

NEGOTIATING ON INFORMATION AND CONSULTATION OF EMPLOYEES (ICE) ARRANGEMENTS

How branches can benefit from ICE rights



The Information and Consultation of Employees (ICE) Regulations mean that employers have to be more open with staff about what is happening in their workplace. Through legislation, it has helped towards creating a culture in which the exchange of information is the norm. This can only be a good thing for relations with the trade union, as long as employers do not use it to try to diminish the strength of the union within the workplace.

Within the trade union movement the ICE Regulations are generally seen as a complementary, legally enforceable right alongside union recognition and collective bargaining rights.

There has been some concern that employers will use them to replace full collective bargaining rights with feeble consultation and/or de-recognition. But whilst the Regulations may be limited in themselves, they can be used to strengthen a union's position within the workplace rather than replace it.

For example in the private sector, workers may be 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.

But there can be some confusion around the purpose of the Regulations. It is therefore crucial that trade union representatives are actively involved in information and consultation procedures if initiated.

*“Collective bargaining is the process by which employers and recognised trade unions seek to reach agreement through negotiation on issues such as pay and terms and conditions of employment. It is quite different from *consultation* where the responsibility for decision-making remains with management. With collective bargaining both employer and trade union take responsibility for fulfilling the bargain. Given this scope for confusion it is particularly important that organisations which recognise trade unions ensure that any consultation or communications procedures they introduce are compatible with, and complementary to, existing collective bargaining processes.”*

[‘Employee communications and consultation’](#) booklet, Acas (www.acas.org.uk)

Trade union representatives can therefore:

- help clarify for employers the separate roles and benefits of consultation and collective bargaining, as well as which subjects are appropriate for each
- use the ICE procedures to strengthen the relationship and dialogue between trade union reps and employer, as well as to reaffirm that communication should be a two-way process and consultation means not just listening but taking account of views
- through their work on the ICE procedures, get to be seen positively by all workers, both members and non-members as being actively engaged in workplace decisions on behalf of the workers.

Information and consultation procedures can generally lead to better treatment of workers, help to build trust, and minimise industrial disputes and litigation.

Why negotiate on information and consultation of employees?

- i. It can **complement existing collective bargaining rights** and may help improve relationships and dialogue with employers, and increase information received.
- ii. Direct involvement by trade union reps will help ensure that **collective bargaining rights are not weakened** or confused by employers with any information and consultation arrangements.
- iii. It **highlights how UNISON values its members** and recognises the need for good communications with employers, which could result in an increase of your branch's activist base.
- iv. It **highlights how UNISON reps already have expert negotiation skills** when dealing with employers.
- v. Agreeing successful procedures on information and consultation with workers can be **a useful recruitment tool**, advertising the benefits of joining UNISON for all.

How to use this guide

This guide has the following sections that you can dip into as relevant in your workplace. The aim is to inform you for negotiations with employers on improving arrangements whilst ensuring that you are aware of the basic legal requirements and rights.

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The basic rights for employees in relation to information and consultation

The Information and Consultation of Employees (ICE) Regulations 2004 and the Information and Consultation of Employees (Northern Ireland) Regulations 2005 (based on a European Directive) give employees rights to be informed and consulted by their employer.

The main difference between the British and Northern Ireland Regulations is that the Central Arbitration Committee (the CAC) is the principal enforcing body in Britain, whereas the Industrial Court is the main enforcing body in Northern Ireland.

Who do the Regulations apply to?

- The Regulations apply to ‘undertakings’ with **50 or more employees** in the UK (or individuals who have entered into or work under a contract of employment including a contract of service or apprenticeship). **It includes part-time employees** but if individuals work for 75 hours or less per month, the employer can choose to count them as half a full-time employee. **It does not include casual and agency staff.** 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. Government guidance indicates that an undertaking should be a “separately incorporated legal entity”. Therefore subsidiaries and other organisations registered separately, count as individual undertakings.

Case law has defined ‘undertaking’ further.

In the case of *Moyer-Lee v Cofely Workplace Ltd (2015)* the employment appeal tribunal (EAT) clarified that an undertaking means a legal entity capable of being the employer of employees serving it under a contract of employment and does not extend to a mere division or department of that single employer.

