



FACT SHEET

Employee Entitlements On a Transfer of Business

Created: October 2021

WHAT IS A TRANSFER OF BUSINESS?

Transfer of business as addressed in sections 310 – 316 of the *Fair Work Act 2009* ('FW Act') relates to a situation in which the ownership of a business changes.

While this Fact Sheet focuses specifically on transfer of business provisions that are designed to minimise the impact of such a transaction on employees, it should be read in conjunction with the *QHA's 'Transfer of Business' Fact Sheet*, which contains supplementary detail regarding when a transfer is viewed to have occurred under the FW Act and the effect this may have on the industrial instrument that provides for employees' minimum enforceable conditions and entitlements.

For the purposes of this Fact Sheet:

- New employer refers to the employing entity that is purchasing etc the business, and
- Old employer refers to the employing entity that owned the business, and employed the employees prior to the sale (transfer).

WHAT HAPPENS TO EMPLOYEES IN A TRANSFER OF BUSINESS SITUATION?

Although the Act does not specifically require employees to be notified of a transfer of business, Modern Awards such as the *Hospitality Industry (General) Award 2020* ('HIGA') and some registered agreements require employers to consult with employees as early as practicable about the nature and effect of significant upcoming changes in the workplace, such as those that may occur as the result of a transfer of business.

In the HIGA, this consultation provision can be found at clause 38.

NON TRANSFERRING EMPLOYEES

A new employer is not compelled to take on the employees of the old employer as part of a transfer of business. Further, as per section 341(5) of the FW Act, opting not to employ someone in these circumstances is not viewed to constitute a breach of their general protections under the Act.

Where employment ends by virtue of the new employer choosing not to employ an existing staff member, the old owner is required to provide notice of termination and is liable to pay termination related entitlements; this may include redundancy pay, untaken accrued annual leave and long service leave (a pro-rata entitlement may be payable if the employee has between 7 and 10 years' service).

TRANSFERRING EMPLOYEES

Section 311 of the FW Act concerns when a transfer of business occurs, and what that means for an employee of the old employer who is employed by the new employer.

Section 311(2) defines an employee as a 'transferring employee' for the purpose of the FW Act. An employee becomes a transferring employee where:

- Their employment with the old employer has terminated

- They are engaged by the new employer within 3 months
- The work they perform for the new employer is the same or substantially similar to the work performed for the old employer
- There is a connection between the old and new employers

Refer: QHA's Transfer of Business Fact Sheet

TRANSFERRING EMPLOYEES AND CONTINUOUS SERVICE

Section 22(5) of the Act provides that for the purpose of most employee entitlements, any period of service with the old employer counts as service with the new employer.

Section 22(6) clarifies that if a transferring employee has already had the benefit of an entitlement calculated based on their service with the old employer, the equivalent period of service should be discounted by the new employer when subsequently undertaking the same calculation.

Example Scenario: Notice Period

An employee has attained 8 years' service at the time a transfer of business occurs. The old employer gives the employee 4 weeks' notice of termination as required by the HIGA based on their duration of service, which they work immediately prior to their employment transferring. Just over 3 years later, the new employer terminates the employee's employment.

In this scenario, the employee will be entitled to 3 weeks' notice of termination based on their 3+ years' service with the new employer. As they had already received the benefit of the 4 weeks' notice that related to their 8 years of service with the old employer (by virtue of serving this period of notice immediately prior to the transfer), that service does not count for the purposes of notice period calculations.

Long Service Leave

State and federal legislation can differ, and while the above scenario refers to the FW Act for notice periods, for long service leave, the *Industrial Relations Act 2016* (QLD) is relevant.

What does this mean? It means that for the purposes of the *Industrial Relations Act 2016* (QLD) and long service leave, the employment of an employee of the old employer has not terminated in the circumstances prescribed by the *Industrial Relations Act 2016* (QLD) when a transfer occurs. The result is that the employee was not eligible to access the benefit of pro-rata long service leave when the transfer of business occurred.

