

WRIGLEYS

— SOLICITORS —

EMPLOYMENT LAW FOR CHARITIES SEMINAR JUNE 2005

INFORMATION & CONSULTATION

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Existing Information Requirements

All of you will already have some form of information process with your staff. Whether or not you actually realise, or appreciate, you all provide information on a range of issues. The ACAS Advisory Booklet on Communications and Consultation identifies a number of ways in which employees are informed at various levels on job related and organisational issues. In this respect the Information and Consultation of Employees Regulations 2004 (SI2004/3426) should not be seen as adding anything new.

All employees are required to be given information on:

- Job role and responsibilities
- Terms and conditions, including discipline and grievance procedures

On starting their job employee will be told arrangements concerning:

- Working conditions
- Supervision and management
- Administration
- Basic information such as who is who, what they do and where they are both physically and organisationally

Staff will also receive information on:

- health and safety
- details of the tasks they are to perform
- standards to be met
- proper use of equipment
- reporting procedures
- a whole raft of measures that affect the way you interact with them on a daily basis.

Information will be available to employees in other ways, for example through your Annual Report or Accounts which will contain information on income and expenditure and activities of the organisation. Those of you getting to grips with the new SORP 2005 will find that you are providing even more information about your organisation. It may not be directed at your employees, but then you should ask yourself the question why not.

Of course you can all rely upon the 'office grapevine' where information is quickly passed around.

One of the issues for you to consider under the Information and Consultation Regulations is whether information is received by the employee in the best form to enable the employee to understand it and make best use of it. Misunderstandings can often happen. Information can be misinterpreted. Rumour and suspicion have a life of their own. You need to make a proper assessment of the form and type of information that is disclosed, when it is disclosed, how and to whom

Consultation

But the Regulations are not just about information. They are also about consultation. Again many of you will probably already be doing this. But what is consultation? The DTI Guidance on the Regulations gives us some help. Its more than just providing information, but it doesn't go so far as negotiating.

It is not enough simply to pass information to your employees and ask for comments. The Regulations impose an obligation on you to ensure that your employees have an understanding of the legal implications involved in the information that you provide. If necessary you need to explain what the information means and help employees understand it. The Regulations require that you actively engage with your employees and take on board their comments and concerns. But the ultimate decision remains with you.

Pre-Existing Agreements

Still feel that you may already be doing all of this?

Well, if you do then you may have a Pre-Existing Agreement (a "PEA") and if you do then the Information and Consultation Regulations may not apply to you.

You will have a PEA if your existing arrangements on information and consultation:

1. are set out in writing;
2. covers all of your employees;
3. govern how you are to give information and seek views, either from employee representatives or direct from your employees; and
4. is approved by your employees.

Here you will see that many existing arrangements for information and consultation will fail because the Regulations require that consultation is from the top, from the chief executive all the way down to the to the bottom of your organisation. Most bargaining or collective agreements will fail to cover the whole workforce. However, a PEA can be made up of more than one

agreement where together those agreements cover all of your employees provided that each of those agreements satisfies the other relevant criteria.

Employees

Looking in a little more detail those requirements I should highlight that the Regulations only apply to employees. They do not include the wider category of workers, such as agency staff or other contract or atypical workers. There is nothing wrong with extending any information and consultation agreement to such workers, but their involvement rests upon the agreement and not any rights under the Regulations

From April of this year the Regulations apply to undertakings with 150 or more employees. From April 2007 they will apply to undertakings with 100 or more employees. By the time the regulations are extended to undertakings with 50 or more employees in April 2008 it is estimated that they will affect 75% of UK employees.

In assessing whether you have the relevant number of employees for the Regulations to apply you have to average of the number of your employees over a 12 month period. The Regulations contain a complex calculation which allows an employer to count part time employees who have not worked more than 75 hours in any particular month in that 12 month period either as full time employees or as half an employee.