In the case of *Advisory Conciliation and Arbitration Service (ACAS) v Public and Commercial Services Union (PCS) (2018)* the EAT confirmed the European Court’s earlier decision that the payment for an undertaking’s goods or services does not have to be made by the consumer or end-user. It applies equally where funding is from some other source.

The EAT asserted that services carried out in the public interest by a public authority without a profit motive (in this case as provided by Acas) were not within the exclusion for the exercise of public powers since they did not involve the exercise of public authority (e.g. legislation, administration and policy development) or otherwise constitute “governmental activities”.

An undertaking could therefore be a company, partnership, mutual, building and friendly society, association, trade union, charity, school, college, university, NHS trust, central or local government body, or an individual who is an employer, but it must carry out an economic activity.

The employer must provide information to an employee or their union (through a **'data request'**) about the number of employees (including part-time employees, casual and agency staff) at the undertaking, so they can determine if the undertaking is covered by the Regulations.

If the employer does not respond within one month, a complaint can be taken to the Central Arbitration Committee (CAC) (or Industrial Court in Northern Ireland).

The trigger mechanism

The statutory process can either be started **voluntarily by the employer**, or triggered by an **ICE request of at least 10% of the employees**.

The ICE request can be through a petition or by letter/s or postcards which should be signed and dated, and must include the support of between a minimum of 15 and up to a maximum of 2,500 employees.

As of January 2019 at the time of writing this guide, the Government's 'Good Work Plan' expressed an intention to reduce the threshold required for a request to set up ICE arrangements to 2% of employees (but continuing with a minimum of 15 employees) from 6 April 2020.

It can be a single ICE 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 the people signing the petition wish to keep their anonymity.

The date of the employee request is defined as the date when the request was sent to the employer or the date that the CAC informed the employer and employees how many employees made the request; or if more than one request was made, the date that the 10% threshold was reached.

This date is important in relation to the timing of negotiations on the agreement.

When the ICE request is not valid

Once the ICE request has been received by the employer, they must act unless they can show that the **request is not valid** such as because:

- there is not a minimum of 50 employees in the 'undertaking'
- the request is not from at least 10% of the employees
- the separate letter requests were not submitted within a six-month period

- a previous request has been made within the past three years (although there are some exceptions to this including if the employer and employees or their representatives have agreed to terminate an arrangement within the three-year period, or 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.)

If the employer believes the ICE request is not valid, they can apply to the CAC for a declaration, as long as it is done within one month of the employee request.

Alternatively the employer may also claim that there is a pre-existing agreement.

Pre-existing agreements

Many union recognition agreements cover aspects of information and consultation, as do existing joint consultative committees, company councils or employee forums.

Under the Regulations, to qualify as a 'pre-existing agreement' it 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) *not* be a European Works Council (EWC) agreement (companies with at least 1,000 employees in European Union member states and with at least 150 employees in two or more member states must have an EWC or equivalent to provide 'transnational information and consultation')
- 2) be in writing, and have been agreed before the ICE request was submitted
- 3) cover all the employees of the 'undertaking' (although there may be more than one agreement in place)
- 4) have been formally approved by the employees either through 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 a new ICE request, then the employer does not have to accept it automatically.

The employer is allowed to ballot the entire workforce on whether they support the new ICE request or not. In the ballot, the new 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).

However, even if the new ICE request is endorsed by employees, it does not necessarily mean that the pre-existing agreement ends.

ICE negotiations

Once a valid ICE request for negotiations has been made, the employer must make arrangements for the **election or appointment of negotiating representatives** and then start negotiations with workers' representatives.

As interpreted by the CAC, this whole process can take up to nine months. This period can be extended with the agreement of both parties, or if complaints have been raised. It can also be extended if there is a need for a ballot because of a pre-existing agreement, or the employer has applied to the CAC for a declaration on whether there was a valid employee request.

Negotiating representatives

All employees must be entitled to take part in the election of negotiating representatives, and all must be represented by a negotiating representative.

Under the default statutory procedures (see below), there must be at least one elected representative for every 50 employees, up to a maximum of 25 representatives. 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 initial negotiations to agree a procedure, and are different from the actual ICE reps who will be elected once the final agreement is signed.

