
INFORMATION AND CONSULTATION OF EMPLOYEES (ICE)

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BACKGROUND

What are the new rights?

From April 2005, the Information and Consultation of Employees (ICE) Regulations 2004 gave employees new rights to be informed and consulted by their employer. The 'standard provisions' in the legislation say employees should be:

- informed about an organisation's economic situation
- informed and consulted about employment prospects, and
- informed and consulted about decisions likely to lead to substantial changes in work organisation or contractual relations

Previously information rights were limited to consultation about collective redundancies and staff transfers (TUPE), health and safety issues, and bargaining information where unions have recognition.

The 'right' is not automatic, but is triggered by either a request by 10% of employees, or initiated voluntarily by the employer. It initially applied to undertakings with 150 or more employees, but then dropped to 50 employees by April 2008.

Advice on the regulations has also been issued by ACAS and the Department for Trade and Industry. UNISON is monitoring the introduction of the new law and if you are approached by your employer about the regulations, please contact your regional officer and UNISON head office, c/o bsg@unison.co.uk.

Why are the regulations being introduced?

Following a European directive, all EU countries are required to have ICE legislation. Information and consultation procedures can lead to better treatment of workers, help to build trust, and minimise industrial disputes and litigation. The ICE regulations mean that employers have to be more open with staff about what is happening in their workplace and this is the first time many employees will have had rights to be informed or consulted.

The regulations also enable employers to benefit from the experience and expertise of their staff. Studies consistently show that increased worker participation leads to higher productivity in the workplace.

A new type of workplace relations?

The regulations impose a 'duty of co-operation' on the parties when negotiating an agreement or implementing it. They must:

“work in a spirit of co-operation and with due regard for their reciprocal rights and obligations, taking into account the interests of both the undertaking and the employees.”

Although this 'partnership' working is common in much of the rest of Europe, it will be a culture shock for many British bosses to really take workers' views on board. However

if employers refuse to genuinely consult they will be breaking the law and a complaint against them can be taken to the Central Arbitration Committee (CAC).

Private or Public? An opportunity or a threat?

The effect of the regulations may be very different depending on whether you are in an organised public sector workplace covered by a comprehensive set of agreements, or in a private company with no union recognition.

Some **public sector** employers may try to use the regulations to undermine existing collective agreements and marginalise the union. This may be the start of attempts to replace full collective bargaining rights with feeble consultation and/or derecognition. There may be a particular threat where UNISON has good existing collective bargaining structures, but low membership density and limited membership participation – such as some organisations in the community and voluntary sector.

Where UNISON is recognised, it already has the right to negotiate on behalf of all the workers in a bargaining unit. Creating a staff consultation council in parallel with a joint negotiating committee, can blur the lines of responsibility, especially if the two bodies disagree. Parallel structures may also stretch overworked union reps even further.

Do bear in mind that a parallel consultation body is also more bureaucracy for management, and requires more time off work for staff. Experience suggests that non-union staff reps are less reliable than union reps, and often just represent their own views, not those of other staff. Also, if the union has difficulty in recruiting new reps, non-union members are even more unlikely to want to be staff reps. Employers should give better facility time to union reps to do their jobs properly before considering creating a new body.

Negotiating Tip:

Information and consultation on a few issues is no substitute for collective bargaining. In the public sector, we need to defend our existing collective bargaining structures. You may need to step up recruitment and organising to justify the union's role as the real representative body of the workforce.

On The Ground:

Horizon Housing Group attempted to withdraw from their Joint Negotiating Committee with UNISON and set up a staff council shortly after a long-standing branch officer left. They claimed (incorrectly) that they were obliged to do so to comply with the regulations. This was contested by a new local UNISON convenor, with regional support. The employer has now reaffirmed their commitment to maintain recognition and the branch organisation has been strengthened.

However in the **private sector** the situation may be quite different. Private contractors have workers in many workplaces separated from each other and scattered across the country. Utilities may have a union presence in the 'core' organisation, but not elsewhere. Millions of workers in the private sector are unorganised, and experience shows that setting up staff structures across a company brings union representatives into contact with non-union members. This can be an important tool in organising and recruiting.

