STATUTORY INSTRUMENTS

2017 No. 1092

PUBLIC PASSENGER TRANSPORT, ENGLAND

The Franchising Schemes and Enhanced Partnership Schemes (Application of TUPE) (England) Regulations 2017

Made - - - -	*20th November 2017*
Laid before Parliament	*27th November 2017*
Coming into force - -	*19th December 2017*

The Secretary of State, in exercise of the powers conferred by sections 123X(6) and (7)(a), (c) and (d) and 138S(6) and (7)(a), (c) and (d) of the Transport Act 2000(**a**), makes the following Regulations.

Citation, commencement and application

1.—(1) These Regulations may be cited as the Franchising Schemes and Enhanced Partnership Schemes (Application of TUPE) (England) Regulations 2017.

(2) These Regulations come into force on 19th December 2017.

(3) These Regulations apply in relation to England only.

Interpretation

2.—(1) In these Regulations—

"the 1985 Act" means the Transport Act 1985(**b**);

"the Act" means the Transport Act 2000;

"affected local services"—

(a) in relation to franchising schemes, means local services(**c**) which, on the coming into force of a local service contract, the relevant operator would be required by virtue of section 123J(3)(a) and (b) of the Act (prohibition on provision of local services other than under a franchising scheme) to cease providing; or

(b) in relation to enhanced partnership schemes, means local services which, on the coming into force of an awarded contract, the relevant operator would be required by virtue of regulations made under section 6E(6) of the Transport Act 1985(**d**) to cease providing;

(**a**) 2000 c. 38. Sections 123X and 138S were inserted into the Transport Act 2000 by section 4 and section 9 respectively of the Bus Services Act 2017 (c. 21).
(**b**) 1985 c. 67.
(**c**) By virtue of section 162(3) of the Transport Act 2000, the term "local service" has the meaning given in section 2 of the Transport Act 1985.
(**d**) Section 6E is inserted by the Bus Services Act 2017, section 12.

"authority" means a local transport authority(**a**);

"awarded contract" has the meaning given in section 138S(11)(**b**) of the Act;

"local service contract" has the meaning given in section 123A(5)(**c**) of the Act;

"personal data" means data which relate to a living individual who can be identified—

(a) from the data; or

(b) from the data and other information which is in the possession of, or is likely to come into the possession of, the local transport authority or authorities;

"principally connected" has the meaning determined under regulation 3;

"relevant employee" means an employee whose employment with a relevant operator is principally connected with the provision of affected local services;

"relevant information" has the meaning given in regulation 4;

"relevant operator" means an operator of affected local services;

"scheme" means a franchising scheme or an enhanced partnership scheme(**d**);

"TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 2006(**e**); and

"working time", in relation to an employee, means any period during which an employee is working at the disposal of the employee's employer and is carrying out the activities or duties assigned by the employer, but does not include any period during which the employee is receiving relevant training, and "relevant training" means any work experience or training for employment provided in accordance with a training course or programme.

(2) The following expressions have the meaning given in TUPE(**f**)—

(a) "assigned";

(b) "appropriate representatives"; and

(c) "employee".

(3) Any period of days prescribed in these Regulations is to be calculated by excluding any day which is Christmas Day, Good Friday, or a day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971(**g**).

Determination of "principally connected" persons

3.—(1) For the purposes of sections 123X(4) and (7)(a) and 138S(4) and (7)(a) of the Act (organised grouping), the determination as to whether a person's employment is "principally connected" with the provision of affected local services is to be made by agreement or, where there is no agreement, in accordance with paragraph (5).

(2) Where an authority, or authorities, make a franchising scheme under section 123H(**h**) or an enhanced partnership scheme under section 138G(**i**), they must issue a consultation notice to—

(a) operators of affected local services; and

(**a**) By virtue of section 162(1) of the Transport Act 2000, the term "local transport authority" has the meaning given in section 108(4) of that Act. Section 108(4) is amended by: the Local Transport Act 2008 (c. 26), section 77(5) and Schedule 4, Part 3, paragraphs 41 and 42; the Local Democracy, Economic Development and Construction Act 2009 (c. 20), Schedule 6, paragraphs 95 and 96.

(**b**) Section 138S was inserted by the Bus Services Act 2017, section 9.

(**c**) Section 123A was inserted by the Bus Services Act 2017, section 4.

(**d**) By virtue of section 162(1) of the Transport Act 2000, as amended by the Bus Services Act 2017, Schedule 2, paragraph 23(2) and Schedule 4, paragraph 8, the terms "franchising scheme" and "enhanced partnership scheme" have the meaning given in sections 123A(3) and 138A of that Act respectively.

