Unite guide for members

Information and Consultation Regulations

Unite guide to Information and Consultation Regulations

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■ INTRODUCTION

Legislative changes that took effect on 6 April 2005 established the right to information and consultation (I&C) on a much wider range of issues and much earlier than previously and as such we have prompted some employers to set up new arrangements for informing and consulting their workers.

This guide is to give reps and Unite officer's an overview of the regulations and to assist them in using the regulations in their workplaces.

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

The Unite industrial strategy for information and consultation aims to:

- Protect and extend collective bargaining rights in the workplace while benefiting from the I&C regulations
- Make the most of opportunities for organising and recruitment while negotiating I&C agreements
- Resist and challenge the deficiencies in UK employment law, and
- Provide the training and education support that Unite reps and officers need to deal with the complex range of issues concerning I&C in the current global economy

This guide intends to give an overview of I&C and as such this guide provides links to more detailed guidance on specific points and examples of I&C in the workplace.

Recognition at a workplace always remains the ultimate priority. However, that does not mean that information and consultation arrangements cannot and should not be used as a way forward for companies where recognition has been refused.

It is important that no information and consultation agreements are signed until they have been checked for legal and policy compliance. Officers are advised to commence this process as early into the negotiations as possible.

■ THE LEGAL BACKGROUND

This guide is not intended as a detailed reference source for the law in this area, but should be used as a guide to the practical issues and strategic approach to be adopted by Unite officers and representatives.

The Information and Consultation of Employees Regulations 2004 (the ICE Regulations) the Statutory Instrument 2004 no. 3426 can be downloaded at http://www.legislation.gov.uk/uksi/2004/3426/made

The regulations have been amended twice and apply to the following:

- To all undertakings[1] with at least 50 employees
- Agreements have to cover all employees regardless of whether they belong to a trade union
- There is a requirement for employers to establish arrangements for informing and consulting with their employees by way of a negotiated agreement

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

a) Where there is no I&C agreement

b) Where there is an existing I&C agreement

A) No I&C agreement

The legally enforceable right to information and consultation does not exist until after a procedure is invoked. The existence of a 'voluntary agreement' is not legally binding or enforceable.

1. In the first instance comes the 'valid employee request' from 10% of the workforce of an 'undertaking' unless the employer formally initiates the statutory process.
2. Then the employer must negotiate the I&C agreement within a time frame
3. If an agreement is reached it is legally binding
4. But if there is no agreement or the employer does nothing the Standard Information and Consultation Procedure (SICP) form applies, this too is enforceable

[1]This means a company with its own unique number at Companies House – where companies structure themselves differently, for example multiple sites or companies, one agreement may cover more than one undertaking. See Unite v GE Aviation Systems, (IC/43(2012).

B) A pre-existing agreement is in place

Remember even if the employer tries to tell the union there is an agreement in place this 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 called Stewart v The Moray Council: EAT 20 April 2006 and can be viewed at
http://swarb.co.uk/stewart-v-the-moray-council-eat-20-apr-2006/

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

- Following a valid employee request
- The employer can hold a ballot to see if the workforce endorses that request
- 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, or
- 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 for an I&C structure 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.

Negotiations must start within three months and can last for up to six 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:

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 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 sections 188 to 192 of the Trade Union and Labour Relations (Consolidation) Act 1992(5) and regulations 10 to 12 of the Transfer of Undertakings (Protection of Employment) Regulations 1981(6).

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.

5. The duties in this regulation to inform and consult the I&C representatives on decisions falling within paragraphs (1)(c)(i) cease to apply once the employer is presented with a duty under –

(a) section 188 of the Act referred to in paragraph (1)(c)(i) (duty of employer to consult representatives); or

(b) regulation 10 of the Regulations referred to in paragraph (1)(c)(ii) (duty to inform and consult representatives); and

(c) The employer has notified the information and consultation representatives in writing that they will comply with their duty under the legislation referred to in sub-paragraph (a) or (b) as the case may be, instead of under these Regulations, provided that the notification is given on each occasion on which the employer has become or is about to become subject to the duty.

