# TRANSFER OF BUSINESS

It is a fundamental legal principle that an employee cannot be transferred to another employer without the employee's consent. Employees are not commodities that can be bought and sold. Therefore, when a business is sold, the general rule is that existing contracts of employment must come to an end.

If the new employer (**purchaser**) does not offer employment to existing employees, then the old employer (**seller**) becomes liable for any termination payments; including payment in lieu of notice, accrued annual and long service leave and redundancy pay (if applicable).

However, if the purchaser offers employment to some or all of the existing employees to perform substantially the same as the work they performed for the seller – and the employee(s) accept this offer – this is known as a '**transfer of business'**.

This guide explains how a transferring employee's statutory entitlements can be affected in a transfer of business.

## What is a 'transfer of business'?

Under the Fair Work Act, a 'transfer of business' occurs when an employee or employees transfer to a new employer within 3 months of leaving the old employer, and the work the employee is doing is substantially the same as he or she was doing with the old employer. In addition, at least one of the following connections must exist between the seller and purchaser:

- an arrangement that the purchaser owns or has use of some or all of the seller's assets that relate to the work in question;
- the outsourcing of work from the seller to the purchaser;
- work previously outsourced is insourced; or
- the seller and purchaser are 'associated entitles', within the meaning of the *Corporations Act 2001*.

## Employee entitlements

The following employee entitlements are determined by length of **service**:

- Annual leave
- Personal/carer's leave
- Parental leave
- Long service leave
- Notice of termination
- Redundancy pay

## Consequences of transferring employment

Employees transferring to a new employer will retain their service for **all** the above benefits (as well as the right to make an unfair dismissal claim) if the new employer is an **associated entity** of the old employer.

If an employee transfers to a new employer that is **not an associated entity**, the new employer **must** recognise an employee's service with the old employer when working out the following entitlements:

- sick and carers leave
- requests for flexible working arrangements
- parental leave

However, service with respect to other entitlements **does not** have to be recognised by the new employer, including:

- annual leave
- redundancy
- unfair dismissal
- notice of termination

**Note:** Whether a new employer must recognise an employee's prior service with respect to **long service leave** will depend on the law in the relevant state or territory. In Victoria, for example, the new employer must recognise a transferring employee's accrued long service leave. For the position in other states and territories, please call the Workplace Relations Advice Line on (03) 8662 5222.

## When does a buyer not have to recognise some entitlements?

As mentioned above, a new employer (that is **not an associated entity** of the old employer) has an option not to recognise a transferring employee's previous service (See definition of Continuous service below) with the old employer with respect to annual leave, redundancy, unfair dismissal and notice of termination. What happens with these entitlements will depend on what was agreed between the seller and the purchaser in the **sale of business agreement**. Please note that if the employer does recognise service for one of the entitlements listed in this section the employer must recognise for all. For example, a new employer who is recognising service for unfair dismissal must also do so for annual leave, redundancy and notice of termination.

## Annual Leave

The following two scenarios can occur with annual leave:

- annual leave that accumulated with the old employer will be carried across to the new employer; **or**
- the new employer will refuse to recognise annual leave that accumulated with the old employer. In this case, the old employer would have to pay out the employee's accrued leave.

## Redundancy

The following two scenarios can occur with service with respect to redundancy:

- the new employer can recognise a transferring employee's prior service with the old employer with respect to redundancy; **or**
- the new employer can choose not to recognise the prior service. In this case, the old employer will need to pay redundancy payments to the employee on termination (if applicable).

However, it is important to note, an employee will generally not be entitled to redundancy pay if they reject the new employer's offer of a job and:

- the terms and conditions of the new job are similar to the old job; and
- the new employer agreed to recognise the employee's prior service with the old employer with respect to redundancy pay.

If this is the case, the old employer must apply to the Fair Work Commission to have the amount of redundancy pay reduced. The application has to be made **before** the employee is made redundant.

### Variation of redundancy pay for other employment or incapacity to pay

See Fair Work Act s. 120

This section applies if:

(a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119 (redundancy pay); and

(b) the employer:

(i) obtains other acceptable employment for the employee; or

(ii) cannot pay the amount.

On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.

The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.

## Definition of Continuous Service

See Fair Work Act – s.22

When service with one employer counts as service with another employer

(5) If there is a transfer of employment (see subsection (7)) in relation to a national system employee:

(a) any period of service of the employee with the first employer counts as service of the employee with the second employer; and

(b) the period between the termination of the employment with the first employer and the start of the employment with the second employer does not break the employee's continuous service with the second employer (taking account of the effect of paragraph (a)), but does not count towards the length of the employee's continuous service with the second employer.

Note: This subsection does not apply to a transfer of employment between non-associated entities, for the purpose of Division 6 of Part 2-2 (which deals with annual leave) or Subdivision B of Division 11 of Part 2-2 (which deals with redundancy pay), if the second employer decides not to recognise the employee's service with the first employer for the purpose of that Division or Subdivision (see subsections 91(1) and 122(1)).

