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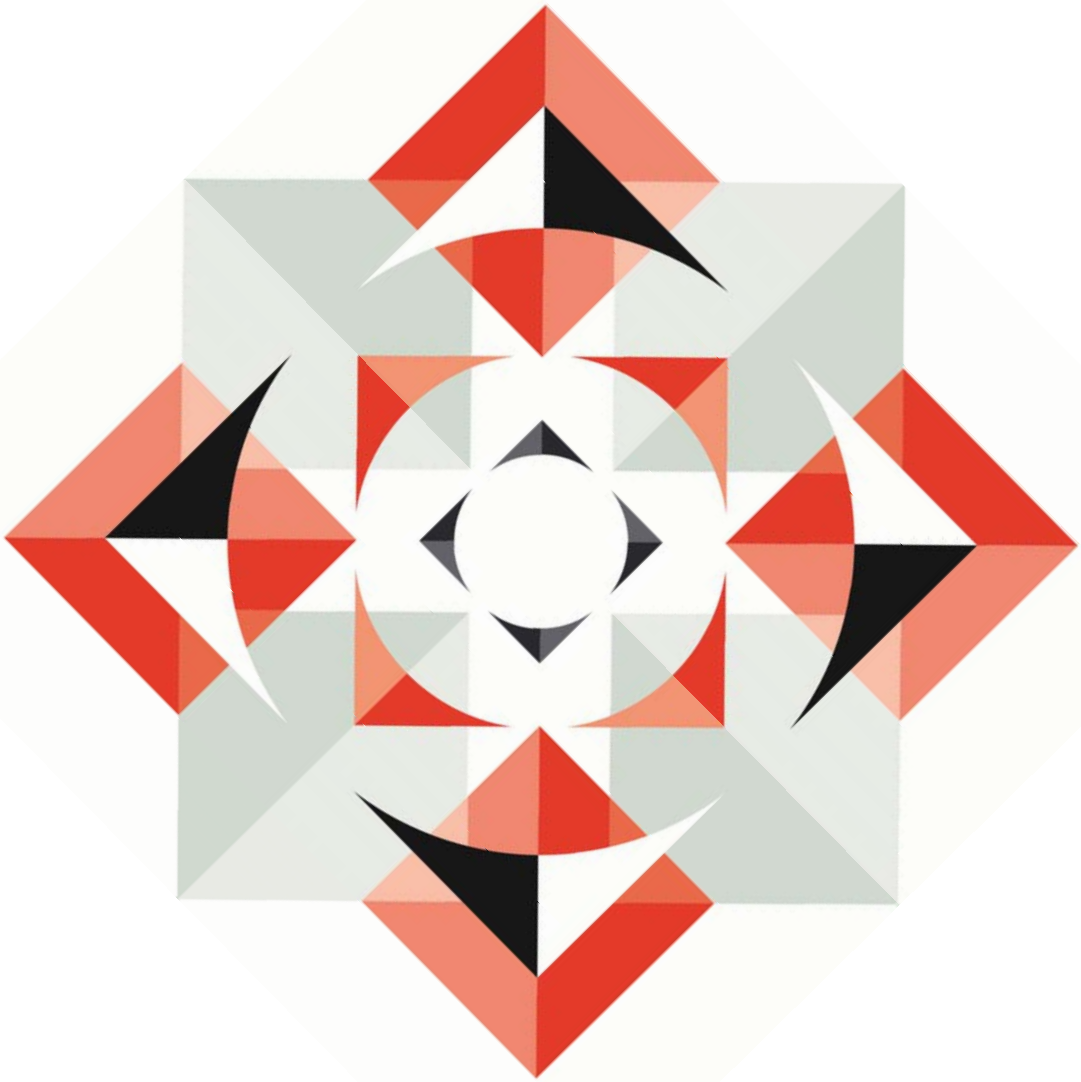
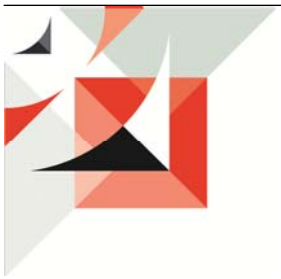
Information and consultation



Inside



Introduction

The Government implemented the EU Information and Consultation Directive by bringing into force the Information and Consultation of Employees Regulations 2004 on 6 April 2005. This Inbrief summarises this piece of legislation and explains the implications for employers.