Employees have the right under the Regulations to demand data to allow them to determine the number of employees in an undertaking.

Undertakings

The regulations apply to undertakings, which the DTI guidance has identified as separate legal entities. It will apply to companies, partnerships and other legal structures, including those which may be divided into different offices. The Regulations will extend to company groups, which would otherwise consist of separate undertakings in the sense that a negotiated agreement can be extended to cover all employees across the group, but otherwise the Regulations focus on single undertakings.

An undertaking is defined as an economic activity, and this will draw on the corresponding case law under the Acquired Rights Directive which covers Transfer of Undertakings (TUPE).

The Regulations will not therefore apply to undertakings which are engaged in purely administrative functions, but the Government has confirmed that it intends implementing a Code of Practice which will extend the principles of the Regulations to the various government departments, executive agencies and other administrative bodies. This will not apply to Local Authorities where adoption of the Code will be voluntary.

Approval

You also need to demonstrate that your arrangements have the approval of your employees. Silence or the lack of any objection doesn't count. Nor is it enough that you have worked to the arrangements for a number of years. Approval can be by way of a ballot, signatures collected from a majority of the employees or agreement with any appointed representatives who represent a majority of your employees as part of those arrangements.

Requirement to negotiate an agreement

If what you have doesn't satisfy the PEA requirements or if you don't have anything then we need to look at the Regulations in more detail.

First off, what do the Regulations actually require you, as employers, to do?

Absolutely nothing.

The Regulations are triggered by an employee request. That request could be for a negotiated information and consultation agreement or for a review of your PEA, if you have one.

If you want, you can initiate the process yourself and offer to negotiate an information and consultation agreement. Alternatively you can try to establish a PEA, but I'll touch on that a bit later in this paper.

The effect of the Regulations is that if enough of your employees want to have consultation, then you will have to set it up. There are two ways of achieving this; either you negotiate and agree what areas you will inform and consult on and the processes involved (the "Negotiated Agreement") or, if you fail to reach an agreement; the Regulations will provide a fall back position and tell you on what areas you are required to inform and consult. These are called the Standard Provisions.

The Request

Looking at the main provisions of the Regulations, a request is kicked off by at least 10% of your employees making a formal request for an information and consultation agreement, subject to a minimum of 15 employees and a maximum of 2,500 employees. The request itself can be aggregated over a 6 month period, which allows support from different department, divisions or places of business to be taken into account.

I mentioned that if a PEA exists then the Regulations may not apply to you. If there is a PEA then the employee trigger to start the information and consultation negotiation process increases from 10% to 40%. Where the request is supported by less than 40% of employees you have the option either to accept the request and enter into negotiations or to ballot your employees and see whether 40% of them, and a majority of those voting, accept the request and start the process of negotiating an alternative information and consultation agreement.

If the initial request is supported by more than 40% of the workforce then the existence of any PEA is largely irrelevant and you will have to begin the arrangements for the election of representatives to negotiate the new information and consultation agreement.

It is not open to employees to make continued requests until the ballot on the PEA gets the result they want. If a ballot fails to achieve the required 40% and a majority of those voting in favour then there is a 3 year moratorium on a new request being made. That moratorium falls if there is a material change in the undertaking which may render the PEA no longer relevant, for example it no longer covers all employees through a merger or acquisition.

Negotiating the Agreement

Once a valid request has been made, the regulations set out a strict timetable for approving and implementing the information and consultation agreement. From receipt of the request, as employers, you have one month to organise a ballot to appoint the negotiation representatives.

These are not the representatives who will participate in the consultation itself, but rather those that you are to negotiate with in setting up the consultation body and the rules that will apply to it. The ballot must take place and the representatives appointed within three months of the request.

There are no fixed requirements for the number of negotiating representatives, but they must represent your entire employee workforce.

