



When businesses change hands

What is a transfer of business?

The transfer of business provisions under the *Fair Work Act 2009*, deals with situations where a business is transferred from one national system employer (e.g. a company) to another. The result may be that an award, agreement, or another type of 'transferable instrument' follows the transfer and becomes binding on the new employer. Therefore, when an employer buys or sells a business, the sale may affect the employment and entitlements of the employees already working for the business.

Under the *Fair Work Act 2009*, a transfer of business takes place if the following requirements are satisfied:

- the employment of an employee (the 'transferring employee') of the old employer has terminated
- within three months after the termination, the employee becomes employed by the new employer
- the work the employee performs for the new employer (the 'transferring work') is the same or substantially the same as the work they performed for the old employer
- at least one of the following connections exists between the two employers:
 - an arrangement that the new employer owns or has use of some or all of the old employer's assets that relate to the transferring work
 - the work from the old employer is outsourced to the new employer
 - work previously outsourced is insourced
 - they are associated entities within the meaning of section 50AAA of the *Corporations Act 2001* (there are a number of ways entities can be associated – broadly speaking, it involves one entity having a controlling interest in the other).

Given the above, there is no transfer of business for the purposes of the *Fair Work Act 2009* unless at least one employee moves to the new employer.

What is a 'transferable instrument'?

Where there has been a transfer of business, certain workplace instruments (transferable instruments) that covered employees of the old employer continue to cover those employees employed by the new employer.

Each of the following is a transferable instrument:

- an agreement (an enterprise agreement approved by the Fair Work Commission, a collective agreement, a preserved individual or collective state agreement, an

Australian Workplace Agreement, an Individual Transitional Employment Agreement, a certified agreement made before 27 March 2006, and an old industrial relations agreement)

- a workplace determination
- an award
- a notional agreement preserving a state award (NAPSA)
- a named employer award (a modern award that commenced on 1 January 2010 that expressly covers one or more named employers)
- preserved redundancy provisions (in certain circumstances, if the transfer occurred before 31 December 2009)
- individual flexibility arrangements
- guarantee of annual earnings.

The transferable instrument will cover a transferring employee while they are performing transferring work until it is terminated, or until a new workplace instrument commences which can cover the transferring employees. An enterprise agreement can cover employees under any previous enterprise agreement (after its nominal expiry date) or any other collective or certified agreement, NAPSA or award. From 1 January 2010, a modern award can cover employees under awards or NAPSA.

Any new employees that you engage will be covered under the applicable modern award or another enterprise agreement. If there is no modern award or enterprise agreement that covers the new staff, then the transferable instrument may also apply to the new employees.

The Fair Work Commission can make orders about who a transferable instrument applies to, or how it will operate.

What happens to employee entitlements on a transfer 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, employers have to give every new employee a copy of the Fair Work Information Statement before, or as soon as possible after, they start their new job. The Statement explains the effect of a transfer of business on an employee's entitlements.

Generally, where there is a transfer of employment, service with the old employer counts as service with the new employer. However, there are exceptions to this general principle. When a new employer is not an associated entity of the old employer, they may decide not to recognise

a transferring employee's previous accumulated service for annual leave or redundancy pay under the National Employment Standards (NES) that now apply.

Given this, the old employer may be under an obligation to pay the affected employees their accrued entitlements (such as annual leave or redundancy).

If the employee has already received entitlements based on service from the old employer, that service is not counted again in determining entitlements with the new employer. For example, if payment in lieu of notice of termination is given by the old employer, the period of notice for any subsequent termination by the second employer is not calculated based on service with the old employer.

What happens to employment records on a transfer of business?

The *Fair Work Regulations 2009* provides the requirements and obligations of employers concerning 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 (i.e. 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. The old employer must give the records to the new employer.

These records are then required to be kept by the new employer for seven years in line with their record keeping obligations under the *Fair Work Act 2009*.

Transfer of business provisions are provided for by sections 307–316 of the *Fair Work Act 2009*.

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