The legislation requires employers to set up formal arrangements for consulting employee representatives on business developments—but only if employees ask for them. These arrangements are commonly called 'works councils', which is what we call them in this Inbrief.

The Government believes that employee involvement leads to high achieving and successful businesses. Its general approach is to accommodate business and encourage agreement between employers and workers. Employers have considerable flexibility in shaping arrangements, but these must be agreed with staff. If they are not agreed, burdensome 'default' provisions on information and consultation apply.

Although there can be advantages to employers in taking the initiative and setting up works council arrangements (explored below), there is no requirement to do anything until employees make a request. Different considerations will apply to different employers and the best approach will depend on their particular circumstances.

How many employees?

The legislation applies to employers with 50 or more employees.

If asked to do so by any employee, an employer must provide information on employee numbers.

How it works - in brief

In outline, the process works as follows:

> Employees trigger an employer's obligations by making a request to the employer to start negotiations

> The employer is then under a duty to arrange for the election of negotiating representatives from amongst its employees

> The employer and negotiating representatives try to reach a negotiated agreement on arrangements for a works council

> If agreement is reached, it is binding and must be followed

> If agreement is not reached, the employer is required to arrange for the election of information and consultation representatives ('consultations representatives') and rather onerous default provisions apply

An independent statutory body known as the Central Arbitration Committee (CAC) can order compliance with the process to be followed in setting up a works council, the terms of negotiated agreements and, if appropriate, the default provisions.

In certain circumstances, an employer who has already agreed with employees to set up a works council can stick with that agreement rather than follow the statutory process. This is called an 'approved pre-existing agreement' (APEA). An APEA must cover the whole workforce and be approved by employees.

The default provisions are explained below. Although agreement is likely to be reached in many cases before those provisions formally apply, they are important because they provide the baseline against which negotiating representatives will set their demands.

Starting the process

Employees will normally start the process by sending an 'employee request' to their employer to start negotiations. The request must be made by 10% of the workforce (though with a minimum of 15 and maximum of 2,500 employees).

An employer can also take the initiative and start negotiations if it wishes.

Employer's response

The employer's response to an employee request depends on whether or not it has an APEA and the level of support for the request.

If there is no APEA, the employer must arrange for the election of negotiating representatives and then start negotiating an agreement with them.

If there is an APEA, the employer's response depends on whether or not the employee request was supported by 40% of the workforce. If it was, the APEA is irrelevant and the employer must arrange for the election of negotiating representatives and then start

negotiating an agreement. However, if less than 40% of employees supported the employee request, the employer has the option of asking for a ballot on whether or not to give up on the APEA.

A ballot to decide whether or not to give up on the APEA must be secret and fair. If at least 40% of the workforce vote to endorse the employee request, the employer must start negotiating a new agreement. If less than 40% endorse the request, the employer can stick with the APEA.

Getting down to negotiations

If an employer is to negotiate an agreement, it must have someone to negotiate with. The employer's first step is to make arrangements for the appointment or election of negotiating representatives.

Election of negotiating representatives

In making arrangements for the election or appointment of negotiating representatives, the whole workforce must be allowed to take part in the process. All employees must have a representative.

Agreeing to set up a works council

Once the negotiating representatives have been appointed, the employer must tell the employees who they are and invite them to negotiate an agreement setting up a works council. Any negotiations must last for six months from the date that the employer tells the employees who the representatives are—though this period can be curtailed or extended by agreement.

A negotiated agreement must cover the whole workforce and set out:

> arrangements for the appointment or election of consultation representatives (though an employer can deal directly with employees themselves if that is agreed); and

> the circumstances in which the employer is required to inform and consult

The agreement must be signed by the employer and then approved by the workforce. It is treated as approved if all the negotiating representatives sign it. If some representatives fail to sign it, it is also treated as approved if a majority of representatives sign it and it is then ratified in writing by at least 50% of the workforce or approved in a secret ballot by at least 50% of those voting.

But we just can't agree….

If the parties fail to reach and approve an agreement, the default provisions apply. For these to work, the employer must have someone to give information to and consult with. So, an employer's first step is to make arrangements for the election of consultation representatives. There should be one representative per 50 employees with a maximum of 25 representatives. There are detailed election rules.

