TUPE POLICY AND PROCEDURE FOR SCHOOLS

Adopted by

Langley Fitzurse CE Primary School

On

Xx / xxx / xx

This model policy will apply to both teaching and non-teaching staff and has been agreed with the following recognised unions: ATL, NUT, NAHT, NASUWT, ASCL, Unison and GMB

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What is it?

1. TUPE stands for the Transfer of Undertakings (Protection of Employment) Regulations 2006, which was updated with the Collective Redundancy and Transfer of Undertakings (Protection of Employment) Amendment Regulations 2014. The purpose of TUPE is to protect employees if the business in which they are employed changes hands. It preserves an employee’s continuity of employment and terms and conditions of service.
2. An employee has the legal right to transfer to the new employer on their existing terms and conditions of employment and with all their existing employment rights and liabilities. This includes any outstanding claims such as claims for unlawful discrimination, unpaid wages or personal injury.
3. Its effect is to move employees and any associated contracted liabilities from the old employer (known as the transferor) to the new employer (known as the transferee).
4. There are three situations where TUPE might apply:
	* Contracting Out or Outsourcing – where a school/academy ceases to carry out activities for itself and assigns them to a contractor to perform.
	* Contracting In or Insourcing – where the school/academy stops the activities being carried out by a contractor and brings them back in house.
	* Contractor to Contractor – where the contract ends and is awarded to a new contractor on subsequent re-tendering.

Who does it apply to?

1. This guidance applies to all employees of the school / academy.

When does it apply?

1. A relevant TUPE occurs when there is a business transfer or a service provision change. Please seek guidance from your HR Advisor to determine if TUPE applies or not at the earliest opportunity. There will be a separate guide for when schools transfer to become an academy which is available from your Senior HR Advisor.

When does it not apply?

1. There are certain exemptions to a business transfer or a service provision change which are detailed in the TUPE guidance for Headteacher/Principal.

Data Protection Act 2018 and General Protection Regulations (GDPR) 2016

1. Records will be treated as confidential in accordance with the General Data Protection Regulations (GDPR) 2016 and the Data Protection Act 2018. Information and data collected in line with this policy is held securely and accessed and disclosed only for the purpose of managing a redundancy process. Further details on how data is used and processed is provided in the school’s/ academy’s privacy notice.

The Process for contracting out– where the school / academy is the transferor (current employer).

Planning

1. It is advised that the school / academy set up a project group to include relevant persons for example the Headteacher/Principal, Chair of Governors, Lead Governor, Bursar and Trade Union representative (if appropriate) to ensure that all options and proposals are considered.
2. A letter of intent needs to be sent to the recognised trade unions who must be included in this preliminary planning stage so they can comment on the options being considered.
3. A meeting must be arranged with relevant employees to explain the proposed TUPE transfer. This should be attended by the Headteacher/ Principal and Project Group who will explain that their service is subject to a review and they will be kept informed of any implications this will have for them Further information on the legal duty to consult is given in the toolkit.

**Scoping**

Please note that this stage will be in-depth for large scale TUPE transfers but may be less detailed for small scale transfers e.g. transfers involving fewer than 5 employees.

1. A preliminary scoping exercise for contracting out needs to be conducted by the Headteacher/Principal/Project Group to determine the extent of the review and what positions may be affected and assigned to the transfer and the cost implications.
2. The school/academy is advised to use the scoping information and instructions as a tool to identify all affected employees and to determine which employees fall within or outside of scope. It is an objective exercise to ascertain fairly those employees who are assigned to the economic entity that is being considered for transfer and to what extent they are employed on the activities of this economic entity.
3. The regulations do not quantify what percentage of time is required by employees working on the specific duties that are transferring for them to be included on the list. What is important is if there is a deliberate organisation of employees whose main purpose is to carry out the work where the duties are fundamentally the same as before. Discussions will need to take place to determine which employees are working on the dedicated duties that are transferring. Factors to be considered include:
	* what is written in employee’s individual contracts regarding their job role and duties.
	* what the line management arrangements are for the service.
	* how the cost of employees services are allocated between different parts of the business.
4. This exercise will involve reviewing statements of particulars or contracts of employment, Job Evaluation Questionnaires (JEQ) and Job Descriptions/Profiles. The actual work undertaken will also need to be reviewed if this differs from the contents of the JEQs and JDs.
5. The spreadsheet needs to be completed with the results of the scoping exercise. For data protection purposes the names of affected employees cannot be revealed at this stage but details of the numbers involved and the job titles can be given to the recognised unions.
6. If an employee has a substantive contract of employment (or a contract of apprenticeship) immediately before the transfer and their role is earmarked as one to be transferred they are deemed to be ‘assigned’ for TUPE transfer and will be informed of this in writing.
7. It is essential that a clear audit trail is maintained of all decisions and actions taken by the Headteacher/Principal/Project Group so that any queries or challenges can be backed up with this supporting material.