You then have six months from appointment to negotiate with those representatives and finalise the information and consultation agreement although this time period is subject to extension by agreement. In default of agreement or an extended deadline then the standard provisions will apply

Once you have received a request it is important that you respond to your employees confirming how you intend to reply. If you wrongly take the view that the request is invalid or the Regulations don't apply to you for whatever reason then the Standard Provisions will automatically apply on expiry of the 6 month negotiation period.

Once the default provisions apply, the employer is under a duty to organise a ballot to elect the information and consultation representatives. There are a minimum of 2 and a maximum of 25 representatives and their numbers will be proportional to the number of employees on the basis of one representative for every 50 employees (or part).

The regulations provide a requirement for the conduct of the ballot and confirms that the cost is met by the employer. Once the information consultation representatives have been appointed, the employer's duty is to provide information to them in a timely fashion that allows them adequately to conduct and prepare for consultation.

The information and consultation representatives have no minimum meeting requirements. They simply have to be consulted on the relevant issues.

Structure of a Negotiated Agreement

A negotiated agreement, similar to the PEA:

- must cover the whole workforce;
- will provide for arrangements to appoint or elect the representatives, or confirm that consultation will be direct with the employees;
- set out the circumstances in which you will inform and consult with the employees;
- be signed by you as the employer; and
- be approved by the employees

Approval

Once the information and consultation agreement has been agreed, it has to be signed by the employer and approved by the workforce.

Here it is worth noting that the agreement will only be treated as approved if:

- All the representatives sign it, or
- A majority of the representatives sign it and at least 50% of the employees approve the agreement either in writing or by way of a ballot.

All within 6 months of the appointment of the negotiating representatives unless you agree to a time extension as part of those negotiations.

Standard Provisions

In looking at the application of the Regulations it is worth looking at what happens if you are unable, for any reason, to reach approval of a negotiated agreement in which case the Standard Provisions, as set out in the Regulations will apply. The Standard Provisions provide that you must provide the representatives with information on:

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

Having given the information, the employer must consult on all but the first issue. In addition consultation on the third issue must be 'with a view to reaching agreement'

Available guidance from the DTI suggests that information under the first requirement may include:

- the launch of new products or services or a significant change or discontinuance.
- reorganisations within the undertaking
- any change to the undertakings aims or objectives
- changes in senior management or at trustee level

Where such changes may affect employment or lead to any contractual changes.

The second requirement will include:

- new employment opportunities or risk of redundancy; and
- employee training and development as an alternative or to mitigate redundancy.

The third requirement will include changes to contracts of employment.

Information and Consultation refers to the workforce as a whole, and not as matters may apply to individuals, so we are talking about policies and procedures and not a requirement to inform or consult on individual grievances or disciplinary procedures

Other Consultation Obligations

Where there is an overlap between the information and consultation agreement and any existing statutory obligation to consult, for example on collective redundancies or on TUPE transfers, you have discretion to follow the statutory consultation or notify matters to the information and consultation representatives.

Where you have an option of consulting a union on collective redundancies, you can choose to consult the union and the representatives or you can consult just the union. It is unlikely that you will have the option of consulting with just the representatives without being in breach of the collective agreement.

Consultation under a Negotiated Agreement

Outside of the Standard Provisions it is for the parties to agree on what areas are subject to information and consultation. There are two approaches. You can be inclusive and identify all of the significant areas on which you believe consultation should take place. The danger is that when something arises which has not been considered you can spend a great deal of time discussing whether it ought to be consulted upon.

The alternative approach is to be exclusive and identify those matters where you agree that there will be no information and/or no consultation. This may exclude, for example particular issues of grievance and discipline or areas such as pay and conditions which may be covered under a collective agreement. Other areas to consider excluding will be consultation on collective redundancies and transfers which are already subject to statutory consultation processes. There is no requirement to exclude these and you may wish to follow both an information and consultation route as well and the specific statutory requirements. Indeed doing so may enable you to enable staff to have a better understanding of the issues involved and you will have a greater awareness of the likely reaction of staff.

