



THE MERITAS GUIDE
TO EMPLOYMENT LAW ON A BUSINESS SALE
in Europe, Middle East and Africa
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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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I. DO EMPLOYEES AUTOMATICALLY TRANSFER TO THE BUYER WHEN A BUSINESS IS SOLD?

Article L. 1224-1 of the French Labour Code states that “*following a change to the employer’s legal status, in particular by succession, sale, merger or equity conversion, all employment contracts effective at the time of change shall continue between the new employer and the company’s employees*”.

This list is not exhaustive and according to case law, these provisions apply more broadly in cases of transfer of an autonomous economic entity whose activity is continued or taken over (e.g. a transfer of business). It should be noted in addition that:

- The application of the transfer rules are mandatory for all parties (employers and employees) and cannot be avoided; and
- The new employer is bound by the same obligations as the former employer at the date of transfer.

Employees transferred in application of Article L. 1224-1 of the French Labour Code continue to be entitled to their contractual benefits following the transfer of their employment contracts: they maintain their seniority, functions, classification, salary and working time and cannot claim severance pay or notice pay.

Article L. 2261-14 of the French Labour Code provides that employees transferred under Article L. 1224-1 are able to benefit from the terms of any collective agreements applicable to their employment with their previous employer (in addition to the terms provided under any of their new employer’s collective agreements) for a maximum of 15 months until a new agreement is negotiated. If no new agreement is negotiated within this time, the employees benefit from the terms of the new employer’s collective

agreements, but are also entitled to benefit permanently from any rights that they may have individually acquired under their previous employer’s collective agreements.

Any customary practices (usages) and unilateral undertakings (engagements unilatéraux) applied by the seller are automatically transferred to the buyer following the merger/transfer of business. However, the buyer is also able to revoke any such practices as long as it complies with a compulsory procedure.

The transfer of employee representatives (staff delegates, Works Council members, trade union representatives) must first be expressly approved by the labour inspector.

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

Under French Law, in terms of communication with the employees, the employer is not required to provide them with any information before the transfer takes place.

French case law considers that the European Union Directive concerning the transfer of employees' rights (EC Directive 2001/23, dated 12 March 2001) is not directly enforceable.

Nonetheless, the employer must inform/consult employees' representatives about the transfer and it is strongly recommended that shortly before the transfer and change of employer take place, a letter is sent to the employees (on a best practice basis) informing them of the transaction and of the fact that it will have no effect on their employment contracts.

Pursuant to the provisions of Article L. 1224-1 of the Labour Code, the seller does not have the right to terminate an employee's contract in order to prevent his transfer.

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


Once the employment contract has been transferred, the purchaser has the right to offer the employee the modification of elements of his contract by signing an amendment.

An amendment is necessary when the purchaser wants to modify what is called “essential elements of the employment contract” such as the remuneration, the duration of working time, or functions, etc.

The purchaser cannot unilaterally impose on the employee a modification of his employment contract. However, the purchaser is entitled to change the working conditions of the employee, without requiring his express consent (e.g. asking the employee to perform additional tasks linked to his functions, etc).

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

Employees who are dismissed shortly before the transfer – in order to prevent the transfer of the employment contracts – can request before an employment Court that their contracts continue with the purchaser (new employer) or alternatively claim for damages against the seller (previous employer).



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.