**Procurement - for maintained schools only**

1. Maintained schools should contact their HR Advisor as it may be appropriate to follow Wiltshire Council’s procurement processes. There are different procedures required depending on the value of the contract. These procedures are set out in the Council’s constitution. The relevant information to be considered is as follows:

19. The value of the contract is the total value of the contract over its full duration including any extensions. Where the contract term is indeterminate or indefinite the value will be 48 times the monthly cost.

20. Once the value of the contract has been calculated then the following provisions apply:

1. Value of £500.00 – A minimum of one written quotation required
2. Value of £501 - £5000 – A minimum of two written quotations required
3. Value of £5001 - £50,000 – A minimum of three written quotations required
4. Value of £50,001 -£100,000 – A minimum of 4 written quotations required.

21. Any contract exceeding £100,000 will need to be procured by the Council following the Public Contract Regulations 2015 and not the School. Please contact your HR Advisor if this applies.

22. When obtaining estimates, the School needs to make any potential providers aware that TUPE is likely to apply, that the potential provider will be required to provide access to the LGPS (Local Government Pension scheme) either by becoming an admitted body to the LGPS or by offering a broadly comparable scheme. In addition the school will be required to enter into a contract that provides for safeguarding obligations and contains other standard Local Authority terms

**Recommendation of a TUPE transfer**

23. If the Headteacher’s /Principal ‘s decision is to recommend a TUPE transfer a report which details the case for this and includes financial information will need to go the governing body. The results and financial implications from the scoping exercise will need to be included in the report.

24 The report must identify any hidden costs or knock on effects such as:

* + staff who are separate from the main group of affected employees but their main role includes providing support to the affected group, e.g. Clerical Assistant. This means they need to be included in the scoping exercise. Also include any staff affected that may not be at work because they are on secondment, maternity leave, sickness absence etc.
	+ payments that staff transferring-in may not be in receipt of from their old employer (the transferor) but are part of the terms and conditions of the new employer (the transferee). This would have an effect on the wages bill if harmonisation subsequently occurs making the transferred-in staff eligible to receive these payments. Examples could include enhanced rates of pay for working evenings, overtime pay etc.

25. All TUPE transfers need to be approved by the full governing body for all schools. For community and voluntary controlled school the Local Authority also needs to approve.

26. Once approval is obtained the Headteacher/Principal/ Project Group will oversee the staff transfer and ensure legal and procedural compliance is met for the TUPE transfer

**Informing and Consulting with Trade Unions**

27. There is a legal duty to consult with recognised unions and individual employees about a TUPE transfer and also if any measures are envisaged post transfer. Measures are any changes that can be anticipated or foreseen as likely to happen and can be of a major concern such as a reorganisation or a minor change such as a change in pay arrangements.

28. A group consultation meeting needs to be arranged at which a presentation by the Headteacher/Principal/Project Group supported by the prospective new employer should be given to the affected employees. There should be the opportunity for questions and answers which need to be recorded for future reference.

29.. Details of what consultation involves and what needs to be included is given in the toolkit including FAQs.

30. Following the group consultation meeting employees need to be invited to a 1 – 1 consultation meeting

31. Failure to inform and consult properly will mean a potential penalty of 15 weeks gross pay for each employee the school has failed to inform and consult adequately with. Please note that staff who need to be consulted are not just the transferring employees but any other school/academy employees who may be affected by the transfer.

**Points to be aware of - other considerations**

**Right to Opt Out of the Transfer**

32. Under TUPE all assigned employees have the right to opt out of the transfer. The Headteacher/Principal should obtain their written objection at the earliest opportunity and advise them of the consequences.

