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?

UNITED KINGDOM

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CONTACT

HowardKennedyFsi LLP
howardkennedyfsi.com

Ms. Susie Al-Qassab
Tel: +44 20 7344 5533
susie.al-qassab@hkfsi.com

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

Where there is a business transfer or a service provision change (outsourcing or insourcing or a change of provider) which is within the scope of the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), there is an automatic transfer of employees assigned to that business/provision of services from the transferor to the transferee.

Employees will transfer on their existing terms, with the exception of certain benefits under occupational pension schemes.

The transferee effectively steps into the transferor's shoes with regard to the transferring employees; so all of the transferor's rights, powers, duties and liabilities pass to the transferee.

For a business transfer to be within the scope of TUPE there must be a transfer of an economic entity (which can include a part of a business) that retains its identity after the transfer. Merely selling or transferring certain assets does not in itself amount to a TUPE transfer. TUPE does not apply to a transfer of shares. TUPE will also not apply to the supply of goods and one-off/short-term outsourcing/insourcing.

Employees who object to the transfer do not become employees of the transferee. Instead, their contracts of employment terminate by operation of law (there is no dismissal) on the transfer date.

TUPE applies where the business/undertaking being transferred is situated in the UK immediately before the transfer (even if some employees assigned to that undertaking ordinarily work outside the UK). It also applies to a service provision change where there is an organised grouping of employees situated in the UK immediately before the service provision change.

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

Both the transferor and transferee must provide certain information to their own affected employees in relation to the transfer/ service provision change and, where any measures are envisaged, consult with them through trade union representatives or elected employee representatives (if there is no recognised union) – there are legal requirements in relation to the election of employee representatives.

As of 31 July 2014, micro-businesses with 9 or fewer employees can inform and consult affected employees directly in certain circumstances.

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 limited circumstances.

Changes will be void if the sole or principal reason for the change is the transfer itself, unless either:

a) The reason for the variation is an economic, technical or organisational reason entailing changes in the workforce (including a workplace change) – a so-called ETO reason, or
b) The terms of the contract permit the employer to make such a variation.

Collective agreements are effectively *"frozen"* at date of transfer. Transferees can make changes to individual terms derived from a collective agreement one year after the transfer so long as they are no less favourable, when considered together, than the employee's previous terms. Changes that do not satisfy these conditions will be void.

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

TUPE provides enhanced protection against dismissal over and above general unfair dismissal law for employees with the qualifying period of service (currently 2 years). Dismissal will be automatically unfair if the sole or principal reason for the dismissal is the transfer itself. If, however, the reason for the dismissal is an ETO reason, then it may potentially be fair (for example by reason of redundancy).

If information and consultation obligations are breached an Employment Tribunal can award up to 13 weeks' actual gross pay for each affected employee. The transferor and transferee may, in certain circumstances, be held to be jointly and severally liable for this.

Please note that some of the fundamental TUPE employment protections are relaxed where the transferor is insolvent.

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.