THE MERITAS GUIDE
TO EMPLOYMENT LAW ON A BUSINESS SALE
in Europe, Middle East and Africa
April 2015

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?

In Austria, all labour law questions concerning the transfer of business are ruled by the Arbeitsvertragsrecht-Anpassungsgesetz (AVRAG), EU Regulations 77/187/EWG and RL 98/50/EG and the Arbeitsverfassungsgesetz (ArbVG). The AVRAG serves to protect the employee when operations are transferred and notes that a dismissal of the employee is invalid during this period.

If a company is transferred to another owner, this new owner enters into the employment contract as the new employer and assumes all existing rights and obligations.

This means that in all kinds of business transfers the employment obligations pass to the new employer as a matter of law (ex lege). The employment stays the same and is not subject to change. These rules do not however apply to national and state employees, homeworkers or employees of companies that are insolvent.

Employees can only seek a termination of their employment contract if their working conditions worsen in a significant way. The termination must only be effected by the business transfer and has to be communicated within one month after the change of employer.

AUSTRIA

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

Most importantly, the transferor or transferee has to inform the employees about their intention before the transfer including to any Works Council, if such exists. If there is no Works Council they must inform the employees affected by the transfer of business in writing, detailing the exact time of the transfer, the consequences of the transfer and any arrangements that will take place.

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

This depends on whether the transfer is a 'singular succession' or a 'universal succession'.

A singular succession means that in the course of the transfer the previous business ceases to exist. In such instances, the new contract owner/employer has to abide by the employees' current employment contracts especially concerning pension promises. In such cases, the new contract owner/employer assumes all of the legal statuses of its predecessor.

Universal succession means that in the course of the transfer the previous business continues to exist. In such instances, the new contract owner/employer, under certain circumstances, may not have to abide by any previous pension promises.

In both instances, the terms of the prevailing employment contract continue to apply.

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

Non-compliant employers face the risk of administrative penalty proceedings with considerable possible fines of up to €7,500. Furthermore, employees have the possibility to claim damages as a consequence of a non-compliance.

Especially if employment contracts are terminated in violation of the legal provisions, the employee can claim a compensation.

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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).

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

Employment relationships are automatically transferred by law in the following cases:

a) Merger of undertakings;
b) Distribution of the business of one undertaking between two or more undertakings;
c) Transfer of part of one undertaking to another undertaking;
d) Change of the legal form of the undertaking;
e) Change of the owner of the undertaking or a part of it; and
f) Transfer of the business of an undertaking to another, including transfer of assets.

In general all transferor's rights and obligations arising from a contract of employment existing on the date of the transfer shall, by reason of such transfer, be transferred to the transferee.

In cases of transfer as a result of merger or change of the legal form of the undertaking, the transferee shall be solely liable with respect to all employer obligations to the employees that existed before the date of transfer from a contract of employment existing on the date of the transfer. However, in all other cases of transfer the transferor and the transferee shall be jointly liable with respect to all employer obligations that existed before the date of transfer from a contract of employment existing on the date of the transfer.

On transfer, all employees' rights and obligations remain unchanged. However, if the working conditions became substantially worse after the transfer, the employees would be entitled to terminate their contracts of employment immediately without prior notice.

Drafting of new employment contracts is not needed. Although considering the change in the identification data of the employer, it is necessary to sign annexes to the existing employment contracts to reflect the change of the employer.

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

The transferor and transferee are required to inform the representatives of their respective employees and the representatives of syndicate bodies, if any, affected by the transfer of the following:

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

Where there are no representatives, the information must be provided to the employees concerned directly.

This information must be given at least two months prior the transfer. Where the transferor or the transferee envisages changes affecting its employees, it must consult the employees' representatives on such measures in the same two-month period with a view to reaching an agreement.

The obligations apply irrespective of whether the decision resulting in the transfer is made by the employer or an undertaking controlling the employer. In considering alleged breaches of the information and consultation requirements, the argument that such a breach occurred because the decision for the transfer was made by another body is not acceptable as an excuse.

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

After the transfer the employment relationship is retained and continues to exist unchanged. Any changes in the employees' terms and conditions post-transfer could be executed by the transferee as a new employer on the basis of the general provisions of the Labour Code and following the specific legal requirements for such changes.

Following the transfer, the 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 signing of a new collective agreement but no longer than one year after the change of the transfer.

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

For breach of the obligation to provide information and to consult with employees, both the transferee and the transferor could be sanctioned to fines between €760 - €2,600. The responsible officer, unless subject to a more severe punishment, may be fined between €130 - €510.

Any other breaches of the relevant legal provisions may result in sanctions ranging between €760 - €7,700. The responsible officer, unless subject to a more severe punishment, may be fined between €550 - €5,200.

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

In accordance with the Czech Labour Code, it is only permissable to change the rights and duties owed under an employment relationship by mutual consent between the employer and the employee.

Thus, any merger, separation, change of legal form of the employer, transfer of assets to an associate, relocation of the registered office abroad, or sale of an establishment or part thereof, entails the automatic transfer of rights and duties under the employment relationships of the current employer to the transferee. The rights and duties under the employment relationships are transferred in full to the transferee.