The employer must:

- make the arrangements for employees to elect the negotiating representatives, satisfying the requirements in the Regulations
- inform the employees in writing who the negotiating reps are, once elected
- invite the negotiating reps to enter into negotiations to reach a negotiated agreement.

The negotiating reps are entitled to paid time off to carry out their duties.

'Default' statutory procedures or standard 'fall-back' provisions

If an employer fails to act on a valid request, or an agreement cannot be reached then the 'default' statutory provisions automatically apply.

This includes the arranging of a ballot by the employer to elect the relevant number of ICE reps (unless the number of candidates is equal to or less than the relevant

number of reps required). There must be at least one elected representative for every 50 employees, up to a maximum of 25 representatives.

The statutory procedures state that the employer must then inform these ICE reps on:

- 1) recent and probable developments of the undertakings and economic situation (information only – the employer does not have to consult on this)
- 2) the current situation, structure and probable development of employment in the undertaking (especially any threat to employment) and consult on these
- 3) changes in work organisation or contractual relations, including collective redundancies and business transfers (TUPE). In these two areas, there must be consultation “with a view to reaching agreement with ICE reps” even if this is not ultimately possible. If there is not genuine consultation, a complaint can be made to the CAC (or Industrial Court in Northern Ireland.)

The information provided must be given in an appropriate format and with enough time for ICE reps to adequately consider it and prepare for consultation.

The ICE reps must be able to meet with the relevant level of management depending on the subject under discussion, in order to get a reasoned response to any points they raise.

Under the statutory procedure, staff transfers (TUPE) and redundancies can be excluded on a case-by-case basis as long as the employers use the existing statutory consultation process instead. But they should let ICE reps know that they are doing this.

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

The negotiated agreement on ICE

Negotiators will inevitably want to extend the statutory provisions within the negotiated arrangement for their particular workplace.

Government guidance suggests that a negotiated agreement should include:

- methods for informing and consulting (whether through representatives, directly with the workforce, or a combination of the two)
- how any ICE representatives are to be chosen, how many there will be, and how they may be replaced
- the types of subjects on which ICE will take place
- the information to be provided
- the timing and frequency of information and consultation
- who will represent the employer at any ICE meetings
- the way in which the employer will respond to the views of employees or their ICE reps
- the circumstances in which the arrangements can be modified or terminated.

The method, frequency, timing and subject matter are open to be agreed.

The final negotiated agreement should be in writing, dated and signed, and cover all employees in the undertaking. If approved by the employees, the agreements can cover the employees of more than one undertaking, where “one or more employers” want to reach an agreement on that basis.

It may also include agreed details such as whether it has reserved positions for representatives of recognised trade unions.

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 (no minimum number of voting employees is set).

Acas also recommend that employers draw up a communications and consultation policy, fully agreed by trade unions and involving employees in the process of setting this up.

“A good policy should set out:

- a clear statement of policy, including the purpose of communications and consultation, the fact that it is an integral part of every manager’s job and the importance of communication as a two-way process and not a one-off exercise
- responsibility for communication at each level
- the methods of communication
- arrangements for consultation and participation
- arrangements for training managers and employees in the skills and processes of communications and consultation
- how the policy will be monitored.”

[‘Employee communications and consultation’](#) booklet, Acas (www.acas.org.uk)

Election of ICE representatives

The statutory procedures contain rules for the election of ICE reps and number required.

The employer should arrange for a ballot to elect the ICE reps unless the number of candidates is equal to or less than the relevant number of reps needed.

Arrangements by the employer must also include the appointment of an independent ballot supervisor and consultation with the employees or their representatives before publishing the final arrangements for the ballot. The ballot must be held no earlier than 21 days after the arrangements have been published. All employees at the undertaking must be covered although there can be separate ballots for different sites or groups of employees.

The number of ICE reps depends on the number of employees within the undertaking, with one rep required per 50 employees or part thereof, and a minimum of two and a maximum of 25.

Representatives rights

ICE reps have a wide range of rights, including 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 at the appropriate hourly rate. 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, selection for redundancy, 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).

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 they feel disclosure would seriously harm or prejudice the undertaking. Again, an appeal can be made to the CAC about the interpretation.

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

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. In Northern Ireland complaints must go to the Industrial Court.

