



What happens to Employee Entitlements when the employer's business is sold or transferred?

The issues of concern for both employees and employers when a business is sold are does the sale 'reset the clock' for the employee's accrued entitlements, and is the new employer responsible for employee's accrued entitlements. The answers to these questions are not straight forward and very much depend on decisions made by the purchaser of the business at the time the business is sold.

At the outset, 2 important distinctions need to be made.

The first is that if the entity (eg a company) operating the business and engaging the employees is sold (that is, by selling the shares in the company to the purchaser, rather than the company selling the business to the purchaser) there is no sale or transfer of the business, and the employer remains the same notwithstanding the underlying ownership has changed. Accordingly, in our example, as the company remains the employer, there is no termination of the employment of its employees and the company remains responsible for all employment entitlements – whether they accrue before or after the underlying ownership changes.

The second is that even though the business has been sold, employees cannot be transferred without their consent from an old employer to a new employer. If the employee does not consent, it is likely their employment will terminate and certain rights which accrue, which we will discuss later.

When does a transfer of business occur?

Under the Fair Work Act a transfer of business occurs when the following requirements are satisfied:

1. The employment of an employee ('transferring employee') with the old employer has terminated; and
2. Within 3 months of that termination, the employee becomes employed by the new employer; and
3. The work the employee performs for the new employer is substantially the same as the work employed for the old employer; and
4. At least one of the following connections exists between the old employer and the new employer:
 - (a) The business assets of the old employer are sold/transferred to the new employer; or
 - (b) The old employer outsources its work to the new employer; or
 - (c) The old employer and the new employer are associated entities – meaning broadly speaking, either has a controlling interest in the other.



If a transfer of business meets the above requirements, the new employer must recognise an employee's period of service with the old employer when working out most of their entitlements including:

- Personal/carer's leave
- Requests for flexible working arrangements
- Parental leave

However, there are some entitlements that the new employer does not have to recognise. These include:

- Redundancy
- Annual leave
- Long service leave
- Unfair dismissal
- Notice of termination

What decisions can the purchaser make that affect employee's entitlements?

If the business assets of the old employer are sold/transferred to a purchaser which is not an associated entity of the old employer, the purchaser has 3 options for dealing with each employee:

1. Not to offer them employment;
2. To offer employment, but without recognising the employee's prior service;
3. to offer employment and recognise the employee's prior service;

There are different outcomes for the employees depending on which option the purchaser selects. Those outcomes are set out below.

Option 1 – Not offer employment

If the purchaser decides not to offer an employee new employment, the employee will remain with the old employer. However, once the business is sold, the employee's role with the old employer will become redundant as there is no business for the employee to work in. This means the employee will be terminated by way of redundancy on completion of the business sale.

This termination triggers payment by the old employer to the employee of all the ordinary entitlements that the employee has for a genuine redundancy, namely:

- Accrued annual leave;
- Termination notice pay, unless the required prior notice was given;
- Redundancy pay – provided the old employer is not a small business (ie has less than 15 employees) and the employee's period of service exceeds 12 months;
- Accrued long service leave for employees with 10 year service and pro-rata long service leave if the employee's period of service exceeds 5 years;

However the old employer is not required to pay out an employee's accrued Personal/Carer's leave.



Option 2 – Offer Employment, but without recognising prior service with the old employer

If this option occurs and the employee accepts employment with the new employer, a termination of the employee's employment with the old employer is deemed to happen at completion the business sale and the employee commences new employment with the new employer.

The new employer must recognise the following accrued entitlements that the employee had with the old employer:

- Personal/Carer's leave
- Parental leave
- Right to request flexible working arrangements
- Termination Notice Pay – unless the old employer has either given appropriate notice of termination or termination pay to the employee in which case the anti double dipping provisions of the Fair Work Act apply which say that you don't count service if the employee has already received a benefit calculated by reference to that service.

However, because the new employer has chosen not to recognise the employee's period of service with the old employer:

- *Annual Leave* – the old employer must payout the employee's accrued annual leave and the employee's annual leave entitlement clock with the new employer is reset.
- *Long Service Leave* – the old employer must, if required by the new employer, payout accrued long service leave for employees with 10 years service and pro-rata long service leave if the employee's period of service exceeds 5 years. However there is no 'reset of the long service leave clock', meaning that once the total of the employee's period of service with the old employer and with the new employer reaches 10 years, the employee qualifies for long service leave and is then entitled to receive the difference between their annual long service leave entitlement and what they have already been paid for long service leave (if any) by the old employer.
- *Redundancy Pay* – the old employer must pay redundancy pay if it would ordinarily be payable to the employee. The employee will be entitled to redundancy pay unless:
 - (i) the old employer is a small business (ie less than 15 employees); or
 - (ii) the employee's period of service with the old employer is less than 12 months; or
 - (iii) the employee rejected the new employer's job offer where the terms and conditions are similar (and no less favourable), the new employer has agreed to recognise the period of service with the old employer, and there will be a transfer of employment if the employee accepts the job offer.

In Option 2, as the new employer refuses to recognise the employee's period of service with the old employer, the employee is entitled to redundancy pay from the old employer.

- *Minimum Employment Period (ie Probation Period)* – the new employer can reset the clock for the employee's probation period by informing the employees in writing before the new employment starts that a period of service with the old employer will not be recognised.
- *Unfair Dismissal* – if the new employer notifies the employee in writing prior to commencement of employment with the new employer that the prior service with the old employer will not count, the Unfair Dismissal minimum period clock is reset (ie normally 6 months, but 12 months if the new employer is a small business)



Option 3 – Offer employment with recognition of employee’s prior service

Under this option, provided the terms and conditions of the new employer’s job offer are similar (and no less favourable) to the existing terms and conditions with the old employer, the employees of the business suffer minimum interruption to their employment terms. The new employer is effectively offering that it will be responsible for all the accrued entitlements of the employee that have not been taken or paid out at the date of termination of employment with the old employer.

What if an employee doesn’t accept the new employer’s job offer?

As stated earlier, employees cannot be transferred without their consent from the old employer to the new employer. If the new employer’s offer has terms and conditions similar (and no less favourable) to the existing terms and conditions with the old employer and recognises continuity of service, the employee will be entitled to receive the entitlements under Option 1 above except the employee will not be entitled to redundancy pay.

Conclusion

The issue of employee entitlements when a business is sold can have a significant financial impact on both the employee and the employer. If you are an employee of a business that is being sold, or if you are an employer selling your business and you require advice or further information regarding employee entitlements, please call [Ken Gray](#) or [Michael Battersby](#) on 02 4731 5899 or email us on commercial@batemanbattersby.com.au.