THE INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 2004 (THE ICE REGULATIONS)

Guidance for Unite Amicus Section Officers and Workplace Representatives

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■ FOREWORD FROM THE GENERAL SECRETARY

Unite Amicus Section Industrial Strategy in relation to Information and Consultation

Legislative changes that took effect on 6 April 2005 establish the right to information and consultation on a much wider range of issues and much earlier than previously and as such have prompted some employers to set up new arrangements for informing and consulting. The Regulations have had two years bed in. The impact has been limited, but Amicus took a lead and we have had the opportunity to take account of experience.

This guide is part of a pack prepared by Unite Amicus Section based on our experience of the Regulations and should be used to make the most of this new legislation as well as protecting the union against its shortcomings.

The right to the information and consultation – which can be "with a view to reaching agreement" - is not automatic. It has to be requested and there are rules about how and when a request can be made.

Nevertheless, about 75% of employees in the UK could be covered from 6 April 2007 and there will be more from April 2008.

The Unite Amicus Section industrial strategy for information and consultation, aims to:

- protect and extend collective bargaining influence in the workplace while benefiting from the new rights;

- make the most of opportunities for recruitment and organisation

- resist and challenge the deficiencies in the UK law, and

- provide the education and support that Unite Amicus Section representatives will require to deal with a range of complex issues concerning the business and economic information.

This guide intends to meet demands for something relatively brief and digestible. Links to more detailed guidance on specific points are included to follow up where necessary. In particular the union has the expertise to give guidance at every stage.

Trade union recognition remains the absolute priority. However, that does not mean that information and consultation arrangements cannot and should not be used as a way forward in companies where trade union recognition has been refused or is not a viable option in the short term.

Unite Amicus Section Advice, Assistance and Approval

No I&C and recognition agreements entered in to by Unite Amicus Section should be signed until they have been checked for legal and policy compliance. Officers are advised to commence this process as early as possible where negotiations are contemplated or have commenced.

Unite Amicus Section can assist in drafting appropriate agreements, or where a draft agreement is already proposed it should be directed through Ann Marshall based at Hayes Court (Ann.Marshall@amicustheunion.org). These can be matched to the model agreements

Derek Simpson, Joint General Secretary

■ THE LEGAL BACKGROUND

This guide is not intended as a detailed reference source for the law in this area, but is more by way of a guide to the practical issues and the strategic approach to be adopted by Unite Amicus Section officers and representatives. Officers should have access to appropriate training and other publications to help with an understanding of the legal framework.

The Information and Consultation of Employees Regulations 2004 (the ICE Regulations)
Statutory Instrument 2004 No. 3426 can be downloaded at http://www.opsi.gov.uk/stat.htm and the directive is at http://ec.europa.eu/employment_social/labour_law/documentation_en.htm

Application

The Regulations apply in three stages

• from 6 April 2005 to **undertakings*** with at least 150 **employees***

• from 6 April 2007 to those with at least 100; and

• from 6 April 2008 for those with at least 50

Words in heavy type and italics are explained in the glossary at the end.

Agreements have to cover all employees, but the Employment Appeal Tribunal have said, in this context, that an agreement with a union can cover non-union members too.

The approach the union adopts depends, among other things, on two possible scenarios:

A. where there is no I&C agreement and

B. where there is an existing agreement

A. NO I&C AGREEMENT

The legally enforceable right to I&C does not exist until after the procedure is invoked. The existence of a "voluntary agreement" is not legally binding or enforceable.

1. First comes the **"valid employee request*"** from 10% of the workforce of an **"undertaking*"** (unless, in the alternative, the employer formally initiates the statutory process).

2. Then the employer must negotiate the I&C agreement, within a time frame.

3. And if an agreement is reached, it is legally binding and in place for three years.

4. But if there is no agreement or the employer does nothing the **standard form Standard Information and Consultation Procedure (SICP)*** applies for three years – this too is enforceable.

B. A PRE-EXISTING AGREEMENT* IN PLACE

REMEMBER EVEN IF THE EMPLOYER TRYS TO TELL THE UNION THERE IS AN AGREEMENT IN PLACE IT MAY NOT BE SO – there is a procedure to test this in a particular situation – by an application to the Central Arbitration Committee (CAC).

A pre-existing agreement can be in the form of a recognition agreement covering information and consultation, or more than one covering the whole workforce, even those not in a union. This will not be enforceable in all probability. There is a case on this point on the EAT website involving Moray Council which can be viewed at
http://www.employmentappeals.gov.uk/Public/Upload/06_0143FHDSLA.doc

Assuming the employer is right and there is a valid and enforceable agreement, then

1. following a **valid employee request***
2. the employer can hold a ballot to see if the workforce endorses that request
3. if 40% of the employees and a majority of those who vote support the request, proceed with 2, 3 and 4 as when there is no agreement (see under A above), or
4. if the ballot does not endorse the request with 40% and a majority of the voters, then the existing I&C stays for three years.

Negotiating an agreement

Once a valid request has been received by the employer, or after the employer initiates the procedure, negotiations must take place between the employer and representatives elected or appointed by the workforce.