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. If the CAC upholds a complaint then an Employee Appeal Tribunal can impose a fine of up to £75,000 payable to the Government. In Northern Ireland, if the Industrial Court upholds the complaint, then the employees can apply to the High Court who can order the employer to pay a penalty.

Complaints to the CAC about ballots on pre-existing agreements or on the election of negotiating representatives or on accepting a negotiated agreement (such as the

ballot arrangements not satisfying statutory requirements), must be brought within 21 days of the relevant event.

Complaints to the CAC about a decision to open negotiations must be made within one month.

Issues with pre-existing agreements cannot be taken to the CAC.

Issues over a breach of confidentiality can be pursued through the civil courts, and over legal protections for ICE reps through employment tribunals.

What are some of the issues to look out for?

Recognition versus Information and Consultation

Where UNISON is recognised, it already has the right to negotiate on behalf of all the workers in a bargaining unit and this is the mechanism that should be strengthened and developed.

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 the employer could continue with its plans even if staff disagree.

Informing is merely the passing of information from management to the workforce.

For more information see UNISON's '[Negotiator's guide to Recognition Agreements](http://www.unison.org.uk/content/uploads/2016/03/Negotiators-Guide-to-Recognition-Agreements.pdf)' (www.unison.org.uk/content/uploads/2016/03/Negotiators-Guide-to-Recognition-Agreements.pdf) and UNISON's '[Guide to Statutory Recognition: using the CAC procedure](http://www.unison.org.uk/content/uploads/2016/07/Guide-to-Statutory-Recognition.pdf)' (www.unison.org.uk/content/uploads/2016/07/Guide-to-Statutory-Recognition.pdf).

Having recognition rights is far better than just information and consultation rights. If the union already has recognition, then try to resist the establishment of a parallel consultation structure. Information and consultation on a few workplace issues is no substitute for collective bargaining.

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. Branches may need to step up recruitment and organising to justify the union's role as the real representative body of the workforce.

If the union has low membership density, the branch 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 provide an opportunity to recruit and organise.

Employers should be reminded that creating a staff consultation council in parallel with a joint negotiating committee, could blur the lines of responsibility, especially if the two bodies disagree.

Parallel structures also mean more bureaucracy for management, and require more time off work for staff. Employers should be encouraged to provide better facility time to union reps to do their jobs properly before considering creating a new body.

A housing association 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 then reaffirmed their commitment to maintain recognition and the branch organisation has been strengthened.

Some employers may wrongly claim they have to set up staff consultation councils and use it as an excuse to withdraw from collective bargaining procedures. But they only have to introduce ICE 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.

Acas advises:

“To avoid misunderstandings it is important to agree at the outset which subjects are appropriate for consideration in the JCC [Joint Consultative Committee] and which are best dealt with in a negotiating or other appropriate forum (for example: a safety committee).”

[‘Employee communications and consultation’](#) booklet, Acas (www.acas.org.uk)

Experience also suggests that non-union staff reps are less reliable than union reps, and may 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 become staff information and consultation reps.

However 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.

Branches can encourage union members to stand as ICE reps. Non-union reps – who may well be out of their depth – may then join the union for support. But it is worth remembering that if an ICE body is established, it may be harder to get rid of at a later date and it will be less powerful than a recognised trade union.

A *charity* 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. Whilst the ICE body is being set up, the campaign has also encouraged the employer to consider union recognition.

The Regulations impose a ‘duty of co-operation’ on the parties when negotiating an ICE agreement or implementing it that some employers may be reluctant to follow.

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.”

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)** www.gov.uk/government/organisations/central-arbitration-committee or the **Industrial Court** in Northern Ireland www.industrialcourt.gov.uk.

Establishing the undertaking

The ICE Regulations only apply to 'undertakings' but the employees' understanding of what an undertaking includes may differ from the employer.

In the *IC/43/(2012) case of Mr Coombs and Mr Holder & GE Aviation Systems Limited*, the complaint made to the CAC was that the employer's arrangements for a ballot to elect information and consultation representatives were defective because within the GE Aviation division in the UK there were three other companies that had not been included in the ballot. It was submitted that the 'undertaking' for the purposes of the ICE Regulations should have covered all four companies.

The CAC panel rejected the complaint because it concluded that the three other companies did not comprise the group as these companies each had their own unique registration number at Companies House.

