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Newsletter

News update for HR Specialists



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Key Brief

The following legislation came into force on 6th April 2008:

- **Corporate Manslaughter and Corporate Homicide Act 2007:** the new Act renders corporations, and some other designated bodies, liable for the new offence of corporate manslaughter if the management of an organisation's activities breaches a duty of care, resulting in death.
- **Sex Discrimination Act 1975 (Amendment) Regulations:** these change, among other things, the grounds on which a harassment claim can be brought, and what actions constitute discrimination occurring on maternity leave.
- **Social Security Benefits Up-rating Order 2008:** this increases statutory maternity, paternity and adoption pay from £112.75 to **£117.18 per week**. Statutory sick pay will rise from £72.55 to **£75.40 per week**.
- **Information and Consultation of Employees Regulations 2004:** the scope of these Regulations is extended to undertakings with 50 or more employees.

Information and Consultation Regulations 2004 ("The ICE Regulations")

On 6th April 2005, the ICE Regulations came into force. These regulations set out

minimum rights for employees to be informed and consulted by their employers, in respect of a number of workforce issues.

Initially, the ICE Regulations only applied to businesses with 150 or more employees. However, as from April 2008, these regulations apply to organisations with as few as 50 employees.

The ICE Regulations set out a regime whereby employers may, and in some cases must, put in place information and consultation agreements governing how they will inform and consult their employees about economic and employment related matters.

The ICE Regulations place a duty upon employers to provide information and to consult with employee representatives, or employees direct. These obligations are in addition to certain other individual consultation obligations which already exist.

The aim of the ICE Regulations is to encourage employers and employees to agree to consensual, voluntary arrangements for information and consultation outside of the statutory scheme.

Whenever a voluntary agreement is reached, then provided it complies with a number of basic requirements, as set out in the ICE Regulations, the effect will either be to exclude entirely the application of the default scheme contained in the ICE Regulations, or to make it much more difficult for employees to seek to overturn the agreement. One way in which to achieve this is by putting in place a pre-existing agreement ("PEA").

There are no rules regulating the content of a PEA e.g. with respect to number of representatives, frequency of meetings and so on, which allows for considerable flexibility for employers, unlike under the statutory scheme whereby there are specific matters, about which the employer must inform and consult.

For a PEA to be valid, it must meet four main criteria: it must be in writing, cover all the employees in the undertaking, set out how the employer is to give information to the employees or their representatives/seek their views on such information and it must have been approved by the employees. To be approved there must be a simple majority either by way of ballot, or signature. It is also possible to have a PEA in place which applies across more than one company, for example where there is a group of companies.

The obligation to negotiate with employees, which is the first stage in any potential information and consultation procedure, will be triggered in one of two ways, by an employee request or an employer request.

A number of formalities must be complied with in relation to any employee request if it is to be valid under the ICE Regulations. It must be in writing, dated, sent to a specific address and set out the names of those making the request. If no employee request is made, an employer is under no obligation to do anything with regard to information and consultation under the ICE Regulations.

The effect of an employee request will depend on whether there is a valid PEA already in place. If the PEA is valid, and the percentage of the workforce making the request is less than 40%, then the employer will have the option of either initiating negotiations on an information and consultation agreement, or holding a ballot to approve or reject the employee request. Where there is no valid PEA, or where 40% or more of employees make the request (despite any valid PEA), then this will automatically trigger negotiations and the employer will not be able to opt for the ballot procedure.

Where the obligation to negotiate is triggered, there are defined rules as to how the negotiations should be carried out. Should

the parties fail to reach an agreement on a framework for information and consultation, within a defined period of time, then the statutory default procedure will apply. The other way that the default procedure will apply is where an employer fails to initiate negotiations within a defined period of receiving a valid request.

There is, however, a three year moratorium on any future challenge or triggering of negotiations, where a valid agreement has been upheld by a ballot, a negotiated agreement has been reached or the statutory default provisions started to apply.

Almost all rights contained within the ICE Regulations are enforceable by way of complaint to the Central Arbitration Committee ("CAC"). Any remaining rights are actionable via the Employment Tribunals.

Failure to comply with an order made by the CAC, can lead to a penalty notice being issued, up to £75,000. In the case of *Amicus-v-Macmillan Publishers Limited* UKEAT/0185/07/RN, the Employment Appeal Tribunal awarded the first penalty for a breach of the ICE Regulations, for failing to hold a ballot to elect representatives. The penalty notice was for £55,000. So, beware!

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