THE MERITAS GUIDE
TO EMPLOYMENT LAW ON A BUSINESS SALE
in Europe, Middle East and Africa
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INTRODUCTION

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"What I truly appreciate about working with the Meritas network is knowing that, no matter which Meritas firm I engage, I'm going to get excellent work and superb service."

Meredith Stone
Vice-President General Counsel Americas
NACCO Materials Handling Group, Inc. (NMHG)

CONNECT WITH CONFIDENCE TO A MERITAS LAW FIRM

Meritas began in 1990 as a result of a US lawyer becoming frustrated at the inconsistent service he received when referring instructions to other US states. He started to develop his own criteria for evaluating performance and service, and from those beginnings Meritas has evolved into an integrated, non-profit alliance of almost 180 independent commercial law firms located in over 70 countries.

When you work with Meritas you will have no fewer than 7,000 experienced lawyers at your disposal, all around the world, in firms that are carefully evaluated and selected and whose work is quality controlled by Meritas.

This guide has been produced by the Meritas Europe, Middle East and Africa Employment Group which is an ongoing collaboration between 34 local firms on multi-jurisdictional labour and employment law issues.

The Group also enables member firms to share information on substantive and procedural developments in their local markets, to stay current on new and emerging workplace issues and further improve client service.

For help and advice in relation to the employment law aspects of a business sale please contact the Meritas member law firm in the relevant jurisdiction in this guide. Each firm offers substantive and procedural knowledge in every facet of workforce management, including negotiating complex employee relation issues, providing advice and representation on expatriation, and merger/transfer employment issues.

ABOUT THIS GUIDE

Employee rights when businesses are sold/ transferred in Europe stem largely from the EU Acquired Rights Directive (Directive 2001/23).

So it is no surprise that there are similarities and common themes across European jurisdictions, namely;

- The automatic transfer principle (automatic transfer of employees from the old to the new owner, along with their contractual terms);
- Protection against dismissal by reason of a transfer;
- Employer obligations for employees (or their representatives) to be informed (almost all countries) and consulted (most countries) in relation to the transfer.

However, there are still many differences across European jurisdictions, including;

- Variation in the definition of a transfer of a business/service to bring it within the scope of the acquired rights regime (in many countries this will go beyond just a straight forward business sale).
- The consequences of a refusal by employees to be transferred;
- Sanctions imposed for failure to inform and consult and for dismissing by reason of a transfer;
- Rules in relation to small/micro employers.

In the Middle East and Africa the law is different again.

The purpose of this guide is to give HR managers, in-house legal counsel and commercial managers an overview of employee rights and employer obligations when businesses are transferred, so they can better negotiate and implement cross-border transactions, but also more effectively manage staff transferring in and out of different jurisdictions.

The guide answers four key questions:

1. Do employees automatically transfer to the buyer when a business is sold?
2. Are there information and consultation (or other) obligations?
3. Can a buyer change employees' terms and conditions after a sale?
4. What are the sanctions against non-compliant employers?

NETHERLANDS

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1. DO EMPLOYEES AUTOMATICALLY TRANSFER TO THE BUYER WHEN A BUSINESS IS SOLD?

A transfer of undertaking exists if an economic entity is transferred and retains its identity. In the event of a transfer of undertaking, the employment agreements of the employees transfer to the acquirer by operation of law at the date of the transfer. The employees keep the same rights and obligations. There is no need to prepare new employment agreements.

Dutch law does not explicitly distinguish between local and cross-border transfers. Case law shows that (lower) courts have assumed that the directive can be applicable in case of cross-border transfers.

The most important exception in relation to employment conditions is that the transferee is entitled to apply his own pension scheme to the employees, even if this pension scheme is less favourable than the pension scheme that was applicable to the employees prior to the transfer.

Employees can refuse to transfer but this does not mean that they can stay with the transferor. If an employee unambiguously refuses to be transferred this will result in the end of the employment contract with the transferor by operation of law. The employee will not enter the employment of the transferee.

It is not possible to exclude the rules concerning transfer of undertakings, since these rules are mandatory.

2. ARE THERE INFORMATION AND CONSULTATION (OR OTHER) OBLIGATIONS?

The works councils of the transferor and the transferee will have the right to give prior advice. If the advice is not in line with the intended decision, this can lead to delays. An employee representation group (in companies without a works council) also needs to be involved, if the transfer has consequences for at least 25% of the employees. However, if the advice has been requested the employee representation group cannot further delay the process. The employees need to be notified prior to the transfer.

Dependent on the number of employees involved, the Merger Code may be applicable. In this event, there are consultation requirements with trade unions.

3. CAN A BUYER CHANGE EMPLOYEES' TERMS AND CONDITIONS AFTER A SALE?

Changes to employment conditions are not allowed, save for changes that would have been possible without a transfer of undertaking. It is also not possible to terminate employment agreements because of the transfer of undertaking. Dismissals may be possible for economical, technical or organisational reasons (ETO reasons).

Following the transfer, any collective agreement will remain applicable until the entry into force or application of another collective agreement by the transferee, or in cases where the provisions of a collective agreement are extended by the Minister of Social Affairs. Provisions of collective agreements remain important because these are considered to be part of the employment agreement, which means that these conditions remain applicable, including after the expiration of the collective agreement, until there is an alternative agreement between the employer and the employee in relation to changes of employment conditions.

If a provision in the employment agreement stipulates the applicability of a specific collective agreement, the transferee may challenge its applicability given his right of freedom of association, which includes the right to not become a member of an employer's organisation.

4. WHAT ARE THE SANCTIONS AGAINST NON-COMPLIANT EMPLOYERS?

The employees enjoy strong protection from the law, which means that attempts to circumvent the applicable rules will be overruled by the courts. If an employer terminates the employment agreement with an employee because of the transfer, the employee can nullify this termination. In cases where the employer does not inform the employees properly, he will be liable for damages suffered by the employees.

Please be aware that the information on legal, tax and other matters contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.