

Buying and selling a business

February 2008

A critical issue for buyers and sellers of businesses is what obligations they have to employees working for the business.

This fact sheet addresses some of the issues about employment commonly faced by business owners when they are buying or selling their business.

Transmission of business

When a business or part of a business is sold or transferred it usually means there has been a transmission of business. The most obvious example of a transmission of business is where the business is purchased and the buyer simply "takes over" from the seller, with business continuing as usual. However, whether there has been a transmission of business can be a complex legal question and legal advice should be sought whether a transmission of business has occurred.

Both buyers and sellers take on obligations to do with employees when a transmission of business occurs. It is important that both parties are aware of the costs involved. This document aims to give buyers and sellers a brief guide to their obligations towards employees arising from a transmission of business.

Federal legislation impacts on businesses that are constitutional corporations, such as trading or financial corporations. Constitutional corporations fall within the Federal industrial relations system while non-constitutional corporations (including sole traders and partnerships) are generally part of the State industrial relations system.

It is important for buyers and sellers to be aware of their status and the applicable industrial relations system. The two systems have different rules and obligations for employers where there is a transmission of business.

Status of employees

An employee's contract of employment with the seller of the business is terminated when a transmission of business occurs. The buyer is not obligated to re-employ the staff of the previous owner. Notice, severance pay and payment for outstanding entitlements such as leave are some of the entitlements that generally arise from a termination of employment. The seller is required to provide employees with these entitlements where relevant.

When a transmission of business occurs, the buyer may become the new employer by agreeing to take on the seller's employees. For the buyer, re-employing existing staff will involve a number of obligations. Buyers need to consult any relevant awards, agreements and legislation carefully in order to gain a full picture of the obligations they take on as the new employer. Buyers should find out about accrued entitlements and costs arising from recognition of past service. These entitlements and costs can vary depending on the terms and conditions of employment of the employees.

Labour Relations

Dumas House, 2 Havelock Street
West Perth, Western Australia 6005
Telephone: 9222 7700 Wageline: 1300 655 266
Facsimile: 9222 7777 Email: labourrelations@docep.wa.gov.au
Internet: www.docep.wa.gov.au



Department of Consumer
and Employment Protection
Government of Western Australia

Assistance in these matters can be obtained through Wageline on 1300 655 266.

In the Federal system, buyers should be aware that employment arrangements covering employees of the seller may continue to operate after the transmission of business. Preserved redundancy entitlements from an agreement that has been terminated and no longer covers the employees may also apply to the buyer.

Advice on Federal employment arrangements on transmission of business can be obtained from the Workplace Infoline on 1300 363 264.

The seller terminates the employees

Notice

The correct amount of notice, or pay in lieu of notice, should be given when terminating employees because of a transmission of business. The length of notice to be given is based on the employee's length of service with the employer. Even if the employees are being re-employed by the new owner, the former employer may still need to give notice to employees.

Employee's continuous service	Notice period
Not more than one year	One week
More than one year but no more than three years	Two weeks
More than three years but no more than five years	Three weeks
More than five years	Four weeks
If the employee is over 45 years of age and has completed two years' continuous service, the required notice period is extended by one week	

These notice requirements apply to employers in both State and Federal systems.

Additional notice obligations may arise from an award, agreement or contract of employment.

Information requirements

In addition to providing notice, employers may also need to inform employees of upcoming changes to the business.

Many employers in the State and Federal industrial relations systems have obligations under the Termination Change and Redundancy Order (TCR Order) of the Western Australian Industrial Relations Commission.

The TCR Order requires employers to notify employees of any changes to the business that have a significant effect on their jobs. Employers are not required to disclose information to employees that may seriously harm the employer's business undertaking or interest in continuing or disposing of the business.

Employers not covered by the TCR Order may have obligations under a relevant award or agreement. Employers should consult relevant awards or agreements and seek advice if they are planning significant changes or terminations.

Severance pay

The TCR Order provides an obligation on employers with 15 or more staff to pay severance pay when making employees redundant. Employers with fewer than 15 employees are generally exempt from paying severance payments. However, the relevant award or agreement will need to be consulted as it may provide for an entitlement to severance pay.

Employers not covered by the TCR Order may still have obligations to provide severance pay under the relevant award or agreement. Employers should always consult the relevant award or agreement and seek advice if they are planning significant changes or terminations.

A publication dealing with the termination, redundancy and unfair dismissal is available by contacting Wageline on 1300 655 266 or by visiting our website.

Other termination obligations

The TCR Order states that a terminated employee is entitled to request and receive a written statement, from the employer, specifying the period of employment and the classification or type of work performed.

The TCR Order allows employees to take paid time off work to search for other employment. The entitlement is for one day of each week of the employee's notice period and is subject to certain conditions.

Employers not covered by the TCR Order should check the relevant award or agreement to clarify their obligations.

Paying out accrued entitlements

If employees are not re-employed by the buyer of the business, the seller of the business is obligated to pay out employee entitlements up to the date of the transmission of business. These entitlements come from the relevant award or agreement and State or Federal legislation.

Entitlements that may need to be paid out, in addition to possible payment in lieu of notice or severance pay requirements referred to above, include:

- Annual leave – Generally calculated at the current rate of pay. Depending on the conditions of employment, annual leave loading may also need to be paid.
- Long service leave – Many employees have a statutory entitlement to payment of pro-rata long service leave after seven years of continuous service.

The buyer takes on existing employees

Buyers who want to take on employees of the seller may decide to interview employees to determine their suitability.

Prior to taking over, the buyer should inform the seller's employees as soon as possible if they are required for employment. The buyer should then clearly explain the proposed terms and conditions of employment.

