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BRIEFING

Employee information and consultation regulations

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Summary

Now that revised Information and Consultation of Employees Regulations have been published, employers must decide whether to enter into voluntary information and consultation arrangements before the Regulations come into force in April 2005. This briefing highlights the pros and cons of taking action now.

The government published revised Information and Consultation of Employees Regulations (the Regulations) on 7 July, in what seems likely to be substantially their final form. Draft guidance on how the Regulations are likely to work in practice was released at the same time. Together they give the detail of the new right of employees to be informed and consulted, which applies from 6 April 2005.

At this stage, employers should balance the pros and cons of taking no action until the Regulations come into force against those of starting to inform and consult staff sooner. Given that the structure of the Regulations and guidance is reasonably clear, employers can make an informed assessment and, in many cases, the scales will tip in favour of early action.

The benefits of consulting now

Employers can enter into voluntary information and consultation agreements with employees that fall largely outside the scope of the Regulations. These will be valid if they are: approved by employees in writing; cover all the undertaking's employees; and set out how the employer will provide information as well as how the employees will give their views.

Voluntary agreements have a number of benefits for employers in comparison with the default arrangements in the Regulations.

- For employers with a group structure, a voluntary agreement could cover information and consultation for employees in all group companies. Instead of

having to inform and consult on a company-by-company basis, as under the default procedure, employers can adopt a single process. Alternatively, employers could agree to deal with some issues at local, and others at group, level. Entering into a voluntary agreement gives an employer maximum flexibility to deal with issues at the right level and minimise duplication of effort.

- A second key advantage is the freedom to agree precisely what issues the agreement will cover and when consultation will take place. In the Regulations, the default obligations to inform and consult are still worded in very general terms. Although the guidance is reasonably pragmatic and helpful in explaining what is likely to trigger a duty to inform and consult, test complaints will inevitably be lodged with the Central Arbitration Committee (CAC). Having a clear agreement with employees about what will and will not lead to consultation and at what stage the obligation arises, reduces uncertainty for employers. It also enables them to tailor their agreement to the most relevant business issues.
- Having a voluntary agreement does not stop an employer from taking advantage of some of the helpful default provisions included in the revised Regulations. For example, under the default procedure, employers do not have to inform under both the information and consultation rules and the Tupe/collective redundancy requirements if there is overlap between the duties. The employer can tell the information and consultation representatives that he is consulting under the Tupe/redundancy rules. Then

there is no need to inform and consult under the default procedure. It would be sensible for an employer to include a similar provision in any voluntary agreement.

- If an employer breaches a negotiated or a default information and consultation procedure, employees can complain to the CAC. If the complaint is upheld, the CAC will make an order saying what the employer must do to comply. A penalty of up to £75,000 can also be imposed. If the employer has a voluntary agreement, the sanctions set out in the Regulations do not apply. As a voluntary agreement would not usually be legally binding, failure to comply with it is more likely to have a negative effect on employee relations than result in direct legal consequences.
- Having a voluntary agreement gives an employer more flexibility to agree how to deal with confidential information. Under the default arrangements, an employee can challenge an employer's decision to withhold confidential information: ultimately it is for the CAC and not the employer to decide what information can be withheld. If a voluntary agreement is in place, the employer and employees can agree what information would be disclosed; when it could be withheld; what would happen if the employer failed to disclose relevant information; and what would happen if an employee revealed information disclosed in confidence.

The downside

Entering into voluntary arrangements will not be the right decision for every business. Before deciding whether to negotiate a voluntary agreement, companies should take the following factors into account.

- Employees must approve a voluntary agreement. The draft guidance suggests it must be approved by a majority of employees who vote in a ballot signed by a majority of the workforce, or agreed by representatives of a majority of the workforce. Depending on the size of the organisation and whether there are existing representatives, it may be difficult to obtain approval.
- The Regulations allow employers to enter into flexible negotiated agreements following a request to negotiate. An employer therefore has an opportunity to clarify its information and consultation obligations

without entering into a voluntary agreement.

However, the sanctions and confidentiality provisions in the Regulations apply to a negotiated agreement and if agreement on the procedure cannot be reached, the default arrangements apply.

- Even where a voluntary agreement is in place, employees can ask for an information and consultation agreement under the Regulations. Having a voluntary agreement may make such a request less likely. It can also give the employer the right to ask the employees covered by the agreement whether they support the request. If less than 40 per cent of these employees support the request, the voluntary agreement cannot be challenged for a further three years.

Entering into a voluntary agreement is not a panacea. Where there is no history of, or commitment to, information and consultation, employers may prefer to wait until the Regulations come into force and then see whether they receive a request to negotiate. However, for businesses that see benefits from informing and consulting staff, there are clear advantages in entering into agreements now, rather than waiting until the obligation is triggered by a request under the Regulations.

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