Negotiating Tip:

Where the union has difficulty in getting recognition, establishing an Information and Consultation (ICE) body can show that the union has some influence. It only takes the support of 10% of employees to establish an ICE body, compared with majority support

needed for recognition. Encourage union members to stand as ICE reps and non-union reps – who are probably out of their depth - may join the union for support.

On The Ground:

East London Connexions repeatedly stalled on negotiating recognition with UNISON after 18 months of negotiations. The union was uncertain if they could win a recognition ballot, so a petition was started by the branch for an ICE body. This campaign raised both the union's profile and increased membership. An ICE body is now being set up. After this campaign, the employer is reported to be about to grant union recognition.

Recognition verses Information and Consultation

Where UNISON has recognition it is usually a voluntary arrangement covering part of the workforce, whereas arrangements concluded under the ICE regulations cover all employees of an undertaking and have got legislative backing.

Negotiating is a joint process, and ultimately the union can reject a proposal if it is unhappy with it. **Consultation** implies an employer should take workers views on board and give reasoned responses to questions, but can continue with their plans even if staff disagree. **Informing** is merely the passing of information from management to the workforce.

Having recognition rights is far better than just information and consultation. If the union already has recognition, then try to resist the establishment of a parallel consultation structure. It is harder for non-union staff to request an ICE body if you expand a 'pre-existing' collective agreement on information and consultation to cover all employees of the undertaking.

In an unorganised workplace, deciding whether to go for recognition or an ICE body depends on the specific circumstances. An ICE body is easier to establish because it requires less workforce support than recognition and can be used as an organising tool. However it is less powerful and could reflect badly on the union if workers regard it as a discredited talking shop. Finally, because such a body is established using the law it may be harder to get rid of at a later date. If you go down the ICE road, then be prepared to recruit and organise workers and ICE representatives that you come into contact with.

For more information see the UNISON bargaining guide to 'Negotiating recognition agreements' [here](#)

Negotiating Tip:

Extend your existing collective agreement on information and consultation (or agree a new one) to cover all employees. If the union has low membership density you might have to agree to consult with non-union members on a limited range of issues. But this keeps the leading role for the union as the 'voice of the workforce' and may also be an opportunity to recruit and organise.

On The Ground:

After a robust defence of the existing recognition arrangements by the UNISON branch, Surrey Police have stated that they will not now pursue the introduction of an information and consultation body. In the meanwhile the branch is reviewing the facilities and recognition agreements in relation to how they consult and what they are recognised for. They may undertake to consult all staff over certain matters, as a way of warding off any future attempts by the employer to derecognise UNISON by the back door.

European Works Councils

Employee representatives on European Works Councils (EWCs) also have consultation rights on cross-border issues for trans-national companies. It makes sense for workers' representatives on EWC's and reps with information and consultation rights under UK law to work together, and exchange information.

THE REGULATIONS

Who do the regulations apply to?

The regulations apply to 'undertakings' with more than 150 employees in the UK from April 2005, more than 100 from April 2007, and more than 50 from April 2008. If the number of employees fluctuates, this is an average over the last 12 months.

- An 'undertaking' is a body carrying out an "economic activity, whether or not for gain" except if that body's principal role is to carry out purely administrative functions or exercise public authority.
- Subsidiaries and other organisations registered separately, count as individual undertakings.
- It is still not clear exactly how these regulations will apply to 'administrative' parts of the public sector, although government guidance says it may "also include schools, colleges, universities, NHS Trusts and Government bodies (both central and local)." The courts will eventually clarify this but if in doubt assume the regulation do apply.
- Employers may choose to count part-time workers (contracted to work for 75 hours or less a month) as half an employee for this calculation, but not for anything else. However they do not have to do this. Because the law refers to 'employees' and not 'workers', casual and agency staff are likely to be excluded.
- The employer must provide information to an employee or their union about the number of employees of the undertaking so they can determine if the undertaking is covered by the regulations. If necessary, this should include part-time as well as full-time employees. The employer should respond within one month, or a complaint can be taken to the Central Arbitration Committee (CAC).

The trigger mechanism

The statutory process can either be started voluntarily by the employer, or triggered by a written and dated request of 10% of the employees. This can be done using a petition or by letters which must include between a minimum of 15 and up to a maximum of 2,500 employees.