It may be a challenge to unions, that there are no pre-defined rules on how to choose negotiating representatives, but employers must ensure that all employees can take part in the appointment or election and that all employees are represented in subsequent negotiations. This enables employers, who chose to do so, to act in a way to try to undermine or exclude the union.

Negotiations must start within 3 months and can last for up to 6 months, though this period is extendable by agreement between the employer and a majority of the negotiating representatives.

Default requirements:

Where no agreement can be reached within six months, or an employer fails to initiate negotiations in the light of a valid request, then and only then will the Standard Information and Consultation Provisions (SICPs) apply, effectively by default. These require that the employer must inform/consult elected employee representatives (one for every 50 employees or part thereof, but with a minimum of two) on:

- business developments (information only)
- employment trends (information and consultation); and
- substantial changes in contractual relations or work organisation, including redundancies and business transfers (information and consultation "with a view to reaching agreement")

There is no point reaching an agreement less beneficial than the SICPs. If this situation arises contact the Unite Amicus Section Team for advice.

Enforcement and sanctions

Enforcement of agreements reached under the statutory procedure, or standard information and consultation provisions where they apply, will be via complaints to the Central Arbitration Committee (whose role is explained at http://www.cac.gov.uk/I&C/I&C.htm) and, if necessary, the Employment Appeal Tribunal. The CAC has limited powers to make orders and can impose a financial penalty up to £75,000. This is recoverable by the Secretary of State as a civil debt.

Rights and protections for Representatives

- There is an entitlement to reasonable paid time off to perform their functions and

- Protection for employees - from detriment for exercising entitlements under the Regulations and a right to claim unfair dismissal – this protection covers those organising signatures for the trigger request, for example.

Confidentiality

This is one of the more challenging issues. It can be problematic and divisive for the union if the representatives are told things they cannot share. Employers who have a negotiated agreement, or who are subject to the standard provisions may, on confidentiality grounds:

- restrict any information or document they provide to I&C representatives, so that it may not be passed on to anyone else. They may do this where it is in the legitimate interest of the undertaking.

- withhold information or documents altogether where disclosing them would seriously harm the functioning of the undertaking, or be prejudicial to it.

Withholding information is only permissible from I&C Representatives on Confidentiality Grounds, where, for example, information was so sensitive that, if it was leaked to third parties, whether inadvertently or deliberately, it could cause serious harm or prejudice to the undertaking.

The fact that information may be price-sensitive or confidential would not necessarily justify withholding information because it can be provided on a restricted confidential basis.

A confidentiality requirement could last for any **length of time**, although it should **not be longer than is necessary** in the legitimate interest of the undertaking. For example, it should cease if the information has been made public. This should be spelt out in the agreement.

The Regulations provide that it will be a breach of duty for an individual to disclose information that has had an obligation of confidentiality placed upon it by the employer and is actionable accordingly. Potentially a breach of confidentiality could result not only in disciplinary action, including dismissal, but also in civil, and possibly criminal proceedings, if it amounts to a breach of stock market/securities trading rules. The union has come across agreements providing for dismissal in the event of a representative disclosing confidential information. This should obviously be avoided. Restrictions on confidential information do not include disclosures under "whistle-blowing legislation" – which are allowed, under the Public Information Disclosure Act. But it is advisable to obtain legal advice before relying on "whistle-blowing" provisions. They are not as good a shield as they are often perceived to be.

In the event of a dispute over information restricted on confidentiality grounds, an employee can challenge whether or not something is truly confidential by presenting a complaint to the CAC. It is essential to have this right written in to any negotiated agreement, as otherwise the employer could seek to deny the right to go to the CAC where this is not stated in a negotiated agreement.

The Regulations do not provide for a representative to obtain advice from a union officer before going to the CAC. If a representative does discuss such a matter with an officer, both must take extreme care not to reveal the information in such a way which might jeopardise the rep's rights. Better to have the opportunity written into the agreement.

■ INFORMATION AND CONSULTATION INDUSTRIAL STRATEGY

A host of different representative structures already exist or have been set up in a variety of contexts (unionised, part-unionised or non-unionised workplaces). Some degree of standardisation is desirable, but there is no single model for all because no two undertakings are the same, although in unionised companies the information and consultation forum often coexists with a separate negotiating process.

Trade Union Recognition remains the central aim of the union for organising in the workplace. To this end Unite Amicus Section prefers for all new recognition agreements to cover the requirements of the information and consultation Regulations wherever possible to pre-empt alternative I&C arrangements being introduced which might undermine the union's role. This should have attractions to many employers, as it has the advantage of greater simplicity and efficiency in practice.

It also provides great opportunities for increased union involvement and recruitment.

Draft recognition agreements including these "Information and Consultation compatible clauses" are available from the Unite Amicus Section Team, although the inclusion of a "pre-existing agreement" clause is not always a block to alternative I&C structures. (This should not be pointed out to employer representatives).

It is also recognised that with more and more companies approaching representatives and officers with draft agreements, the union needs a "wish list" of its own, which workplace representatives and officers can refer to in negotiations. For this, please refer to the section below entitled "Guidance on What to Include in any I&C Agreement."

