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 European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 are designed to safeguard the rights of employees when there is a change in the legal owner of the business or part of the business in which they are employed. Regulation 4 provides that when a transfer of an identifiable economic entity occurs all employees of that entity are automatically entitled to transfer over to the new entity on the same terms and conditions of employment and with continuity of service. Typically such a transfer may occur in Ireland in the following situations; contracting out arrangements, changing contractors, contracting-in an activity or in-sourcing a previously contracted out activity.

In transferring over on the same terms and conditions of employment no new contracts of employment are required but rather the existing contract of employment will be read as if it was issued by the new entity, the transferee.

The only exception to the terms and conditions that transfer over relate to pension rights. Regulation 4 (3) provides that this Regulation shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes.

In Ireland the legislation does not address a situation where an employee refuses to transfer and as such we must rely on case law for guidance. This issue was addressed in the case of *Symantec Ltd -v- Leddy & Lyons*. In this case, the issue was whether the employees had been made redundant and were entitled to statutory redundancy payments as a result of their refusal to transfer. In May 2009 the High Court held that the refusal of an employee to transfer does not result in the employee being made redundant. Consequently the employee was not entitled to any severance payment. In this instance the High Court appears to have aligned itself with the UK approach, however the decision is currently under appeal to the Supreme Court.

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

Regulation 8 sets out the requirements for the transferor and transferee to inform representatives of their respective employees of the following:

a) The date or proposed date of the transfer;
b) The reasons for the transfer;
c) The legal implications of the transfer for the employees and a summary of any relevant, economic and social implications of the transfer for them; and
d) Any measures envisaged in relation to the employees

The affected employees must be given the information, where practicable, not later than 30 days before, and in any event, in good time before, the transfer (or, in the case of the transferee, before its employees will be affected by the transfer).

In the absence of a trade union or staff association, the employer is obliged to put an arrangement in place whereby the employees elect representatives to consult with their employer in relation to the transfer.

Where there are measures envisaged as a result of the transfer that will have an effect on the employees, for example redundancies, changes in work practices, etc. the transferor must consult with the employee representatives with a view to reaching agreement.

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

The Regulations specify that where an agreement provides for a less favourable term or condition it will automatically be deemed to be modified so as not to be less favourable. This is so even where an employee consents to the less favourable term. A provision that is more favourable to an employee, however, is permissible.

It is not possible for parties to a transaction to contract out of the Regulations. Any provision in an agreement that purports to exclude or limit the application of the Regulations is deemed to be void.

In relation to collective agreements, the regulations provide that a transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

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

An employee may seek redress from a Rights Commissioner for any breach of the Regulations. The Rights Commissioners have a very broad power to require the employer to "take a specified course of action" in order to comply with the Regulations.

The Rights Commissioner may also make awards against employers of such compensation as is just and equitable, subject to the following limits:

a) Up to four weeks' remuneration for breach of the employers' obligations to inform/ consult with an employee; and
b) Up to two years' remuneration, for breach of any other provision of the Regulations (e.g. an improper dismissal or unlawful change to a term or condition of employment).

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.