Reaching 10% of the employees

Establishing the 'undertaking' will clearly impact on the trigger mechanism that requires an ICE request to be supported by a minimum of 10% of the employees.

In the *IC/47/(2014) case of Dr Jason Moyer-Lee, Mr Henry Chango and others & Cofely Workplace Ltd*, the CAC panel's decision was that the ICE request was invalid because it had been made on behalf of the employees at the organisation's University of London site rather than all the organisation's employees, which were scattered at 600 sites operated by the undertaking.

The CAC's annual report explained that the "Panel's interpretation of the term 'undertaking' in the Regulations was that it referred to the Company as a whole and not the one site in question... [The Employment Appeal] Tribunal supported the CAC's interpretation that the word 'undertaking' referred to the legal entity employing the employees concerned and could not be applied to, for example, an organisational unit. The Tribunal noted, as the CAC had done, that the government, at the time of enacting the Regulations, had made a conscious decision to use the term 'undertaking' rather than the alternative 'establishment'."

When an ICE request is being considered in the workplace, it is important that care is taken in clarifying the number of employees in the workforce with the employer, so that there is a clear figure for totals (taking account of part-time workers appropriately). This will then highlight the level of support required from staff.

In a fragmented workplace, it may be particularly difficult to get these details. The CAC may back a data request that goes beyond providing the bare number of employees, and this then could help towards making a successful ICE application.

In the case of *IC/4/(2005) Macmillan Publishers*, the employer was found to have failed to provide information about the number of employees in an undertaking after a complaint was made to the CAC by the trade union. The union, Amicus (now part of Unite) requested data on the "average number of employees employed within the undertaking in the UK over the past twelve months and to ascertain which sites, establishments or plants are considered to be part of the undertaking." But the employer did not respond.

The CAC Panel found that in essence, the employer should provide sufficient information (such as of details of staff within each site i.e. "more than the disclosure of a bare number") so that the employee can check the data provided and come to some conclusion as to whether it is false or incomplete or not.

Under the Regulations, employees have a potentially powerful right to request data about the number of employees working in the undertaking. This data request can be made whether or not an ICE request is subsequently made.

As the CAC guidance explains, under *Regulation 6(1)* a complaint can be made to the CAC “by an employee or an employees’ representative that the employer has failed to provide information to determine the number of people employed by the undertaking in the UK or the number of employees that constitutes 10% of employees in the undertaking, or that information provided is false or incomplete.”

This potentially could include a clear differentiation of agency workers or sub-contractors who would not count towards the 10% required for an ICE request.

As well as ensuring that all employees of the undertaking are covered in regard to an ICE request, it may on some occasions be of benefit to the workers to consider whether to try to establish that ICE arrangements could cover more than one ‘undertaking’ under the same employer.

Checking for any pre-existing agreement

All employees within a bargaining unit, whether or not they are members of the union would be considered to be covered by a collective agreement. If the bargaining unit then covers all the employees in the undertaking, the existing collective agreement could be a valid pre-existing agreement in relation to the ICE Regulations, provided it also meets the the other obligations (see page 9 above).

Even in cases where not all employees were covered, the collective agreement could play a role if other pre-existing agreements covered the remainder of employees.

Therefore there may be cases when union reps may want to maintain a pre-existing agreement, but they would need to show that it is popular and useful.

A health branch already had a recognition agreement. However a non TUC affiliated trade union with around 10% membership threatened to use the ICE Regulations to force its way in.

As the CAC guidance states “In these circumstances, if 40% of employees request information and consultation arrangements, the employer must nevertheless start negotiations to establish such arrangements. However, if the number of requests is at least 10% but less than 40%, the employer can choose to run a ballot for the employees to decide if the employer should initiate negotiations to establish information and consultation arrangements.”

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.

A charity 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. The employer still went ahead with introducing the ICE committee, but it was merely a meeting taking place just before the main joint negotiating committee meets.

A 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.

Pre-existing agreements need to be considered carefully by union reps thinking of using the Regulations as they have the potential of hindering or blocking progress towards a new ICE arrangement.

In the case of *Stewart v Moray Council* [2006] IRLR 592 EAT, the various collective agreements already in place were found not to amount to a pre-existing agreement by the Employment Appeal Tribunal, confirming the CAC's decision.

