



Ministry  
of Justice

## **Probation Reform Programme - Updated Assignment Guidance (August 2020)**

This guidance material has been produced by the Probation Reform Programme and aims to support the transfer of staff from one organisation to another as part of the implementation of the new probation model in June 2021.

Broadly this document is broken down into five sections:

1. Introduction
2. Pre-Assignment Assessment
3. Assignment Assessment
4. Assignment Decision
5. Due Diligence Process by future employer (HMPPS-NPS)

## 1. Introduction

This guidance broadly sets out the principles of staff transfer and thereby aims to ensure that employees have a consistent experience of assignment during mobilisation.

Transfers of staff to HMPPS (NPS) will be undertaken by way of Staff Transfer Scheme(s) (based on the principles of TUPE) using powers contained within the Offender Management Act 2007.

Transfers of staff to Dynamic Framework providers will be undertaken by way of the Transfer of Undertakings Protection of Employment Regulations (TUPE).

This guidance document follows the principles already set out in the Role Assignment Guidance published previously and used for Wales in 2019 and is adapted to suit the current context in England and Wales.

### **Population scope of assignment activity**

It should be noted that employees and/or workers (as defined in section 230(3)(b) of the Employment Rights Act 1996) of the CRC, their parent organisation, supply chain and sub-contractors could be in-scope to transfer and should be considered as part of the assignment process. Employment status should be identified based on how such individuals are currently treated by the engaging organisation for employment law purposes. Eligible employees could include those on fixed-term contracts but not agency workers, independent (self-employed) contractors or sessional workers who cannot be categorised as either an employee or worker as outlined above.

The assignment outcome would only be subject to change due to: appeal, a change in role, or formal objection to the transfer by the individual.

### **Consultation**

This assignment guidance document is an authority produced / owned product that has been discussed and shared with NPS National Trade Unions.

## 2. Pre-Assignment Assessment

Employers must put arrangements in place so that line managers and potentially affected employees agree:

- the substantive role (not any temporary role e.g. acting-up or loan) held that will be used for assessment purposes; and
- what information will be used for the assessment e.g. Job Descriptions or other written information agreed by the employee and line manager;

Employers must make “special provisions” i.e. reasonable endeavours to notify employees who are temporarily absent from the workplace to include them in the assignment process;

## 3. Assignment Assessment

The assignment process will apply a general principle that ‘the people follow the work’ i.e. eligible staff (CRC staff, parent organisation staff, CRC supply chain staff, Sub-Contractor staff) in scope will transfer wherever their work transfers, provided they are assigned to an ‘organised grouping’ delivering services/activities in-scope to transfer.

When undertaking assignment current employers should refer to:

- Details of the service definitions for NPS and DF services provided by the Authority. Please see Annex A
- This guidance document including the assignment process flow chart at Annex B
- An individual's information.

All relevant substantive roles should be considered as part of the assessment, vacancies could also be considered. Where a member of staff is temporarily covering another role, they should be considered in their substantive role.

The performance and capability of employees is not relevant to the assignment process.

The following underlying assignment principles should be considered when undertaking the assessment:

- Consider if the individual's role is part of an organised grouping which has the principal purpose of carrying out the services that are transferring and whether the individual's role is assigned to that group other than on a temporary basis.
- Consider whether the role is wholly or mainly involved in delivering the activity attached to the transferring services. If a role is split across more than one activity, or covers other work not related to probation services, then the individual may not be assigned to an organised grouping or may not be wholly or mainly delivering the transferring activity, and may not transfer.
- Consider how the service is organised and arranged i.e. if the service was deliberately set up to support a particular area i.e. dedicated support or do they provide services across other elements of the future model.
- Consider the percentage of time spent on the transferring service. This will often be indicative of whether the role an employee/worker occupies is assigned to the service and in scope to transfer but will not always be determinative. There will be cases where other elements will need to be considered as part of the bigger picture. However, the general position is outlined below.
  - In the context of the Probation Reform Programme a current employee could find that their role is solely dedicated to what will in the future be one part of the future model or it could be split between activities that in the future will fit with two parts of the future model (NPS & DF).
  - Where a role is 100% focused on the transferring services / activity then it should be assigned to that part of the future model (NPS or DF);
  - Where a role is less than 100% focused on the transferring services / activity then it should be considered in one of the following ways:
    - More than 50% of time delivering one element of the transferring service/activity - assign the role to that part of the future model.
    - Less than 50% of time delivering the transferring service / activity - the role would potentially not be essentially dedicated to the transferring service / activity and may not be eligible for transfer and will not be assigned.

