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## Spain: Employment protection in relation to business transfers

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Spain

Phase:

Management

Type: [Employment protection in relation to business transfers](#)

Last modified: 24 October, 2017

Native name:

**Estatuto de los Trabajadores / Law 12/2001 de medidas urgentes de reforma del mercado de trabajo para el incremento del empleo y la mejora de su calidad**

English name:

**The Spanish 'Workers Statute' / Law 12/2001 on urgent measures to reform the labour market for increasing employment levels and the improvement of the quality of work**

### Article

Article 44 of the Spanish 'Workers Statute' modified by article 2 of Law 12/2001 for the improvement of the quality of work

### Description

Spanish legislation only applies to transfer of undertakings if the transfer affects an economic entity that retains its own identity and autonomy. Accordingly, a change of ownership (e.g. merger) which changes the employer's legal entity does not fall within the definition of business transfer. Outsourcing is also excluded from the framework of transfers of undertaking, except in instances where the new employer acquires the basic infrastructure.

The economic entity must consist of an organised group of means aiming to carry out an economic activity, whether essential or auxiliary, and must have autonomy in terms of conducting its own activities. Under Spanish law, two specific factors must be shown in order to trigger such rules. These are:

- the objective factor: the tangible delivery of all the elements which are essential to enable the undertaking to continue to operate, and
- the subjective factor: the substitution of the old employer for the new one. It is not necessary that there is a contractual relationship between them.

If the transfer involves the transfer of labour contracts alone, the rules will not apply. In such cases the explicit consent of the employees is required, not of their representatives.

In general, all employees are covered under the legislation. According to the Statute of Workers, employees are 'employed workers that carry out a voluntary and remunerated labour activity within an organisation and under the direction of another (natural or legal) person, named employer'. However, it is unclear if this extends to apprentices and seconded employees.

All obligations enshrined in the employment contract (both permanent and fixed-term contracts) are transferred to the new employer without change, including benefits and pension contributions as agreed. Employees on temporary contracts are entitled to the same rights and benefits as permanent employees. Moreover, the transferee is also liable for all debts incurred by the previous owner, particularly those arising from employment claims.

If the employees are covered by a collective agreement, this agreement will remain in place until it expires, or until a new agreement can be reached with unions.

### Comments

Article 44 of Spanish Workers Statute transposed the European Directive 2001/23/EC. It provides that, in case of transfer of undertaking, the contract will not be cancelled and the new employer will be liable with regard to the contractual obligations. Moreover, if employees are covered by a collective agreement, this agreement will remain in place until it expires, or until a new agreement can be reached with unions.

In the pre-crisis period, most juridical and case law debates focused on those cases where it was needed to analyse if the undertaking, business or part of an undertaking preserved its autonomy, as a result of the different implications provided in the law and the Directive 2001/23/EC. If autonomy is preserved, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before (Article 44.5 Spanish Workers

Statute).

During the Great Recession, however, common transfers of undertakings were replaced by transfers involving companies facing economic problems. Due to those circumstances, in recent years the courts have detected cases whereby transfers of undertakings were declared void for being assessed as fraudulent transfers aiming to reduce the workforce. In some cases, the courts have declared void collective dismissals implemented before the transfer. In other cases, the courts declared void the dismissals or modification of working conditions implemented after the transfer.

#### Cost covered by

Not applicable

#### Involved actors other than national government

Trade union  
Works council

#### Thresholds

No, applicable in all circumstances

#### Sources

- Desdentado Bonete, A. (2002), 'La sucesión de empresa: una lectura del nuevo artículo 44 del Estatuto de los Trabajadores desde la jurisprudencia', Revista del Ministerio de Trabajo y Asuntos Sociales, n. 38.
- Expansión (2015), 'Sucesión de empresa: el nuevo foco de problemas laborales', 18 June
- Law 12/2001
- Statute of Workers' Rights
- Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses
- Implementation Report Directive 2001/23/EC on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses

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