

## > Industrial Relations Fair Work Information Sheet Transfer of Business

*This information sheet is relevant to all employers in Queensland*

### **What is transfer of business?**

Under the Fair Work Act 2009, a transfer of business has occurred when a business changes owners and an existing employee transfers across. This occurs when the ownership of a business is transmitted from one person to another, either by sale or merger, at least one employee of the old employer transfers to the new employer and their needs to be a relevant connection between the old employer and the new employer.

A transferring employee is an employee whose employment transfers to the new employer within three (3) months after the termination of employment with their original employer. There is also a requirement that the transferring work the employee performs for the new employer is the same or substantially the same, as that done for the old employer.

In relation to a relevant connection, a relevant connection between the old employer and the new employer exists if:

- In accordance with an arrangement between the old employer and the new employer, the new employer owns or has the beneficial use of some or all of the assets of the old employer that relates to the transferring work done by the employer. For example, in the clothing industry, the new employer may acquire assets such as sewing machinery from the old employer;
- The old employer out-sources the transferring work to the new employer;
- The new employer ceases to outsource transferring work and as a result the old employer 'in-sources' the transferring work; or
- The new employer is an associated entity of the old employer at the time the transferring employee becomes employed by the new employer.

A change of business name, executive officer or general structure alone does not constitute a transmission of business.

Under the *Fair Work Act 2009*, there is no obligation on employers to notify their employees of a transfer of business or what workplace instrument will apply. However, for any new employee employed after 1 January 2010, an employer must be given a Fair Work Information Statement. This statement must contain an explanation of the effect on an employee's entitlements when they are subject to a transfer of business.

## Where do you find transfer of business provisions in legislation?

From an industrial relations perspective, transfer of business is governed by the Fair Work Act 2009 ('the Act'). Part 1 to 8 of the Act contains general rules regarding the employers' obligation in terms of entitlements, whilst **Regulations 3.41** provide the requirements for record keeping.

It is also important to note that taxation and corporation laws can have implications for a transfer of business, however, this Fact Sheet focuses specifically on the employment relationship aspect.

## What are the key considerations?

The key considerations depend on whether the existing employees are transferring to the new employer or not.

If no employees transfer, then a transfer of business does not occur and the key considerations for the previous employer include:

- Termination payments (including notice and leave)
- Severance payments (exemptions may be applicable)
- Redundancy procedure (including consultation and written notice)

If employees are transferring, the key considerations are for the new employer, and include:

- Possible redundancy procedures
- Possible severance payments
- Transfer of employee entitlements
- Transfer of existing industrial instruments
- Guarantee of annual earnings
- Record keeping obligations

The considerations for transferring employees are explained in further detail below.

## Transfer of employee entitlements

When a transfer of business occurs, the new employer becomes liable for any accrued entitlements of transferring employees unless it decides not to in writing to the employee and will then be payable by the old employer.. Accrued entitlements may include sick leave, annual leave and/or long service leave. If the new employer is an associated entity the new employer must also recognise the transferring employee's continuity of service but not if a non-associated entity and decides not to do so in writing. This means that the new employer must count any service that the employee had with the previous employer for the purposes of determining notice periods, severance payments, parental leave and qualification for long service leave.

Usually, the sale document will specify details regarding the transfer of employee entitlements.

## Transfer of existing industrial instruments

The new employer will be bound by an existing industrial instrument (a transferable instrument). A transferable instrument includes an enterprise agreement that has been approved by Fair Work Australia, a workplace determination or a named employer award. Under this arrangement:

- The transferable instrument will bind the new employer to the exclusion of any other enterprise agreement or modern award that applies to the new employer and the transferring employee in relation to the transferring work; and
- Any non-transferring employees (a 'new' employee) who are engaged by the new employer to do the transferring work will also be covered by the transferable instrument, provided that at the time no other enterprise agreement or modern award applied to them in relation to their occupation.

**NOTE:** *under the Fair Work Act 2009 there is no time limit to how long the transferable instrument will apply, therefore, a transferable instrument may be binding upon the new employer indefinitely, subject to other orders made by Fair Work Australia or on application by the new employer to Fair Work Australia or, until such time that it is replaced by a new industrial instrument.*

## Guarantee of annual earnings

If:

- A transferring employee who has been given a guarantee of annual earnings for a definite period; and
- The transferring employee was a high income employee directly before the transfer from the old employer to the new employer; and
- Some of the guaranteed period occurs after the transfer occurs and an enterprise agreement does not apply to the transferring employee;

Then the new employer is not obligated to comply with the guarantee of annual earnings in relation to any part of the guaranteed period before the transfer.

Further, the new employer is not obligated to comply with the guarantee of annual earnings to the degree that it requires the new employer to pay an amount of earnings to the transferring employee, in relation to the part of the guaranteed period after the transfer time, at a rate that is more than the annual rate of the guarantee of annual earnings.

If the transferring employee is entitled to non-monetary benefits under the guarantee of annual earnings after the transfer time and it is not practicable for the new employer to provide those benefits to the transferring employee then the guarantee of annual earnings is taken to be varied so that instead of the entitlement to those benefits the transferring employee is entitled to a sum of money that is equivalent to the agreed monetary worth of those benefits.

## **Record keeping obligations**

The previous employer must give the new employer all records relating to the transferring employees, which the previous employer was required to keep by law. The new employer can request the previous employer to produce these records to the new employer.

**For further information contact the Chamber of Commerce and Industry Queensland's (CCIQ) Employer Assistance Line on 1300 135 822 or lodge a query at our Online Portal found on the CCIQ website under Employer Assistance Line.**

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