6. Where there is an obligation in these regulations on the employer to inform and consult their employees, a failure on the part of a person who controls the employer (either directly or indirectly) to provide information to the employer shall not constitute a valid reason for the employer failing to inform and consult. For example, if the employer is part of a big multi-national organisation.

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 (CAC) and, if necessary the Employment Appeal Tribunal. The CAC has limited powers to make orders and can impose a financial penalty of up to £75,000. This is recoverable by the Secretary of State as a civil debt.

There are 14 different applications or complaints that can be made to the CAC. There is a different form for each application or complaint and it is important to complete the correct one. Further information can be found on the CAC web site at http://www.cac.gov.uk/

Rights and protections for representatives

There is an entitlement to reasonable time off to perform their functions in relation to I&C negotiations.

There is 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 in relation to confidentiality.

Confidentiality

This is a very challenging issue for Unite representatives. Employers who have a negotiated agreement or who are subject to the standard provisions can – on the grounds of confidentiality

- Restrict the passing of documents or information to I&C representatives so that it cannot be passed to anyone else, even 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 towards it

However, the reality is that the withholding of information from I&C representatives on confidentiality grounds is only permissible if the information was so sensitive that if it was leaked to a third party – whether inadvertently or deliberately – it could cause serious harm or prejudice to the undertaking. Added to which if the information was that sensitive, the information could be provided but on a strictly restricted confidential basis.

As well as this 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.

Restrictions on confidential information do not include disclosures under 'whistle blowing' legislation, which are allowed under the Public Information Disclosure Act. However, it is advisable to obtain legal advice before relying on 'whistle blowing' provisions.

In the event of any dispute over a restriction of information on confidentiality grounds an employee can challenge this decision by making a complaint to the CAC. It is essential to have this right written into any negotiated agreement, otherwise an employer could seek to deny the right to go to the CAC where this is not explicitly stated in the negotiated agreement.

Taking the initiative on information and consultation

Officers will need to take a close look at the companies they represent and decide what approach to take regarding Information and Consultation. One of the key issues is whether there is a recognition agreement for all employees. The key questions to be asked are:

If there is a recognition agreement:

- Should Unite seek an agreement to cover I&C rights? or
- Have a separate agreement which would be legally enforceable
- Would an I&C agreement enhance the union's current arrangements?
- Are the employees likely to support it?

If there is no recognition agreement:

Would Unite be able to succeed in getting reps elected in the bargaining units with no recognition?

Will the introduction of I&C structures undermine the union by providing a platform for non-union representatives?

Strategy for negotiating an I&C agreement

Any strategy for a negotiated I&C agreement must be carefully paced and officers should ensure that reps at the company where an I&C agreement is being negotiated should be kept well informed, well supported and have an active and effective engagement with the members they represent. Officers must try to make absolutely sure that as far as possible it is Unite workplace reps who become the I&C representatives.

If officers are not completely satisfied with any agreement that is already in place and think Unite could negotiate a better agreement, the Information and Consultation Regulations could offer an opportunity for renegotiation.

Officers must be on their guard against employers who determine that they already have a pre-existing agreement or a voluntary agreement and want that ratified by the union. The problem is that those agreements will almost certainly be unenforceable and often has wording in them which can undermine Unite and the collective bargaining work we undertake. As such, every opportunity must be taken to re-negotiate an I&C agreement under the Information and Consultation Regulations which is enforceable.

In order to ascertain the 10% agree requirement, as specified in the Regulations companies are required to provide data on the average number of employees employed within the undertaking in the UK over the past twelve months.

In addition and in accordance with CAC ruling – Amicus and Mcmillan Publishers CAC case Number IC/4/(2005), they are also required to provide the following information:

- The establishments, sites and/or plants that you consider make up an undertaking, and
- The number of employees within each of those establishments, sites and/or plants

Using the legal requirement under the Regulations to provide information, also provides officers with an excellent opportunity to gain information on the structure of the company, even if they do not want to officially trigger the process of information and consultation. Obviously this information would be vital in any recruitment/organising initiative or campaign.

■ GUIDANCE ON WHAT TO INCLUDE IN AN I&C AGREEMENT

1. Recognition agreements

In the first instance any new recognition agreement should include the specific requirements of the I&C Regulations. The most important reason for this is to ensure employers are prevented from using I&C as a mechanism to create alternative information and consultation systems that may undermine the collective bargaining arrangements that Unite is actively trying to promote. At the same time Unite needs to make sure that any agreement would not be left open to challenge if the agreement did not cover the entire workforce.

