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Small but Perfectly (In)formed (and Consulted)?

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It has been nearly three years since the UK Information and Consultation of Employees Regulations 2004 (the 'Regulations') came into effect for organisations with 150 or more employees. The Regulations give employees the right to be informed and consulted about a wide range of key business developments in the workplace. The Regulations have been phased in, extending in April 2007 to organisations with 100-149 employees and, from 6 April 2008, to organisations with 50-99 employees. Organisations with fewer than 50 employees will not be covered by the Regulations. This article considers the likely impact of the extension of the Regulations to smaller organisations with 50-99 employees and how such organisations may choose to manage the requirements under the Regulations.

Summary of Information and Consultation Obligations

The first point to note is that the information and consultation obligations under the Regulations do not apply automatically; they must be triggered by a formal employee request. A minimum of 15 employees or 10% of employees (whichever is the greatest) must make a written request to negotiate an information and consultation agreement. Obviously, for organisations with 50-99 employees this threshold will only be met if 15 employees make a request, which for organisations with only 50 employees, equates to 30% making such a request. In such organisations, this is potentially a high hurdle for employees to overcome. If no employee request is made the company is free to decide whether or not to implement such an agreement.

If an employee request is received, the company must have in place, one of the following: (i) a pre-existing agreement; or (ii) a negotiated agreement or (iii) the standard agreement. The parties are given the freedom to tailor the agreement to suit their individual needs by deciding the subject matter, timing, method and frequency of information and consultation via a negotiated agreement or using a pre-existing agreement.

A company may use a pre-existing agreement if it has been agreed before an employee request is made and the agreement is in writing, covers all employees of the undertaking, sets out how the employer is to give information to employees or their representatives and how it will seek their views on such information and is approved by a majority of the workforce.

The company must put the continuance of the pre-existing agreement to a ballot. A vote by 40% of the workforce is required to discontinue the pre-existing agreement.

If a pre-existing agreement does not meet the statutory requirements or is discontinued or the parties fail to reach a negotiated agreement within 6 months or such extended period if mutually agreed between the parties, the standard information and consultation provisions in the Regulations will apply. These provisions may be seen as more onerous as it requires the company to inform and consult on:

- the recent and probable development of the organisation's activities and economic situation;
- the situation, structure and probable development of employment within the organisation and on any anticipatory measures envisaged, in particular where there is a threat to employment; and

- decisions likely to lead to substantial changes in work organisation or contractual relations.

Impact
The Department of Trade and Industry Final Regulatory Impact Assessment 2004, undertaken before the Regulations came into effect, found that organisations with 50-99 employees were the largest group impacted by the Regulations: almost 18,000 organisations fall within this threshold, compared to 5,700 within the 100-149 threshold and 13,000 within the 150 plus threshold.

As well as affecting more organisations, the Regulations may have a more profound effect on these smaller organisations than on larger ones because there is less likely to be an existing culture of informing and consulting in small organisations. Larger organisations may already have been unionised or established European or local works councils or joint consultation committees. However, smaller organisations are less likely to have a culture of consulting with their workforce on a collective basis. Further, they may have been less likely to have had to consult collectively under the collective redundancy and transfer of undertaking regulations. Given the threshold for collective redundancy consultation is 20 or more redundancies, such organisations would have had to be losing 20-40% of their workforce to fall within scope.

It is also worth noting that a company can be fined up to £75,000 for failing to comply with the Regulations. This penalty applies to all companies, regardless of size, but may obviously represent a much bigger blow for smaller organisations.

Way ahead
The Regulations can be seen as an opportunity to improve the workforce by engaging in serious dialogue on issues which affect employees. Information and consultation is good industrial practice and can increase employee morale and commitment. With this in mind, some organisations have taken a proactive approach and initiated discussions to reach a negotiated agreement, in the absence of a valid employee request. However, the size, structure and resources available to smaller organisations may mean that they are less able, and therefore less likely, to take such a proactive approach. They may prefer the idea of being small, but not perfectly (in)formed (or consulted). However, whether their employees are prepared to let the *status quo* continue remains to be seen.