The Code does not permit any contractual exclusion or modification by the employers as regards provisions relating to the transfer of rights and duties under the employment relationships. Employees, on the other hand, are not entitled to prevent the transfer of the employment relationships, but the employer is obliged to discuss the circumstances of the transfer with the trade union and any Works Council, or to inform the affected employees in advance.

In the case of cross border transfers, where the participating employer's relationship with the employees is governed by Czech law, the Czech Labour Code shall prevail over the transfer of the rights and duties of the employer.

CZECH REPUBLIC

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

Both the transferor and the transferee must give sufficient advance notice before the entry into force of the transfer of any rights and duties under an employment relationship (and in any event, with a minimum of 30 days' notice), and inform the trade union and any Works Council, and discuss with them the following matters in order to arrive at an agreement:

- the stipulated or proposed date of transfer
- the reasons for the transfer
- the legal, economic and social consequences for the employees, and
- any proposed measures in relation to the employees.

If no trade union or Works Council exists, both the transferor and the transferee shall communicate within the same time limits the above information to any employees who will be affected by the transfer.

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

The transferee cannot unilaterally change any rights and duties implied by the employment agreements of the transferred employees. As indicated above, such changes can only be effected based on an agreement with the employees or under the rule of law. The transferee shall, however, be entitled to any and all acts which the transferor was entitled to in accordance with the Labour Code, valid employment agreement, or approved internal regulations. The employer shall therefore be entitled to organise and supervise work of its employees, for instance, by modifying working hours or rest periods.

If an employee gives notice within two months of entry into force of the transfer, or if the employment is terminated by agreement within the same time, the employee can file a suit with a court of law claiming that the employment was terminated due to a fundamental decline in the working conditions in relation to the transfer of the employment relationship.

The duties of the transferee under Article 3 Section 3 of Directive 2001/23/EC are part of the Czech legislation as stipulations of § 338 Section 2 of the Labour Code. Therefore the transferee shall continue to observe the rights and duties agreed in any collective agreements for the period of operation of this agreement, but said period shall be limited by the end of the calendar year that follows after the year of acceptance of the rights and duties by the transferee.

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

Both the transferor and the transferee must give sufficient advance notice of any transfer and of the consequences for any employees affected. If information and consultation obligations are violated, the employer can be penalised by a fine of up to €7,300 per employee.

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

The Egyptian Labour Law No. 12 of 2003 (Labour Law) governs all employment issues. In addition however, several Ministerial Decrees also govern the employment relationship. The Labour Law and its Decrees aim to increase private sector involvement while at the same time achieving a balance between the rights of employees and employers.

According to Egyptian law, in the case of a transfer of shares of an Egyptian entity, the employment contracts of the employees working for such entity will remain valid and will not be affected by the transfer, as the entity itself will still exist and remain as the employer.

Under this principle, the Labour Law provides under Article (9) that in case of a merger, spin-off, sale or transfer of an entity, the employment contracts of the employees are not affected or terminated. The successor and the former employer are jointly responsible for implementing all the obligations under the employment contracts.

Hence, the transfer of shares does not prevent the transferee from fulfilling the obligations under the existing employment contracts, as they remain in force and binding with all accrued years of service, benefits and rights; the employees' rights should not be reduced, altered or changed. All the liabilities and obligations resulting out of the employees' employment contracts and internal regulations with the transferor will be transferred to the transferee, who will remain liable to satisfy such obligations and liabilities.

An employee cannot refuse the transfer of shares. Nevertheless, the employee may submit his resignation and terminate the employment relationship in case of refusal, and in such circumstances, no compensation will be due to be paid by the employer.

However, if the employer/seller sells one of its businesses/activities, the employees will remain employed by the employer/seller and will not be transferred with the sale of business.

Accordingly, if the buyer, in a business sale scenario, wishes to take over the employees relating to the business, new employment contracts need to be executed between the employees and the buyer in its capacity as the new employer. Before executing said new employment contracts, the existing employment contracts must be terminated. The seller is solely responsible for terminating the employment contracts and for compensating the employees to avoid any potential claims.

Alternatively, no compensation is payable if the seller and the buyer agree that the buyer offers the employees the same salaries and benefits and agrees to take the employees' seniority with the seller into account. In such a case, employment agreements shall be transferred to the new entity practising the transferred activity. Hence, there is no automatic transfer of employees in the case of sale of a business.

The employees of an Egyptian entity will not be affected in the case of a cross border transfer.

EGYPT

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

There is no obligation under the Labour Law to notify the employees or their unions about the transfer of shares of an entity or the sale of business. Hence, the notifying of employees is not necessary.

However, in the case of a business sale and the buyer desires to take over the employees related to the business, new employment contracts may be executed by the new employer and employees, provided that all accrued entitlements are paid to the employees. Thereafter a copy of each new employment contract should be deposited with the competent social insurance office. If the buyer offers to the employees the same salaries and benefits and agrees to consider the employees' seniority the buyer shall proceed to the competent labour office with the sale of business documents and other related documents to change the seller/former employer's name to the buyer/new employer's name.

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

In the case of the transfer of shares, the transferee may not amend any of the terms or conditions of the employment contracts to reduce employees' rights and benefits, nor can they amend the employee's internal regulations. However, if the amendments will be in the employees' interest and benefit, then the transferee may amend the terms and conditions of the employment contracts. The criterion is the reduction of the employees' benefits and rights, even where the employees' consent was obtained.

