

Changes to the information and consultation of Employees Regulations 2004

The Information and Consultation of Employees (ICE) Regulations were introduced on 6 April 2005. They place employers under a duty to inform and consult with their employees on a regular basis in relation to issues such as a businesses economic situation, current and prospective employment prospects and business decisions that could lead to substantial changes in either work organisation or the contractual relationship between an employer and its employees.

Initially, the ICE Regulations only applied to businesses with 150 or more employees. On 6 April 2007 this increased to businesses with 100 or more employees and from 6 April 2008 they will apply to all businesses with 50 or more employees.

Claire Say highlights the key issues contained in the ICE Regulations.

The requirement to inform and consult employees, in accordance with the ICE Regulations, does not operate automatically. It is triggered by either a formal request from employees for an Information and Consultation (I&C) Agreement or by employers choosing to start the process themselves.

Where there are existing arrangements or agreements for employee information and consultation, these may be

retained provided they have sufficient workforce support. The ICE Regulations therefore give employers the flexibility to tailor information and consultation arrangements to suit their own circumstances. Employers can either wait for a valid employee request for an I&C Agreement, review their current information and consultation systems or introduce new employee consultation arrangements for the first time.

A valid employee request for an I&C Agreement must be made by at least 10% of the businesses employees, subject to a minimum of 15 employees and a maximum of 2,500 employees. On receipt of a valid request an employer must commence negotiations for an I&C Agreement within three months, starting first with the election and appointment of employee negotiating representatives. Once these representatives have been appointed, they and the employer have six months within which to reach an agreement, although this period can be extended if both parties so wish.

A negotiated agreement must set out (i) the circumstances in which the employer will inform and consult with its employees, (ii) cover all the businesses employees, (iii) provide for information and consultation with either employee I&C representatives or employees directly and (iv) be in writing and signed by both the employer and its employees.

Where negotiations for an I&C Agreement fail to lead to an agreement or where an employer fails to respond to a valid employee request for an I&C Agreement standard I&C provisions, as set out in the ICE Regulations, will apply. These require employers to elect by ballot employee I&C representatives.

In either circumstance employers are not obliged to follow an I&C representative's opinion, decision making remains the responsibility of management. Employers may, on confidentiality grounds, restrict the information that they provide to an I&C representative if this is in the legitimate interests of the business. Further, in certain circumstances employers may also withhold information altogether from I&C representatives where this would otherwise be prejudicial or could potentially cause serious harm to the business.

In the event that there is a pre-existing information and communication agreement with employees, provided this is valid an employer will not always need to negotiate a new one. A valid pre-existing agreement must be (i) in writing, (ii) cover all the employees in the business, (iii) set out how the employer will inform and consult the employees and their representatives and (iv) be approved by the employees.

However, where there is a pre-existing agreement and a valid request for an I&C Agreement is received an employer must hold a ballot to determine if the request is endorsed by its employees, if they do not they will be obliged in any event to negotiate a new agreement. Where a ballot is held and 40% of employees, plus the majority of those who vote, support the employee request an employer must negotiate a new agreement. If, however, fewer than 40% of employees endorse the employee request, the employer will not be under any obligation to negotiate a new agreement, the pre-existing

agreement will remain in force and there will be a three year moratorium on further employee requests being made.

If employers fail to comply with negotiated I&C Agreements and/or the standard provisions, complaints can be made by employees to the Central Arbitration Committee. Where a complaint is upheld against an employer they could become liable to a fine of up to £75,000, payable to the Secretary of State.

In conclusion, the ICE Regulations allow for flexibility in the way employers can inform and consult with their employees. Employers should remember that consultation involves employers actively seeking and then taking account of the views of employees and/or their representatives before making a decision. This means giving enough time and information to allow I&C representatives to consider issues and form a view, which the employer then genuinely and conscientiously considers.

ACAS guidance suggests that employers should inform and consult with their employees to improve organisational performance, management performance and decision making, employees' performance and commitment, levels of trust, job satisfaction and work-life balance. There are many ways in which employers can communicate with employees including holding small group meetings with departmental managers, intranet bulletins, email, team briefings, monthly newsletters and, in larger organisations, joint consultative committees or staff councils. Managers and employees may need training if such consultative committees are to work effectively for all parties.

If you would like any further information or are interested in any of the training programmes that RadcliffesLeBrasseur can provide please contact Sejal Raja at sejal.raja@rlb-law.com or Claire Say at claire.say@rlb-law.com

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