Although the agreements were in writing, they covered all employees (union members and non-members alike, because of the wording of the agreements), and had been approved by the employees and endorsed by trade union reps, they failed in one area.

The Chair of the CAC reported that “the Regulations state that a pre-existing agreement should ‘...set out how the employer is to give information to the employees or their representative and seek their views on such information.’ As can be seen from the CAC decision, the Panel's view was that the Council's agreement did not meet the requirements of that provision and the EAT's view was that the agreement ‘...does not engage with those detailed requirements in any way.’

Furthermore, and significantly from the point of view of businesses with previously negotiated trade union agreements, the EAT also supported the CAC decision that approval for pre-existing agreements could be inferred where a majority of employees in an undertaking were union members. It did however comment that, when considering the question of the approval of a pre-existing agreement consisting of two or more agreements, the CAC should consider separately whether each agreement had been approved by the group of employees it covered.”

Improve on the standard statutory requirements of the ICE agreement

As long as the agreement covers the very general requirements of the legislation, 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 (see page 9), but a negotiated agreement may contain fewer (or more) than this.

As reported in the CAC annual report in the case, *IC/46/(2013) Mr S Wright and Rolls Royce Plc*, the complaint, was that “the employer had failed to comply with the terms of a Negotiated Agreement. The applicant submitted that the employer had failed to consult employees on proposed restrictions to its Global Travel Policy... The Panel concluded that the travel policy was not a ‘contractual relations arrangement’ within the meaning of the Negotiated Agreement. The Panel also found that changes to the policy did not amount to ‘decisions likely to lead to substantial changes in work organisation’, a further criterion in the Negotiated Agreement which determined whether the employer was obliged to inform and consult.”

Where an ICE negotiated agreement is in place, reps can use it to challenge the employer for failing to consult. Whatever the outcome (in the Rolls Royce case mentioned above, the CAC ruled in favour of the employer), raising the issue may still lead to improvements in the level of consultation.

There could also be a requirement for employers to inform and consult under the ICE Regulations and other legal duties such as some pension, redundancy and business transfer issues.

In addition to the topics for discussions the negotiated ICE agreement may include a number of practical issues such as meeting agendas, facilities to prepare for meetings, joint compilation of minutes and reports, communications, processes to follow up issues between meetings, housekeeping and travel arrangements, and administrative back-up.

When ICE agreements are in place, it is important that representatives meet with the relevant level of management, depending on the subject under discussion, in order to get a reasoned response to points that they raise. ICE reps should not have to meet with lower level managers who are likely to know less than they do and this could be confirmed in the negotiated agreement.

Trade union involvement in the ICE agreement

It is unlikely that any employer could effectively consult with each individual within their entire workforce given that all workers will need time to read documents and discuss the issues, so it is important to have elected representatives.

The membership of an ICE body is left completely up to negotiation. Branches and reps should try and make sure that the union holds some or most of the seats as of right. A negotiated ICE agreement could incorporate the right for union officials, specialists and experts to attend, and include reserved union seats. ICE representatives could also be included in your facility time agreement.

If there are elections for the ICE reps, branches and reps should put up union candidates and try to win every place. However it cannot be assumed that union reps automatically represent all the employees in an undertaking.

As reported in the CAC's annual report, in the case of *IC/50/(2015) Ms C Morrissey & University of London*, Ms Morrissey submitted a complaint to the CAC that the employer "was in breach of the Regulations by restricting candidates to those nominated by the two recognised trade unions, that this effectively excluded the majority of employees from making nominations and that employees were not given a proper choice as the ballot paper simply asked whether the employees did or did not support the two candidates...

...[The employer's] position was that, under the Regulations, it was entitled to decide if negotiating representatives should be appointed or elected and that it was good practice to accommodate any information and consultation arrangements within its existing industrial relations framework...

The decision of the CAC panel was to uphold the complaint. Although it accepted that it was an employer's choice as to whether negotiating representatives should be appointed or elected, the panel was not persuaded that the process the employer adopted met the statutory requirement of providing for representation of all employees. By restricting nominations to those put forward by the two recognised trade unions, no account appeared to have been taken of the fact that the majority of employees were not union members...