Using the above example for long service leave purposes, the value of long service leave paid to the employee upon their termination with the new employer should be calculated based on their entire 11 years' service (8 years' with the old employer + 3 years' with the new employer).

In a practical sense, the old employer in the above scenario would have been required to furnish the new employer with a monetary consideration in relation to the value of long service leave associated with the employee's service under the old ownership.

As the table overleaf illustrates, similar considerations may need to be made in relation to other employee entitlements where the existence of specified conditions result in an obligation for their accrued balance to transfer along with the employee. Similarly, exceptions to the requirement to recognise a transferring employee's prior service exist for the purpose of several employee entitlements where a transfer of business occurs between 'non-associated entities' (as defined by section 50AAA of the *Corporations Act 2001* (Cth)); these are also summarised in the table on page 3 of this fact sheet.

Obtain Professional Advice

Because of the complex and intricate nature of the legislation governing the treatment of employee entitlements on a transfer of business, retrospectively correcting non-compliance represents an extremely costly and time consuming if not impossible challenge. As such it is important that both the old and new employers have a pragmatic understanding of the obligations imposed in relation to each employment related entitlement in the context of their specific circumstances.

The QHA recommends obtaining professional corporate advice and ensuring all relevant matters have been formally addressed in a compliant manner before the transfer of business occurs. Making sure that the legal advisers that are handling the sale/purchase are also considering the employment side of the transaction is important for this reason.

Entitlement	Associated Entities	Non-Associated Entities
Notice of Termination	As a transfer of business terminates employment, the old employer is obliged to provide permanent staff (who are also transferring employees) notice of termination , or equivalent payment in lieu of notice to which they are entitled under the relevant industrial instrument applying to the employee, or section 117 of the NES.	
Parental Leave	Service with old employer must be counted by the new employer for the purpose of determining an employee's eligibility to access these entitlements under the NES	
Requests for flexible working arrangements		
Personal/ Carers' Leave	Accrued untaken balance of this form of leave must transfer to new employer	
Annual Leave	Accrued untaken balance of this form of leave must transfer to new employer	<p>The new employer can choose not to recognise prior service, obligating old employer to pay balance of accrued untaken annual leave to employee on termination.</p> <p>If the new employer does not intend to recognise prior service, this must be communicated to transferring employees BEFORE they become an employee of the new employer.</p> <p style="text-align: right;"><i>REF: FW Act s91</i></p>
Long Service Leave	<p>The <i>Industrial Relations Act 2016</i> (QLD):</p> <ul style="list-style-type: none"> • Provides that service with the old employer must be recognised by the new employer for: <ol style="list-style-type: none"> 1) Transferring employees 2) Employees dismissed no more than 1 month prior to the transfer of business, who are re-engaged by the new employer within 3 months of the termination having occurred • This makes the transfer of any accrued untaken balance of leave to the new employer obligatory <p style="text-align: right;"><i>REF: Industrial Relations Act 2016 s123(1)(a) and (b), s132(3), s94</i></p>	
Redundancy	Service with old employer must be counted by the new employer for the purpose of calculating a transferring employee's redundancy pay if their role is made redundant by the new employer subsequent to the transfer.	<p>New employer can choose not to recognise service, obligating old employer to pay redundancy on termination (if the relevant industrial instrument provides for it)</p> <p>UNLESS</p> <p>The employee rejects offer of employment with the new employer AND:</p> <ul style="list-style-type: none"> • Terms and conditions are similar to old job • The employee's prior service is recognised for the purpose of redundancy pay • A transfer of employment would have occurred if employee had accepted offer.

Unfair Dismissal	The new employer must recognise service with old employer for the purpose of determining when an employee has met the <u>minimum employment period</u> .	Service with old employer may be discounted if the employee is notified of this in writing by the new employer prior to commencement of employment with the new employer. <i>REF: FW Act s384(2)(b)</i>
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Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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October 2021