

## **Information and Consultation**

Over a number of decades, most countries in Europe adopted local legislation making compulsory information and consultation mechanisms between employer and employee. The UK remained determined to take a laissez faire approach. However in 2002, the EU adopted a directive that put an end to this traditional position.

The directive was incorporated into UK legislation in the Information and Consultation of Employees Regulations 2004. The measures are being phased in over time. In 2005, businesses 'carrying out an economic activity' with 150 or more employees had a new duty to set up information and consultation mechanisms if formally requested to do so by their employees. From 6th April 2007, the Regulations will apply to businesses with 100 or more staff, and from 6th April 2008, to businesses with 50 or more staff. The purpose of this article is to highlight the main elements of the Regulations and dispel a few myths.

This article is written for employers who do not have any existing agreements with their workforce already in place.

### **Overview**

The Regulations aim to encourage social dialogue between employers and employees by encouraging employers to inform and consult with their employees on an on-going basis about matters that may affect them. Informing and consulting with your employees should not affect your power to manage your business. Your duty is to inform and consult, not to negotiate and agree.

The Regulations set out a time frame and the basic principles for reaching an information and consultation agreement. The parties are relatively free to decide the format and content included in the agreement. From the point where you or your employees decide that you should have an information and consultation mechanism, you have six months to come to an agreement with your employees on the format and content of the consultation. If no agreement can be reached that the Regulations will impose a default statutory scheme.

The most important element of the Regulations is that if you and your workforce do nothing, the Regulations will **not** impose an automatic duty to inform and consult on you **nor** do they impose a duty to consult with trade unions.

### **Counting your Employees**

The Regulations only take effect when you have reached a specific number of employees (currently 150, dropping to 100 in April 2007 and 50 in April 2008). The first step to deciding whether these Regulations will affect your business is to count your employees. How do you count your employees? Firstly, you only count employees – contractors and agency workers are not included. If you have part time employees that work for 75 hours or less a month (roughly 17 hours per week), you can count them as half of a full time employee. If you have an unstable work force, what matters is the average number of employees over the 12 months preceding the request to consult.

Secondly, the total number of employees employed in a group of companies is irrelevant. What is important is the number of employees in each individual company. This means that, while overall you may have 100 or more employees, if they are split between a number of companies, the Regulations will not apply to your group. In other member states, there is a substantial body of anti-avoidance case law on the issue of splitting up businesses into separate companies. Similar issues may in time affect the UK.

### **Initiating Negotiations on an Agreement**

Your duty to inform and consult will only be triggered in one of the two circumstances below:

1 You decide to commence negotiations. You may decide that it would be helpful to have a forum for discussion on changes to the business. This may be particularly helpful in circumstances where you intend to make changes to the business that will have a significant impact on the workforce.

2 Employees decide to commence negotiations. Employees can only force the issue if 10% of employees submit a written request (either one request or a number of requests from different employees over 6 months). 10% will obviously depend on the number of employees that you have, but it is subject to a minimum of 15 employees and a maximum of 2,500. A request must be in writing, and state the names of the employees making it as well as the date on which it is sent. Requests may be sent directly to the employer, or to the Central Arbitration Committee (“CAC”) which will handle them on their behalf if the employees want to act anonymously. If neither of these two conditions are met, you will not be under any obligation to try to establish an agreement.

### **Workforce Representatives**

Within three months of receiving a valid request, you will have to make arrangements for employees to appoint workforce representatives. Who are your workforce representatives? They are employees of the company and are not required to be union members. How are workforce representatives chosen? There are no rules in the Regulations about how they should be chosen as long as all employees can participate or be represented. Representatives can be elected or appointed. How many representatives should you have? Unless the statutory scheme is imposed on you, you and your employees can agree the number of representatives. Once representatives are chosen, you will invite them to commence negotiations.

### **Content of Negotiated Agreement**

Within six months of receipt of the valid request from employees (or within an agreed extension of this period) the parties are expected to have decided on the content of the negotiated agreement. The Regulations let parties determine the content for themselves but in order to be valid, the agreement must:

a) set out the circumstances on which the employer must consult – there is freedom to decide subject matter, frequency, method and timing;

- b) provide for appointment or election of representatives or direct consultation with all employees or both;
  - c) cover all the employees in the company;
  - d) be signed by the employer;
  - e) be approved by the employees – this is by having all employees sign the agreement, or the agreement is signed by a majority of the representatives with written approval of 50% of the employees, or 50% of employees vote in a ballot to approve the agreement.
- Once the agreement is agreed, no further negotiated agreement can be requested for three years.

### **The Statutory Scheme**

If you and your employees fail to reach an agreement within six months of receipt of the request (or by the end of any agreed extension of time) or if you ignore a request, then the statutory scheme under the Regulations will automatically apply. The default scheme is as follows:

#### *Workforce representatives:*

You will be responsible for organising a ballot to elect workforce representatives. The scheme requires that you have one representative for every 50 employees or part thereof with a minimum of 2 and a maximum of 25.

#### *The content of the agreement:*

- i) You will have to inform only on recent and probable development of the business activities and economic situation;
- ii) You will have to inform and consult on the situation, structure and probable development of employment within the business and on any anticipatory measures envisaged, in particular, where there is any threat to employment;
- iii) You will have to inform and consult on decisions likely to lead to substantial changes in work organisation or in contractual relations with a view to reaching agreement.

#### *Timing of information and consultation:*

The information should be provided in time for representatives to be able to study proposals and prepare for consultation. This means that the information should be provided in time to meet relevant layers of management and respond to it. This could be problematic when business decisions need to be made more quickly than the consultation process can move.

### **Confidential Information**

The subject matter of consultation often includes market sensitive information, which if it became public knowledge in your industry, could cause serious damage to your business. This is one of the main reasons why employers are reluctant to embark on consultation. The Regulations give two ways you can help protect confidential information.

You can place your workforce representatives under a duty of confidentiality and the Regulations provide that it will be a breach of a statutory duty to disclose information that you have stated to be confidential. It could be a fair reason for dismissal if an

employee breaches this duty. While it may be satisfying to sack the culprit, this alone is unlikely to be sufficient protection for your business.

More helpfully, you will also be permitted to withhold information where the effect of the disclosure will be sufficiently serious to justify doing so. This will be in circumstances where the disclosure could damage the functioning of the business or be prejudicial to it. Litigation on this matter will be heard by the CAC.

### **Enforcement**

What happens to you if you do not comply with your new duty to inform and consult? Your employees may complain to the CAC. If the complaint is upheld, the CAC can order the employer to take certain steps to rectify their breach of the Regulations. It can also impose a penalty of up to £75,000.

### **Conclusion**

While the idea of having to inform and consult with your employees may seem intimidating, in fact, certain employers believe it is very good for staff morale and ultimately, productivity. If you do not wish to initiate discussions regarding consultation, you will only have to do so if a valid request is made by your employees. If you ever receive a request from your employees to initiate consultation, it should not be ignored and legal advice should be sought.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0207 831 5052, or email us at [info@employease.co.uk](mailto:info@employease.co.uk).

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