- Spends exactly 50% of time delivering the transferring service/activity - consider the nature and extent of work carried out during that time, is the activity shared equally or does one aspect merely take longer to carry out. The views of the role holder should be considered when arriving at the final assignment outcome.
- Where activities to be carried out following the transfer are "fundamentally the same" as those carried out pre-transfer, those assigned to such organised grouping wholly or mainly involved in the delivery of the service / activity would be in scope to transfer. The activities should not become overly fragmented i.e. the more split up the activities become between different providers the less likely it is that staff transfer will apply. The activities should remain fundamentally the same. If the work activities are fundamentally different after the transfer then staff transfer will not apply.
- In borderline cases consideration will need to be given to factors such as
  - the amount of value and time given to other parts of the business (i.e. non-probation related services)
  - the managerial responsibility held over various parts of the business (NPS or DF),
  - the internal charging mechanisms/the allocation of the cost of the employees' role to particular parts of the business
  - the description of the duties in the contract of employment (taking into account that duties may differ in practice).
  - Whether seen as an integral part of the business being transferred.

### **Absence from the Workplace**

Those absent from the workplace, for whatever reason, will generally be included in the process (maternity leave, absence, career break, secondment, suspension etc). Where an employee is on long-term sick leave, it is only where the absence can be viewed as permanent and there is no expectation that the employee will be returning to work to participate in activities that their absence will exclude them from being in scope – what constitutes a reasonable expectation of the employee returning is a question of fact. Any decision to exclude on the basis that there is no prognosis of a return to work must be managed on a case by case basis and supported by clear evidence including advice from occupational health.

Where an individual is absent from the office it will be their role immediately before the absence commenced which will be considered for the assignment process.

Where an individual is seconded out of the organisation it will be their role immediately prior to going on secondment that will be considered for the assignment process.

Where an individual is seconded into the organisation from another organisation they are not eligible to be considered for transfer as they remain the responsibility of their employer.

## Corporate Services and Support Services Roles

A service definition for corporate or support services roles has not been provided however the expectation will be that current employers use the assignment principles outlined in the assignment assessment section of this guidance document and the details of the roles based on the current operating model to undertake the assignment assessment.

Whether staff in these roles are in-scope or not may depend on the principles set out in the section above i.e. 'Assignment Assessment'.

- Whether they are part of an organised grouping
- whether they are wholly / mainly assigned to the transferring services / activity e.g. do they solely service a particular part of the future model (NPS or DF)

## Dynamic Framework

For DF the following principles should be followed when considering assignment;

- **Non- Day 1 Services** – the current working assumption is that the Non-Day 1 services will not be commissioned for the transfer date. If staff are not delivering Day 1 services they would not be assigned and would not transfer. The Authority is currently working with key stakeholders within NPS to confirm whether or not these services will be part of any regional commissioning strategy and will update current employers if this is confirmed.
- **Staff who are split across regions/PCCs or activities** - As part of the DF MVP, some of the DF Day 1 services will be commissioned at a regional level (Accommodation & ETE) and some will be commissioned at PCC level (personal wellbeing, women's services). The assignment of employees/workers that fall into this category will always be a question of fact and the above assignment principles should be followed.

## 4. Assignment Decision

Employees must be notified of the assignment outcome in writing and must be advised of their right to appeal and the timescales of this process.

### Appeals

The only grounds for appeal are:

- Incorrect substantive role used for assessment – details of the correct role need to be provided with the appeal;
- Incorrect role information used for assessment – further role information must be submitted with the appeal;
- Where a role (with the same work content / functions) is treated differently in the assignment assessment;
- Where this guidance has not been adhered to and this has materially affected the assignment decision.

Timings:

- Appeals need to have been received by the specified local submission point within 15 working days of the date of the assignment letter.

- Appeals will be considered and the outcome confirmed in writing within 10 working days of the date the appeal is received.
- Appeals will be considered by a panel which will include a minimum 2 people (different from those who made the original decision and with appropriate expertise).
- There will be no further internal avenue of appeal.

#### 5. Due Diligence by the receiving organisation (HMPPS-NPS)

Once current employers have completed the assignment, receiving organisations will undertake the necessary due diligence to confirm that they agree with the assessment of the staff assigned to transfer to HMPPS (NPS). The receiving DF organisations/successful DF bidders, will liaise directly with the current employers to validate employees/workers that have been assigned to transfer to the DF.

#### Changes following assignment

- Treatment of staff who secure a substantive job move (level transfer or promotion) after the assignment but ahead of the transfer date – if vacancies have been assigned then the successful candidate will know where the role is assigned - this will supersede their previous assignment.
  - If a new substantive role is created after the assignment process but before the date at which no further recruitment is permitted (to be agreed locally) – the new role will be considered using the same assignment assessment and the outcome will be made clear to any applicants for the role.
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#### Annex A – Service Definitions (August 2020)



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# Annex B

## Assignment flow chart