Confidentiality

One of the concerns expressed by employers in relation to consultation is on the question of confidentiality. Often this concern is identified by large commercial businesses in relation to price sensitive information which must be disclosed to the markets before it can be disclosed to employees. The Regulations make it clear and refer to the stock market listing rules where consultation with employee representatives is not a prohibited disclosure.

In the course of information and consultation, it is inevitable (under the Standard Provisions, but perhaps not so under a Negotiated Agreement or a PEA where you have more flexibility in agreeing areas on which you will consult) that you will be required to give confidential information to the representatives. Under the Standard Provisions, the representatives will be under a statutory duty of confidentiality and, therefore, liable to damages if they breach that duty, unless there is any relevant whistle blowing issue. A Negotiated Agreement or a PEA should contain clear provisions dealing with any breach of confidentiality by employee representatives, including dismissal and other disciplinary action as well as the recover of legal costs and damages for any loss arising out of the breach or any misuse of confidential information

Any agreement should be clear how confidential information is to be identified. There are generally three tiers of information. The first is the type of confidential information which you don't want to tell the representatives, where you reasonably believe that the effect of disclosure

would seriously harm the functioning of or be prejudicial to your organisation. The nature of this information should be spelt out.

The second tier is confidential information which the representatives may not pass on. This will be new to most representatives and it is likely they will need guidance and training on their role and responsibility.

The third tier is information that the representatives can disseminate but in order to validate the consultation process it must be information which the employees would not otherwise know or have access to.

Structure

I have included in these notes some of the issues that should be taken into account in settling any negotiated agreement. This includes issues such as how representatives are to be appointed, for how long, how meetings with the representative body are to be structured and whether they are to have any standing agenda. Certainly you will need to define what issues are to be consulted on with a dispute resolution procedure to deal with any issues that arise between the representatives.

It is important to ensure that there is some structure to the agenda, otherwise you risk that the representatives will turn their attention to minor issues which can either lead them into conflict with your organisation through inappropriate demands or a complete failure of the consultation process and the loss to your organisation of the benefits that consultation and staff engagement can bring.

The process should not undermine your existing consultation, if you have any, and it is important to ensure that there is adequate feedback to the workforce on matters which have been dealt with through the information and consultation process.

Matters that should be included in a Negotiated Agreement (and a PEA)

- Title and objective of the consultative forum
- Terms of reference
- How it impacts on other consultation (collective or statutory)
- Composition, including employee representatives from all levels (including management)
- How the employers' representatives will be identified
- Employees covered, identifying any separate agreements for different parts of the undertaking
- Election procedures, when they are held, any qualification of candidates, nominations and voting arrangements. Number of representatives
- Training for representatives
- Period of office, resignations, retirement by rotation and reappointment

- Electing a chair and other members of the committee
- Progressing matters between meetings
- Meeting arrangements, frequency and notice requirements
- Location, procedure for agreeing agenda, quorum and duration
- Facilities for representatives, eg time off to liaise with employees and payment for attendance at meetings
- Financial resources including ability to consult experts
- Responsibilities of representatives, including reporting arrangements
- Duration of the Agreement and its review and renegotiation.
- Dispute resolution
- Legal enforceability of the Agreement

The Central Arbitration Committee

And dispute or other issues arising in relation to either the Standard Provisions or a Negotiated Agreement are dealt with by the Central Arbitration Committee (the "CAC"). It has a number of powers open to it ranging from ordering a party to comply with any obligations through to imposing a financial penalty of up to £75,000 where the employer fails either to inform and consult as required by a negotiated agreement or where they have failed to arrange a ballot for appointment of the information and consultation representatives. This money is not paid to employees or to the representatives but to the Secretary of State.

For example if there is a dispute whether a particular employer comes within the remit of the Regulations, in terms of number of employees or whether it is carrying out an economic activity reference can be made to the CAC, but only once employees have initiated a request.

