

PRIVATE CONTRACTORS UNIT

Providing a co-ordinated approach to
organising the private contractors

Organising Guide to Transfers of Employment 2008

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UNISON

Organising Guide to Transfers of Employment

Welcome to UNISON's organising guide to dealing with the transfer of employees from one employer to another. Whether the transfer is between a public sector organisation to a private company or community and voluntary sector organisation or from private sector to private sector, this guide will assist you in dealing with the transfer.

increasing demands are being made upon their time. This guide attempts to ease the burden of trying to track down various bits of information by offering a comprehensive 'one-stop shop' with links to the sources of information. However, Branches and Regions should continue to read Head Office updates in relation to the Union's strategy.

What is the guide for?

This organising guide is the 'one-stop shop' for all the information and advice you will need when dealing with transfers, from start to finish.

As well as giving general information and organising advice, the guide provides access to the specific pieces of advice and policy produced by UNISON for each of the sectors; local government (including police), health and education.

Who is the guide for?

The guide is aimed at members and stewards, but is of use to anyone dealing with transfers including branch officials and UNISON's regional staff.

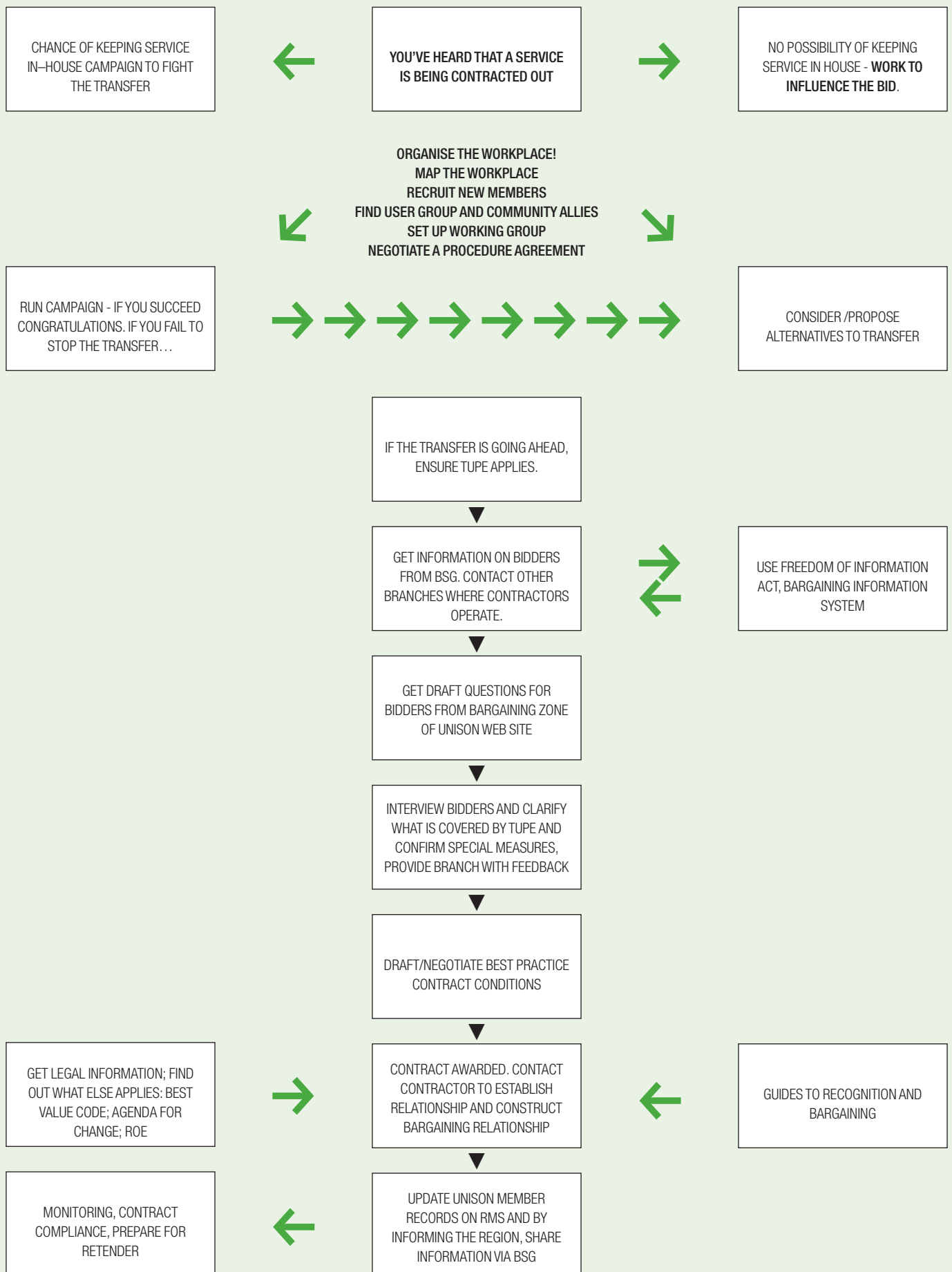
What does the guide cover?

The guide covers all organising aspects of the transfer process from the time members hear rumours that a service is to be tendered, to the time staff are transferred to a new organisation. The guide covers advice on how to deal with the whole process, to ensure the bargaining mechanisms are in place and update UNISON's systems in the event of the service being contracted out.

Why produce this guide?

Dealing with staff transfers is a fact of life for many of our branches and regions and UNISON has produced vast amounts of information and advice on the various forms of privatisation ie. best value, market testing, PFI, Large Scale Voluntary Transfers etc over the years. This organising guide aims to condense and update this organising information and bring it together in one place. Many branches and regional officers are finding

The Transfer Flowchart



Background

The transfer of all or part of the workforce to a new employer is increasingly becoming a fact of life for public service employees. Privatisation, contracting out, market testing and large scale voluntary transfers in housing are just some of the policies which have resulted in large numbers of employees transferring from the public sector.

UNISON strongly opposes the privatisation of public services and continues to campaign against outsourcing. However, many of our members have been and continue to be transferred to the private sector and UNISON will continue to negotiate and represent them.

It is important that these transferred members do not feel cut off from UNISON or feel that being a member of the union is no longer worthwhile. UNISON will continue to work to secure effective recognition, collective bargaining and develop a working relationship with employing organisations.

1 Step One – Pre-Transfer

Corporate Procurement Policy

UNISON branches should negotiate a corporate procurement policy with their public sector employer. It is good practice to have a policy in place in advance of any tendering exercise. Where a policy is not in place then one should be negotiated as soon as possible. The policy should cover negotiations on alternatives to contracting out at the 'option appraisal' stage, when your employer is looking at how it intends to provide the service, as well as trade union and staff involvement where the decision to contract out has been made.