33. As TUPE protects an employee’s continuity of employment and contractual entitlements opting out will mean that the employee’s employment comes to an end at the transfer date and they have no right to be redeployed or to receive a redundancy payment. They have in effect resigned, terminating their contract of employment.

34. However, if an employee objects to the transfer and resigns because they feel the transfer will result in a substantial and detrimental change in their working conditions they may have the right to bring a claim for constructive dismissal if they have the necessary minimum continuous service of 2 years.

**Disclosure of Employment Information required for Due Diligence**

35. If the TUPE transfer is to proceed a due diligence exercise needs to be undertaken where the old employer (the transferor) gathers and discloses employment information to the transferee (new employer) prior to negotiation of the transfer contract. This will ensure the transferee (new employer) will know exactly what it is liable for as they will inherit the contracts of employment of the transferred employees and all associated rights and liabilities.

36. Much of the information required can be gathered beforehand as part of the bidding and consultation process which will help when the official due diligence exercise must be done. However, any information provided before the ‘official due diligence’ exercise must, for data protection purposes, be anonymous.

37. The due diligence information must be provided by the old employer (Transferor) to the new employer (Transferee) 28 days before the transfer takes place. The provisional information already gathered and passed to the Transferee (new employer) as part of the bidding and consultation process will need to be finalised and updated and no longer has to be anonymous.

38. The due diligence, employee liability information questionnaire, covers a wide range of information relating to the business and employees.

39. Failure to supply the correct information required under TUPE regulations could make the transferor liable to fines of a minimum £500 per employee

40. The information received as part of the scoping and due diligence exercises may result in wanting to re-negotiate the contract and might involve a re-structuring, an alteration to the price or adding a particular warranty or indemnity. Please speak with your schools HR advisor in these circumstances.

 **In-Sourcing a Service Provision or Business Transfer to the School/Academy**

41. Where a school / academy is taking a service in-house from an external service provider or is to take on a new service which will involve a TUPE transfer of employees to the school / academy please contact your schools HR advisory at the earliest opportunity so they can advise and support you through the process of transfer.

42. The school’s / academy’s Chair of Governors is legally required to write to the existing provider with information on the service review/restructure. The letter will also contain information on any measures\* (changes) that are envisaged to the structure or that no measures are envisaged. Measures are any changes that can be anticipated or foreseen as likely to happen and can be of a major concern such as a reorganisation or a minor change such as a change in pay arrangements. The letter must also state if any ETO (economic, technical, or organisational) reasons are likely to take place post transfer (see section on variation to terms and conditions of employment below).

43. Although, the school / academy is only required to consult with appropriate representatives of its own workforce, in TUPE transfers both the transferor and the school / academy will be held liable for any award of compensation made by an employment tribunal for failure to inform and consult properly. Therefore, joint consultation with the appropriate representatives of the transferor (old employer) to ensure that the process runs smoothly is advisable or at the very least the school / academy will need to ensure that the transferor (old employer) arranges for consultation to take place as appropriate with the transferee (new employer).

44. When arranging either collective or individual consultation meetings the transferee needs to ensure that consideration is given to ensuring meetings are accessible and that any reasonable adjustments are made.

45. Meetings should cover:

* 1. letters to be sent to the assigned employees by the transferor (old employer) explaining the transfer.
	2. a presentation by the transferor (old employer) supported by the Headteacher/Principal/ project group to the affected employees with the opportunity for questions and answers which should be recorded for future reference.
	3. consultation with both the existing providers’ Trade Union representatives and the school’s/academy’s Trade Union representatives.
	4. one to one meetings with assigned employees by the transferor supported by the Headteacher/Principal/ member of the project group (if required) which give employees the opportunity to ask questions which need to be recorded along with the responses.
	5. writing to any employee who did not attend consultations to keep them informed of the TUPE transfer process.
	6. The school’s/ academy’s Headteacher/Principal, with school HR Advisor support, will need to investigate and consult with employees, or their employee representative, to see if a change in place of work amounts to a material detriment or not and for the decision to be conveyed to the affected employees.
	7. discussions with affected employees on what entitlements they may get under their transferring terms and conditions of employment i.e. measures.
	8. liaison with the relevant Pension provider as to provide pension information and maybe a presentation to affected employees to explain the provisions.

