is to have their existing contract and benefits continued with their new employer. These cannot be changed if the reason for the change is the transfer itself. However, if a genuine need arises to change the contract on the basis of an ETO reason entailing changes in the workforce, then this may be justifiable.

If the contract and benefits are changed, an employee may be able to complain to an employment tribunal, provided they have one year's continuous service, and they should seek further advice from their regional office.

The law relating to transfer of undertakings is complex and you are advised to seek legal advice through your local regional official on individual circumstances.

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