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Information and consultation

Inside

Introduction

Employers with at least 50 employees can be required to establish arrangements for informing and consulting their employees on business developments. These arrangements are commonly called 'works councils'. This inbrief summarises the legal framework for them and its implications for employers.

Background on works councils

UK employers have traditionally engaged with their employees' representatives by engaging with trade unions. However, the EU enacted a Directive on information and consultation in 2002. This led the Government to enact a framework for works councils by way of the Information and Consultation of Employees Regulations 2004 (the "Regulations"). It does not replace the concept of trade union recognition but sits alongside it. Works council and trade union recognition arrangements may nevertheless be linked by agreement.

The Government amended the Regulations with effect from 6 April 2020 to make it easier for employees to request the establishment of a works council. This reflects that the Government believes that employee involvement leads to successful businesses. It means that works councils are likely to become more commonplace despite their EU law origins and Brexit.

There is no requirement for an employer to act unless it receives a request to establish a works council from a sufficient number of its employees. However, an employer can derive significant benefits from proactively setting up a works council before it receives such a request.

The Regulations give flexibility for employers and special employees' representatives to agree works council arrangements tailored for their business's needs. However, if the parties cannot agree then default 'standard provisions' will apply.

To which employers do the Regulations apply?

The Regulations apply to employers with 50 or more employees. The number of employees is calculated using a special statutory formula that averages the number of employees over a 12 month period and that allows employers to weight part-time employees.

Information requests

Employees are entitled to request sufficient information from their employer to enable them to calculate how many employees are employed by the employer using the special statutory formula and how many employees would need to support a request for a works council. If an employer fails to provide this information then its employees may apply to the Central Arbitration Committee (the "CAC"), the judicial body with responsibility for enforcement of the Regulations, for an order requiring its provision.

Commencing the process to establish a works council

An employer may generally choose voluntarily to establish a works council but is under no obligation to establish one a valid written request is made. In order to be valid then a request or cumulative requests within a period of 6 months must be made by 2% of employees. However, if 2% of employees equals:

- fewer than 15 employees then the request must be made by at least 15 employees; and
- more than 2,500 employees then the request does not need to be made by more than 2,500 employees.

The necessary level of support had been 10% of employees until 6 April 2020. This reduction explains why employers should now reflect on whether to establish a pre-existing agreement for the reasons detailed below.

Pre-existing arrangements

A pre-existing agreement is one that is in writing, covers all employees, has been approved by employees (such as in a poll question at the same time as electing the first members of a new works council that would operate under it) and sets out how the employer is to give information (including information on agency workers) to the employees or their representatives and seek their views on it.

Employers should consider potential downsides of establishing a works council outside of the framework of the Regulations. These could include a hostile response by any recognised unions. However, pre-existing agreements' advantages include:

- it may be easier to tailor arrangements that are appropriate for its business when it is not negotiating "in the shadow" of the standard provisions that the special

employees' representatives know will apply if they don't reach an agreement following a valid request;

- they generate goodwill by showing that employers are keen to listen to their employees' views;
- they cannot be enforced by employees or their representatives at the CAC; and
- if a valid request is made by fewer than 40% of employees then the employer enjoys a discretion not to start negotiations immediately but to hold a ballot of its employees on whether they endorse the request. Unless a majority of employees then endorse the request and that majority represents at least 40% of employees then an employer is under no obligation to negotiate.

The negotiations

An employer's first step is to arrange for the appointment or election of special employees' representatives with a mandate to negotiate with it. All employees must be entitled to stand and to vote in any election and it must be conducted in such a way that all employees will be represented by the special employees' representatives.

An employer must notify all employees of the outcome of any election and then invite the special employees' representatives to enter into negotiations. Negotiations last for up to six months and the commencement date for that period is the date three months after the overall process was initiated. However, the employer and the special employees' representatives may extend the negotiating period by agreement before it expires.

A negotiated agreement must:

- cover all employees;
- set out the circumstances in which the employer must inform and consult;
- be in writing;
- be dated;
- be signed on behalf of the employer;
- provide for the appointment or election of information and consultation representatives or provide for the employer to inform and consult employees directly;
- provide that information provided by an employer must include information on agency workers; and
- be approved by the employees.

A negotiated agreement is approved by the employees for these purposes if:

- it has been signed by all of the special employees' representatives; or
- it has been signed by a majority of them and also approved by more than 50% of employees in writing or in a ballot.

If a negotiated agreement is reached then its terms will govern the operation of the works council. If there is no negotiated agreement reached before the expiry of the negotiation period then the default standard provisions will apply.

The default standard provisions

An employer's first step is to arrange for the election of information and consultation representatives. Detailed rules govern the election and provide an employer with a discretion to organise its employees into constituencies if that will enable their representatives better to represent their interests. The election must ensure that there is generally one information and consultation representative per 50 employees or partial tranche of 50 employees. However, the overall number of information and consultation representatives is always capped at 25.

An employer must then inform its employees' information and consultation representatives on:

- the recent and probable development of the business's activities and economic situation, and the situation, structure and probable development of employment within the business. Guidance suggests that this should take place at least annually;
- any anticipatory measures envisaged to deal with a threat to employment. There is no numerical threshold for this obligation being triggered in contrast to the test of at least 20 proposed dismissals for the purposes of collective redundancy consultations; and
- any decision likely to lead to substantial changes in work organisation or contractual relations, including collective redundancies and TUPE transfers.

The employer's information must be given at such time, in such fashion and with such content as are appropriate to enable, in particular, the information and consultation representatives to conduct an adequate study and, where necessary, to prepare for consultation.

The employer must then consult:

- in such a way as to ensure that the timing, method and content of the consultation are appropriate;
- on the basis of the information given by the employer and of any opinion which the information and consultation representatives express to the employer;
- in such a way as to enable the information and consultation representatives to meet the employer at the relevant level of management depending on the subject under discussion and to obtain a reasoned response from the employer to any such opinion; and
- in relation to collective redundancies or TUPE transfer, with a view to reaching agreement on the decision.

The parties are under a duty to work during an information and consultation process in a spirit of co-operation and with due regard for their reciprocal rights and obligations. This includes taking into account the interests of both the business and the employees.

Confidentiality

An employer must generally give information to its information and consultation representatives even if it is confidential. However, it may:

- provide such information on terms of confidence; or
- withhold it if its disclosure would, according to objective criteria, seriously harm the functioning of the business or be prejudicial to its interests.

If an employer discloses information on terms of confidence then the information and consultation representatives are under a

statutory duty to keep it confidential. Employers can therefore seek an injunction preventing its disclosure or obtain damages if the information has already been disclosed in breach of the terms of confidence.

If information and consultation representatives consider that information should not have been provided on terms of confidence then they may apply to the CAC for that restriction to be set aside. They may also apply for the CAC to order the disclose of information than an employer has withheld.

Enforcement

If an employer breaches its obligations under the Regulations then employees or their representatives (as applicable) can complain to the CAC. If a complaint is well-founded then the CAC may order an employer to take such steps as are necessary for it to comply with its obligations. However, the CAC may not suspend or alter the effect of any act already done by the employer. This reflects that information and consultation does not affect management's prerogatives to manage its business. If a complaint is well-founded then the EWC may also apply to the Employment Appeal Tribunal for the imposition of a punitive fine payable to the Government of up to £75,000. Such fines are rare but the EAT has imposed fines of £10,000, £20,000 and £55,000 as at the date of this inbrief.

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