Union Recognition, Collective Bargaining and Information and Consultation

Any approach regarding Information and Consultation rights should be carefully considered so as to ensure that collective bargaining rights are not be undermined by this legislation. To help facilitate this it is essential to:

1. Check what existing union recognition arrangements exist for the company

2. Provide full details of recognition rights and arrangements together with any draft agreement when seeking advice or approval re any new I&C agreement

3. Consider any proposals from the employer from the point of view of whether the I&C arrangements proposed might:

   a. Undermine existing recognition provisions because the I&C group would overlap with what had previously been collective bargaining areas (this includes collective consultation on TUPE and redundancies as well as re pay and benefits)

   b. Undermine union representation arrangements, e.g. by guaranteeing non-union I&C representative places in bargaining units where the union is recognised

   c. Undermine union information and influence by providing for company representatives to meet with I&C reps more frequently than they meet with union negotiating bodies

   d. Harm the trust and communication between union workplace representatives or officers, and the members they represent, but giving the company too much discretion to decide what information given under I&C provisions is 'confidential'.

Constituencies and structures for consultation

Workplace representatives should be assisted in mapping membership within an undertaking so that the union can identify where membership is concentrated, and bear this in mind in discussions to set constituency boundaries for information and consultation representatives to be selected from.

Try to anticipate how the choice of constituency boundary might enhance, or undermine, union strength and standing.

Avoid any definition of constituencies as 'non-union' reps as this will entrench and institutionalise non-union structures.

Groups and multi-site structures

In multi-site companies the union should seek group level structures, supplemented by plant level structures.

Plant level should be used both for plant only issues, and for more detailed plant level discussions on group issues. The union should strive to obtain union negotiating rights across these same structures wherever possible.

Where group level structures are being established they should include representation from every site in the undertaking, and meetings should be called 'as and when necessary to deal with emerging issues' but also a minimum of at least twice per year.

Relationship of I&C structures to European Works Councils (EWCs)

Most companies covered by the EWC Directive will have been in the first wave of companies that will be covered by the new legislation. Given the superior HR resources of such companies it is also highly likely that some of these companies will approach their workforces to put I&C structures in place. Alternatively they may also be the best targets for Unite Amicus Section members to request the establishment of I&C mechanisms – but do not forget that to have the binding entitlement to the information and the opportunity of consultation, there must be a valid request* by 10% of the workforce in the undertaking, or formal initiation of the process by the employer.

Whether the company approaches its workforce or Unite Amicus Section makes the initial approach, officials should strive to make sure that group and plant level structures are clearly linked and connected to existing EWCs.

Although the information and consultation procedures and definitions are weaker for EWCs than those contained in the ICE Regulations, Unite Amicus Section members will gain more if their I&C reps at plant, national and European level are as far as possible the same people. Furthermore, they will also gain more if there is at least a consistency of representation and flow of information through and across the various levels.

Working Alongside Non-Union Representatives

One of the main challenges of the Regulations is that information and consultation structures will cover the whole workforce, and circumstances will undoubtedly arise where the union will have to cope with a mixture of union and non-unionised groups (or "mixed constituencies").

The requirements for all employees to be covered means that, except where Unite Amicus Section has recognition for a whole work force, union representatives may have to sit on I&C bodies

alongside non-union representatives. This should be seen as an opportunity to promote the union by showing that union representatives are better trained, better organised, and more effective, than non-union representatives. Non-union representatives should be seen as potential recruits to the union and not as enemies.

The employer cannot rule out union members as I&C representatives and the workforce can be encouraged to appreciate that Unite Amicus Section representatives have the support and responsibility to ensure the spirit of the Regulations and the Directive are properly maintained.

Where there are union and non-union I&C representatives, a frequent option has been to introduce an over-arching information and consultation committee, incorporating representatives of both union and non-union groups, with trade union representatives continuing to negotiate with management in a separate body. **Information and consultation can therefore be kept separate from negotiation.**

Unite Amicus Section representatives should always push for meetings of union negotiating bodies to take place immediately before, or failing that, after, any meeting of a separate I&C body. This is intended both to ensure that the union representatives are at least as well informed as their non-union colleagues, and also to ensure that negotiations and decision making within the union sphere is dealt with contemporaneously with any I&C consultation.

In addition, if any union representatives are not already members of any I&C body, the union should push for any I&C agreement to provide for them to attend I&C meetings at least as observers, and to receive the same training as other I&C forum members.

Furthermore, clauses are often written into agreements for the new consultative body affirming "for the avoidance of doubt", that its remit does not extend to negotiations, i.e. "Where pay, terms and conditions of employment are negotiated on a collective basis with trade union representatives, then these arrangements will continue". As stated above, you should ensure that statutory consultation rights are still reserved to the union. In addition, if the union had previously had rights to negotiate on other issues, such as health and safety or training; the union retains to right to negotiate in these areas even if the I&C body is informed and consulted about them.