46. If there are not sufficient posts for all of the transferring employees’ consideration will need to be given to a redundancy exercise after the transfer has taken place. The redundancy policy and procedure followed will be the one according to the terms and conditions that the employees have transferred in on. Any costs involved with a redundancy exercise need to be taken into account by the school/academy. The reason for redundancy must be due to an Economic, Technical or Organisational (ETO) reason and not the transfer itself(see section on variation to terms and conditions of employment below for explanation).

47. From 31 January 2014 where the transferee (new employee) intends making 20 or more redundancies after the transfer, consultation that takes place with relevant employees prior to the transfer can count for the purposes of complying with the collective redundancy consultation duty. This is even though the transferee is not yet the employer of the Transferring employees.  This is subject to:

* the transferee (new employer) notifying the transferor (old employer) in writing that it has chosen to carry out pre-transfer consultation with the affected employees.
* the transferor (old employer) agrees to the transferee (new employer) carrying out such consultation.
* consultation about the transfer and redundancies should start at an early stage with trade union representatives and employees.
* and remember to keep to the redundancy consultation timescales as detailed in the relevant procedure.

48. The Headteacher /Principal needs to check if any recruitment is required if not all the employees are transferring. All employees will be kept informed and reassured that any advertising and recruitment will not affect their positions.

49. On behalf of the school / academy the HR advisor will liaise with the relevant Legal professional about contacting the existing employer with a due diligence letter confirming that the transfer is covered by TUPE and requesting the required information at least 28 days prior to the transfer date. The information required will include all payments, salaries and allowances (e.g. unsocial hours) and any deductions made.

50. Relevant information will also have to be given to the schools / academies payroll provider so that the transferring employees can be set up for payment.

51. Once the transfer has taken place the Headteacher / Principal should confirm with all transferred employees, via a transfer letter, that they are now employees of the school / academy.

**TUPE - Clearances and Right to Work Checks**

52. The transferee employer should receive as part of the due diligence process all necessary clearance and relevant records from the transferor (e.g. DBS, identity checks, prohibition checks etc).  If these cannot be supplied the transferee employer will need to conduct their own checks.  Where a school transfers to an academy any employee who is appointed onto the academy trust body must have new clearance checks undertaken as part of the transfer.

In the case of foreign workers who required a right to work check to work in this country and are subsequently TUPE transferred, another right to work check does need to be carried out by the transferee employer within 60 days of the transfer taking place.  This is in accordance with Home Office regulations and immigration law.

**Contractor to Contractor TUPE Transfer (Service Provision Changes)** *School HR Advisory are able to support this type of transfer at an agreed consultancy rate as this is not covered by the Right Choice*

53. The TUPE 2006 Regulations under the service provision changes allows for contractor to contractor transfers where the service provision changes are ‘fundamentally the same as carried out pre-transfer’. The responsibility for ensuring TUPE regulations are complied with rests the respective contractors.

54. The Headteacher / Principal/project group should ensure that efforts are made to find out the numbers, grades, salaries etc. of outgoing contractor staff assigned for transfer to the new contractor and that affected contractors have been consulted. If necessary written confirmation of this can be obtained.

55. Prior to the end of the initial contract the outgoing Contractor should be asked to supply information about the number of employees wholly or mainly employed to undertake the contract requirement. If it is apparent from the information provided that there may be a TUPE transfer then this information needs to be included in any subsequent tender documentation.

56. The school / academy must be careful not to impose its own view of the application of TUPE on a third party and it cannot guarantee any information received from an outgoing Contractor which is passed on to the incoming contractor. The information provided is for tenderers to form their own opinion and to price accordingly.

57. The school / academy will not provide any indemnities for a Contractor’s failure to comply with the requirement of the TUPE regulations.

Variation to terms and conditions of employment

58. A variation to terms and conditions of employment by either the transferor or transferee which is connected to the transfer is automatically unfair where the reason is the dismissal itself. Changes to terms and conditions in a transfer situation are not automatically unfair if there is an ETO (Economic, Technical or Organisational) reason entailing changes in the workforce or a reason unconnected with the transfer. Any other variation will be void.

59. There is no statutory definition of an ETO but examples of an ETO reason are:

* 1. Economic reasons – where the demand for output has fallen and profitability is unsustainable without dismissing staff.

b. Technical reasons – where the transferee wishes to use new technology and

 the transferring employees do not have the required skills.