In the case of the sale of a business, the new employer may execute new employment contracts with different terms and conditions at its sole discretion and in accordance with the provisions of the Labour Law.

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

In the event that the employer does not comply with the procedures provided by law, the employee may claim damages as a consequence of non-compliance.

Pursuant to the Labour Law, the amount of compensation is to be determined by the Labour Court upon the employee's request for compensation. The compensation should not be less than two months' full wage for each year of service (counted as the previous years of service with the former employer), in addition to any other entitlements (i.e. accrued leave, bonus, and others, if any).

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1. 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.

FRANCE

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).

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

Section 613a of the German Civil Code (Bürgerliches Gesetzbuch) determines employers' and employees' rights and duties in cases of a business transfer.

The transferor's employees automatically transfer to the transferee at the moment the establishment is transferred, so no further action or agreements are necessary. Existing terms and conditions as well as all the statutory and contractual employment rights and liabilities remain. As the transferee steps into the employment relationship on equal terms, he is basically liable for any duties. However, together with the transferee, the transferor is jointly and severally liable for those duties that have already arisen prior to the date of transfer and are due before the end of one year after the date of transfer.

Rights and duties arising from collective bargaining agreements and/or works agreements do not transfer if other collective bargaining agreements and/or works agreements apply to the transferee.

Employees can object to the transfer of their employment without giving reason. In case of objection, the employee will continue his employment with the transferor. If the transferor is no longer in a position to offer a job to the employee a dismissal for operational reasons may be socially justified.

Section 613a of the Code is a mandatory provision. Neither the transferor nor the transferee can deviate from the rules to the employees' detriment. The Federal Labour Court has ruled that section 613a of the Code may also apply if a business is transferred from Germany to a location abroad.

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

According to Section 613a para 5 of the German Civil Code either the transferor or the transferee must notify the employees affected in written form prior to the transfer of the business about the:

- date or planned date of transfer
- reason for the transfer
- legal, economic and social consequences of the transfer for the employees, and
- any measures that are taken into consideration with regard to employees.

Furthermore, the employees must be informed about their right to object to the transfer of employment. The information must be given prior to the transfer, albeit the Code does not contain any specific provision regarding the time of notification. If any Works Council exists, it has to be informed about the intended transfer of business.

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

The transferee cannot unilaterally change the employees' terms and conditions. It may however negotiate new terms and conditions with individual employees.

If the employees' and employers' rights and duties are governed by a collective agreement or by a works agreement they become part of the employment relationship between the transferee and the employee and may not be altered to the disadvantage of the employee before the end of the year after the date of transfer. However, prior to the expiry of this period the rights and duties may be altered if the collective agreement or the works agreement no longer applies or, where it is not the case that both parties are bound by a collective agreement, a new collective agreement is agreed between the new owner and the employee.

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

Most breaches of law result in the invalidity of the actions taken (e.g. dismissal because of the transfer, unilateral change of terms of employment, etc). Employees who are dismissed shortly before the transfer – in order to prevent the transfer of the employment relationships – have a claim to be reinstated under their previous contractual conditions by the transferee of the business.

Furthermore, if an employee was not properly informed about the transfer he can object to the transfer of employment for an indefinite period of time. In case of objection, the employment relationship will automatically revert to the transferor. Moreover, the employee may, under certain conditions, claim compensation for damages suffered due to the insufficient notice of the transfer.

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

Directive 98/50/EC relating to the safeguarding of employees rights in the event of transfers of undertakings, businesses or parts of businesses was transposed into Greek law via Presidential Degree 178/2002. The latter applies to every contractual or statutory business transfer, merger, takeover or acquisition of a company or any part of it to another employer. It does not apply to ships and vessels, to share deals, bankruptcy or other insolvency proceedings of the transferor as well as to transfers within the public sector.

In the event of cross-border transfers, in addition to Greek law the applicable European legislation should be taken into consideration.

The protection provided by law covers all the transferor's employees with an effective employment contract at the date of the transfer, whether it is for a fixed or indefinite term (e.g. suspended employees, trainees, employees on leave, etc). All existing rights and obligations of the transferor relating to employment agreements or relationships are automatically transferred on the transfer date.

Until completion of the transfer both the transferor and the transferee will be jointly and severally liable for all obligations arising from any employment contract/relationship. Upon completion of the transfer the transferee shall be bound by all employment terms including collective bargain contracts (CBC) and arbitral decisions, but they are entitled to terminate or modify any private insurance scheme in case the relevant costs are disproportional to the transfer.

Transferred employees reserve the right to terminate their employment contracts before or after the transfer and are always entitled to resign.

GREECE

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

The employee representatives should be informed about the transfer, the date and reasons of the transfer, any potential consequences (social, economic, legal, etc) affecting the employees, and the measures to be taken so that any negative consequences may be prevented.

The transferor should inform the representatives prior to the transfer, while the transferee must provide information to them before the transfer directly affects the employees. The employees' consent is not considered as a prerequisite for the transfer.