Frequency of Meetings

There is no set frequency of Information and Consultation committees and the basic approach should be to incorporate wording that:

- obliges the employer to call meetings as and when necessary to comply with the spirit and intent of the legislation, and

- sets a minimum number of standard meetings (and the ACAS guide recommends once a month)

Selection of I&C representatives

The facts that information and consultation must cover the whole workforce, along with the power in the hands of the employers, also brings challenges when determining how representatives will gain seats on the forum.

Often within a company there are obvious groupings that form "natural constituencies" - on the basis of location, function or job role for example (much the same as 'bargaining units' for CAC recognition applications). Sometimes a mix of approaches is adopted and it will be up to union officers and workplace representatives to negotiate the best option for them. Where the Standard Information and Consultation Provisions apply the employer is responsible for organising the ballot, they must draw up proposals for the ballot and consult representatives of the employees about them (e.g. the negotiating representatives or trade union representatives).

The ballot must be fair. There is a 21 day time limit to complain to the CAC that the ballot arrangements are defective. The balloting provisions are in Schedule 2 to the Regulations.

Independent trade unions are best placed to represent the whole workforce and some employers will go along with this, but others will try and place restrictions on who can stand for election to the information and consultation committee.

Unite Amicus Section advocates that in bargaining units where the union is recognised, any negotiated I&C agreement should provide for the union to select the representative for that bargaining unit. If the company insists on specific representation of non-union members, the union should opt for an election across the bargaining unit in which both union and non-union members vote. The union should also seek provision that if the union workplace representative under any union recognition agreement is not elected as the I&C representative for the bargaining unit, they should nevertheless be guaranteed a place on the I&C forum as an observer. This is preferable to having a guaranteed union representative and a guaranteed non-union representative from the same constituency. This latter arrangement should be strongly resisted as it dilutes the union's influence within the bargaining unit, and creates an incentive for the person elected by non-union members to remain outside of the union.

■ NEXT STEPS: TAKING THE INITIATIVE ON INFORMATION AND CONSULTATION

Officers will need to take a closer look at the companies they represent and decide what approach to take with regard to information and consultation; asking

- Is the union recognised for all employees?
  - ❑ If so – should the union seek an agreement to cover the I&C rights, or have a separate agreement which would be legally enforceable? Will it enhance the union's current arrangements? Are the employees likely to support it?
  - ❑ If not – would the union be likely to succeed in getting union reps elected in the bargaining units where it is not yet recognised, or might the introduction of I&C structures undermine the union by providing a platform for non-union representatives?
- Do the Regulations cover the company in the light of its size?
  - ❑ If not, is it worth trying to approach the employer for an agreement by consent in any event? (Such an agreement would not be enforceable).

The strategy on Information and Consultation should be carefully paced. Officers should ensure that union representatives at any company where the union is seeking to promote I&C are particularly well informed, well supported and have an active and effective engagement with those they represent. Officers must seek to make absolutely sure that the I&C representatives are as far as possible the same people as the Unite Amicus Section workplace representatives.

An employee or an employees' representative may request data from the employer for the purpose of determining the number of people employed by that undertaking in the United Kingdom. Amicus has had a good result from a complaint to the CAC about MacMillan Press' failures to respond properly to such a request – they are now facing a substantial fine. The decision can be found on the CAC website. It may be that officers are already being asked by companies to start negotiations on information and consultation. If so, please seek advice from the Unite Amicus Section I&C Team as soon as possible.

Where officers are not completely satisfied with the agreements that are already in place and think the union could get negotiate a better agreement, the Information and Consultation Regulations might offer the opportunity the union has been looking for to renegotiate.

Where employers claim there is a 'pre-existing' Information and Consultation Agreement that falls short of the Standard Provisions, they may not be right and there are provisions for employees to over turn it, if it is valid. If an officer thinks this might be appropriate, advice and support on this can be obtained from the Unite Amicus Section I&C Team.

Officers need to be on their guard against those employers who may be encouraging employees and Trade Union representatives to sign "pre-existing" or voluntary agreements. They may well be unenforceable. The biggest caveat comes with those companies that are trying to use the Information and Consultation Regulations to undermine the trade union. This is often not obvious on a casual reading of draft agreements, so please check any proposals in detail, bearing in mind this guidance.

Remember the requirement that the whole workforce is included means that the union and its members cannot be excluded. Guidance follows on what to include in an agreement. In summary, advice from ACAS states that the core of an information and consultation agreement might take the form of **a statement of principles and intentions** with a section then setting out the structures and subjects as outlined in the Regulations. Unite Amicus Section advises that the Standard Information and Consultation Provisions, as set out in the Regulations, should be included as an absolute minimum.

■ GUIDANCE ON WHAT TO INCLUDE IN ANY ICR AGREEMENT

Unite Amicus Section requires all new agreements to be processed and legally checked. They should be directed through Ann Marshall, based at Hayes Court before they are signed.

On a more proactive note, it is recognised that with more and more companies approaching stewards and officers with draft agreements, the union needs a "wish list" of its own, which reps and officers can refer to in negotiations.

Clauses for inclusion in the draft model recognition agreement

From the outset Unite Amicus Section acknowledges that new recognition agreements should also cover the requirements of the Information and Consultation Regulations wherever possible.