The first signs of change

The time that you first hear that your employer is intending to put a service out to tender or retender an existing contract is the time to act.

You may not have been officially notified of the possibility of the tendering or retendering, it may be a

rumour, but it is an extremely important time in terms of organising opportunities. Your branch should get as much information as possible about the proposed outsourcing or transfer, the service affected, members that will transfer and potential members.

Oppose the transfer

It is UNISON policy to oppose the privatisation of public services. Branches may want to mount a campaign against the possible outsourcing and build up support from the local community and general public. You will also need to gather arguments against the privatisation. For more information on how to oppose a privatisation or outsourcing click here: www.unison.co.uk

A. The in-house bid

It is important to establish early on whether or not an in-house bid will be submitted. If a bid is being prepared then this will be done by management but it can be influenced by trade union involvement. It is good practice for an in-house bid to be submitted but this is not always possible as organisations may have already decided that the service will be outsourced.

Ensure there is an in-house bid

Where there is an in-house bid, it will be prepared by management but it is important the union ensures that its member's interests are fully represented. Local government branches should contact APSE (Association of Public Service Excellence) who can give advice on trade union involvement in a bid.

Find out how management intend drawing up the in-house tender and insist that you are involved at all stages. The purpose of union involvement is to try to influence the in-house bid but your involvement does not mean that you agree with every aspect of it. Do not be drawn into accepting responsibility for the outcome of tendering.

Involve members, talk to them about the in-house tender and how they feel about any proposals.

B. Gather information

Get as much information about the process as possible. Under the TUPE regulations, the current employer must inform and consult trade union representatives about the transfer (Regulation 13 and 14) at the earliest opportunity. Take an early lead and do not wait until statutory consultation kicks in. Try to persuade your current employer into early discussions and provision of information. They may decline to get involved until the statutory time period – but many good employers will co-operate even if they cannot give you all of the information you need.

Find out which service/s have been selected for outsourcing and why, what the proposed timetable is, how many jobs will be affected and who will be transferring. If the proposed outsourcing is a section 31 partnership then see UNISON produced guidance on Integrated Care or if shared services / strategic partnership is being proposed then see the case study.

- Confirm TUPE transfer
- Clarify terms for TUPE selection
- Clarify which terms and conditions/contractual items are to be transferred (do your own checklist to ensure items have not been missed)
- Clarify pensions

In some situations management will tell you that they are still identifying exactly which services and staff are to transfer. Even if this is true, do not let them use this as an excuse to delay giving you other valuable information.

Speak to the staff affected and gather information on their terms and conditions so that this can be cross checked with the **employee liability information** that the old employer will give to the new employer (see 2.5)

Identify the key decision makers in this process.

Try to get the information from your employer, however if they appear to be dragging their feet then you should try to get the information elsewhere.

The procurement process

All UK public authorities are required by law to comply with the Public Contracts (Scotland) Regulations 2006 or the Public Contracts Regulations 2006 (for the rest of the UK). This means that all public sector contracts worth more than (c. £144,000 for services and supplies and c. £3.6m for works), must be publicly advertised.

The authority must publish a 'Prior Information Notice' at the beginning of each financial year listing the contracts it intends to tender. It must then place an individual notice for each contract in the Official Journal of the European Union when it is being tendered. There are four procedures that can be used to tender contracts.

The open procedure

The contract is advertised and contractors submit a bid.

The restricted procedure

The contract is advertised and contractors submit an 'expression of interest'. The authority then selects those which meet its criteria who are invited to bid.

The competitive dialogue procedure

This may only be used in the case of particularly complex contracts. The authority enters into a dialogue with contractors about how the contracts can be best fulfilled.

The negotiated procedure

This has generally been replaced by competitive dialogue and should only be used in 'exceptional cases', according to the Office for Government Commerce (www.ogc.gov.uk/documents/ProcurementPolicyCompetitiveDialogue.pdf).

Freedom of Information

With the introduction of the Freedom of Information Act 2000, it is now possible for the public and trade unions to have access to information that has been previously unavailable to them. There are also rights to bargaining information for recognised unions.

Equalities

Gender Equality Duty

The Gender Equality Duty (GED) came into force on 6 April 2007 and applies to all public authorities and private bodies carrying out a public function, such as services contracted out to the private sector.

Public authorities are now legally obliged to promote equality of opportunity and eliminate discrimination for service users and staff. They have to go beyond ticking boxes and review progress to ensure they are delivering results. If there are no positive outcomes then the public authority will be failing in their legal duties.

Using the Duties

If your employer is proposing to contract-out or re-tender a service, make sure they comply with the new duties by examining how this would promote gender pay equity. This would apply to both the authority and any potential private sector employer. The union branch should be fully involved in this process.

For further information on the all the equality duties and a checklist click on the links below:

<http://www.unison.org.uk/file/EqualityDutiesGuidance.pdf>

<http://www.unison.org.uk/file/A4663a.doc>

Company Information

Find out which companies are interested in tendering and get information on them and their relationship with UNISON from the Bargaining Information System (BIS) or the Private Contractors Unit.

C. Organise and recruit

Whether the public authority has made a formal announcement to staff or whether they have merely heard rumours of a forthcoming tendering exercise, there will be a great deal of unease and uncertainty

amongst staff. Workers will understandably be feeling insecure about their jobs and their potential new employer. Branches should get involved by organising around this issue and recruiting members and stewards to be involved in the process. Branches are more likely to recruit new members when they can see the union can influence the process.

It is also extremely important to make sure the union is communicating with the workforce, so that they can see the union has a role to play. Members should be engaged at all stages so try to hold regular workplace meetings and produce bulletins keeping members informed of the process and the developments at regular intervals.

Organise and recruit around this issue. Undertake a mapping exercise to identify members affected by the outsourcing.

D. Get involved

Once you hear a service is to be put out to tender, it is important to establish that TUPE will apply. If the employer argues that TUPE will not apply, then you should contact the regional officer to get legal advice

Try to negotiate a procedure/procurement agreement with your employer for trade union representatives to be involved and consulted before any decision is made to contract out services. This will give the branch an opportunity to be involved in putting forward alternatives to an outsourcing. Included in the agreement should be:

If you are able to negotiate a procedure agreement it is important to get agreement on seeing the draft contract documents. If you can influence the drafting of the contract documents before they are finalised, you will be able to exert much greater union influence on the whole transfer process.

Branches must make sure that, where applicable, a clause on the appropriate Two-tier workforce Code should also be included in the contract documents.

Interview Contractors

As good practice, branches should try to interview the potential contractors as early as possible in the tender process. Bargaining Support Group has compiled a list of questions to ask contractors. The questions may be addressed to any organisation – commercial or voluntary – bidding for a contract to run a service, or set of services, for a public body. This could be anything from a local authority to a university. They can apply to PFI as well as Best Value and are meant for general guidance only.