(**e**) S.I. 2006/246, amended by S.I. 2009/592.

(**f**) The terms "assigned" and "employee" are defined in regulation 2 of TUPE to which there are amendments not relevant to these Regulations. The definition of "appropriate representatives" is contained in regulation 13(3) of TUPE as substituted by S.I. 2014/16.

(**g**) 1971 c. 80.

(**h**) Section 123H was inserted by the Bus Services Act 2017, section 4.

(**i**) Section 138G was inserted by the Bus Services Act 2017, section 9.

(b) appropriate representatives of employees employed on those affected local services.

(3) Any notice issued for the purposes of paragraph (2) must set out—

(a) the proposed criteria for determining if a person's employment is principally connected, which may include particular individual roles;

(b) the consultation process and the agreement sought;

(c) the periods over which the consultation process will take place;

(d) the parties to be issued with a consultation notice; and

(e) what constitutes agreement between the parties.

(4) Once there is agreement between the parties for the purposes of paragraph (1), the authority, or authorities, which have made the scheme must notify the parties and publish the details of the agreement.

(5) If there is no agreement for the purposes of paragraph (1), a person's employment is treated as "principally connected" with the provision of affected local services if that person spends, on average, at least half of their working time—

(a) assigned to the provision of affected local services; or

(b) assigned to activities connected wholly or mainly to the provision of affected local services.

(6) In this regulation, "the parties" means—

(a) the authority or authorities that have made a franchising scheme or an enhanced partnership scheme;

(b) the operators of affected local services; and

(c) appropriate representatives of employees working on those affected local services.

Meaning of "relevant information"

4.—(1) For the purposes of these Regulations, "relevant information" means—

(a) relevant employee information; and

(b) information about the identity of appropriate representatives of relevant employees.

(2) For the purposes of this regulation "relevant employee information", in relation to a relevant employee, means—

(a) such of the particulars of employment that an employer is obliged to give to an employee by virtue of section 1 of the Employment Rights Act 1996(**a**),

(b) such information about any collective agreements, as defined in section 178(1) of the Trade Union and Labour Relations (Consolidation) Act 1992(**b**), in respect of a relevant employee,

(c) such information describing the affected local services with which a relevant employee's employment is principally connected, including the proportion of a relevant employee's working time assigned to those affected local services, and

(d) such other information,

as the authority or authorities making a request under regulation 5 consider necessary in order to enable any person considering entering into a local service contract, an awarded contract, or any other agreement for the provision of local services, to calculate the costs and liabilities likely to arise from the application of TUPE to such a contract or agreement.

(**a**) 1996 c. 18.
(**b**) 1992 c. 52.

Request for information

5.—(1) At any time after an authority or authorities have made a scheme under section 123H or 138G of the Act the authority or authorities may issue a request to a relevant operator for such relevant information about relevant employees as may be specified by the authority or authorities.

(2) A request made by virtue of paragraph (1)—

(a) must specify the date by which the relevant operator is to respond to the request, which must be not less than 21 days beginning with the date on which the request is issued;

(b) must contain sufficient information about the scheme to enable a relevant operator to determine which of their employees would be relevant employees for the purposes of that request;

(c) must only request such information as the authority or authorities consider necessary in order to carry out their functions in relation to the application of TUPE in connection with the scheme; and

(d) must not include a request for personal data, except to the extent that such a request is for information about the identity of appropriate representatives.

(3) If a relevant operator in receipt of a request for information made by virtue of paragraph (1) is of the opinion that the requirement specified in paragraph (2)(b) has not been satisfied, the relevant operator must—

(a) notify the authority or authorities of that opinion within 14 days of receipt of the request made by virtue of paragraph (1); and

(b) describe the information which, in the opinion of the relevant operator, is required in order to satisfy the requirement in paragraph (2)(b).

(4) If the authority or authorities receive a notice in accordance with paragraph (3)(a) the authority or authorities must—

(a) supply to the relevant operator such information as seems to the authority or authorities to be necessary, taking into account the description of information supplied in accordance with paragraph (3)(b), in order to enable the relevant operator to respond to the request made by virtue of paragraph (1); and

(b) specify a revised date by which the relevant operator is to respond to the request made by virtue of paragraph (1), which must be not less than 21 days beginning with the date on which the information described in sub-paragraph (a) is received by the relevant operator.

(5) If a request has been made by virtue of paragraph (1) and the authority or authorities no longer require information about relevant employees they must notify the relevant operator.