The most important reason for this is to prevent employers from using Information and Consultation as a mechanism to create alternative Information and Consultation systems that may undermine the Trade Union.

At the same time the union needs to be sure that any such agreement would not be open to challenge, if the agreement did not cover the whole workforce. In such circumstances it may be inevitable that "parallel systems" involving "mixed constituencies" exist.

Draft recognition agreements including these "Information and Consultation compatible clauses" are available from the Ann Marshall at Hayes Court.

What should be in a Unite Amicus Section I&C Agreement?

1. Objectives and Reference to EU and UK Legislation:

A well worded statement of principles and objectives is a good thing to start with. Reference should be made to the European Directive (EU Directive 2002/14/EC) as well as the UK Information and Consultation Regulations (Information and Consultation of Employees Regulations 2004). This will give all future representatives and participants a clear reference to the European Directive and UK Regulations upon which their rights are based.

2. Protection of I&C Reps:

Reference to full protection from unfair treatment by the employer - i.e. discriminating or dismissing representatives, or election candidates, for carrying out their duties under the agreement. Explicit in the text should be reference to Article 7 of the EU Directive and UK Regulations 27-29, and 30-34.

These references should also specify reasonable time off to carry out their duties – particularly to canvas the views of those they represent and also the ability to report back to constituents (UK Regulations 27-29).

The agreement should state that any extra hours worked in conjunction with I&C duties will be paid hours.

3. Facilities:

Reference to full facilities being available including telephones, faxes, email, internet, meeting rooms, photocopiers, etc, must be made in the agreement

4. Definitions of Information and Consultation:

The definitions of Information and Consultation should at least be as strong as those in the European Directive and the fallback provisions of the UK Regulations i.e. (see regulation 20):

"Information means the transmission of data by the management to employees' representatives, in order to enable them to acquaint themselves with the subject matter and to examine it." (European Directive Article 2) The exact wording of UK Regulation 20 is given overleaf:

Standard information and consultation provisions

(1) Where the standard information and consultation provisions apply pursuant to regulation 18, the employer must 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; and

(c) subject to paragraph (5), decisions likely to lead to substantial changes in work organisation or in contractual relations, including those referred to in -

(i) sections 188 to 192 of the Trade Union and Labour Relations (Consolidation) Act 1992; and

(ii) regulations 10 to 12 of the Transfer of Undertakings (Protection of Employment) Regulations 1981.

(2) The information referred to in paragraph (1) 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.

(3) The employer must consult the information and consultation representatives on the matters referred to in paragraph (1)(b) and (c).

(4) The employer must ensure that the consultation referred to in paragraph (3) is conducted -

(a) in such a way as to ensure that the timing, method and content of the consultation are appropriate;

(b) on the basis of the information supplied by the employer to the information and consultation representatives and of any opinion which those representatives express to the employer;

(c) 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

(d) in relation to matters falling within paragraph (1)(c), with a view to reaching agreement on decisions within the scope of the employer's powers.

These clauses are extremely clear about the definitions and process of I&C and no agreement should ever be accepted or signed that does not meet these minimum provisions. The duty to provide information in advance, for example, to consult with a view to agreement, over matters which are likely to lead to substantial changes to the contract of employment or changes to the organisation of work in some way may arise frequently in some cases and be inevitable even when it is infrequent.

5. Issues for Information and Consultation:

Include the minimum provisions i.e. those given above, but also seek to include other matters such as:
- health and safety
- education
- training
- equal treatment
- pensions

6. Issues Excluded from I&C:

It must be stated explicitly that the I&C agreement will in no way cover or affect areas dealt with in collective agreements, and that the existing collective bargaining machinery will remain in place.

It must be stated that the agreement does not remove the statutory obligations covered by TUPE and Collective Redundancies legislations. It should also be stated that remuneration of employees and matters relating to individuals are not be covered by the agreement.

7. Composition:

The text should state how the body will be made up – how many employee representatives and how many management representatives.

Where trade unions are recognised it is desirable to have seats reserved for trade unions to nominate representatives without a ballot.

If there is no recognition but membership then the union should still try to insist on the union nominating the representatives, however, if this is not possible then the union should insist on a ballot accepting that the constituencies may be departments or areas where no trade union recognition exists – e.g. sales, administration. The union should then campaign hard to win the seats and organise these areas.

Under no circumstances should any position be defined as a non-union position as this will institutionalise and entrench non-union representatives.

8. Deputies:

There should be provisions for the nomination or election of substitutes to fill the places of representatives that can't attend.

9. Scope:

Reference should be made to the fact that the Forum/Council should cover all employees within the company, and also to what will happen in the case of mergers and acquisitions of other undertakings.

10. Officers:

Forum Chair – it should be written into the agreement that there is a designated chair of the meeting and if possible that this is the employee side coordinator. If this is not possible then a shared chair is preferable to one that is permanently under employer control.

Forum Secretary – it should be written into the agreement that there is a forum secretary whose duty it is to take minutes, circulate the agenda, book rooms etc.