Failure to provide employees with data on the number of employees with one month of a request may lead to a complaint

Anonymous requests to trigger the Regulations can be made via the CAC who will not reveal the name of those making the request, but who will still require names in order to satisfy itself that the request is validly made by an appropriate number of employees

The representatives have the right to challenge an assessment that information is confidential or any withholding of information and this would be determined by the CAC. The CAC hearing is in public and accordingly, challenging confidential information can bring it into the public domain.

In contrast challenging a PEA is a matter for the Courts, if the PEA itself so provides or it can be shown that the PEA created an enforceable contract. You may take it from this that the PEA has certain advantages, not least that the CAC has no jurisdiction.

In considering the powers of the CAC remember that whilst they may have the ability to fine and direct they do not have the ability to declare invalid any action that may have been taken without the appropriate consultation.

The Rights of Representatives

All employee representatives are entitled to reasonable time off with pay during working hours to perform their functions. The representatives are entitled to bring a claim in an employment tribunal where:

- an employer refuses to pay for time off; or
- the representative suffers any detriment or dismissal for reason of the performing of their representative duties - doesn't apply under PEA

The representatives do not act as agents for the workforce and they have full power to comment without the need to refer issues back to the workforce.

Tactics

As employers you need to determine whether you have something that already satisfies or can easily be modified to satisfy a PEA. You may find that you can development departmental and other staff meetings which in aggregate will satisfy a PEA. Alternatively if you have nothing in place and having seen the flexibility that a PEA can give you, you need to determine whether you want to be proactive. There is a great deal of commentary on the benefits of engaging staff and developing their involvement in and knowledge of the business. Initiating your own arrangements allows you to do it at a pace that can mould any consultation to the specific needs of your organisation.

You can negotiate a PEA at any time before you receive an employee trigger request under the Regulations. However if you do intend to negotiate a PEA be careful to ensure that you do not accidentally trigger the Regulations and fall into the statutory timetable.

However, in considering whether or not to be pro-active, it is wise to take account of what your employees actually want. Implementing consultation and information processes will add administration costs and time and will require significant input from all levels of your organisation. Where you may be confident that your workforce are not likely to trigger a request, seeking a PEA may bring little in the way of benefit and you may be able to settle for a more informal arrangement for information and consultation.

One of the anticipated problem areas with the information and consultation agreement is how it will actually impact on the role of trade unions. For a variety of reasons, your organisations may have little if any relationship with a union or if there is a union that is recognised it may not stretch across your entire workforce. There is a fundamental difference between the role of a union and of the information and consultation representatives. The union is largely focused on negotiating core terms which are matters outside of the Regulations. However, trade union representatives where they work well and have active support from their union and the employees they represent can add value to the information and consultation process through their knowledge of your organisation. Ultimately, the issue may not be one for you to decide because the appointment of representatives is a matter for your employees.

Conclusion

The Information and Consultation body that exists, either as result of a PEA or through a Negotiated Agreement or the Standard Provisions under the Regulations, allows the creation of a single channel for communication with staff, particularly within large workforces. It enables senior management to determine whether your organisational aims and objectives and the strategy and direction coming from board level reaches and is properly understood by employees.

Having representatives may enable some employees to be more confident, frank and open and find a voice rather than be reluctant to express their true thoughts and through that it allows you to properly manage and order your employees' priorities.

You don't have anything to fear from the Regulations other than the application of the Standard Provisions themselves which help no-one. Whether or not you need fear any trigger will to a large part depend on whether you have an active or disgruntled workforce who have not already been given an opportunity to engage in dialogue with you in some informal way.

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Copies of the Regulations can be found at: www.opsi.gov.uk/si/si2004/20043426.htm

The DTI Guidance is at www.dti.gov.uk/er/consultation/i_c_guidance_01.htm

ACAS Guidance is at www.acas.org.uk/info_consult/consultation.html

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