Obligation on relevant operator in receipt of request for information

6.—(1) Subject to paragraphs (2) and (3), a relevant operator must respond to a request for information made in accordance with regulation 5 within the period which applies by virtue of regulation 5(2)(a) or (4)(b).

(2) Paragraph (3) applies where an authority or authorities make a request for information by virtue of regulation 5 and either—

(a) the operator does not have any or all of the information requested, and is unable to obtain the information at a reasonable cost; or

(b) the operator is unable, by virtue of the prohibition contained in paragraph (7)(b), to respond to the request.

(3) In either of the circumstances described in paragraph (2)—

(a) the operator must, within 14 days beginning with the date on which the request is received, give notice in writing to the authority or authorities that the operator is unable to respond to the request, explaining why it is not possible to provide any or all of the information requested; and

(b) the obligation imposed by virtue of paragraph (1) no longer applies to the operator in respect of any of the information in relation to which the operator has given notice under sub-paragraph (a).

(4) If, having received notice by virtue of paragraph (3)(a), the authority or authorities issue a revised request for information—

(a) this regulation applies to the revised request as if it had been a request made by virtue of regulation 5; and

(b) the revised request must specify the date by which the relevant operator is to respond to the request, which—

(i) must be not less than 21 days beginning with the date on which the revised request is received by the operator; or

(ii) must be, in a case where either of the circumstances described in paragraph (2) applied to the request made by virtue of regulation 5, but the operator failed to inform the authority or authorities of that fact within the period specified in paragraph (3)(a), not less than 21 days beginning with the date on which the period specified in paragraph (3)(a) expired.

(5) If a request is made by virtue of regulation 5, the relevant operator must continue to provide revised information about the identity of the appropriate representatives to the authority or authorities if that information changes after the response is provided in accordance with paragraph (1).

(6) If paragraph (5) applies, the obligation on the operator to provide revised information continues until that operator receives notice that it is no longer required for the purposes of regulation 5.

(7) In responding to a request for information made by virtue of regulation 5 a relevant operator—

(a) must take such steps as are reasonable in the circumstances to ensure that the information provided is complete and accurate; and

(b) must not disclose personal data, except to the extent necessary in order to satisfy a request for information about the identity of appropriate representatives.

Allocation arrangements

7.—(1) After making a scheme under section 123H or 138G of the Act the authority or authorities, must consult—

(a) relevant operators; and

(b) appropriate representatives of relevant employees,

about the proposed allocation arrangements.

(2) The allocation arrangements must—

(a) identify organised groupings of relevant employees, or classes of relevant employees within such organised groupings; and

(b) identify for each organised grouping of relevant employees or, as the case may be, class of relevant employees within such organised groupings, the local service contract or the awarded contract to which each organised grouping or class of relevant employees is to be assigned.

(3) After the end of the consultation required under paragraph (1), the authority or authorities must publish details about the allocation arrangements made in accordance with this regulation and notify—

(a) relevant operators; and

(b) appropriate representatives of relevant employees.

(4) For the purposes of this regulation a class of relevant employees is to be defined with reference to one or more of—

(a) the identity of the relevant operators by whom relevant employees are employed;

(b) the organised grouping to which the relevant employees belong;

(c) any identifiable sub-groups to which the relevant employees belong, in a case where the organised grouping is divided into sub-groups by the relevant operator for the purpose of organising the responsibilities of relevant employees; and

(d) the characteristics of the work undertaken by relevant employees when working for a relevant employer, including in particular—

(i) the nature of the duties undertaken; and

(ii) the times and the places at which those duties are normally undertaken.

Additional provisions where situation in section 123X(2) or 138S(2) arises

8.—(1) This regulation applies in the circumstances set out in paragraph (2), if at any time—

(a) before the date on which a local service may first be provided under a local service contract, in the case of a franchising scheme, or

(b) after the making of an enhanced partnership scheme,

an application is made to a traffic commissioner for the cancellation or variation of a registration made under section 6 of the 1985 Act with respect to services which are affected local services.

(2) The circumstances referred to in paragraph (1) are that—

(a) the effect of the application is that affected local services would cease to be provided before the coming into force of the local service contract or an awarded contract, as the case may be, under which services similar to, or the same as, those which are to cease to be provided would in future be provided; and

(b) the authority or authorities who made the scheme propose to enter into an agreement with a person, by reason of the cessation of those services, to provide replacement local services in the period between their cessation and the coming into force of that local service contract or awarded contract, as the case may be.