- For the purpose of calculating the 10%, part-time workers count as full workers.
- This can be a single request, or combined requests made over a maximum six-month period.
- The request for negotiations can be made to the employer, or to the Central Arbitration Committee (CAC) if you wish to preserve the anonymity of people signing the petition.

Once a valid request for negotiations has been made, the employer must enter into negotiations with workers' representatives within three months. If an employer fails to

act on a valid request, then the “default” statutory provisions automatically apply after 6 months.

However there is a 3-year moratorium on using the regulations in certain circumstances. These prevent the invoking of the regulations from the date when:

- a ‘pre-existing’ agreement was signed (unless it is terminated) or
- the ‘default’ statutory procedures were implemented or
- a 40% endorsement ballot was lost (see ‘pre-existing agreements’ below)

This moratorium does not apply if there have been material changes in the structure of the undertaking so a pre-existing agreement no longer covers all employees or has employee approval.

Negotiating Tip:

Some employers have wrongly claimed that they have to set up staff consultation councils and used it as an excuse to withdraw from collective bargaining procedures. But they only have to introduce new arrangements if there is a request by 10% of the workforce, and even then they have the option to put it to a vote if there is a valid pre-existing agreement.

On The Ground:

At Luton Borough Council, a staff association used the threat of invoking the ICE regulations in an attempt to get recognition. The association had much less than 10% membership. UNISON opposed the attempt at recognition, and the employer rejected the staff association’s approach.

Pre-existing agreements

If there is a ‘pre-existing agreement’ on information and consultation and a request is made under the statutory ICE process, there is some protection for the existing agreement. To qualify as a ‘pre-existing agreement’ an agreement merely has to “set out how the employer is to give information to the employees or their representatives and seek their views on such information”. But it must also:

- 1) Be written, and be agreed prior to the ICE request being submitted.
- 2) Cover all the employees of the undertaking (you may have more than one agreement, as long as all employees are covered)
- 3) Have been approved by the employees

Employee approval can be demonstrated by either:

- A simple majority of those voting in a ballot of the workforce, or
- A majority of the workforce expressing support through signatures, or
- The agreement of representatives of employees who represent a majority of the workforce (this usually means trade unions).

If these conditions are met, and less than 40% of employees of the undertaking signed the request, then the employer does not have to accept it automatically. They are allowed to ballot the entire workforce on whether to continue with the existing arrangements or not. In the ballot, the ICE request has to be endorsed by 40% of employees (not just those who vote) and a majority of those who vote.

If the employer decides on a ballot, they must inform employees of this within 1 month of the ICE request being submitted, and hold the ballot at least 21 days after informing them. The ballot results must be announced as soon as reasonably practicable.

If the pre-existing agreement(s) covers employees in a number of different undertakings (for example, several Housing Associations) then the employer(s) must ballot all those employees covered by the agreement(s).

On The Ground:

At the Scottish Ambulance Service UNISON already had recognition and a partnership agreement. A non-TUC union with around 10% membership threatened to use the regulations to force its way in. Although UNISON might have been able to sign a 'pre-existing' agreement, it was likely that there would still have been a ballot under the '40%' rule. Rather than give the renegade union the publicity of a ballot, a new consultative committee with minimal influence was established to formally comply with the regulations.

The negotiations

The negotiations take place between the employer and representatives elected or appointed by the workforce. The employer must make arrangements within 3 months so that employees can appoint or elect genuine representatives to conduct negotiations on their behalf. All employees must be entitled to take part in this process, and all must be represented by a negotiating representative. There is no requirement that the representatives constituency sizes be equal. For example, it may be that each section of an undertaking has one rep, or that a number of reps are elected in an organisation-wide ballot. Note that these reps are only for the negotiations, and are different from the ICE reps elected once the final agreement is signed.

There is a then period of six months for negotiations to agree a procedure, although this can be extended by mutual agreement. If no agreement is reached, then the "default" statutory procedures will apply (see below). The statutory procedures also automatically kick in if the employer fails to initiate negotiations within six months of the original request being made.

Negotiating Tip:

This may mean union reps have to sit down with non-union members to negotiate with the employer. Try to get some union officers as negotiating reps as of right. Also try to make sure the union wins all the negotiating representatives positions.