Consultation procedures between the transferor, the transferee and the employee representatives are required prior to the transfer. Such consultation should entail a discussion in relation to any measures that may affect the employment conditions. The consultation should be carried out in good faith in view of reaching a consensus, whose failure shall not prevent the transfer.

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

The transfer should not affect the terms and conditions of employment agreements/ relationships or any employee rights and obligations existing at the time of the transfer.

This rule refers, inter alia, to the employee's salary, professional development issues, voluntary benefits, rights in relation to the years of service (i.e. severance payment), etc. The transferee is not entitled to introduce any detrimental changes to the employment terms and conditions without the employees' prior consent. In any case, it is a factual issue whether any amendments to the employment contracts are detrimental or equivalent to the formerly applicable.

CBCs can be renegotiated by the transferee even in situations where the changes are detrimental to the employees. The transferee will, however, be bound by the former CBC for a period of six months after its termination.

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

In cases where the transferor or the transferee fails to properly inform and consult with the employee representatives a fine ranging between €147 - €8,804 may be imposed.

Employees may not be dismissed by the transferor or the transferee for reasons relating to the transfer. If this does occur, the dismissal will be considered illegal and unfounded. However, dismissals in compliance with the national Labour Legislation are permitted.

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

The Hungarian Labour Act defines a business transfer in line with the provisions of EC Directive 2001/23 of 12 March 2001. As such the rights and obligations arising from employment relationships existing at the time of the transfer of an economic entity (organised grouping of material or other resources) are transferred to the transferee employer.

This means that if it is established that by way of a transaction an organised group of resources are transferred, and this group of resources maintains its identity, then the business transfer takes place automatically and the parties cannot elect to opt out from the automatic transfer provisions.

Any effected employees have the right to terminate their employment relationship with regard to the business transfer for cause within 30 days, if the transfer involves a substantial change in working conditions to the detriment of the employee, and in consequence maintaining the employment relationship would entail unreasonable disadvantage or would be impossible. In such an event, the employee will be eligible for all the allowances he/she would get in a case of termination of employment by the employer (i.e. severance payment, time allowance, etc).

It is to be noted however, that if the transfer takes place in the context of a liquidation procedure then different rules will apply.

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

The most important obligation of the transferor and the transferee is that they give notice of the transaction to the employees or, if applicable, to the Workers' Council in advance.

In addition, the transferee is required to inform the employees of any changes to their work conditions within 15 days following the closing of the transaction. It is important to note that both the transferring and the receiving employer will be jointly and severally liable in respect of any employee obligations that arose prior the date of transfer, if the employee submits a claim within one year from the date of transfer.

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

Within the frameworks set out by the relevant legal provisions, the employment contract and, if there is one, a collective agreement, the employer is entitled to unilaterally define and redefine certain aspects of the employment (i.e. the daily work schedule, any allowances and benefits payable on top of the base salary, or other benefits or specific responsibilities relevant to a certain role, etc).

The transferee may decide to change such conditions (bearing in mind the relevant notice requirement and the employee's right to terminate) but any issues that are regulated in the employment agreement itself can only be modified by mutual consent of the parties.

Section 282 of the Labour Code additionally sets out that the receiving employer is required to maintain the conditions specified in any collective agreement existing at the time of transfer for a period of one year after the date of transfer. This does not apply if the collective agreement expires within one year after the date of transfer, or if the employment relationship is covered by a collective agreement after the date of transfer. Previously, the work schedule was exempt from such an obligation however the new legislation has made it clear that it does now apply to the work schedule.

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

The key risk is that the employee or the Workers' Council may challenge the unlawful action of the employer in court.

In cases where there has been a business transfer by law but the receiving entity has not taken on the employees of the transferring entity, the court may rule that the existing employment contract was terminated contrary to the provisions of the Labour Code without a justified cause and apply the sanctions available for unlawful termination (including a requirement to pay the equivalent of up to 12 months' average salary).

As a general rule, an employee may not however claim that his employment contract be reinstated – given that both the transferor and the transferee have joint and several liability.

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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).

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

According to Article 2112 of the Italian Civil Code it is considered as a transfer of business any operation or transaction, leading to a transfer of a business or of a part of it, with or without profits, irrespective of the means used for said transfer, including the usufruct or the lease of business as well as of companies' merger or spin-off.

The above provisions apply to any operation involving a change in the "ownership of an organized economic entity" concerning the production or the exchange of goods and services, included the transfer of only a part of an undertaking.

A transfer of a part of business occurs where the transferred complex of goods objectively appears as an entity having an organizational and economic autonomy finalized at the performance of an activity for the production of goods and services.

Italian Case Law states that a transfer of business takes places also in the case that it concerns only a group of employees, provided that such employees are permanently coordinated and organised between them and they have a special know-how (e.g. transfer of the employees working in tax collection service). In such a case it is not necessary that, together with employees are transferred further assets or contracts. In such a case it is not necessary that, together with the employees, are transferred to other assets, so that the operation is considered in all respects a transfer of business.

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

Should the transfer concern an entity (or a part of it) employing more than 15 people on the whole (regardless of the number of employees to be actually transferred), a compulsory joint consultation procedure with Trade Unions must be put in place by each party of the transfer, by giving a formal notice to Trade Unions at least 25 days before the implementation of the takeover.