Employee Representatives Coordinator – it should be written into the agreement that the employees will elect one of their number to chair the employee side meetings and who will also agree the agenda and minutes prior to circulation.

11. Agenda:

The timing of the drawing up and circulation of the agenda – e.g. items in hands of secretary 7 days before the meeting and circulated 5 days prior to the meeting. Also that outstanding issues can be raised under 'Any Other Business'.

12. Meetings:

The text should be drawn up in such a manner that emphasis is on the company to call meetings 'as and when necessary to inform and consult on emerging issues', but it is good practice to specify a minimum number of regular meetings – ACAS recommends once a month but provided the 'as and when necessary' wording is in place then less regular meetings might be acceptable.

The text should allow the employee side to meet alone (without management) before, during and after the meetings with management, in order that they have sufficient opportunity to discuss and plan their responses. It is good practice to explicitly state that there will be pre- and post- meetings without management. There should be a clause allowing the Forum Chair or Employee-side Coordinator to call extraordinary meetings when deemed necessary.

13. Experts:

A clause should be included allowing Full Time Trade Union Officers to attend the meetings if the employee-side requests it. Ideally, the clause should also allow the employee-side to call for financial experts to attend and offer advice if deemed necessary.

14. Confidentiality:

A confidentiality clause is almost a necessity, even if the union would not want to have one in an ideal world (see also entry in the Legal Overview (page 7) and Glossary).

The clause should state that the where companies withhold information they will notify employee representatives that this is the case, but should also include wording allowing appeal to the CAC to test whether the confidentiality request or the withholding is valid. Such clauses should contain wording indicating that the confidentiality requirements will not be consistently or unreasonably used.

It would certainly help to have a provision to enable representatives to consult with others, perhaps limited to an officer of the union, or legal advisor, to consider, at least the issue of whether the information is confidential for the purposes of the Regulations or the Directive.

N.B. Stock Exchange rules are not a legitimate reason to withhold information from workforce representatives.

15. Training:

Provisions should be made for paid time off for the training of I&C representatives (ideally 1-2 weeks per year) and also that trade union facilities and courses will be used.

16. Termination and renegotiation procedures:

It is good practice to include a clause stating the length of the agreement, that either party may terminate the agreement with 6 months notice, and that no changes to clauses or paragraphs will be made without both parties agreeing.

17. Enforcement:

It is extremely important that the agreement explicitly states it is enforceable via the procedure detailed in UK Regulations.

Explicit reference to using the procedures detailed in the UK Regulations 22-23 should be made.

■ RECRUITMENT, CAMPAIGNS AND ORGANISING

As has been mentioned previously, as all undertakings* with more than 50 employees are or are to be obliged to set up a mechanism for information and consultation, following a valid request* , this will give opportunities for unions to organise in areas where they have previously been kept out.

Trade Union recognition remains the absolute priority, but Information and Consultation could and should be used as a way to achieving this in companies where trade union recognition has been refused, or is not a viable option in the short term.

Organising opportunities will arise following different scenarios, a number of which are listed below:

- FTOs will be asked to highlight companies that are looking to sign an information and consultation agreement, or where workplace representatives are seeking to make a valid request.
- Whilst the union expects trade unions to be able to nominate their representatives based on their normal election arrangements, organisers may need to assist in any elections that are held, as well as identifying and encouraging union members to stand in areas where the union does not have recognition.
- Organising for elections, including helping with any "union slate" and running information campaigns, as well as organising opportunities around issues raised through the information and consultation forum once it has been established.
- Organising and recruitment highlighting the benefits of trade union membership, using information and consultation as the vehicle.
- Once a company has been highlighted, the communications department should be kept informed and involved for effective campaigns centred on any election timetables and issues management.

■ EDUCATION AND TRAINING

Officials - have already received some training and this will be reinforced in the light of experience. Officer's guidance will assist in negotiating effective I&C arrangements and raise the issue of employers trying to use I&C to undermine the trade union structure.

Organisers - will need to be trained in the strengths and weaknesses of the Regulations to take advantage of the opportunities for organising and recruitment. Organisers need to work together with officers and plan strategically regarding the identification of target companies. They will then need to work in conjunction with the campaigns department.

Workplace representatives – should have training on the content of the Regulations and the need to seek legal advice on the structure and content of agreements. Once Information and Consultation structures are in place representatives will require specific training to fulfil their roles. The Information and Consultation Regulations, if implemented correctly will entrust workplace representatives with a lot more information and involvement than may have been the case in the past.

Education department - has built on the presentation that has already been provided to officers and has also developed a number of activities including a negotiating exercise. They are also looking to introduce a section from an external institution regarding a course on financial management accounting and interpreting accounts etc.

GLOSSARY OF TERMS AND OTHER MATTERS

For the purposes of these Regulations

Data Requests - an employee of an employees' representative may request data from the employer for the purpose of determining the number of people employed by that undertaking in the United Kingdom.

Employee - an individual who has entered into or works under a contract of employment.

According to the Regulations, when calculating the number of employees in an undertaking an average is taken over a 12-month period. By using the term employee to calculate the thresholds, certain categories of workers are excluded if they are not employees, for example temporary agency workers and sub-contractors.