The negotiated agreement

The final negotiated agreement has few constraints on what it contains. It must cover all employees in the undertaking, and set out the circumstances in which the employer must inform and consult their employees. It must either provide for the election or appointment of Information and Consultation Representatives or that the employer will inform and consult with employees directly, or both.

It is unlikely that an employer can effectively consult with their entire workforce as individuals given that all workers will need time to read documents and discuss the issues. Try to make sure you have elected representatives.

Negotiating Tip:

As long as the agreement covers the very general requirements stated above, there is no 'list of issues' that it has to cover. The "default" statutory procedure does have a list

of issues that should be consulted on, but a negotiated agreement may contain fewer (or more) than this.

The membership of an ICE body is left completely up to negotiation. Try to ensure the union holds some or most of the seats as of right. If there are elections, put up union candidates and try to win every place.

To be valid, the agreement has to be agreed by either:

- 1) all the negotiating representatives or
- 2) a majority of the negotiating representatives plus at least 50% of employees in the undertaking in writing or
- 3) a majority of the negotiating representatives plus at least 50% of employees who vote in a ballot.

The regulations say 50% of those who vote must support the agreement, but do not specify that a minimum number of employees must vote.

On The Ground:

Metropolitan Housing Trust proposed setting up a staff council, claiming that union membership was not high enough to represent all staff. Following a rejection of the employers' initial plans, UNISON entered into negotiations and the plan was substantially scaled down. It was agreed that a consultation committee will meet before the main union-only joint negotiating committee. The union has first refusal on all staff places on the consultative committee if it has a rep in the constituency, and the employer agreed to give the union adequate facility time and assist in recruiting and getting new reps.

Ballots

Ballots are organised (and paid for) by the employer, but they may appoint an independent ballot supervisor and must publish the arrangements for the ballot. It must be fair, secret, accurately counted and with all entitled to stand as candidates and anyone who is an employee on the voting day (or first day of voting) entitled to vote.

Negotiating Tip:

Having the employer organise a ballot clearly has the potential to be unfair. Ask for an impartial agency, like ACAS or the Electoral Reform Ballot Services, organise the ballot rather than the employer. If the employer insists on organising the ballot themselves, ask for a union rep to jointly supervise the process. Check that the question and information on ballot paper are unbiased. Complaints can be taken to the Central Arbitration Committee (CAC).

On The Ground:

The Outlook Care Group wanted to introduce an ICE committee, even though UNISON already had recognition. Following discussions with the branch and an ACAS facilitated meeting they recognised the importance of union stewards and safety representatives. They still intend to go ahead with an ICE committee, but it will merely be a meeting just before the main joint negotiating committee meets.

The “default” statutory procedure

If an agreement cannot be reached, then the default statutory procedures apply.

These require that the employer must inform/consult elected employee representatives (one per 50 employees or part thereof, with a minimum of two) on:

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- 1) Recent and probable developments of the undertakings and economic situation (information only – the employer does not have to consult on this).
- 2) Current situation, structure and probable development of employment in the undertaking (especially any threat to employment).
- 3) Changes in work organisation or contractual relations, including redundancies and transfers. In this area, consultation must be “with a view to reaching agreement with ICE reps“ even if this is not ultimately possible. If there is not genuine consultation, a complaint may be made to the CAC.

This information must be given with enough time, and in an appropriate fashion, to enable information and consultation reps to adequately study it and prepare for consultation. Representatives must meet with the relevant level of management, depending on the subject under discussion, to obtain a reasoned response to points that they raise.

Employers have to present their future plans at an early enough stage for workers (or their representatives) to study them, prepare for discussions and influence the outcome. Information and consultation has to take place at:

- an appropriate time and
- the relevant level of management
- so you can't be fobbed off with a middle manager who knows less than you do.

Employers are permitted to exclude staff transfers (TUPE) and redundancies on a case-by-case basis and use the existing statutory consultation process instead. But they should inform ICE reps that they are doing this.

ICE reps are allowed to negotiate changes to the statutory procedure with the employer.

Compliance and enforcement

Complaints about breaches of the regulations must go to the Central Arbitration Committee (CAC) – the same body that has responsibility for statutory recognition procedures. The only exceptions are over a breach of confidentiality, which employers may pursue through the civil courts, and over legal protections for ICE reps, which are enforced via Employment Tribunals.

