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?

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

The rights of employees in cases of transfer of (or part of) an undertaking are protected under the Collective Bargaining Agreement n° 32bis (CBA 32bis). Industry level CBA's can determine specific rules for transfers of undertaking.

CBA 32bis applies in cases of a change of employer resulting from the transfer of (or part of) an undertaking or business that keeps its identity after the transfer. The change of a service provider (in cases of in- or outsourcing, for instance) can also be considered as a transfer of an undertaking when the business retains its identity after the change. Whether or not the business retains its identity is assessed by a number of factual elements, such as whether or not the business' key tangible assets are transferred, whether or not (the majority of) employees are taken over, and whether or not the brand and/or customers are transferred, etc.

The Belgian courts tend to give a very broad interpretation to the concept of transfer of undertaking.

In cases of a transfer of a business, the employment contracts of all employees assigned to the transferring (part of the) business automatically transfer to the transferee. By operation of law (ex lege) the transferee will be bound by all collective and individual terms and conditions of employment as they existed at the time of transfer, including those relating to the employees' salary, seniority, workplace, and job assignment, etc. However, certain benefits under occupational pension schemes do not automatically transfer (unless they are provided in a company collective bargain agreement – CBA), albeit the transferee must provide equivalent benefits.

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

The Works Council (or, in its absence, the trade union representatives or Health and Safety Committee) must be informed of the economic, technical or financial reasons that justify the transaction, and of its economic, financial and social consequences.

Furthermore, the Works Council needs to be consulted on any consequences of the transaction for the affected workers. In companies without any trade union representation, the employees must receive the same information directly.

In principle, this information must be given "in advance" (i.e. prior to a decision on the transfer being taken). A careful approach would require informing the employees prior to signing the (binding) LOI. However, companies often choose a more practical approach and inform employees after signing a binding agreement, but before the transfer takes place.

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

The transferee takes on the transferring employees on their existing terms of employment and can only make changes to their terms in the same (limited) circumstances as the previous employer (transferor):

- Minor changes by the transferee to non-essential individual employment conditions are possible unless such changes are excluded in the employment contract
- Substantial changes to essential employment conditions are only possible with the express consent of the employee(s) involved
- Changes to employment conditions laid down in a company CBA require the approval of the trade unions, and
- Employment conditions in industry CBA's cannot be changed by the transferee.

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

Transferring employees may not be dismissed for the sole or principal reason of the transfer. Such dismissal could be deemed unfair and due to recent legislation (since 1 April 2014) an Employment Tribunal can award up to 17 weeks' actual gross pay for each affected employee, on top of statutory termination entitlements. The employee may, however, be dismissed for an economic or technical reason, or because of his performance.

If information and consultation obligations are breached, an administrative penalty can be imposed.

Finally, the transferor and transferee may, under certain circumstances, be held jointly and severally liable for debts already existing and arising from the employment contracts on the date of transfer (such as arrears of salary and National Insurance contributions).

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.