Branches are encouraged to be selective and to amend the questions for their own use. Some refer to terms and conditions relevant to specific service groups. Choose those that best match your situation and amend them or add your own questions to fill the gaps. Questions on TUPE, Employment Policies and Conditions of Service and any special measures, for example, should cover your own situation.

Some branches may find it helpful to draw up a table of questions so the answers can be scored or written down. Space can also be made for supplementary questions.

Before you go into a meeting about outsourcing with your current employer or the potential contractor, make sure you know what you want to get out of it. The following are some key points to consider when preparing for an interview with shortlisted bidders:

- Get a list of the shortlisted bidders (their full names if possible)
- Ask your Regional Officer or the Bargaining Support Group for information on the bidders (allow time for this)
- Once you know where else they have contracts, contact the relevant UNISON branch and ask them what their experience has been
- Get together a team of reps with a range of expertise and experience
- Ask your Regional Officer if they want to attend the interview with the contractors
- Study the information you have been given by

the contractors

- Together, draw up your list of questions and decide who will ask which questions
- Decide who will take notes

Checklist – First Signs of Change

Gather Information on

- Which services are being tendered
- What is the proposed timetable
- How many jobs and who will be affected
- Who are the decisions makers
- Get information on bidding companies

Organise

- Map the members and potential members affected by tendering
- Hold meetings with this group of workers
- Undertake recruitment initiatives
- Appoint stewards

Get involved

- Negotiate a procedure agreement
- Check contract documents for Tupe and Two-tier Code clauses
- Interview contractors

2 The Importance of TUPE

Almost all contracts in the public sector are now awarded under a TUPE transfer, it is still important to ensure that the contract documents include TUPE provisions. It is important to stress that this guide is not a legal or comprehensive guide to TUPE. Users of this guide should follow the links to get more TUPE information. Some of the main points about TUPE are listed below.

2.1 What is TUPE?

The TUPE or Transfer of Undertakings (Protection of Employment) Regulations 2006 came into force for transfers taking place on or after 6 April 2006. They replaced the original TUPE regulations 1981 which were introduced to safeguard employees' rights when the business in which they are employed changes hands.

TUPE applies where there is a relevant transfer, either where there is a service provision change from A to B or where an undertaking is transferred from A to B.

The TUPE Regulations provide important legal safeguards:

- Individuals who are employed by A immediately before the transfer automatically become the employees of B from the time of the transfer on the terms and conditions they previously held with A.
- B inherits A's rights and liabilities in relation to those individuals.
- Protection against dismissal of any employee (whether before or after the transfer) for any reason connected with the transfer is automatically unfair unless the change is 'an economic, technical or organisational – "ETO" – reason entailing changes in the workforce' in which case the dismissal is fair if reasonable in the circumstances.
- Pensions – accrued pension rights in the pension scheme operated by the former employer are

protected. However future pension rights after the date of transfer are excluded from the TUPE Regulations.

- Any collective agreements in force at the time of the transfer are transferred to the new employer and any terms of a collective agreement that are incorporated into the contracts of individual workers are protected in the same way as other individual contractual rights.
- Recognition of the union by the employer also transfers over to the new employer. It is important to get an agreement from the new employer that recognition will continue.
- A must inform recognised trade unions about the consequences of the transfer, and B must prove A with sufficient information in this regard.
- Consultation and disclosure of information – All employees who could be affected by a change of employer have the right to be informed in advance of what is happening. This includes both employees working for the old employer and the new employer. The employers must provide information and consult with the trade union(s) representing any workers employed by the old or new employer who may be affected by the transfer.

The Regulations do not have the effect of transferring:

- Criminal liabilities of the transferor; or
- Rights and liabilities relating to occupational pension schemes.

2.2 Information and consultation under TUPE

The employer must inform and consult either representatives of a recognised trade union or elected representatives of the employees. The legal requirements on employers to inform and consult under TUPE are set out below, however, branches are advised to be pro-active. Don't wait until the statutory consultation kicks in before trying to get information about the proposed transfer. You might

not succeed, but if you do you will be in a stronger position to influence the TUPE process.

2.3 Employers duty to inform

TUPE says that **all employees who could be affected** by a change of employer have the **right to be informed** in advance of what is happening. This includes both **employees working for the old employer and those working for the new employer**. The legal requirements on information and consultation are to be found in of the TUPE Regulations 2006.

Regulations 13 and 14 state that before a transfer takes place, the employer must inform the trade union or appropriate representative of the following:

- the fact **that there is to be a transfer**
- the **reasons** for the transfer;
- the **date** or proposed date that the transfer is to take place;
- the **legal, economic and social consequences** of the transfer for the affected employees
- what **measures are likely to be taken** in relation to affected employees;
- if **no measures** are to be taken, that this is the case; and
- what **measures will be taken by the new employer** or, if none are envisaged, that this is the case.

The employer must provide this information **long enough before the transfer** to allow time to consult. It must be delivered to each representative **or sent by post** to them and has to be sufficient to enable the representatives to perform their duties.

This information must be provided whether or not the employer anticipates that there will be any change to the work.

If it is envisaged that **measures will be taken** (for example that jobs may change) the employer also has an **obligation to consult** with the representatives, to consider any representations they make and to reply to them, stating reasons for objection where appropriate.

Where there is a recognised trade union the employer must inform and consult with its representatives.

2.4 Employers' duty to consult

The employer has a duty to consult when it envisages that it will **take measures** in relation to affected employees **in connection with the transfer**. There is no definition of taking measures but it is likely to include any proposed change to work practices and change of work location. Its purpose is to make employees aware of any potential changes. Affected employees can include:

- those who transfer
- those who do not transfer but whose jobs might be affected
- those already working for the new employer (the transferee) whose jobs might be affected

Consultation must take place with the trade union/ employee representatives with a view to seeking their agreement and Regulation 13 (7) specifies that the employer must consider representations made and reply to them, giving reasons for any representations that they reject.

Source: LRD Tupe a guide to the business transfer regulations May 2006

Regulation 13(8) sets out the **minimum facilities** that the employer must provide for appropriate representatives. These include

- access to the affected workforce
- and to such accommodation and facilities, e.g. use of a telephone, as is appropriate.

2.5 Employee liabilities information

The 2006 regulations place a new obligation on the old employer to notify the new employer of the **employee liabilities** that will be transferring these are;

- their age and identity;
- information contained in their statement of employment particulars (ie the information required to be given to employees in writing by the Employment Rights Act 1996, section 1);
- information relating to any collective agreements which will be relevant to the employee;
- instances of any disciplinary action in the two years prior to the transfer that would be covered by the statutory disciplinary or dismissal procedures;
- instances of any grievances raised in the two years prior to the transfer that would be covered by the statutory grievance procedures; and
- instances of any actual or potential legal claims against the transferor in the previous two years.