The employer may (but is not obliged to) count a part-time employee as representing half a full-time employee if they worked under a contract for 75 hours or less in any month during the period for calculating employee numbers.

Negotiated agreement

Negotiated agreements may cover more than one undertaking, or may provide for different arrangements in different establishments.

In order to be valid, negotiated agreements must:

- set out the circumstances in which employers will inform and consult their employees
- provide either for the appointment or election of Information and Consultation representatives, or for information and consultation directly with employees (or both)
- be in writing and dated
- cover all the employees of the undertaking, or group of undertakings if more than one undertaking is to be covered
- be signed by, or on behalf of the employer
- be approved by the employees - i.e. either signed by all the negotiating representatives; or be signed by a majority of the negotiating representatives and either be approved in writing by at least 50% of employees or approved by 50% of employees who vote in a ballot.

An EAT decision has confirmed the view that an agreement with a trade union can "cover all the employees", even the non-unionists.

Pre-existing agreement

This is can be an agreement that pre-dates the 1 April 2005, or one agreed subsequently. If it is not agreed following a valid employee request, or formal invocation by the employer (the "trigger" for the process), then the rights to information and consultation are not legally enforceable. Remember that if an employer claims to have a "pre-existing agreement" does not mean that there is one, which is valid under the ICE Regulations.

Although the Standard Information and Consultation Provisions are arguably "minimum requirements", the UK Regulations allow for "pre-existing agreements" that are considerably less beneficial to employees.

In order to be valid, pre-existing agreements must:

- be in writing
- cover all the employees of the undertaking

- set out how the employer is to give information to the employees or their representatives and to seek their views on such information

- be approved by the employees - methods could include: a simple majority among those voting in a ballot of the workforce; a majority of the workforce expressing support through signature or the agreement of representatives of employees who represent a majority of the workforce (including trade union officials in workplaces with a recognised union).

We should avoid agreeing to any "pre-existing" or "negotiated" agreement that is less beneficial than the Standard Provisions may be challenged as being in breach of the Directive in the view of Unite Amicus Section experts. An EAT decision has confirmed the view that an agreement with a trade union can "cover all the employees", even the non-unionists. Where employees believe that there is no valid pre-existing agreement in place allowing the employer to hold a ballot for endorsing an employee request, a complaint may be made to the Central Arbitration Committee (CAC)

Price-sensitive information
Information, which would be expected to cause a movement in a listed company's share price.

Public sector application
The government says it "fully supports the principle that employees have a right to be informed and consulted about important issues affecting them, regardless of whether they are working in what is legally defined as an "undertaking". It has confirmed that it is in the process of developing a Code of Practice with the civil service unions that will apply the principles of the new legislation to central government departments that do not constitute undertakings for the purpose of the Regulations. It has been stated that Local authorities will not be formally covered by the Code, but will be expected to adhere to its principles.

Representatives
There are two types mentioned in the Regulations:

- Negotiating Representative - elected or appointed by employees for the purpose of negotiating the I&C Agreement. All employees must be able to take part in the appointment or election of these representatives.

- Information and Consultation Representative - if provided for in the negotiated agreement, I&C representatives are elected or appointed to serve on the permanent I&C body, once the I&C agreement has been validly endorsed.

I&C Representatives do not have to be the same people as negotiating representatives.

Standard Information and Consultation Provisions
If an employer and negotiating representatives fail to agree an arrangement - or to extend the time for negotiation - within six months, or an employer fails to initiate negotiations in the light of a valid request then the standard I&C provisions apply.

The details of the standard procedure are as follows:

On the selection of I&C representatives:
- representatives must be elected in a ballot - which it is the employer's obligation to organise

- the number of I&C representatives is proportional to the number of employees in the undertaking - one per 50 employees or part thereof, subject to a minimum of two representatives and a maximum of 25.

On the subject matter for the information and consultation provisions, namely
- Information on "the recent and probable developments of the undertaking's activities and economic situation"

- Information and Consultation on "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"

- Information and Consultation on "decisions likely to lead to substantial changes in work organisation or in contractual relations". Consultation in this category is required to take place "with a view to reaching an agreement"

The Directive then prescribes the quality and method of informing and consulting. It states that 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.

Consultation must take place at an appropriate time, using appropriate means. The consultation is expected to be at the relevant management level depending on the subject matter of the discussions. The consultation is to take account of the information provided by the employer and upon the opinion of the employee representatives. It must be conducted in a manner, which allows employee representatives to meet with the employer and to obtain a "reasoned response" to any opinions expressed.

Undertaking

An undertaking is a separate legal entity.

For Unite Amicus Section operating in the private sector the definition of an undertaking in most cases means a company with its own unique number at Companies House. Some organisations structure themselves so that they have a different company for each plant, or even different companies for different groups of workers, who work at the same place. Remember an agreement may cover more than one undertaking though.

In the public sector it is plain that an "undertaking" includes a local authority, NHS Trust, college or university, but there may be complications about who is the employer.