Article 47 of Law 428/1990 lays down a timing such as to allow to anyway conclude the procedure before the transfer becomes effective.

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

The employment relationships continues with the transferee on the same terms and conditions as with the transferor, preserving all previous rights deriving from their labour contracts.
Transferor is bound to apply contractual and economic terms and conditions (either collective or corporate) in force at the transfer date up to their expiration date, except that the above-mentioned agreements are substituted by other same level contracts in force in the transferee enterprise. In this case, the new collective agreements applied by the transferee will govern the employment relationships of the employees transferred after the date of transfer.

Should a transfer involve significant changes in an employee's position, the employee can resign for "cause" within a three month period following the transfer and he is entitled to receive payment in lieu of notice.

Transfer of a business does not constitute a "justifiable reason" for dismissal of one or more employees working in the business or branch being the object of the transfer. The transferor and transferee remain jointly and severally liable for all entitlements the employees had at the time of the transfer, unless the employees themselves release the transferor from his obligations by special proceedings provided by Law.

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

In the case that the transferor and/ or the transferee fail to comply with the aforementioned consultation procedure, the Unions can start a quick proceeding before a Court in order to obtain a declaratory judgement of anti-union behaviour and may go as far as to force the parties of the transfer of business to restart the consultation procedure.

The failure of the procedure does not affect the legal effectiveness of the transfer, but the non-compliance of the Court order can result in criminal penalties for legal representatives both of the Transferor and the Transferee.

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

Kenyan law is generally silent on employee rights/employer obligations in the event of a transfer of businesses. It seems therefore that the sanctity of the contract between the transferor and transferee prevails.

However, in the realm of mergers and acquisitions of companies listed on the Nairobi Stock Exchange (NSE) Kenyan law does make provision for some employee rights/employer obligations. Other rights are accorded and obligations imposed as a matter of practice.

There is no automatic transfer of employee rights/employer obligations to an acquirer on a business combination except where the employer company is taken over, in which case there is no change of employer, merely a change in its shareholders.

Under Section 9 of Kenya's Banking Act the transfer of employment contracts of employees of the institutions involved is implied.

KENYA

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

The transferee in its takeover offer document must state its intentions with regard to the continued employment of the employees of the transferor company.

If there are to be redundancies notifications need to be given to the local Labour Office and to the Ministry of Labour.

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

It is common practice for the terms of the transaction agreements to provide for the acquirer of business assets to undertake to offer to hire all staff of the business on like terms and to honour all past-service obligations.

The terms of any applicable collective agreements need to be respected when determining rights of employees and obligations of the employer.

If the target company has in place retirement benefit schemes for its workforce the Retirement Benefits Act must be complied with in terms of transfers of benefits or assets of the scheme, or the establishment and registration of new retirement schemes.

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

If the acquirer does not take on the employees it would have to terminate their employment and compensate them.

A claim may be maintained against the acquirer for unfair/unlawful termination or declaration of redundancy for:

- the equivalent of a number of months' wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of termination;
- reinstatement;
- reengagement, or
- damages.

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

A transfer of undertaking is defined by Article L.127-1 of the Luxembourg Labour Code as any transfer of an undertaking, business, or part of an undertaking or business, to another employer as a result of a legal transfer or merger, a succession, hiving-off, conversion of a business or conversion into a company.

According to Article L.127-2, a "transfer" happens when an economic entity which retains its identity and that constitutes an organised grouping of resources, including employees and equipment, is enabled to pursue an economic activity, central or ancillary.

Under Article L.127-3 the rights and obligations arising for the transferor of a contract of employment or of an employment relationship existing at the date of the transfer shall, by virtue of that transfer, be transferred to the transferee. This means that all rights and obligations arising from the employment contract existing on the date of the transfer shall be retained in full by the transferee.

Both transferor and transferee may be held mutually responsible with respect to their obligations after the date of transfer.

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

In accordance with Article L.127-6 of the Luxembourg Labour Code, both transferor and transferee shall notify, in due course before the transfer, to the employees' representatives (or the employees themselves where the company consistently employs less than 15 people) the:

- date or proposed date of the transfer
- reasons of the transfer
- legal, economic and social implications of the transfer for the employees, and
- any measures envisaged in relation to the employees

Furthermore, where the transferor or the transferee envisages measures in relation to its employees, it shall consult the employee representatives in due course on such measures with a view to reaching an agreement.

It is also to be noted that the transferor must notify to the transferee, in good time, all the rights and obligations that are transferred to him. A copy of this notification has to be sent to the Luxembourg Inspectorate of Labour and Mines (*Inspection du Travail et des Mines*).

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

The transferee may modify the employees' terms and conditions unilaterally after the transfer of the employment contracts.

As a general rule, amending working conditions is not subject to any formality except where the employer chooses to amend the employment contract to the disadvantage of the employees and where the envisaged amendment concerns an essential clause in the employment contract.

In order to protect employees' rights, the amendment of an essential clause to the disadvantage of the employee is subject to a number of formalities that must be complied with by the employer in accordance with the provisions of Article L.121-7.

In principle, any amendment to an employment contract must be drawn up in writing (as an addendum to the employment contract). The transfer of undertaking cannot be considered as a valid ground for the modification of an essential clause of the employment contract.