A failure to provide this information will result in a financial penalty for the employer.

Official guidance

You can view two of the government's official guides on the new regulations which aim to clarify some of the changes made by the new Regulations at the address below.

Employment rights on the transfer of an undertaking: A guide to the 2006 TUPE regulations for employees, employers and representatives.

Website: <http://www.dti.gov.uk/er/individual/tupeguide2006regs.06regs.pdf>

Website: <http://www.opsi.gov.uk/si/si2006/20060246.htm>

UNISON has produced a number of guides to TUPE and these are available from service groups. Branches negotiating TUPE transfers should also seek advice from their Regional Officer.

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TUPE Plus

The TUPE Regulations offer a basic level of protection for staff transferring from one employer to another but the protection is limited to the time of transfer. UNISON branches involved in negotiating employee transfers can build on the basic protections afforded under TUPE to negotiate transfer terms that enhance and extend these rights – known as a TUPE-plus Agreement. Such agreements also seek to provide rights for workers who do not have protection under the TUPE Regulations, such as new starters who join the organisation after the transfer. Many UNISON branches have negotiated TUPE plus agreements which apply to the whole length of the contract and extend to cover new starters.

Link

See Bargaining Support Group - A Guide to Negotiating Staff Transfers: http://www.unison.org.uk/bargaining/doc_view.asp?did=306

For regular updates on TUPE please see the Bargaining Support Group's monthly bulletin 'TUPE Update' on the Bargaining Zone of the UNISON web page.

Checklist – TUPE

- Ensure TUPE is written into the contract documents
- Use the TUPE regulations to get as much information about the transfer as possible
- Try to negotiate a TUPE plus agreement
- Ensure TUPE is applied

3 Other legislation and agreements

Over the past 15 years tens of thousands of staff have been transferred from local councils and the NHS to private contractors. Most of these will have had their pay and conditions protected when they transferred under TUPE. However, newer staff taken on after the transfer, usually face worse pay and conditions. This creates a two-tier workforce with colleagues working along side each other doing the same jobs but on different terms and conditions.

As a result of UNISON's pressure, the government has recognised the need to address the inequities of a two-tier workforce. A number of codes and protocols have, therefore, been introduced for this purpose.

Branches need to ensure that where appropriate, the necessary reference to an agreement or code of practice is included in the transfer contract documentation. Do not assume that employers will include the codes and protocols into the documentation or that they will be enacted. UNISON has experience of a number of transfers where it has become clear after the transfer has been concluded that the terms of the relevant codes of practice have been ignored. UNISON has worked hard to influence the government to introduce employment protection measures that will end two tier pay and conditions in outsourced services. These protections will only be effective if we police them to make sure they are being followed. Ensuring that the provisions of the relevant codes of practice are written into all contract and tender documents will prevent bad companies from undercutting the tender bids from the good contractors that do want to observe the codes.

Always check that compliance with the appropriate code or protocol has been written into the contract documentation along with guidance on how it will be implemented.

The codes and protocols and the sectors covered by them are as follows:

All Public Sector

Code of Practice on Workforce matters – public sector

On 18 March 2005 the Government published a Code of Practice on Workforce Matters in Public Sector Service Contracts. Until then, the Code had operated in local government only; the extension applied it to the wider public sector - including the Civil Service, NHS and maintained schools - with immediate effect.

This is applicable in England only. It is automatically incorporated into the service specifications and conditions of every public sector contract awarded to a service provider that involves a transfer of staff from the relevant public sector organisation, or where staff originally transferred out from the public sector organisation as a result of an outsourcing are TUPE transferred to a new provider under a retender of contract.

The Code does not apply where the Code of Practice on Workforce Matters in Local Authority Service Contracts applies. Other exemptions are public corporations and trading funds, Independent Sector Treatment Centres, transfers where the Retention of Employment Model for NHS PFI contracts applies, higher and further education institutions and Academies. There are currently no two-tier workforce protection codes in Northern Ireland.

http://archive.cabinetoffice.gov.uk/opsr/workforce_reform/code_of_practice/index.asp

Local Government and Police

Public Private Partnerships in Scotland - Protocol and Guidance Concerning Employment Issues 2002

In December 2002 the Scottish executive signed a protocol ensuring that in all future public private partnerships workers would receive 'fair pay' and rights over pensions, holiday and sick pay commensurate with colleagues in the public sector. The protocol convinced a number of Scottish

councils to keep services in-house.
<http://www.unison-scotland.org.uk/briefings/pppprotocol.html>
<http://www.scotland.gov.uk/Resource/Doc/1069/0005205.pdf>

Section 52 of the Local Government in Scotland Act 2003 applies similar protection to that given by the PPP protocol to all local authority contracting in Scotland. NB the pension provision for two-tier workforce is at the same lower standard as the best value code.

http://www.opsi.gov.uk/legislation/scotland/acts2003/asp_20030001_en_1

Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts in England

In March 2003 the Code of Practice on Workforce Matters in Local Authority Service Contracts came into force. The Code requires contractors to offer new staff 'fair and reasonable terms and conditions' which are 'no less favourable' than those of transferred employees. New joiners are guaranteed some pension provision - either membership of the Local Government Pension Scheme, a good quality employer pension scheme, or a stakeholder pension scheme with a minimum 6% employer contribution.

UNISON Guide Best Value Code of Practice on Workforce Matters in Local Government and Police Authority Service Contracts in England
<http://www.unison.org.uk/acrobat/13612.pdf>
http://www.ogc.gov.uk/documents/Code_of_Practice_on_workforce_matters.pdf

Code of Practice on Workforce Matters in Local Authority Service Contracts- Wales April 2003

A similar Best Value Code covering local authorities and national park authorities in Wales came into force in April 2003.

Applying the Code of Practice

The Code applies to all forms of contracting out. It applies to new contracts, re-tendered contracts and sub-contracts. Branches should ensure the code is written into the contract documents. This is what it says:

Fair terms and conditions for new staff

Under the Code, authorities have to ensure that contractors employ new staff working alongside transferred staff, on authority contracts on "fair and reasonable terms and conditions which are **overall no less favourable** than those of transferred employees."

Pensions

Contractors must also offer new recruits one of the following occupational pensions:

- the local government pension scheme (LGPS)
- a good quality pension scheme - either a contracted out final salary based defined benefit scheme, or a defined contribution scheme
- for defined contribution schemes the employer must match employee contributions up to 6%
- a stakeholder pension scheme, where the employer must match employee contributions up to 6%

Transferred staff

The Local Government Act 2003 has made the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and its annex, A Fair Deal for Staff Pensions, legally binding. This says that even if TUPE does not apply by law, transferred employees must be treated as if TUPE does apply. So transferred employees will keep their terms and conditions when they are transferred to a contractor even if TUPE legally doesn't apply. They will also have the right to either the LGPS or a "broadly comparable pension" scheme approved

by the Government's Actuary Department (GAD). Authorities must also ensure that contractors make arrangements for handling the accrued benefits which staff have already earned.