The Employment Appeal Tribunal dismissed the employer's appeal and found that the CAC was entitled to make the decision it had. The Tribunal made the point that the purpose of the Regulations was to engage the whole workforce in information and consultation and that any arrangements put in place had to be effective in meeting that purpose; good industrial relations was therefore a relevant consideration. It added that it was not an employer's choice alone as to whether representatives should be appointed or elected; the Regulations provided that an employer should make arrangements to allow the employees to elect or appoint representatives."

Having the employer organise a ballot may be seen as having the potential to be unfair. Therefore branches or union reps could ask that an impartial agency, like [Acas \(www.acas.org.uk\)](http://www.acas.org.uk) or the [Electoral Reform Ballot Services \(www.electoralreform.co.uk\)](http://www.electoralreform.co.uk), 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. Particularly check that the question and information on the ballot paper are unbiased. Complaints can be taken to the Central Arbitration Committee (CAC).

If the organisation has a European Works Council, although its agreement does not qualify as a pre-existing agreement, it still makes sense for workers' representatives on EWC's and ICE reps to work together and exchange information as they both have consultation rights.

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 ICE 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.

Therefore the negotiated ICE agreement should include some provision for training in order to help employees better understand the information they are given. If the training provided for new ICE reps involves the union, it may also be useful for recruitment.

Further information

Gov.UK information and services

www.gov.uk/informing-consulting-employees-law

NI Direct government services

www.nidirect.gov.uk/articles/information-and-consultation-employees

The Central Arbitration Committee

<https://www.gov.uk/government/organisations/central-arbitration-committee>

Information from the CAC about the legislation, the statutory process and the way the CAC handles applications and complaints.

www.gov.uk/government/publications/the-information-and-consultation-of-employees-regulations-2004-cac-publications

How to make, and respond to, applications or complaints to the CAC under the Information and Consultation of Employees Regulations 2004

www.gov.uk/government/collections/information-and-consultation-application-and-response-forms

ICE Regulations (the original wording was amended in 2006 to take account of consultation on pension changes)

www.legislation.gov.uk/ukxi/2004/3426/regulation/3/made

The Industrial Court

www.industrialcourt.gov.uk/statutory-duties-and-types-applications/information-and-consultation-employees

Northern Ireland guidance (Industrial Court)

www.industrialcourt.gov.uk/sites/industrialcourt/files/media-files/sept_05_-_information_consultation_guidance.pdf

Northern Ireland ICE Regulations

www.legislation.gov.uk/nisr/2005/47/contents/made

Acas guidance

Information and consultation of employees (ICE)

www.acas.org.uk/index.aspx?articleid=1598

Consultation

www.acas.org.uk/index.aspx?articleid=675

Employee communications and consultation
(including an advisory booklet)
<http://www.acas.org.uk/index.aspx?articleid=663>

TUC report and guidance

Democracy in the Workplace: strengthening information and consultation (2014)
https://www.tuc.org.uk/sites/default/files/Democracy_In_The_Workplace_2014_.pdf

TUC Worksmart
<https://worksmart.org.uk/work-rights/discipline-and-policies/staff-consultation>

Electoral Reform Services

The UK's leading provider of independent election and balloting services
www.electoralreform.co.uk/

Other UNISON guidance

'Negotiator's guide to Recognition Agreements'
www.unison.org.uk/content/uploads/2016/03/Negotiators-Guide-to-Recognition-Agreements.pdf

'Guide to Statutory Recognition: using the CAC procedure'
www.unison.org.uk/content/uploads/2016/07/Guide-to-Statutory-Recognition.pdf

Also contact your **regional education teams and / or LAOS** to find out what training and resources are available to assist you with negotiating with your employer or promoting the issues in this guide with your members <https://learning.unison.org.uk/>

Putting the case to employers – what they can gain

Improved performance

A basic requirement for any venture, is good communication with all those involved. Time spent on communicating openly and comprehensively is time well spent as it will ensure that misinformation, rumour, and misunderstanding is avoided as well as the wasted time and resources in combating them.

Progress is likely to be more consistent if the information flow to workers is ongoing so that they continue to receive real, up-to-date information about their jobs including technical information, deadlines, targets and feedback.