It is also to be noted that in accordance with Article L.127-3, following the transfer, the 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?

If the transferee does not comply with the formalities when modifying an essential clause of the employment contract, the amendment to the contract becomes null and void.

In such a case, the employee may oppose the amendment and refer the matter to the Labour Court to confirm that it is null and void and, once this confirmation is made, return to work as if the amendment had never been made.

The employee may also claim for damages if the transferee does not have valid grounds for the modification of an essential clause of the employment contract, or for the termination of the employment contract.

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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.

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POLAND

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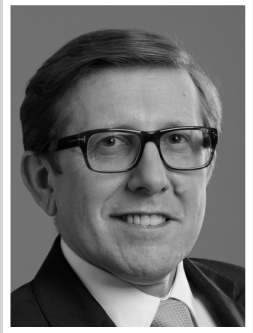

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1. DO EMPLOYEES AUTOMATICALLY TRANSFER TO THE BUYER WHEN A BUSINESS IS SOLD?

Upon a transfer of (or part of) an undertaking to another employer, employees are automatically transferred thereto. Consequently, the transferee becomes a party to any existing employment relationships by operation of law, and the transfer is neutral for the employees. Employees cannot effectively oppose such transfer to the transferee.

The transferor and transferee cannot effectively void any effects of the transfer regarding employees – any agreement to do so will be held to be invalid and ineffective.

A transfer of employees can also occur upon a cross-border transfer involving a Polish employer of employees.

The individual employment contracts of any transferring employees and all provisions of internal legal acts of the transferor (e.g. work and salary rules; collective agreements, etc) resulting in claims (e.g. for bonuses or fringe benefits) are transferred to the transferee. Such provisions somehow supplement the employees' individual employment relationships. However, the transferor's internal acts are not transferred to the transferee.

The transferee is not obliged to conclude new employment contracts because the existing contracts will remain in force in the existing wording.

Within two months after the transfer to another employer, any transferring employee can terminate their employment with seven days' advance notice. The effect of such termination for the employee is the same as termination by the employer with notice under the relevant labour law.

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

The main obligation of the transferor and transferee is to notify their own employees of:

a) The planned date of the transfer of (or part of) an undertaking to another employer;
b) The main reasons for the transfer;
c) The legal, economic and social effects on employees; and
d) Any planned measures regarding employees' employment terms, especially the terms of work, pay and re-qualification.

If trade unions operate at the employer's business they should be so notified. Likewise, if the existing or transferee employer intends to start actions affecting employees, it should negotiate an agreement on that with the unions. Such notice should be given in writing no less than 30 days before the planned date of the transfer.

If there is a workers' council at the employer's business it should be notified of and consulted about the planned transfer, however its opinion as to the merits/ demerits of such a transfer is not binding.

In certain cases, upon the transfer of an undertaking, part or all of the resources, receivables and payables of the transferor's social security fund should also be transferred to the transferee. In certain cases, an agreement on that should be executed.

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

As a rule, following the transfer of employees, the transferee can unilaterally change their terms of work and pay but must justify it properly (e.g. in order to avoid unequal treatment between new and existing employees (discrimination)). The transfer per se cannot be a reason for the change.

If a collective agreement applied at the transferor business, its provisions giving rise to claims, taken over by the transferee, cannot be changed unilaterally for a year after the transfer. Thus, they can be changed following the first anniversary.

Terms of work and pay can always be changed by mutual agreement, i.e. upon the employee's consent.

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

Failure to notify trade unions of the planned transfer is a misdemeanour punishable with a fine up to PLN 1,080,000 or freedom limitation.

Upon such transfer, the transferor should take steps to promptly eliminate any differences in work or pay terms of both transferring and existing employees, even if such changes may result in the (dis)advantage of individual employee groups. Failure to take such steps may result in a breach of the ban on discrimination and liability in damages of the transferor.

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

Pursuant to the Portuguese Employment Code, there is a transfer of an undertaking when there is a change of ownership of an undertaking or establishment or part of an undertaking or establishment that constitutes an economic unit, regardless of its cause (e.g. sale, break-up, merger).

An economic unit is defined by law as an organised set of resources aimed at the pursuit of a principal or ancillary economic activity.

The law expressly sets out that the assignment or the retrocession of the right to run a business that is an undertaking, establishment or economic unit is also considered to be an undertaking transfer.

Whenever an undertaking is transferred and is expected to maintain its functioning identity, there is an automatic assignment of the employees to the transferee, except for those that have been temporarily moved to work in the undertaking. The contractual terms and conditions that governed the employment relationship with the transferor should be maintained irrespective of the transfer of the undertaking.

Therefore, the transferee automatically assumes the transferor's rights and liabilities as soon as the transfer of the undertaking is concluded. This automatic effect cannot be objected to by the transferee nor waived by means of an agreement with the transferor.

Notwithstanding the above, during the year following the transfer of the undertaking, the transferor and the transferee are jointly and severally liable for the payment of the employees' entitlements, which have become due before the transfer.

However, the transferee is entitled to require the transferor to reimburse the amounts the former was called to pay by the employees.

Furthermore, any collective bargaining agreement to which the transferor was bound, applies to the transferee until it expires or, at least, during the 12 months following the transfer, except if another collective bargaining agreement commences to apply to the transferee in the meanwhile.