Including the Code in the Contract

Authorities must include the Best Value Code of Practice in the contract made with the contractor.

Education

Sixth Form Colleges, Further and Higher Education

At the time of writing, the government maintains that Sixth Form Colleges, Further and Higher Education institutes are exempt from the roll out of the Best Value Code of Practice Code on the grounds that their institutions are independent of government. However, David Milliband has written to the employers in these sectors "to pave the way" for discussions with unions to end the two tier workforce.

Schools

School staff are employees of the local authority, unless they work in a self governing school or an academy, the Code of Practice on Workforce Matters applies where a local authority employs staff at the school who are transferred to a contractor. The code also applies if that contract is subsequently re-tendered.

A Building Schools for the Future – A branch handbook has been produced by UNISON and can be found at <http://www.unison.org.uk/file/A2941b.pdf>

Branches should note:

Where the Code of Practice on Workforce Matters is deemed not to apply branches should be aware that TUPE will almost certainly apply to the transferring workforce as a straight forward matter of employment rights.

Health

Agenda for Change and Private Contractor Staff Agreement

An agreement has been reached with the Department of Health, unions and the organisations representing contractors which will see terms and conditions equivalent to Agenda for Change introduced into private sector contracts that fall within the scope of the agreement.

Coverage of the Agreement

The agreement covers staff working for private companies but does not cover all staff. It covers those working on 'soft facilities management' contracts, such as catering, cleaning, portering, laundry and switchboard.

This agreement currently applies to England only, although the Welsh Assembly is in the process of agreeing implementation of the agreement. At the time of writing, this had not been formalised. Scotland has a separate agreement.

The Agreement does not cover staff employed in the following areas:

- private companies in Northern Ireland
- under contracts to which Retention of Employment applies
- staff employed by Independent Sector Treatment Centres and
- staff employed on hard facilities management services

The agreement is being implemented in two stages. From 1 October 2005 there will be increases to basic pay, London Weighting and annual leave for contract staff, with full introduction of Agenda for Change for contract staff from 1 October 2006.

Full details of the agreement are can be found on <http://www.unison.org.uk/acrobat/B2036.pdf>

Checklist – Codes of Practice

- Ensure the relevant Code of Practice is included in the contract documentation
- Try to negotiate the inclusion of the Code of Practice on Workforce Matters into Further and Higher Education institutes, foundation, academy or voluntary aided schools

4 Explore alternatives to transfer

Branches should investigate the possible alternatives to transfer these include:

Secondment

Some authorities have agreed to staff being seconded to a new employer rather than being transferred. In the case of Liverpool Direct, a joint venture company (JVC) formed between Liverpool City Council and British Telecom, staff were seconded to the JVC instead of being transferred. They remain employees of Liverpool City Council.

Retention of Employment – PFI

The Retention of Employment (ROE) model is a policy implemented by the Department of Health, covering staff employed in NHS Trusts in England, which are involved in Private Finance Initiative (PFI) schemes. In ROE ancillary staff in cleaning, catering, laundry, portering and security services remain NHS employees and do not have to transfer to the private sector. They will however be managed by the private sector and other groups of staff (ancillary supervisors, estates and maintenance staff and other non-clinical support staff) may still be subject to transfer. The ROE model currently applies to any PFI scheme, which had not already gone out to advert by June 2001.

Who is covered by the ROE?

The Department of Health ROE matrix sets out the main ancillary staff groups covered by ROE.

These are known as the “five trades” and cover about 85% of staff usually affected by PFI. All non-supervisory staff, in these areas, will be covered by ROE and remain NHS employees although managed by the private sector partner (PSP).

- Catering (this does not cover delivery of cook chill meals);
- Cleaning (Excluding external building cleaning);
- Laundry (this refers to in house laundries);
- Security (there may be some debate over building/car park security);
- Portering (except where portering/maintenance roles have been combined where there will need to be local negotiation).

For more information see PFI NHS Retention of Employment Model, A UNISON Briefing and Negotiating Guide 2003.

Checklist – Alternatives to Transfer

- Check whether there is an opportunity for secondment rather than transfer
- If PFI in the NHS, check whether the ROE model is applicable

5 Access to information

Employers should disclose bargaining information to recognised trade unions, and ACAS have issues a code of practice on this (www.acas.org.uk/index.aspx?articleid=1878). The code includes (but is not restricted to) access to information and statistics on pay and benefits; conditions of service, workforce by grade, sex etc; performance and efficiency; financial information.

If an employer obstructs a union's bargaining by refusing to disclose information required by the code, a complaint can be made to the Central Arbitration Committee (www.cac.gov.uk) which can make a declaration requiring the information to be disclosed. If the employer fails to comply, the union may make a further complaint to the CAC and may also present a claim for improved terms and conditions of employment. The CAC can make an award on the claim and amend the contracts of employment of the employees concerned.

In addition, the Freedom of Information Acts came into force on 1 January 2005. The introduction of the UK Act and the Scottish Act mean that the public has the right to obtain information that has traditionally been kept out of the public domain.

The Act applies only to public authorities. Public authorities are already making more information available to pre-empt requests and many have "disclosure logs" of information already released under the Act on their websites. This can include lists of contracts, their value and the contractor. The use of Freedom of Information should be done strategically. It is better to use existing collective bargaining channels first.

Ask other UNISON branches, services groups and head office departments for information first, as it may already be available. Encourage your employer to automatically publish all documents of public interest on their web page.

The Freedom of Information Act should be kept in reserve to use if employers refuse to disclose

vital information.

See <http://www.unison.org.uk/acrobat/B1959.pdf>

6 Contract Award

Negotiating the transfer

Once the contract has been awarded to a private contractor, branches need to ensure

- that, where appropriate, staff are transferred as expected
- that the new employer recognises the union
- and that pay and conditions are maintained
- Docas arrangements are in place
- clarity of new bargaining structures
- members' new employer details are updated on to the RMS system.

Under TUPE the staff that have been identified for transfer in the affected service must transfer to the new employer. The contractor cannot pick and choose through interviewing which staff will transfer.

Union recognition

Under TUPE, union recognition arrangements also transfer to the new employer. Branches should contact the successful contractor for an early meeting to establish bargaining arrangements. Now is a good time to start to build on the relationship with the potential employer.

UNISON, via the Private Contractors Unit (PCU), may be involved in national discussion with the contractor so it is important to inform the Private Contractors Unit or the Bargaining Support Group of all contract awards.

