Transfer of Business

eBook

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Overview

The rules that apply when a transfer of business occurs are contained in the Fair Work Act 2009 (Cth) (the Act).

The Act details;

- what constitutes a transfer of business and essentially a transferring employee,
- the implications of a transfer of business on employee entitlements and conditions of employment and
- the role of the Fair Work Commission in relation to a transfer of business.

This e-book provides an overview of the transfer of business provisions.

Should you have any specific questions, please reach out to us via enquiries@liquidhr.com.au or 1300 887 458.

Transfer of Business

When does a transfer of business occur?

There is a transfer of business if the following requirements are satisfied:

1. the employment of an employee of the old employer has terminated;
2. within 3 months after the termination, the employee becomes employed by the new employer;
3. the work the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
4. there is a connection between the old employer and the new employer.

When is there a connection between the old employer and new employer?

There is considered to be a connection between the old employer and the new employer if ***one or more*** of the following conditions are met;

a) *a transfer of assets from the old employer to the new employer*

The new employer owns or has the beneficial use of assets owned or used beneficially by the old employer; and these assets "relate to or are used in connection with the work performed by the transferring employees".

b) *the old employer outsources work to the new employer*

This is intended to cover the situation where an employer (the old employer) decides that it no longer wishes to perform work of a particular type, or no longer wishes to perform as much work of a particular type, and so engages a third party to perform that work instead and that third party engages employees of the old employer to continue performing that work. This provision applies irrespective of whether there is a transfer of assets between the old employer and the new employer.

c) the new employer ceases to outsource work to the old employer

The intention of this subclause is that a transfer of business occurs where a new employer decides to in-source the work previously done by the transferring employee of the old employer.

d) *the new employer is an associated entity of the old employer*.

The definition of 'associated entity' is that used in the *Corporations Act 2001*. The *Corporations Act 2001* [Cth] (s50AAA) defines an 'associated entity' of another entity (the principal) in the following circumstances:

- the associate and principal are related bodies corporate
- the principal controls the associate
- the associate controls the principal and the operations, resources or affairs of the principal are material to the associate
- the associate has a qualifying investment in the principal, has significant influence over the principal and the interest is material to the associate
- the principal has a qualifying investment in the associate, has significant influence over the associate and the interest is material to the principal
- a third entity controls both the principal and the associate and the operations, resources or affairs of the principal and the associate are both material to the third entity.

Control

The word 'control' is defined in the Corporations Act (s50AA) to mean when one entity controls another when the first entity can make decisions that determine the financial and operating policies of the second entity.

Acceptance of employment with the new employer

Following a transfer of business as detailed above, transferring employees will be covered by the old employer's enterprise agreements (and named employer awards if applicable) indefinitely, until the enterprise agreements or awards are terminated or replaced in accordance with their terms and the appropriate legislation.

Note: Modern awards that are not named employer awards (e.g. Clerks Private Sector Award 2020) are not transferable instruments because they continue to cover transferring employees according to their terms following a transfer of business. This is because modern awards that are not named employer awards cover a class or classes of employees or employers specified in the award (e.g., employees working in retail shops). Because an employer or an employee is covered by an award if the employer or employee is included in the specified class, there is no need to include provisions providing for the transfer of modern awards that operate on an industry basis.

Potential for transferring employee's enterprise agreement or named employer award to cover new employees

After the transfer of business has taken place, new employees (that is, not transferring employees) of the employer who perform work that was previously performed by the employees for the old employer (that is transferring work) will also be covered by the old employer's enterprise agreements or named awards (if applicable), in circumstances where the new employer has no enterprise agreement or named award capable of applying to the employees performing the transferring work.

What entitlements transfer?

On a transfer of business a new employer is required to recognise employees' service with the old employer when calculating;

- personal/carers leave;
- parental leave; and
- the right to request flexible work arrangements
- Notice of termination

Broadly, these provisions are intended to ensure that an employee's service-related entitlements under the National Employment Standards (NES) are not affected merely because the employee's employer changes as a result of a transfer of business, or because the employee's employer changes within a group of employers who are associated entities.

If the new employer and the old employer are non-associated entities, the new employer has a choice whether to recognise an employee's prior service and their associated annual leave and redundancy pay. If the new employer does not agree to recognise service, the old employer must pay out these entitlements.

The National Employment Standards will allow for an employer's redundancy obligations to be waived on a transfer of business should an offer of employment be made by the new employer which;

- is on substantially similar (and overall, no less favourable) terms and conditions as applied to the employee immediately before the termination.
- recognises the employee's service with the first employer for the purpose of the entitlement to redundancy pay; and
- had the employee accepted the offer, there would have been a transfer of employment in relation to the employee.

Note: if an employee is transferred to an employer that is an associated entity, than service with the previous employer will be deemed to be continuous for all service-related National Employment Standards entitlements including annual leave and redundancy pay.

Long Service leave

Although long service leave is referred to under the National Employment Standards, the source of entitlement for most employees is the relevant state or territory long service leave statute, which would usually specify the requirements and obligations on a new employer when a transmission of business occurs. For example, the New South Wales Long Service Leave Act provides for continuity of service where a business or a part of a business has been transferred as a going concern from one employer to another and a person who, at that time, was an employee of the first employer and became an employee of the second without any break in service, then service with the first employer is regarded as service with the second employer in calculating leave due to the employee.

Reference should be made to the applicable long service leave statute to determine an employee's entitlement to a recognition of service with the first employer when a transfer of business occurs.

Transfer of employment and unfair dismissal protection

On a transfer of business, transferring employees' previous service for the purposes of the minimum employment period for unfair dismissal will be recognised unless the new employer expressly informs transferring employees in writing of a requirement for a new minimum employment period.

Note: if an employee takes up new employment within a three-month period with an employer that is an associated entity of the previous employer, the employee's service with the previous employer will be taken to be continuous for the purposes of the unfair dismissal minimum employment period.

Role of the Fair Work Commission in transfer of business

The Fair Work Commission (FWC) will have powers to make orders in relation to transfer of business. For example, the FWC may order that a transferable instrument (such as an old employer's instrument) cover existing or new employees of the new employer, not just transferring employees. New employers will also be able to apply to the FWC to 'switch off' the transferable (old employer's) workplace instrument.

Fair Work Information Statement

Any new employee must be given a Fair Work Information Statement by the employer. This statement must contain an explanation of the effect on an employee's entitlements when he/she is subject to a transfer of business.

Employment records

The *Fair Work Regulations 2009* (3.41) contains provisions which specify the obligations of employers regarding the records of transferring employees. The old employer is required to transfer the employment record for each transferring employee at the time the connection between the two employers occurs, ie when the transfer of assets occurs, when the work is outsourced or insourced or, for associated entities, when the employee is transferred. If the transferring employee becomes an employee of the new employer after the transfer, the new employer must ask the old employer to provide them with the employee's records and the old employer must give those records. These records must be kept by the new employer for seven years.

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