It should also be highlighted that liability for paying any fines imposed on the transferor by the Portuguese Working Conditions Authority for a breach of employment law is assigned to the transferee (the transferee is, however, allowed to require the transferor to reimburse the amounts paid).

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

When a transfer of an undertaking is envisaged, both the transferor and the transferee should inform the representatives of the employees (Works Council, trade union committees or trade unions representatives) or, if these do not exist, the employees themselves, of the date and grounds of the transfer, its legal, economic and social consequences and the envisaged measures affecting the employees.

The information should be provided in writing with reasonable notice (no less than 10 days prior to the transfer). Additionally, both the transferor and transferee should consult the representatives of the employees with a view to agreeing upon the measures to be applied as a consequence of the transfer.

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

Existing employment agreements are automatically transferred to the transferee, who is bound to comply with the same conditions as apply to the transferor.

Nevertheless, this does not prevent the transferee from changing some limited aspects of the employment relationship where the law or the applicable collective bargaining agreements generally allow the employers to unilaterally alter the terms under which work is rendered by the employee (e.g. workplace changes or the definition of the working schedule). The transferee cannot change or withdraw the employees' acquired rights.

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

A refusal to accept the liabilities associated with the transferred employees or the violation of the consultation and information obligations are deemed to be infringements, which may lead to a fine being imposed by the Portuguese Working Conditions Authority.

The amount of any fine may vary according to the seriousness of the infringement, the turnover of the liable entity and the degree of guilt.

Generally, the employees may resort to court to enforce the applicable legal provisions.

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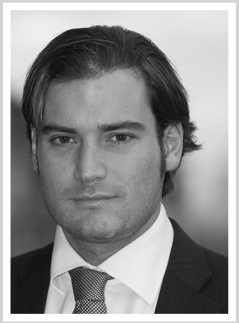

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1. DO EMPLOYEES AUTOMATICALLY TRANSFER TO THE BUYER WHEN A BUSINESS IS SOLD?

According to Spanish Law, in the event of a transfer of undertaking the new employer shall subrogate in the transferor´s rights and obligations. In these situations, when a transfer of undertaking takes place, all employees' rights are transferred to the new employer, including seniority, salary, Social Security obligations, and all working conditions, so there is no need to draft new contracts. This is an act of national application and is regulated in the Workers Statute.

Furthermore, the transfer of undertaking takes place, in accordance with Spanish law, when the transfer affects an economic entity that retains its identity, meaning an organised grouping of resources, which has the objective of pursuing an economic activity.

To determine whether there has been a transfer, a change in the company ownership is necessary and the transfer must affect an economic entity that retains its identity and continues its business activity.

In certain situations, employees can refuse the transfer so they remain working for the transferor, if the transferor continues its activity. These situations usually take place in cases of sub-contracting.

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

According to Spanish legislation the transferor and the transferee are required to provide employee representatives with the following information, in cases of a transfer of undertaking:

a) The date of the sale;
b) The reasons for the sale;
c) The legal, economic and social implications for the employees; and
d) Any measures intended to be applied upon the transfer of undertaking.

In the event of there being no employee representatives the transferor and transferee should directly inform employees affected by the transfer of the abovementioned required information. This information should be provided with sufficient notice.

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

The transferee may change the employees' terms and conditions upon a transfer of undertaking if there are justifying business grounds and only after 15 days' consultation.

This 15-day consultation period must be performed with the employees' representatives and is intended to allow a period of negotiation of any measures to be applied upon the transfer of undertaking. This consultation period must take place before said measures are implemented and the parties have the obligation to negotiate in good faith.

With regard to the Acquired Rights Directive 2001/23, its content is regulated in the Workers Statute. Relations between the employers and employees affected by the transfer of undertaking will continue to be regulated by the Collective Agreement in force at the time of the transfer. This Collective Agreement will be applicable until its validity expires or a new applicable Collective Agreement is enforced.

In those cases in which the business maintains its identity, the employees' representatives will continue to retain their current roles and duties.

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

The transferor and the transferee will retain joint and several liability for any breaches of the employees' rights and obligations that take place within three years after the transfer. The parties will also be jointly and severally liable for the obligations that arise after the transfer of undertaking when said transfer is considered a criminal offence.

SWITZERLAND

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

When an employer transfers their business or part of the business to a third party transferee, all rights and obligations arising out of the employment contracts are automatically transferred from the date of the transfer.

Thus, all employee rights and obligations generally continue to exist unaltered. This particularly applies to any entitlements that are based on the duration of the employment relationship.

Employees are entitled to decline the transfer. In such a case, the employment relationship ends after the statutory (not the contractually agreed) notice period has lapsed. The employees and the transferee are obliged to fulfil the contract until the termination date.

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

In cases of a transfer of business or part of a business the transferor is obliged to inform the employees' representatives or Works Council, or if no such Council exists, all employees of the following:

- the reason for the transfer, and
- the legal, economic and social implications of the transfer for the employees.

If measures are intended to be taken that will affect the employees (e.g. a change of working conditions), the obligation to provide information is converted into an obligation to conduct a consultation procedure with the Works Council, or if no such Council exists, with all employees. This consultation obligation entails a duty to enter into a dialogue with all employees in order to include them in the transfer process.