Checklist – Contract Award

- Ensure appropriate staff transfer
- Ensure union recognition continues
- Check pay and conditions are maintained
- Inform PCU of the contract award

7 Post Transfer

Build Bargaining Mechanisms

Inform Private Contractors Unit ('PCU')

Once a contract has been awarded it is important to try to establish the bargaining mechanisms. Check on UNISON's Private Contractors Unit website to see if the contractor is one of UNISON's target companies. If the company is a subsidiary of one of the target companies then a forum will have already been established.

It is important that you contact the Private Contractors Unit following the award of a contract so that arrangements can be made to invite a representative from your branch to attend the forum meetings. If the company is not one of the target companies then the PCU will advise you on how to establish a structure.

Contact New Employer

Branches should write to the new employer as soon as possible following the transfer of staff. A model letter has been produced. It is important to establish a relationship with the employer so a meeting should be arranged as soon as possible. A model letter to send to the new employer is attached at appendix A.

Update UNISON Records

Amending RMS

Once a contract has been awarded and staff have been identified to transfer to the new employer then the RMS must be updated.

The RMS department has a procedure for updating records called the Bulk Transfer Update. This procedure is set out on the RMS Information Centre via RMS On-line.

Branches should inform the region of any contract awards that have involved the transfer of staff.

Docas Arrangements

It is important to establish arrangements for the payment of union contributions with the new employer. A model Service Level Agreement can be found on the RMS User Information Centre at http://rms_uninet/userdocumentation and a model letter to send to the new employer is attached at Appendix B.

It is essential that the Docas file is updated following a staff transfer. This can be done by 'Bulk Update Transfers'. This document can be found on the RMS on-line pages of the intranet. At present UNISON has identified eight Key National Employers, if the organisation that staff are transferring to is one of these companies then a different procedure should be used to update the Docas file.

Updating BIS

The Bargaining Information System (BIS) is a UNISON database designed to provide bargaining information for UNISON negotiators. It is also used to monitor developments and trends on the bargaining front. The BIS aims to support negotiations with all types of employer including public authorities, private companies and the voluntary sector.

It holds information on:

- UNISON employers and other public, private and voluntary organisations we deal with
- Financial information and news relating to these organisations
- Contracts held and issued by those organisations
- Current agreements with UNISON employers

The Bargaining Information System should be used by branches to retrieve information about potential bidders for contracts.

When a contract has been awarded that information should be recorded on BIS.

Detailed guidance on how to amend RMS, process Docas and update BIS can be found on See http://rms_uninet/userdocumentation.

Checklist – Update UNISON records

- Inform PCU of the transfer
- Contact the new employer and establish relationship
- Establish Docas arrangements
- Amend RMS
- Update BIS system

8 Checklists at a Glance

First Signs of Change

- Does a corporate procurement policy exist
- Which services are being tendered
- What is the proposed timetable
- How many jobs and who will be affected
- Who are the decisions makers
- Get information on bidding companies
- Campaign against the tendering
- Lobby for an in-house bid
- Map the members and potential members affected by tendering
- Hold meetings with this group of workers
- Undertake recruitment initiatives
- Appoint stewards
- Negotiate a procurement agreement if one doesn't already exist
- Check contract documents for Tupe and Two-tier Code clauses
- Interview contractors

TUPE & Codes of Practice

- Ensure TUPE is written into the contract documents
- Use the TUPE regulations to get as much information about the transfer as possible
- Try to negotiate a TUPE plus agreement
- Ensure TUPE is applied
- Ensure the relevant Code of Practice is included in the contract documentation
- Try to negotiate the inclusion of the Code of Practice on Workforce Matters into Further and Higher Education institutes, foundation, academy or voluntary aided schools

Alternatives to Transfer

- Check whether there is an opportunity for secondment rather than transfer
- If PFI in the NHS, check whether the ROE model is applicable

Contract Award

- Ensure appropriate staff transfer
- Ensure union recognition continues
- Check pay and conditions are maintained
- Inform PCU of the contract award

Update UNISON records

- Inform PCU of the transfer
- Contact the new employer and establish relationship
- Establish Docas arrangements
- Amend RMS
- Update BIS system

Corporate Procurement agreements

UNISON branches should use the duties to consult under Best Value and TUPE, to negotiate a corporate procurement policy with their local authority. This has been done by UNISON branches in Bradford and Gateshead. This should cover negotiations on alternatives to contracting out at the option appraisal stage, when your council is looking at how it intends to provide the service, as well as trade union and staff involvement where the decision to contract out has been made. See Box right.

Top questions to contractors

Negotiating a procedure/ procurement agreement

- ✓ Involving staff and unions in the option appraisal stage
- ✓ Involving staff and unions where there is a decision to outsource

Trade union involvement in the tendering process to include:

- ✓ Trade union consultation on contract documents
- ✓ Trade union involvement in the interviewing of short-listed bidders
- ✓ Trade union and staff involvement in the selection process of contractors
- ✓ Requirement on contractors to negotiate with trade unions on terms and conditions for new starters
- ✓ Trade union recognition by the contractor for new starters as well as transferred employees
- ✓ Full disclosure of workforce information
- ✓ Model contract clauses

Where appropriate:

- ✓ Implementation of TUPE
- ✓ Implementation of the Best Value Code of Practice/AfC
- ✓ Alternative dispute resolution
- ✓ Arrangements for monitoring the implementation of the Best Value Code of Practice

- 1 Has your organisation been involved in other externalisation proposals with other local authorities or other parts of the public sector? If so, what was the outcome of these proposals?
- 2 Did any redundancies result? If so, what percentage of staff were affected and how did your organisation deal with the matter?
- 3 Are these staff still employed on the terms and conditions they had before transfer?
- 4 What percentage of transferred staff is still in your organisation's employment?
- 5 What has been the performance of the service since externalisation?
- 6 Has your organisation continued to recognise the trade unions and is there collective negotiation over terms and conditions?
- 7 Have new starters been employed on different terms and conditions to transferred staff?
- 8 Will you apply the Best Value Code of Practice on Workforce Matters and any laws linked to it?

Questions to contractors

Previous Outsourcing

- 1 Has the contractor been involved in outsourcing bids with other parts of the public sector? If so, what proportion of these was successful?
- 2 If any, where are previous public sector contracts held?
- 3 Did any redundancies result and, if so, what percentage of staff were affected, and how did the contractor deal with the matter?
- 4 What percentage of staff is still in the contractors' employment?
- 5 What has been the performance of the service since externalisation?
- 6 Has the contractor provided a comparable pension scheme?
- 7 Has the contractor continued to recognise the trade unions, and is there collective negotiation over terms and conditions?