Studies consistently show that increased worker participation leads to higher productivity in the workplace.

“Information and consultation is part of a broad range of practices that are pursued by so-called High Performance Workplaces. There is a host of evidence to show that companies engaging in high performance work practices enjoy higher productivity and profitability than those which do not....

... Responsibility for major decisions still rests with management, but a voice for workers not only improves decision-making, it also fosters greater trust between management and employees....measures which better enable managers to build on the experience and expertise of the workforce lead to better business outcomes.”

‘Democracy in the Workplace: strengthening information and consultation’, TUC (www.tuc.org.uk/publications/democracy-workplace-strengthening-information-and-consultation)

Don't keep re-inventing the wheel

Setting up a mechanism for communication and consultation as required under the ICE Regulations ensures that there is an ongoing agreed process in place to manage the process.

Because of their particular skills and experience in collective bargaining and communicating with members in the workplace, trade union reps are uniquely placed to offer expertise in setting up and being involved in the operation of this mechanism.

Managers can benefit from the knowledge and experience of workers

The consultation process ensures that all angles are explored when management decisions are being made, including the consideration of workers' opinions with their specific skills and experience.

The ICE Regulations enable employers to benefit from the experience and expertise of their staff.

Workers are also more likely to accept management decisions if they feel their opinions have been listened to and they have engaged with the process.

“This may be particularly important at times of emergency or where new practices or procedures are being introduced.”

[‘Employee communications and consultation’](#) booklet, Acas (www.acas.org.uk)

Improved relations with workers

Workers are likely to be far more committed and motivated in their work, if they have a clear understanding of their role and how it fits into the organisation’s aims as a whole, as well as how they can influence decisions affecting them.

They are likely to be more actively engaged as a contributing worker within the workplace if they feel their views will be listened to.

“Employees are more likely to go that ‘extra mile’ if they feel valued and involved in decision-making.”

[‘Employee communications and consultation’](#) booklet, Acas (www.acas.org.uk)

It establishes a positive culture of information and consultation

Most employers have a responsibility under the Regulations and most recognise that they do.

A workplace where the employer does not wait for an ICE request and a trigger of sufficient workers to introduce ICE negotiations, will help towards building employee trust. It can also help engender loyalty and improved productivity if all staff feel engaged and informed.

Checklist for branches and union reps

- Does the union already have recognition rights, a collective bargaining agreement and a joint negotiating committee in place?** Prioritise strengthening these and increasing facility time, avoiding parallel consultation structures and recruiting more members from the workforce.
- Might ICE arrangements be of benefit to the trade union?** For example if you do not have existing recognition rights and are currently unlikely to get them as you have a low density of union members. Or if it could be a useful way of strengthening the union's position within workplaces scattered across the country.
- Are ICE arrangements proposed by the employer or by non-union members?** Clarify with the employer that they do not *have* to set up staff consultation councils unless there is a request by 10% of the workforce and no pre-existing agreement. Clarify the separate roles and benefits of consultation and collective bargaining. Make sure union reps are actively involved in any negotiations on ICE arrangements.
- Have you established the 'undertaking'?** Ensure that your understanding of what the undertaking includes is the same as the employer's and fulfils the requirements of the ICE Regulations requirements.
- Do you have details of the number of employees in the workforce?** You can make a data request from the employer even if you do not then put in an ICE request.
- Is there any pre-existing agreement in place?** This could be a collective agreement if it covers all the employees in the undertaking but check if it fulfils the requirements of ICE Regulations, and can be shown to be popular and useful. Even if a new ICE request is endorsed by employees, it does not necessarily mean that the pre-existing agreement ends.
- If an ICE agreement is to be negotiated, is the union represented within the negotiating reps?**
- Does the ICE negotiating agreement include reserved union seats on the ICE body, as well as a right for union officials, specialists and experts to attend ICE body meetings?**
- Does the ICE negotiating agreement include some provision for training of the ICE reps?** If the training involves the union, it may be useful for recruitment.

- Does the ICE negotiating agreement clarify the subjects for information and consultation, whilst keeping appropriate subjects within any existing collective bargaining agreement?
- If there are elections for the ICE reps, are there union candidates?
- Is an impartial agency such as the Electoral Reform Ballot Services involved in any election process to ensure that it is fair?