(3) As soon as reasonably practicable after the authority or authorities have received a copy of the application(**a**) described in paragraph (1), the authority or authorities who made the scheme must consult—

(a) relevant operators; and

(b) appropriate representatives of relevant employees,

about the revised allocation arrangements which the authority or authorities propose to make in respect of an organised grouping of relevant employees, or classes of relevant employees within such an organised grouping, affected by the circumstances described in this regulation.

(4) The authority or authorities who made the scheme must finalise and publish the revised allocation arrangements before—

(a) issuing invitations to tender in accordance with section 89(1) of the 1985 Act (obligation to invite tenders for subsidised services); or

(b) entering into an agreement by virtue of section 91(2) of the 1985 Act,

to operate replacement local services.

(**a**) By virtue of regulation 3(4) of the Public Service Vehicles (Registration of Local Services) Regulations 1986 (S.I. 1986/1671), the person making such an application is required to deliver a copy to any authority within whose area there are stopping places for the service. There are amendments to these Regulations but none are relevant.

(5) For the purposes of this regulation "revised allocation arrangements" means allocation arrangements described in regulation 7 revised to take account of any application made under paragraph (1) in circumstances described in paragraph (2).

Signed by authority of the Secretary of State for Transport

Jesse Norman
Parliamentary Under Secretary of State
Department for Transport

20th November 2017

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision about the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to employees of bus operators who are affected by the making of a franchising scheme or an enhanced partnership scheme.

A franchising scheme is a scheme made under the Transport Act 2000 ("the Act") under which an authority identifies the local services that it considers appropriate to be provided in an area under a local service contract. A local service contract is an agreement where the franchising authority grants an exclusive right to operate the local services to another person in exchange for an undertaking to provide the local services on such terms as may be specified in the agreement.

An enhanced partnership scheme is a scheme made under the Act under which an authority specifies the area to which the scheme relates, and imposes requirements in relation to local services by specifying them in the scheme.

The effect of making a franchising scheme or an enhanced partnership scheme may be that certain operators of local services would have to cease providing services. Sections 123X and 138S of the Act provide for TUPE to apply so that employees transfer to a new employer in these circumstances. These Regulations supplement the provisions in TUPE by making specific provisions relevant to franchising schemes or enhanced partnership schemes.

Regulation 3 defines the meaning of "principally connected" for the purposes of sections 123X(4) and 138S(4) of the Act. The employment of a person is principally connected if all parties agree that it is following the consultation process. If no agreement is made, the employment of a person is treated as principally connected if the person spends, on average, at least half of their working time in activities connected wholly or mainly with the provision of services affected by the making of the scheme.

Regulation 4 defines the meaning of "relevant information" for the purposes of these Regulations.

Regulation 5 enables an authority to request relevant information from bus operators after the scheme has been made. If an authority makes a request it must contain all the required information such as a date which the operator must respond by, which must be no later than 21 days from the

date the request was issued. If the operator considers that the request does not contain sufficient information to respond to the request it may request further clarification.

Regulation 6 provides obligations for relevant operators to provide local authorities with information they have requested within specified time periods and in certain circumstances, to update the local authority if that information subsequently changes. The regulation also provides the process that will apply where the operator is unable to fully comply with such a request.

Regulation 7 requires relevant authorities to consult employee representatives and operators about the proposed allocation arrangements. Once the consultation ends, the authorities must publish the details of the allocation arrangements.

Regulation 8 makes separate provision for a situation in which an operator ceases providing affected local services before the coming into force of the relevant local service contract or awarded contract. In this situation, the authority may propose to procure a replacement operator at short notice to ensure that services continue to be provided. Sections 123X(2) and 138S(2) of the Act provide for TUPE to apply to employees who transfer to a replacement operator as a result. This regulation requires the authority to consult on the revised allocation arrangements which it proposes to apply to the transfer of employees in this situation, and to publish the revised allocation arrangements before either issuing invitations to tender for the contract to operate replacement services, or entering into the agreement in circumstances other than accepting a tender.

A full impact assessment has not been published for these Regulations. However an assessment has been made of the impact of the Bus Services Act 2017. Copies of that impact assessment may be obtained from the Buses and Taxis Division, Department for Transport, 2/12 Great Minster House, 33 Horseferry Road, London SW1P 4DR or from the Bus Services Act page on gov.uk: https://www.gov.uk/government/publications/bus-services-bill-impact-assessments.

An Explanatory Memorandum is published alongside this instrument on www.legislation.gov.uk.

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