Furthermore, the law imposes a joint liability on the transferor and the transferee for all claims arising out of the employment relationship that have already become due prior to the transfer or that will become due until the time the employment contract could be ordinarily terminated.

This joint liability represents a mandatory provision and cannot be altered by any agreement between the transferor and the transferee. However, it is possible and advisable to set up an internal indemnification scheme for such claims between the transferor and the transferee in the business transfer agreement.

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

It is generally possible to amend employment terms. This can be done with immediate effect with the employees' consent to the change. Without the employees' consent, employment terms can only be amended unilaterally under observance of the applicable notice periods. If a collective labour agreement is applicable to the transferred employment relationships, the transferee must respect the provisions of the agreement for one year from the date of the transfer (if the collective labour agreement has not already ended prior to this date due to expiration or termination).

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

The law does not state any specific sanctions if the information or consultation obligations are breached. However, the employer may become liable for damages sustained by the employee as a consequence of a breach of such obligations.

If the transfer occurs in the context of a merger, a carve-out or an asset deal, the employees are entitled to enforce their consultation rights by preventing the execution of the transaction itself.

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

When an undertaking/business is transferred to a new entity all existing employment contracts are automatically transferred to the new entity. The transferee becomes responsible for all rights and obligations arising from said employment contracts. The transferor remains jointly and severally liable for two years after the transfer.

As a general rule, neither the employee nor the former and new employer (the transferor and the transferee) can terminate employment contracts based solely on the fact that a transfer has occurred. If the new employer wants to terminate the contracts he must do so based on one or more of the general grounds for termination provided for in the Labour Code. The transfer of a business is not one of these reasons.

The employees can refuse to go with the business and thus terminate their employment contract if the transfer results in major material changes in the essence of the employment relation, such as location, working schedule and hours, nature of business, etc. In such a case, employees may be considered to have justified reasons to terminate their contracts.

The employee must be notified in writing of the change of employer. It is recommended to obtain a written acknowledgement.

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

The Transferor must notify the employee in writing of the change of employer.
It is recommended to obtain a written acknowledgement from the employee. If the transfer of business results in major changes in the essence of the employment relation, it is also necessary for the Transferor and/or the Transferee to obtain the written consent of the employee for each of those changes. In the absence of such consent, the employees may terminate the employment agreement on justified grounds.

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

The transferee cannot unilaterally worsen the employment terms and conditions post-transfer. Nevertheless, it is always possible to unilaterally improve the terms of employment agreements to the benefit of the employees. Note that all changes to the material/essential provisions of the employment contracts require the written consent of the employees.

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

If the employer without a justified reason terminates an employment contract, the employee can claim that the termination was unfair and request an order from the court to be reassigned to his previous post. In that case that such a request is upheld the court would additionally:

a. award unemployment compensation equal to four months' salary, and
b. order the employer to re-employ the employee within one month, on the same terms of employment as before.

The employer may refuse to re-employ in which case it would pay the terminated employee a one-time compensation. According to the current case law the amount of such compensation ranges between 4 and 12 months' salary.

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UAE

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

Except in cases where there is a complete transfer of ownership of a company, there is no automatic transfer of employees and their rights when undertakings (businesses/ contracts) are transferred in the United Arab Emirates (UAE). However, there are a number of practical details that must be considered.

In such situations, there is a transferor (Company A) and a transferee (Company B). Company B is not obliged by UAE law to transfer any of the employees from Company A. However, if Company B decides to retain Company A's employees post-transfer, Company B must allow the employees to decide whether they want to continue their employment with Company B. In any case, all of the employees' UAE residency visas sponsored by Company A will need to be cancelled by Company A and re-processed under the sponsorship of Company B.

If an employee terminates his employment, Company A is obliged to pay the end of service gratuity due to the employee under UAE Federal Law No (8) of 1980 (known as the UAE Labour Law). If any employee wishes to continue his employment with Company B, they must be allowed to decide between the following two scenarios:

a) They receive their end of service gratuity from Company A and then begin a new employment contract under Company B; or
b) Company B will sign an undertaking stating that at the end of the employee's tenure, Company B will pay the end of service gratuity for the employee from their original start date with Company A.

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

There are no obligations under UAE law for the transferor and transferee businesses with regard to informing and consulting transferring employees.

Practically speaking, the businesses will notify employees of the transfer in order to arrange for end of service gratuity payments to employees not wishing to continue their employment with Company B.

Company B will be responsible for sponsoring the UAE residency visas and adhering to the employment contracts of any transferring employees.

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

Company B may renegotiate employment contracts post-transfer however changes may not be made unilaterally. Both Company B and the employees must agree to any employment contract changes. Should there be any changes to an employment contract, both Company B and the employee must sign an addendum to the labour contract. The new employment contract must then be registered with the UAE Ministry of Labour.

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

Should there be any breach of any provision under the UAE Labour Law, the employee can file a claim with the UAE Ministry of Labour. The Ministry of Labour will conduct mediation between the employer and the employee. Failing a resolution during mediation, the employee may file a claim with the Dubai Courts. It is at the discretion of a judge at the Dubai Courts to make a ruling on the merits of the case.

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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.