Business Strategy

- 1 Why is the contractor interested in acquiring the assets of this authority/trust/university and how does this relate to the contractor's longer-term business strategy?
- 2 As a contractor you are required to provide a method for ensuring that the quality standards set out in the specification are met. Please explain how this would be achieved.
- 3 What are your proposals should you fail to reach the required standard? What action would you feel was appropriate?
- 4 What is the contractor's risk strategy with this contract? What will it do if it becomes loss-making?
- 5 Does the contract intend to sub-contract any parts of the contract?
- 6 Does the contractor intend to compete for other contracts in the authority?

Organisational matters

- 1 Confirm which functions/services are to transfer and which staff.
- 2 What is the intended structure for the management of the transferred department(s)?
- 3 Will the transferred departments have fully devolved financial and accounting responsibility?
- 4 Is a consensus amongst staff in favour of a transfer required?
- 5 Please explain how you would ensure that the minimum staffing levels quoted in your proposals are maintained, particularly for short notice absence.
- 6 Would all staff remain in their present posts after transfer, or would they have to undergo interview and selection before being offered a post?
- 7 What is the contractor's policy regarding the transfer of staff to other sites or contracts operated by the company?
- 8 Where will staff be located and what are relocation policies in the event that people will have to change location?
- 9 What happens to employees who do not wish to or are unable to transfer to another location?
- 10 Departments have their own in-house administrative, clerical and finance staff. Would the contractor require all the support staff currently employed?

TUPE

- 1 What is the contractor's policy with regard to implementing the TUPE regulations and how would the contractor comply with these regulations?
- 2 Does the contractor agree that the TUPE regulations should apply for the length of the contract?
- 3 For how long is the contractor prepared to guarantee employment to transferred employees?
- 4 How would the transfer process be managed?
- 5 What are the contractor's redundancy terms?
- 6 Who would be responsible for monitoring the contract with respect to compliance with the TUPE regulations?

Employment Policies

- 1 Is a dress code imposed for staff not requiring special clothing, eg an overall code?
 - for front office staff
 - for back office staff
 - in relation to jewellery and body artRequest copies of any policies not covered by collective agreements eg. dress code, code of conduct, car policy.
- 2 What health policies (eg no-smoking policy, Health and Safety policy and structure) does the contractor apply?
- 3 What harassment policies does the contractor apply?
- 4 Does the contractor have policies in relation to grievance and disciplinary procedures?
- 5 Does the contractor have policies in relation to sickness absences?
- 6 Would disabled employees be given support/consideration in order for them to perform all tasks?
- 7 What are the contractor's plans for:
 - Canteen
 - Car Parking/secure bicycle area
 - Shower/changing room
 - Recycling and green issues
- 8 How will the contractor resolve a problem of recruitment and retention?

Conditions of Service

- 1 Has the contractor studied the current employee handbook? Is the contractor aware of all existing terms and conditions of employment?
- 2 Would the contractor honour existing council arrangements including flexi-time, job sharing, part-time employment, annual leave entitlement, car allowances, standby payments, conditional overtime, access to company vehicles for work, etc?
- 3 What is the company's policy on maternity, paternity/partner and parental leave? Are these simply the statutory schemes or are there more favourable contractual provisions?
- 4 What is the company's policy on compassionate leave?
- 5 What arrangements would be made for those with council car loans and would your company reimburse employees for any increase in interest payments?
- 6 Council employees presently receive annual wage awards and career increments. What are your company's criteria in awarding wage increases?
- 7 How are they applied and to whom?
- 8 At what time of the year do they occur?
- 9 Will early retirement be allowed?
- 10 Would pay dates change?
- 11 Do employees participate in profit sharing or share ownership schemes?
- 12 There are a number of bonus schemes operated throughout your Group of companies. Are they applicable to all staff, and how are staff eligible to participate?
- 13 Do bonus schemes have an adverse impact on one gender group
- 14 Some employees are entirely dependent upon public transport for their travel to work. The location of a new place of work must take account of frequent and reliable bus and rail services. What assurances can you give that the location of premises will take account of these matters?
- 15 Does the company provide a Private Health Scheme?
- 16 Does the NHS Injury Benefits Scheme apply

to transferred staff, or is a comparable scheme provided?

- 17 What is the company policy on the use of short term, temporary and zero hour contracts?
- 18 What is the contractor's definition of 'full time'?
- 19 How much does the contractor rely on agency staff?
- 20 Maintenance of standards depends on adequate staff training. Please explain how this training will be provided and how the costs will be met.

Pensions

- 1 What pension provision will be made available and copies of any schemes?
- 2 What arrangements will be 'broadly comparable' in all aspects to the current local authority/NHS/ university scheme?
- 3 Does the company have a GAD certificate?
- 4 Will the staff be provided with independent financial advice on the comparability of pensions?

Equal Opportunities

- 1 Does your organisation have an equal opportunities policy?
- 2 How does your organisation implement its equal opportunities policy?
- 3 Who has senior management responsibility for implementing equal opportunities?
- 4 How will you ensure that the Equal Opportunities Commission Code of Practice on Equal Pay is followed?
- 5 What equality monitoring procedures do you have?

Health & Safety

- 1 What evidence has the contractor got of a good health & safety record?
- 2 What are the RIDDOR records for the previous 12 months?
- 3 What arrangements would the contractor make for the appointment of a health & safety officer?
- 4 What safety management system is in operation?
- 5 What methods do you have on consulting with

- the trade unions on health and safety issues or, if no trade unions are recognised, with the workforce?
- 6 What arrangements does your organisation have for training staff on health & safety and ensuring competency?
 - 7 How will you comply with the authorities safety plan?
 - 8 What arrangements will your organisation make to ensure that any sub-contractors have adequate safety management systems, consultation arrangements, use only competent employees, and will comply with all relevant health and safety legislation and the safety plan?
 - 9 Can the contractor supply a copy of its health & safety policy?

Training

- 1 What type of training opportunities are available to employees?
- 2 What opportunities are there within your organisation for the career development and promotion of existing employees?
- 3 Does your company intend to offer training opportunities to all employees, including those of clerical and administrative or manual grades?

Trade union organisation

- 1 Does the company recognise the right of all employees to be a member of a trade union?
- 2 Does the company recognise and negotiate with trade unions on pay and conditions?
- 3 Does the company recognise UNISON for collective bargaining?
- 4 If you seek to change existing terms and conditions of transferred staff, how you negotiate and with whom?
- 5 What facilities will be offered to trade union representatives and stewards?
- 6 Do you operate a check-off / payroll deduction system for union subs?

Staff involvement

- 1 Does the company regularly seek the views of staff on working methods, procedures, assessing contract and/or company performance?
- 2 What form does this consultation take?
- 3 What is the company's position on the EU Information and Consultation Directive?