The terms and conditions of employment may be stipulated in State or Federal awards, collective or individual agreements and the relevant statutory minimums. If employees in the State industrial relations system are not covered by an award or agreement, the *Minimum Conditions of Employment Act 1993* will underpin any employment arrangements. Employers in the Federal industrial relations system should be aware that employment arrangements prior to the transmission of business are likely to bind the buyer.

Buyers should also ask the seller of the business how their employees' employment has been regulated, and request copies of any existing agreements. Any information provided by the seller should be confirmed by seeking independent advice.

It is recommended that buyers call Wageline on 1300 655 266 for assistance in determining award or agreement coverage, and for current pay rates and conditions in the State industrial relations system. A full copy of State awards is available from the Western Australian Industrial Relations Commission's website at www.wairc.wa.gov.au.

Employees' entitlements when they are re-employed

Leave obligations may carry over from the previous employer. Buyers should consider any additional costs when negotiating the final terms of sale. The employment obligations that a buyer is taking over

should be specified in the agreement between the buyer and seller.

Depending on the arrangements, the seller may be required to pay out annual leave to employees on termination. Some awards or agreements state that leave loading must be paid on top of the annual leave entitlement.

There is no general obligation for payment for accrued sick leave on termination. Accrued sick leave may be recognised by the buyer. Alternatively, some awards provide for sick leave accrued with the seller to be credited to employees who are re-employed by the buyer. Buyers should check the provisions of the relevant award or agreement.

Long service leave

When buying a business, the buyer needs to be aware of the length of service of any staff they intend to re-employ from the existing business. This is important because an employee's long service leave is based on continuous service with the business, not just one employer. When a buyer re-employs staff from the seller's business, the buyer also takes on the obligation for the employee's future long service leave.

The buyer can prepare for a future long service leave payment through an agreement with the seller. If there are long-serving employees in the business who are going to be re-employed, it is common for an arrangement regarding long service leave to be made as part of the sale. Parties can agree to factor future potential long service leave payments into the sale price. Another option is for the seller to place money into a trust fund to be used by the new owner when the employees accrue a long service leave entitlement. Whatever arrangements are made, the responsibility for future long service leave payments ultimately lies with the buyer.

The long service leave entitlement under current State legislation is 8.667 weeks' paid leave after 10 years' continuous employment. Employees receive a pro-rata long service leave payment on termination if they complete seven years' service. The long service leave entitlement may differ between awards and agreements, so it is important that employers check the relevant employment arrangements.

Employers can obtain further information on long service leave by contacting Wageline on 1300 655 266.

Severance payments when employees reject offer of employment from buyer

Employees may be offered a job with the buyer but are not obligated to accept. However, the seller may be exempt from making severance payments to employees who decline a position with the buyer that has similar terms and conditions to the employee's previous position and that recognises the period of continuous service with the seller. This exemption may arise from the TCR Order, where it applies, or other redundancy provisions that apply under the relevant award or agreement.

Federal system notification requirements

Buyers in the Federal industrial relations system are generally required to provide a notice to employees of the seller who they employ within 28 days of employing them. The notice is required to provide information about employment arrangements, including any existing employment arrangements and preserved redundancy provisions that will continue to bind the buyer.

A copy of the notice must be provided to the Workplace Authority within 14 days after the notice is given to the employee. The Workplace Authority can be contacted on 1300 363 264.

Buyers in the Federal system will also become liable for parental leave entitlements of employees. Sellers are required to notify buyers of employees on parental leave and any relevant documentation in relation to parental leave.

Need more information?

If you require more information on employment arrangements contact Wageline on 1300 655 266 or visit our website: www.docep.wa.gov.au

Wageline 1300 655 266

8.30am – 5.00pm weekdays
except Wednesday 9.00am – 5.00pm

For more information on obligations in the federal system contact the Workplace Infoline on 1300 363 264.

This information is provided by the Department of Consumer and Employment Protection (DOCEP) as a general guide only and is not designed to be comprehensive nor to render legal advice. Readers should not rely on the contents of this information without first obtaining legal advice.

DOCEP does not accept liability for any loss suffered by a reader who acts contrary to the advice in the above paragraph.

Checklist

Seller	Buyer
<p>Obligations that can apply to seller</p> <ul style="list-style-type: none"> ✓ Give correct amount of notice to employees ✓ Discuss changes with employees ✓ Pay out annual leave and other entitlements ✓ Inform buyer of the award, agreement or contract currently in place ✓ Provide for future long service leave payments ✓ Give severance pay to employees ✓ Inform buyer about parental leave obligations 	<p>Obligations that can apply to buyer</p> <ul style="list-style-type: none"> ✓ The buyer may choose to but does not have to re-employ existing employees of the seller ✓ If intending to re-employ the employees, tell the seller and employees before taking over the business ✓ Determine obligations relating to continuity of service and accrued entitlements that will be taken on by the buyer ✓ Determine conditions of employment that will apply to employees and, in Federal system, whether previous employment arrangements will bind the buyer ✓ Factor leave payments into terms of sale ✓ In the Federal system, provide the requisite notice to employees who are re-employed and a copy to the Workplace Authority

This publication is available on request in other formats to assist people with special needs

DP099797 / 5000

Regional offices

Great Southern	(08) 9842 8366
South-West	(08) 9722 2888
Mid-West	(08) 9964 5644
Goldfields/Esperance	(08) 9021 5966
North-West	(08) 9185 0900
Kimberley	(08) 9169 2811



Department of Consumer
and Employment Protection
Government of Western Australia