The Directive and the Regulations apply to "public or private undertakings carrying out an economic activity, whether or not operating for gain". They may be partnerships, co-operatives, mutuals, building societies, friendly societies, associations, trade unions, charities and individuals who are employers - if they carry out an economic activity. It may also include schools, colleges, universities, NHS trusts, and Government bodies (both central and local), again if they carry out an economic activity. Ultimately, DTI guidance acknowledges that it is a matter for the CAC and the courts to decide.

Even before a request for a negotiated agreement is made, the Regulations allow the employer to be asked to provide data to calculate the relevant number of employees in an undertaking, which must of itself reveal information to assist in determining the undertaking.

Valid employee request

A valid request for an agreement to be negotiated can be either: a single request by 10% of the workforce or a number of different requests by different employees over a period of 6 months which collectively add up to 10% of the workforce.

This is important as a request by one person or only a few can constitute a request, which only becomes a valid request if the workforce can galvanise 10% of their number to sign the petition, or submit requests of their own. A request by one or a few can also trigger the entitlement to pursue a data request. It must be in writing, dated and sent to either the employer or the CAC. Valid requests can only be made once every 3 years. Requests may be sent directly to the employer or can be made through the CAC, where they may be handled anonymously.

APPENDIX 1

ACAS Joint Consultative Committee Constitution checklist

- The title and objectives of the committee
- Its terms of reference - the matters it can and/or cannot discuss and its powers
- Its composition:

i. employee representatives (number, constituents)
ii. management representatives
iii. co-option and ex-officio provisions
iv. named deputies for representatives
v. method for obtaining members, appointment, election etc

- Election procedure

i. who organises
ii. when held
iii. qualifications of candidates and voters
iv. nominations
v. voting arrangements

- The period of office of members and arrangements for their retirement
- Electing/nominating officers of committee, that is: chairperson, secretary
- Meeting arrangements

i. frequency, advance notice
ii. when and where held
iii. procedure for placing items on the agenda
iv. arrangements for minutes
v. quorum
vi. duration of meetings

- Facilities for committee members

i. time-off for liaising with constituents
ii. payment while attending meetings
iii. reporting arrangements
iv. publication of minutes
v. methods of reporting back
vi. responsibilities

- Methods of altering constitution

Source: ACAS Information and Consultation, good practice advice, 2004

APPENDIX 2

The DTI's guidance on the Information and Consultation Regulations includes suggestions for contents of negotiated agreements, which it states, "is not intended to be prescriptive in any way".

Suggestions for contents of negotiated agreements

Coverage

- The undertaking (or group of undertakings in the case of agreements covering more than one) covered by the agreement
- Which staff in the undertaking(s) are covered by the agreement (as long as all employees are covered)
- Whether separate arrangements will exist in different parts of the undertaking (for example, in different establishments, organisational divisions or sections of the workforce)
- Where the employer has one or more collective agreements with trade unions, what the relationship is between those collective agreements and the negotiated information and consultation agreement

Methods of information and consultation

- The type of arrangements to be set up, including whether there will be representatives of employees, and/or direct information and consultation with the workforce
- Whether any "hierarchy" of structures will be set up, e.g. at national, regional, local level
- How any representatives of employees are to be chosen or appointed, how many such representatives, how long they will serve, how they are to be replaced
- Any obligations there may be on any employee representatives, for example, to report back to the workforce or to seek their views
- The nature of any direct forms of information and consultation with the workforce

Frequency and timings of information and consultation

- How often information and consultation will take place
- When information and consultation will take place

Subject-matter

- Types of subject to be covered
- How subjects will be chosen and how agendas of any meetings will be drawn up

Information and consultation

- The type and nature of information to be provided
- How views/opinions of staff can be given
- What the employer will do in response
- Who will represent management at any meeting

Statutory consultation requirements

- How other legal requirements to consult employees (e.g. on collective redundancies, business (TUPE) transfers, health and safety, European Works Councils, pensions) will be handled where relevant, and what the relationship will be with the consultation arrangements set up under this negotiated agreement.

Confidential information

- How confidential or price-sensitive information will be dealt with (this must be consistent with the requirements in Regulations 25 and 26 concerning confidential information)
- Obligations on anyone in receipt of confidential information
- Disciplinary measures for breach of any confidentiality restriction

Disputes

- How disputes can be resolved before making a formal complaint to the Central Arbitration Committee (though a negotiated agreement may not seek to prevent employees or their representatives bringing a dispute to the CAC or an application or appeal being made to the Employment Appeal Tribunal or an employment tribunal

Restructuring

- Implications of company restructuring for information and consultation structures, for example the implications for the number and identity of any employee representatives, or the possibility of revising the agreement.

Duration of agreement

The duration of the agreement and circumstances in which it can be reviewed, revised or terminated. This could be important because there is a three-year moratorium from the date of a negotiated agreement.

Source: DTI guidance on the Information and Consultation Regulations

The DTI also advises that Employers and negotiating representatives are free to agree whatever arrangements they wish as to the method, frequency, timing and subject-matter of information and consultation, according to the specific circumstances of their own organisation!

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