

August 2015

TRANSFERRING TES WORKERS (TEMPS)

FREQUENTLY ASKED QUESTIONS (FAQ)

In the process of employing Temps, a Client organisation may wish to transfer Temps supplied to them by one TES to another TES service provider. This can give rise to legal and/or contractual issues and this FAQ endeavors to provide answers to some of the more common questions and also highlight the potential risks for the parties involved.

Q: Can a TES worker simply transfer from the payroll of the TES provider to the Client?

No. Employment records, employee registrations with bodies such as Bargaining Councils, SETA, UIF, COID, and others cannot simply be transferred to that of the client. There should be a formal termination of employment with the TES to allow for formal employment by the Client.

Q: Why must there be a formal resignation?

The law requires a formal termination of employment. The Temp is therefore required to formally resign from the TES and to serve their notice. After that they will be free to accept a new employment contract with the Client directly.

Q: Would I be entitled to a fee if the Client employs our Temp?

Yes, but please ensure upfront that you make provision for this in your Terms and Conditions of Business. Alternatively, make sure that this is covered in your SLA with the Client.

Q: What happens when a Client wants to transfer Temps from one TES to another?

This can be unilateral (driven by one party, usually the Client) or consultative. There are formal procedures that should be followed to ensure that all legal and statutory obligations are met. Failure to do this can lead to high risk for all parties – Client, TES and Temp.

Q: What happens when a Client has decided unilaterally to transfer Temps to another TES?

Use your best endeavours to engage the Client, the incoming TES and the Temps to ensure that the transfer happens in a transparent and consultative manner. The important aspects are to decide who will be responsible for accrued benefits such as leave pay and whether length of service will be preserved with the incoming TES.

Q: Are there other risks associated with a non-consultative process?

Yes. Without formal communication and consultation with the Temps, it is possible that an allegation of constructive dismissal may be made. In this case the TES provider and the Client will be jointly & severally liable.

Q: What happens when the transfer of Temps from one TES to another is consultative?

This is the preferred method and the following procedure should be followed to ensure that all legal and statutory obligations are met.

1. On notice from Client, consult with Temps and advise them of transfer to new TES.
2. Engage new TES and agree terms of transfer with regard to continuation of employment, preservation of length of service and transfer of accrued benefits.
3. If Temp agrees to transfer, facilitate with new TES having due regard to relevant records.
4. If Temp refuses, they may resign, work their notice period and be paid out all severance and accrued benefits as allowed by law.

Q: Would it be considered to be a S197 transfer (in terms of LRA) if Temps move from one TES provider to another?

Not automatically. However, deciding whether a transfer falls under S197 is highly complex. It is therefore preferable to manage the transfer process correctly and avoid the risks that all parties face under S197.

Q: What are the risks if a formal change of employment does not take place?

There are risks associated with transfers under the LRA and the obligations for the incoming employer. Further risks can arise in the event of injury, illness or death if the employee is still registered as being an employee of the TES whilst actually being on a new TES or the Client's payroll. All employee registrations and records must be updated to mitigate risk. These could include:

- Bargaining Councils
- SETA
- COIDA
- UIF
- Employee benefits

Q: What are the statutory reporting implications?

Without a formal termination of employment, the TES provider will not be able to report accurately in terms of skills development (WSP & ATR) and employment equity. Reports to the various statutory bodies, including Bargaining Councils, will also not be accurate and may have both financial and punitive implications and non-compliance risks. Further, with the advent of the Protection of Personal Information (POPI) there are also potential risks associated with sharing of personal information of the TES worker. All information and records should be maintained in strict accordance with the law.

Transferring of Temps is a complex matter and you are welcome to call APSO Head Office if you require guidance on all matters relating to TES.