# INFORMATION & CONSULTATION

## A GUIDE TO THE LAW

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## INTRODUCTION

**The Information and Consultation of Employees Regulations 2005 come into force on 6 April 2005, implementing EC Directive 2002/14 on Information and Consultation in the Workplace.**

Where negotiating procedures are triggered under the regulations, employers are placed under new obligations to inform and consult with appointed information and consultation representatives, on an ongoing basis, on potentially wide-ranging employment-related developments.

Those obligations are backed up by sanctions including the issue by the Central Arbitration Committee of enforcement notices, and, ultimately, the imposition of penalties of up to £75,000 by the Employment Appeal Tribunal.

However, even where a union is recognised, union representatives do not automatically become the information and consultation representatives. Negotiating representatives elected by the whole workforce negotiate an information and consultation agreement with the employer, which provides for the appointment or election of information and consultation representatives, or for information and consultation directly with employees (or both).

Although the regulations provide opportunities for unions to access new, enforceable information and consultation rights, there is the possibility of appointment of non-union information and consultation representatives, which could have the effect of diluting union influence.

Unions will want to consider how the new rights will fit in with existing recognition, collective bargaining and consultation arrangements.

In this guidance supplement, we give a brief overview of the regulations.

## WHEN DO THE REGULATIONS APPLY?

The regulations will apply to undertakings with:

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

An "undertaking" means any "public or private undertaking carrying out an economic activity, whether or not operating for gain".

This is similar to the definition in TUPE and will include most parts of the public sector (except where the dominant function of the body is administrative).

The number of employees employed by an undertaking is calculated using the average for the previous twelve months. This is important to establish whether or not (1) the regulations apply; and (2) the 10 per cent threshold to initiate the negotiating procedure has been met.

Employees or employee representatives can request information about the number of employees employed by the undertaking. That request must be complied with within one month.

## INITIATION OF THE PROCESS

The process can be initiated either by employees or by the employer.

### THE "VALID EMPLOYEE REQUEST"

A valid employee request must be in writing, sent to the employer's head office or the Central Arbitration Committee, and specify the date on which it was sent.

The request must be made by 10 per cent of the employees, subject to a minimum of 15 and a maximum of 2,500.

There is a three-year moratorium on employee requests (and employer notifications) where there is already in force a negotiated agreement, or the standard information and consultation procedures apply, or an earlier request was not endorsed in the ballot in circumstances

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where there was a valid pre-existing agreement, unless there have been "material changes" in the undertaking.

### SUPPORT FOR THE REQUEST

If the request is made by more than 40 per cent of the workforce, the employer has to start negotiating new information and consultation arrangements.

If the request is made by between 10 per cent and 40 per cent of the workforce, and a "pre-existing agreement" exists, the employer must either hold a ballot to see if the employee request is endorsed, or start negotiating new information and consultation arrangements.

If the employer decides to hold a ballot, it must inform the employees as soon as reasonably practicable and within one month of the employee request, and then hold the ballot as soon as possible; and within 21 days of telling the employees.

If a majority of those voting in the ballot, and 40 per cent of the employees, endorse the request, then the employer has to start the negotiation process. Otherwise, the request lapses and the pre-existing arrangements continue.

### "PRE-EXISTING AGREEMENTS"

A pre-existing agreement is one that was entered into before an employee request has been made and:

- is in writing
- covers all of the employees of the undertaking
- has been "approved by the employees"
- sets out "how the employer is to give information to the employees or their representatives and to seek their views on such information".

The DTI guidance suggests that employee approval may be by way of a simple majority in a ballot of the workforce; or (in smaller organisations) a majority of employees' signatures; or by the agreement of a majority of representatives of employees who represent a majority of the workforce (eg trade union representatives).

Provided that they satisfy these criteria, existing recognition agreements can be valid "pre-existing agreements". European Works Council agreements do not count as pre-existing agreements .

## NEGOTIATING A NEW AGREEMENT

If the request proceeds, the employer must initiate negotiations.

### INITIATION OF NEGOTIATIONS

As soon as reasonably practicable (and within three months), the employer has to arrange for the appointment or election of negotiating representatives by all employees so as to ensure that representation is provided for all employees, tell the employees who the negotiating representatives are and invite the representatives to negotiations.

Negotiations can last for up to six months, or such longer period as may be agreed.

### NEGOTIATED AGREEMENTS

A negotiated agreement must:

- set out the circumstances in which employers will inform and consult employees
- provide either for the appointment or election of information and consultation representatives
- be in writing and dated
- cover all the employees in the undertaking
- be signed by, or on behalf of, the employer
- be approved by the employees.

Employers and representatives are free to agree on the subject matter, method, frequency and timing of information and consultation – although the standard information and consultation provisions are a good starting point – see below.

The negotiating representatives do not have to be elected from the whole workforce under the negotiated agreement.

They can also decide that the employer will communicate directly with employees.

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A negotiated agreement will be approved if either:

(1) all the negotiating representatives sign it, or

(2) a majority of the negotiating representatives sign it, and either 50 per cent of the employees approve it in writing or vote in favour in a ballot.

## STANDARD INFORMATION AND CONSULTATION PROCEDURES

If the employer fails to initiate negotiations, or no agreement is reached within the six months (or extended period), then the standard information and consultation procedure apply.

The employer must arrange for a ballot to elect the appropriate number of information and consultation representatives – one per 50 employees, subject to a maximum of 25 and a minimum of two.

The employer must then provide the information and consultation representatives with information on:

(a) the recent and probable development of the undertaking's activities and economic situation

(b) 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

(c) decisions likely to lead to substantial changes in work organisation or in contractual relations.

The employer must then consult on (b) and (c).

That information must be provided at an "appropriate" time to enable the representatives to conduct an adequate study and prepare for consultation. There are additional provisions setting standards for the quality of the consultation.

## CONFIDENTIAL INFORMATION

Where a negotiated agreement is entered into, or the standard procedures apply, specific rules apply in relation to confidential information disclosed (or withheld) by the employer:

- if the employer imposes a duty of confidentiality, then a failure to observe it is a breach of statutory duty
- individuals can challenge a duty of confidentiality at the Central Arbitration Committee, which will determine whether the disclosure "would, or would be likely to, harm the legitimate interest of the undertaking"
- an employer can withhold information on the ground that disclosure would "seriously harm the functioning of the undertaking, or be prejudicial to it".

## ANTI-VICTIMISATION AND TIME OFF

Negotiating representatives and Information and Consultation representatives have rights and protections, including:

- the right to paid time off
- the right not to be unfairly dismissed
- the right not to suffer a detriment.

## ENFORCEMENT

Complaints are usually made to the Central Arbitration Committee, which will decide upon, for example:

- what counts as an undertaking and how many employees are employed in it
- whether the employer has failed to provide data on numbers of employees
- whether ballots have been held in time in compliance with detailed requirements
- whether the appointment or election of negotiating representatives was valid
- whether an employer has failed to comply with a negotiated agreement or the standard information and consultation provisions.

If an employer fails to comply with a negotiated agreement or the standard information and consultation provisions, then application can be made to the Employment Appeal Tribunal for a penalty notice for up to £75,000.