Complaints about breaches of agreements negotiated under the regulations, or the default statutory procedure, must be brought by an ICE representative within 3 months of the alleged breach. This also includes complaints that consultation arrangements have not been set up at all. Issues with pre-existing agreements cannot be taken to the CAC.

Complaints about ballots on pre-existing agreements, on electing negotiating representatives or accepting a negotiated agreement must be brought within 21 days of relevant event. Complaints about a decision to open negotiations must be made within one month.

The CAC may issue a compliance order or may refer the matter to ACAS if it believes it may resolve this issue. Appeals against a CAC decision can be made to an Employment Appeals Tribunal (EAT), but only on a point of law.

The CAC cannot stop an employer from acting but if it upholds a complaint then an EAT can impose a fine of up to £75,000 payable to the government. This £75,000 limit

might be open to challenge in the courts under European Law as being too low to be an effective deterrent.

ICE REPRESENTATIVES

Representatives rights

ICE reps have a wide range of rights, including paid time off and protection against discrimination.

They are entitled to “take reasonable time off during the employee’s working hours to perform their functions as a representative”, and this should be paid. If the employer does not permit this, reps can complain to an employment tribunal, which may award the employee pay for the time they would have taken off. However, the employment tribunal has no other sanctions against the employer.

ICE representatives, and other employees, are also protected against unfair dismissal or detriment under the regulations for actions related to the regulations. If they are also union reps then they have ‘double protection’ against discrimination. The only exception is if they have breached the confidentiality of the employer (see below).

Negotiating Tip:

Try to include Information and Consultation representatives in your facility time agreement.

Confidentiality

If disclosure of certain information would harm the legitimate interests of the undertaking, employers may place ICE reps under a duty of confidentiality. However, reps can take the case to the Central Arbitration Committee (CAC) who will make a judgement as to whether the restriction is valid or not.

Under exceptional circumstances, employers may also withhold information or documents completely, if their disclosure of which would seriously harm or prejudice the undertaking. Again, an appeal can be made to the CAC.

Employees are not bound by confidentiality where they make a ‘whistleblowing’ disclosure under the Public Interest Disclosure Act 1998.

Training

There is a clear training need for negotiating on the Information and Consultation regulations themselves, and UNISON, the TUC and ACAS have training materials and courses available.

However there may also be a training need for I&C representatives to understand the information they are being given. Although the “standard procedures” say that reps must be allowed sufficient time to “adequately study [proposals] and prepare for consultation”, if they are given complex financial and organisational data relating to the future of an organisation they may unwittingly agree to employer proposals without fully understanding them.

Negotiating Tip:

Try to provide training for new I&C representatives with union input. You may be able to use this to recruit non-union reps.

FURTHER HELP

Resources

UNISON has a wide range of bargaining resources online at the Bargaining Zone - www.unison.org.uk/bargaining – or through your branch from UNISON Communications. These include:

ICE safety checklist – Are your recognition agreements under threat? – stock no. 2409 - www.unison.org.uk/acrobat/14703.pdf

Freedom of Information Act guide - <http://www.unison.org.uk/acrobat/B1959.pdf>

The ACAS guide to the ICE regulations is at www.acas.org.uk/info_consult/consultation.html

Contacts

Advisory, Conciliation and Arbitration Service (ACAS) helpline is open Monday - Friday 08:00 - 20:00 and Saturday, 9am-1pm on 08457 474747

Trades Union Congress (TUC) is Congress House, Great Russell Street, London, WC1B 3LS. www.tuc.org.uk Tel: 020 7636 4030 Fax: 020 7636 0632

Central Arbitration Committee (CAC) is at 22nd Floor, Euston Tower, 286 Euston Road, London NW1 3JJ. www.cac.gov.uk enquiries@cac.gov.uk Tel: 020 7904 2300, Fax: 020 7904 2301

Electoral Reform Services is at The Election Centre, 33 Clarendon Road, London, N8 0NW. www.erbs.co.uk enquiries@electoralreform.co.uk Tel: 020 8365 8909 Fax: 020 8365 8587

Your Comments

UNISON welcomes comments on this information sheet. Contact the Bargaining Support Group at UNISON Centre, 130 Euston Road, London NW1 2AY

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