

BRIEFING NOTE

Information and Consultation of Employees Regulations 2004

On 6th April 2005 the Information and Consultation of Employees Regulations ("Regulations") came into force. Here are some important facts to note:

- The Regulations will effect all organisations employing more than 50 employees (although this is being phased in between now and April 2008).
- By April 2008 it will only need 5 employees to trigger negotiations under the Regulations.
- 75 per cent of employees in the UK work for an organisation which employs 50 or more employees.
- The maximum penalty for non-compliance with the Regulations is £75,000.

What is it all about?

The Regulations require employers with 50 or more employees to negotiate with employee representatives with a view to agreeing and producing an information and consultation agreement ("I&C agreement"). The I&C agreement will set out parameters for ongoing provision for informing and consulting with employees or their representatives.

Who is affected?

The Regulations are in fact being phased in over a number of years and will apply to:

- Undertakings with 150 or more employees from 6 April 2005
- Undertakings with 100 or more employees from 6 April 2007
- Undertakings with 50 or more employees from 6 April 2008.

For the purpose of the Regulations an undertaking covers a separately incorporated entity, such as a company or partnership, rather than an organisational entity such as an establishment, division or business unit.

How are the Regulations triggered?

The Regulations apply automatically, but have no affect until triggered. The Regulations will only be triggered when:

- A written request is made, in a certain prescribed form, by at least 10 per cent of the employees (that will be just 5 employees from 2008) to negotiate an I&C agreement ("Valid Request"); or
- The employer issues a written notification that it is seeking to negotiate an I&C agreement ("Employer Notification").

A Valid Request need not be filed as one single request but may be made up of a series of requests over a six months period.

Once you have received a Valid Request you must initiate negotiations for an I&C agreement. You will have three months from receiving a Valid Request to make arrangements for employees to appoint or elect negotiating representatives. There will then be a further six months (which can be extended by agreement) to negotiate an I&C agreement.

What should a negotiated agreement cover?

A negotiated I&C agreement may cover more than one undertaking, or provide for different arrangements in different establishments. The Regulations set out some basic minimum requirements for I&C agreements:-

- The agreement must set out the circumstances in which the company will (or will not) inform and consult their employees, such as frequency, method (either directly or through representatives or both) and matter;
- Provide for the appointment or election of information and consultation representatives or provide that the company must inform and consult the employees directly;
- Be in writing and dated;
- Cover all employees in the undertaking;
- Be approved by the employees. Either signed by all negotiating representatives or by a majority of the negotiating representatives and be approved by at least 50 per cent of the employees in the undertaking (either in writing or a ballot satisfying statutory conditions).

What if the negotiations fail?

Where agreement cannot be reached within the time limit or an employer fails to initiate negotiations when required to do so, the standard information and consultation provisions will apply by default. The Regulations require the Company to inform and at times consult the employees on the following:-

1. Information on the recent and probable development of the undertaking's activities and economic situation.
2. Information on the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking.
3. Information on decisions likely to lead to substantial changes to work organisation or contractual relations.

It is considered that most companies will want to avoid the standard procedures as they are prescriptive. However, as they are also prescriptive for employees, as they may not provide them with what they want, they too may want to avoid falling back on the standard procedures.

An interesting point to note, however, is that under the Regulations if a negotiated agreement or standard procedure is in place it will be a breach of statutory duty for an individual who has an obligation of confidentiality placed upon him by the employer, in relation to the information under the Regulations, to disclose that information. The employer will be able to sue the employee for any damages as a result of his breach. This statutory right is not available to pre-existing agreements.

What if you already have a pre-existing agreement in place?

If you receive a Valid Request for a new I&C agreement and you already have a 'valid' pre-existing agreement in place (please note that pre-existing does not mean before April 2005 but before a Valid Request or an Employer Notification) then you must do one of two things, either:-

- Initiate negotiations for a new I&C agreement; or
- Put the matter to a ballot of the workforce. If 40 per cent of the workforce agree with the request then the employer must begin negotiations with the negotiating representatives. If not then the pre-existing agreement remains in place.

To be a 'valid' pre-existing agreement under the Regulations it has to follow a prescribed form. If you already have a pre-existing agreement in place we will be happy to review it for you to check whether it is 'valid' under the Regulations.

To conclude...

The key for employers is that they should work out what sort of arrangement would work for them and to start introducing, even informally, arrangements which suit both the employer and the employees. By doing so, employers will have worked out what is required in any formal arrangements. Perhaps more importantly, this will also enable an employer can create a working arrangement which is valued by employees and which they would not give up in favour of the default provisions that the standard I&C agreement would provide.

We are advising our clients, who employ over 50 employees or are likely to employ over 50 employees by April 2008, that now is the time to consider the Regulations rather than waiting for the applicable category to be phased in. If you have no arrangements in place for informing and consulting employees then we will be happy to draft a pre-existing I&C agreement. One of the conditions of a 'valid' pre-existing agreement is that it is approved by the employees, therefore, the employees should be consulted with prior to the implementation of the agreement. If the employees are happy with the agreement there will be little chance of them making a Valid Request.

If there is no agreement or arrangements in place (or there are but they are informal) and the relationship is such between management and the employees that you feel the risk of a Valid Request is minimal then you may consider waiting and seeing what happens. If a Valid Request is made, you will still have up to nine months to come to a negotiated agreement. If, however, you fail to come to an agreement then the standard procedures will apply and regulate what you **must** inform and consult your employees on.

As with most recent employment legislation these Regulations will only be a problem if ignored.

April 2005