(6) If the national system employee has already had the benefit of an entitlement the amount of which was calculated by reference to a period of service with the first employer, subsection (5) does not result in that period of service with the first employer being counted again when calculating the employee's entitlements of that kind as an employee of the second employer.

Note: For example:

(a) the accrued paid annual leave to which the employee is entitled as an employee of the second employer does not include any period of paid annual leave that the employee has already taken as an employee of the first employer; and
(b) if an employee receives notice of termination or payment in lieu of notice in relation to a period of service with the first employer, that period of service is not counted again in calculating the amount of notice of termination, or payment in lieu, to which the employee is entitled as an employee of the second employer.

Meaning of transfer of employment etc.

(7) There is a transfer of employment of a national system employee from one national system employer (the first employer ) to another national system employer (the second employer ) if:

(a) the following conditions are satisfied:

(i) the employee becomes employed by the second employer not more than 3 months after the termination of the employee's employment with the first employer;

(ii) the first employer and the second employer are associated entities when the employee becomes employed by the second employer; or

(b) the following conditions are satisfied:

(i) the employee is a transferring employee in relation to a transfer of business from the first employer to the second employer;

(ii) the first employer and the second employer are not associated entities when the employee becomes employed by the second employer.

Note: Paragraph (a) applies whether or not there is a transfer of business from the first employer to the second employer.

(8) A transfer of employment:

(a) is a transfer of employment between associated entities if paragraph (7)(a) applies; and

(b) is a transfer of employment between non-associated entities if paragraph (7)(b) applies.

## Unfair Dismissal

A new employer does not have to recognise a transferring employee's service with the old employer for the purposes of the employee serving the minimum period necessary to qualify for unfair dismissal protection. This means, in effect, the "clock" starts again on an employee's probationary period. A new employer must make this clear to a transferring employee **in writing** before the new employment starts.

Under the Fair Work Act, an employee can generally make a claim for unfair dismissal if he or she has completed the 'minimum period of employment'. This is a period of 6 months (or 12 months where the employer is a small business with fewer than 15 employees).

***Example:*** *Sally has been working for her employer for 2 years and therefore qualifies for unfair dismissal protection. However, when she agreed to transfer to a new employer after a sale of business, the new employer wrote to Sally informing her that it would not recognise her prior service with the old employer with respect to unfair dismissal.*

*Within the first 6 months of employment with the new employer, Sally is terminated for poor performance. Sally cannot make an unfair dismissal claim.*

## Notice of termination

When a business is sold and there is transfer of business, all existing employment contracts must come to an end because an employee's position with the old employer ceases. Therefore, the old employer has to give an employee notice of termination (or provide payment in lieu of notice).

If an employee transfers to the new employer, but is later terminated, only service with the new employer counts for determining how much notice the employee gets. In other words, the notice "clock" starts again when the employee begins employment with the new employer.

> ***Example:*** *James has been working for his employer for 5 years before the business is sold. He is offered a job by the new employer, which he accepts. His old employer provides him 4 weeks' notice of termination in accordance with the NES.*
>
> *Within the first 6 months of employment with the new employer, James is terminated for poor performance. James's new employer only has to provide 1 weeks' notice in accordance with the NES.*

## Transferable instruments

When a transfer of business occurs, employees who accept positions offered by the new employer may continue to be bound by certain workplace instruments that applied to them prior to the transfer. Transferable instruments include enterprise agreements, enterprise awards, individual flexibility arrangements (IFAs) and workplace determinations.

If employees are performing work which is covered by the transferring instrument, they will continue to be subject to the terms of the transferable instrument, until that instrument is terminated or replaced by another that covers them.

It is also possible for newly hired (non-transferring) employees to be subject to the terms of a transferable instrument if they are not covered by another modern award or enterprise agreement.

The Fair Work Commission can vary the instrument, or make orders as to whether it will or will not apply. In doing so, it must take into account a variety of factors, including the interests of either party.

## Frequently Asked Questions (FAQs)

### What is an 'associated entity'?

The term 'associated entity' is defined by section 50AAA of the *Corporations Act 2001* (Cth) and generally requires consideration of whether sufficient 'control' is exerted by a parent company over its subsidiary company (in other words, does the parent company have a capacity to influence certain aspects of its subsidiary?)

This consideration is a complex area of law and it is **strongly recommended employers seek the advice of a commercial lawyer** if unsure whether two businesses are associated entities.

### How does this all work?

If a new employer agrees to acknowledge an employee's prior service with the old employer for any entitlements, the new employer (purchaser) would negotiate with the old employer (seller) a deduction from the purchase price of the business to take into account the value of this liability.

How the adjustment to the purchase price is made is a matter of negotiation between the new and old employers. Transfer of business is a complex area of law and it is **strongly recommended** employers seek the advice of a commercial lawyer when buying or selling a business.

### What happens to employee records on a transfer of business?

The old employer is required to transfer the employment records for each transferring employee at the time a business is sold. These records are then required to be kept by the new employer for seven (7) years in line with the record keeping obligations under the Fair Work Act.

## Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222.**