Under these circumstances, although there are examples of 'mixed constituencies' in companies it should be noted that any work around I&C should also encompass campaigns for promoting Unite in areas of the undertaking where membership is low, starting a focussed recruitment campaign and ensure organising is part of the overall strategy so all workplaces are covered and the biggest number of workers within any company are brought into trade union membership.

2. Legislation

An introductory statement of the principles and objectives with explicit reference to the European Directive, as well as the UK Information and Consultation Regulations. This will give all representatives and participants a clear reference point when negotiating an agreement.

3. Protection and facilities for I&C reps

There must be included information about full protection from unfair treatment by the employer, for example, discriminating or dismissing reps or election candidates. Explicit in the agreement should be reference to Article 7 of the EU Directive and UK Regulations 27-29 and 30-34. There should also be included specific statements about reasonable time off to carry out their duties and permissions to use literature to encourage members to participate and the use of all forms of technology, access to meeting rooms, telephones, printers and literature to communicate with members and keep them informed.

4. Definitions of Information and Consultation

The definitions of I&C should be as strong as those in the European Directive as a minimum and there should be strong negotiating with employers to ensure the agreement is as good as can possibly be negotiated.

The European Directive Article 2 stipulates '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'.

5. Standard information and consultation provisions

Please see information on page 7.

6. Other issues for information and consultation

The minimum inclusions as mentioned above should be included but as well as these there will also be other matters that should be included, these could encompass:

- Health and safety
- Education
- Training
- Equal treatment
- Pensions
- Employment policies

7. Issues excluded from information and consultation

Any I&C agreement will not cover or affect areas dealt with in collective bargaining agreements, and that the existing collective bargaining arrangements will remain in place.

It should also be mentioned that an I&C agreement does not remove the statutory obligations covered by TUPE and Collective Redundancies legislation. It should also be stated that remuneration of employees and matters relating to individuals are not covered by the agreement.

8. Composition of forum/council

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

It is important that Unite is represented on any I&C body and that the union representatives are allocated sufficient places with a goal of full trade union representation on the body.

If a workplace has Unite members but no recognition agreement then the union should try to insist that the union nominates representatives to sit on the body. 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 recognition exists. The union should then campaign hard to win the seats and organise in these areas.

Under no circumstances should any position be defined as 'non-union' as this will institutionalise and entrench the acceptance of non-union representatives.

9. Deputies

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

10. 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.

11. Officers

(a) 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 co-ordinator. If this is not possible then a shared chair is preferable to one that is permanently under employer control.

(b) 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.

(c) Employee representatives co-ordinator – 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.

12. Agenda

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

13. Meetings

The text should be drawn up in such a manner that the 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 one a month but provided the 'as and when necessary' wording is in place then less regular meetings may 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 co-ordinator to call extraordinary meetings when deemed necessary.

14. Experts

A clause should be included allowing full time Unite officers to attend the meetings if the employee side requests it. The clause should also allow the employee side to call for independent experts to attend and offer advice deemed necessary, in order to understand the subject matter and undertake any detailed assessment.

15. Confidentiality

A confidentiality clause is almost a necessity even if the union would prefer not to have one. The clause should state that 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 withholding of information is valid. Such a clause should also contain wording that says the confidentiality requirements will not be consistently or unreasonably used.

It would also help to have a provision to allow representatives to consult with others, this could be limited to an officer of the union or a legal representative to assess whether the information is confidential for the purposes of the Regulations or the Directive.

NB Stock Exchange rules are not a legitimate reason for withholding information from union representatives at the company.

16. Education and training

Provision should be made for paid time off for the training of I&C representatives, including an agreement that Unite facilities and courses will be used.

Unite provides education and training about information and consultation. Please contact your regional office for further information or go to the Unite web site to view the training guide.

17. Termination and re-negotiation 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.

18. Enforcement

It is extremely important that the agreement explicitly states it is enforceable via the procedures detailed in the UK Regulations 22 – 23.

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