Mapping Exercise

The sort of information you should gather includes:

union membership density;

It is important to know who your members are in order that stewards or people willing to act as contacts are appointed. In addition non-members should be located and approached with a view to recruiting them. Knowing the numbers and location of staff can also help with ensuring the subscriptions are being collected.

age/gender/disability/ethnicity of the workforce;

Gather this information on the workforce as it may differ from that which the old employer provides to the new employer. The Disability Discrimination Act 2005 has introduced a **general duty** for institutions and public authorities to promote disability equality and to take into account the impact upon disabled people when developing services or policies. The DDA also applies to contractors. For further details see (BSG Bargaining Guide to DDA 2005 <http://www.unison.org.uk/acrobat/B1959.pdf>). For Northern Ireland the equalities duties are more extensive, see the regional web pages.

key work locations;

Knowing the key locations of the workforce means branches can target members effectively with necessary communications, holding meetings etc.

organisation structure;

Knowing the structure of the new employer's organisation is important so that you know who to contact if a problem arises. This may produce a swift resolution.

There are several ways to get hold of information to map the workforce. You may be able to get some from your employer. Workforce questionnaires are one method of getting this information, but longer interviews with key individuals who have an overview may also be valuable to you. **Be aware**

that the process of gathering information to map the workforce may also be an opportunity to give workers information about the union, and to identify potential campaign leaders within the workforce who are curious, co-operative and responsive to the union's message.

Hold meetings with the affected workforce and recruit new members and stewards. The UNISON documents that may help you in this process are:

Link

Branch Development and Organising Toolkit: an overview.

Guide to Good Branch Practice <http://www.unison.org.uk/acrobat/10679.pdf>

Stewards and Workplace Representatives Handbook

<http://www.unison.org.uk/acrobat/11534.pdf>

Contract Documents

Specification

Specifications are a full description of the work that has to be done. They will be incorporated into the contract documents. Whoever wins the contract will have to deliver the agreed specification.

Tightly worded specifications will deter cowboy contractors and will also enable greater monitoring of contracts.

Contract documents

The specification and two other documents form the contract documents, they are:

- A the contract itself which gives the conditions of the contract and the pricing schedule.
- B The documents about the tendering exercise which include the instructions to tenderers.

Branches/stewards should always try to be involved in and consulted on the drafting of the specification. Branches/stewards should also ensure that the contract documents contain a clear statement that TUPE will apply to the contract, existing pay and conditions will, therefore, be transferred with existing staff. If your employer is claiming that TUPE will not apply then you should seek legal advice.

Date _____

Dear _____

CONTRACT AWARD

I understand that you have been awarded the contract for
(Service) _____ by (Awarding authority).

As you know, the employees on this contract will be transferred under the Transfer of Undertakings (protection of Employment) Regulations 2006 ('TUPE') and as such will have their pay, terms and conditions, collective agreements and UNISON recognition transferred with them.

Could I, therefore, request a meeting with the relevant managers of the contract, in order to discuss the new bargaining arrangements.

I look forward to hearing from you.

Yours sincerely

Branch Secretary

Date _____

Dear _____

UNISON DOCAS Payments and Information

UNISON is currently reviewing the arrangements we have with you for the payment of UNISON subscriptions and the provision of membership information. As part of this review, I am writing to enquire whether you are able to provide us with the following:

- 1 Payment of DOCAS subscriptions by BACS directly to UNISON's bank
- 2 Monthly electronic DOCAS reports to UNISON's Head Office. This should also incorporate any DOCAS information that you may currently send to UNISON Regional Offices. We would prefer the file to be in ASCII format and to be sent as a CSV (Comma separated variable) file.
- 3 As a minimum we would like to receive the following information:
 - Employer code
 - Employer PAYE number
 - Employer name
 - Employee national insurance number
 - Employee payroll number
 - Employee surname
 - Employee forename
 - Employee gender
 - Date of birth
 - Payment frequency
 - Pay period
 - Contribution for the period
 - Date of first subscription payment
 - Date of last subscription deducted
 - Date of employee transfer
 - Date employee cancelled UNISON subscription
 - Date of leaving employer
 - Date payment deducted

I would also ask for any codes, with translations that identify an employee's work location.

I should be grateful if you would let me know whether you are able to meet this request. It may be advisable for UNISON officers to meet your payroll managers to discuss the request in more detail. I look forward to your reply.

Yours sincerely,

Branch Secretary

ETO Reason

The 2006 regulations introduced a significant new provision that allows changes to be agreed for a reason connected with the transfer if it is an economic, technical or organisational reason entailing changes in the workforce. Until the new regulations came in this was a defence available to an employer who had dismissed an employee as a result of a transfer. The government extended this to allow for contractual changes even though this is not permitted by the Directive because it believed it was inconsistent to allow employees to be dismissed for an ETO reason but not allowed to accept changes to their terms and conditions.

(Source: LRD – TUPE May 2006)

Case study of shared services / strategic partnership

The contract

It is a contract worth £300m over 10 years covering Finance, IT and HR. It is a strategic partnership between Suffolk County Council, Mid-Suffolk District Council and BT Ignite – BT's business services and solutions division. There is a main site in Ipswich in an old power station close to Suffolk County offices, with a number of satellite and sub offices

Service Delivery

It seems to have had a beneficial effect on service levels in IT, and HR has had some teething problems about availability of phone numbers but is settling down. There is a single phone number for all contact.

Staffing

Staff are still employed by the partner authorities, but seconded to CSD which employs no staff of its own. There were concerns about job losses at the time of the creation of the partnership and merger of services, which did not materialise. However since then reviews of all three functions have occurred. HR has lost some jobs, but these staff

were transferred back to Suffolk County and put on the recruitment priority register and slotted in to other posts. In light of forthcoming budget cuts, this redeployment is unlikely to continue happening.

Existing terms and conditions have generally been retained, as staff are just on secondment. However, a performance system has been introduced for some IT staff who have to complete a certain number of jobs per day. UNISON ensured the transparency of this scheme, and a steward is monitoring its use to ensure fairness

Union organisation

Suffolk County and Mid-Suffolk branches continue to represent their own members. CSD invite both to appropriate meetings (eg reviews of functions). There is a joint UNISON staff forum where reps from both branches exchange information.

Pre Privatisation	Pre-Transfer	Post Privatisation
Fighting privatisation	Engaging to influence transfer	Getting organised
In-house bid	Influence employer when choosing contractor	Recruit, train and develop company UNISON reps
Lobby the decision makers	Engage with employer and preferred contractor	Provide support within branch
Get contractors reports from Bargaining Support	Negotiate TUPE transfer and clarify all T&C to transfer	Recruit to strengthen TU density
Organise a recruitment campaign	Negotiate recognition, facilities and bargaining machinery	Establish good industrial relations with new employer
Media campaign	Docas	Establish collective bargaining machinery
	Continue organising and campaigning	Review recognition and facilities
		Establish joint working in other areas eg Learning, Health and Safety