The default provisions

Once consultation representatives have been elected, the default information and consultation provisions apply. They require the employer to provide consultation representatives with information on:

> the recent and probable development of the business's activities and economic situation

> the situation, structure and probable development of employment within the business

> any measures envisaged to reduce or deal with threats to employment, such as possible redundancies (this applies even when the number envisaged is below the threshold of 20 used for collective redundancy consultation purposes); and

> any decision likely to lead to substantial changes in work organisation or contracts of employment, including collective redundancies, business transfers and outsourcing

Having provided information, employers must consult on all the above matters other than the development of the business's activities and economic situation.

But what do we actually have to do?

The Regulations are onerous and brief reports from management or 'state of the nation' speeches are unlikely to do.

The employer has to provide the representatives with sufficient information to allow representatives to conduct a proper study.

The Regulations envisage that representatives may want to consult an expert.

The representatives may express views or come up with options that are different to those suggested by the employer. If they do, the employer must give a reasoned opinion in response.

The representatives must be able to engage with the appropriate management levels for whatever is being discussed.

The aim of the consultation must be to reach agreement.

We can't tell them that - it's confidential!

Employers are expected to give representatives confidential information, but not where doing so would cause serious harm to the functioning of the business or be prejudicial to it in other ways. Although an employer can decide what is confidential, representatives can challenge not only the employer's view but also a refusal to provide information by applying to the CAC.

Where information is disclosed, representatives owe the employer a statutory duty to keep it confidential. Employers could obtain court orders preventing disclosure and, if disclosure had occurred, representatives would be liable in damages.

We're not having any of this!

If employers refuse to co-operate with this process and fail to comply with their obligations, representatives—or employees, if representatives have not been appointed—can apply to the CAC to resolve disputes. The CAC has wide-ranging powers to require employers to comply with their duties in the lead up to setting up a works council (e.g. organising elections).

Once there is a negotiated agreement or the default provisions apply, employers and representatives can apply to the CAC if the agreement or provisions are not complied with. Although the CAC may order compliance, it cannot suspend or set aside acts of the employer.

If an order is made against an employer, the representatives may also seek an order that the employer pays a penalty of up to £75,000. The penalty goes into Government coffers and not to representatives, so there is no financial incentive to seek a penalty. However, if an employer, say, closes a plant without consultation, the only remedy is a penalty, as explained above, the closure cannot be suspended or set aside.

An order of the CAC is treated as a High Court order and employers may be liable for contempt of court (which, in really extreme cases, can mean imprisonment) if they do not comply.

Having another go

To try to ensure stability, there is a three year rule. Employees can't try to change things for three years unless there are significant changes and no longer representatives for the whole workforce. The three year rule applies only if there is an APEA that is endorsed, a negotiated agreement or the default provisions apply. If there is no APEA at all (and no other works council arrangements), employees can keep on trying.

Should we have an APEA?

There are distinct advantages for many employers in setting up an APEA in advance.

APEAs are more flexible than arrangements under the Regulations. They can be designed to fit in with group structures, for example by applying to more than one legal entity or on a division-by-division basis.

By setting up a works council through an APEA, employers are likely to retain greater control than they would if the statutory mechanisms were applied.

If an APEA exists, employees will have to obtain at least 40% support to change things. That may be hard to achieve.

APEAs cannot be enforced through the CAC—and there is no statutory penalty for non-compliance.

An employer is likely to generate goodwill by taking proactive steps to involve employees. It may also be good for business. Employee dialogue can help staff feel valued and make them better aware of the climate in which the business operates. It can also enhance innovation and adaptability to change.

Although there are advantages in an APEA, it will not be appropriate for all employers. Setting up a works council will involve a generation of interest in a collective approach which many employers will want to avoid. In organisations with a high turnover or very little interest in any level of employee involvement, it may be hard for employees to hit the 10% trigger for an employee request. And where organisations have good relationships with trade unions and an existing recognition arrangement, employees may see little to gain through a works council.

The experience of organisations with European Works Councils suggest that employers should give careful thought to how works councils are structured. It is important to set up a framework that will ensure issues are discussed at the right level—that is, a level that will interest and engage representatives. An APEA is more likely to be endorsed if it ties in with how the business is structured.

What about the unions?

Trade unions do not feature at all in the Regulations. Some see this as permitting employers to circumvent existing union structures, while others see works councils as stepping stones to full recognition.

Employers with existing union recognition arrangements will need to consider whether and, if so, how to include unions in a works council structure. This is most easily achieved through an APEA, though it is also possible to do so in a negotiated agreement.

For further information on this subject please contact:

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