1. Organisational reasons – where it is not practical to transfer employees due

 to the location of the transferee. –:

 From 31 January 2014, a change in work location leading to a dismissal won’t be

 automatically unfair and will be covered by an ETO reason but this will be

 dependent on the facts of each case.

60. The ETO reason must relate to the transferor’s future conduct of the business and be relevant after the transfer. It must be an objective of the employer’s plan and not just a possible consequence of it.

61. For an ETO reason to be valid the transferee must establish the need for a change in the workforce which normally means a workforce reduction or a change in the job function of the employees.

62. Changes to terms and conditions of employment in anticipation of a TUPE transfer are automatically void.

Possible Options of variations to terms and conditions

63. The harmonisation of terms and conditions of service on a transfer is a difficult issue and the options are very limited. The possible options listed below need to be viewed cautiously and are by no means safe. These options must be discussed between the school, their HR Advisor and legal advisor before being considered and implemented.

64 Current case law indicates that the transferee can change terms and conditions of employment which are to the benefit of the employee. Harmonising up is, therefore, a potential option.

65. Transferees can re-negotiate terms and conditions derived from collective agreements subject to:

* + 1. the variation takes effect more than one year after the transfer
		2. the rights and obligations in the employee’s contract, when considered together, are no less favourable to the employee than those that applied immediately before the variation.
		3. consultation and the normal rules on effecting a variation of contract still need to take place.
		4. collective agreements only can be re-negotiated, other changes are subject to standard TUPE protection
		5. applies to variations agreed on or after 31 January 2014.

66. An agreement between parties to vary the contract involving detrimental changes could mean that there is less chance of a challenge although this would not be definite. It may be possible, however, if something else can be provided in return or it can be proven that owing to economic circumstances a more favourable settlement isn’t possible without recourse to making job cuts.

67. Application for another position

 An employee who has transferred but subsequently applies and is appointed to another position can be offered the new position on revised terms and conditions of employment.

68. Buy Out

Although not watertight it is possible for local authorities to buy out terms and conditions and to reach agreement to vary a contract and to write this into any agreement which may limit the chances of any challenge being brought.

69. Equal Pay claim

If a TUPE transfer results in a two tier system of terms and conditions of service that could potentially lead to an equal pay claim a tribunal may accept this as a defence argument.

70. Delaying the harmonisation

By delaying (for a considerable period of time, which is not defined) a harmonisation review of terms and conditions an ETO reason may develop during the intervening period which would mean the harmonisation is not connected to the TUPE transfer.

**Support staff Pensions**

71. There are special provisions for dealing with occupational pension schemes.

72. If the transferor (old employer) provided a pension scheme the transferee (new employer) must provide some form of pension arrangement for members of the old employer’s scheme and for employees who are eligible to join. It does not have to be the same as the arrangement provided by the old employer but will need to be of a minimum standard as specified under the Pension Act.

73. All employees transferring into the School will become members of the Local Government Pension Scheme (LGPS) unless they actively decide to opt-out of the scheme. Contact will need to be made with the administrator of the Wiltshire Pension fund prior to the transfer to make arrangements and to determine that there are no problems with transferring staff accessing the Wiltshire Pension fund.

74. Under LGPS provisions employees being TUPE transferred from the council have entitlement to an LGPS pension or comparable ‘good quality’ pension under which they can continue to earn pension benefits through their future service. Contact must be made with the Wiltshire Pension Fund to ensure that the statutory obligations are fulfilled and to find out how the new employer can apply to become an admitted body to the LGPS scheme

Equal Opportunities

75. The school / academy will make any necessary adjustments to ensure that all employees are treated fairly. For further information see the guidance on equal opportunities in Equality and Diversity Policy and Guidance.

Legislation

* Transfer of Undertakings (Protection of Employment) Regulations 2006
* Collective Redundancy and Transfer of Undertakings (Protection of Employment) Amendment Regulations 2014

76. This policy has been reviewed by an external legal organisation to ensure compliance with (the above legislation and) our statutory duties.

Advice and guidance

77. The TUPE guidance for schools / academies (toolkit 1) is available to support this policy plus various template letters.

78. Please contact your Education HR Advisor for support and advice if undertaking any form of TUPE