

## THE HUMAN SIDE OF OUTSOURCING

## Government review of TUPE

## EMPLOYEE'S PERSONNEL FILE

NAME

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PRINT EMPLOYEE'S NAME

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**Kathryn Dooks and David Williams, Kemp Little LLP, look at this “mini-consultation” which forms part of the government’s promise to cut red tape for businesses.**

George Osborne’s autumn statement to Parliament announced a “call for evidence” on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”), the legislation which protects employees on an outsourcing.

### What is TUPE?

TUPE implements the European Acquired Rights Directive (“ARD”). The ARD safeguards employees’ rights where an economic undertaking or the assets of a business are transferred. In such a scenario, the contracts of employment of any employees assigned to the transferor’s business will transfer automatically by operation of law to the transferee.

The employees transfer on their existing terms and conditions of employment, with their length of service preserved. All accrued employment liabilities pass to the transferee. TUPE also requires the transferor to inform and consult with affected employees.

### Is TUPE ‘gold-plated’?

The previous Labour administration re-enacted TUPE in 2006 with the aim of providing greater certainty as to the application of the regulations to outsourcing contracts.

The concept of a “service provision change” was introduced (a concept which is not found in the ARD), which means that on an outsourcing, any employees assigned to the services immediately before the change of service provider will transfer under TUPE to the new service provider.

There has, to date, been some uncertainty about the interpretation of the “service provision change” and little case law to assist.

A service provision change occurs in three situations, broadly on an outsourcing, in-sourcing and change of

contractor. However, whether or not there is a service provision change can be a complex issue.

A change of contractor tend to be the most difficult type of case. TUPE will only apply to such cases if: “...activities cease to be carried out by a contractor on a client’s behalf ... and are carried out instead by another person (a subsequent contractor) on the client’s behalf.”

Immediately before any service provision change there must also be an organised grouping of employees in Great Britain whose principal purpose is carrying out the activities on behalf of the client.

### Government review

The government is concerned that some businesses believe that TUPE is gold-plated and overly bureaucratic. The call for evidence is a precursor to a full consultation process. Given that TUPE implements the ARD, there is only limited scope for change.

The government wants to see if there is scope to improve TUPE’s implementation of the ARD and to reduce the burden on businesses, whilst continuing to provide appropriate levels of protection for employees. The government also wants to hear about any unintended and adverse consequences on businesses or employees when TUPE interacts with other legislation.

Public sector transfers are excluded from the review, as are the separate rules protecting occupational pension rights which are dealt with in the Pensions Act 2004.

The closing date for responses to the government’s call for evidence is 31 January 2012.

Evidence can be uploaded to [www.bis.gov.uk/Consultations/call-for-evidence-effectiveness-of-current-tupe-regulations](http://www.bis.gov.uk/Consultations/call-for-evidence-effectiveness-of-current-tupe-regulations)

Should the balance of evidence call for possible changes to TUPE there will be a formal consultation on any proposed changes in 2012.