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INFORMATION AND CONSULTATION AT WORK

A guide for employees

PART ONE – Introduction and overview

This guidance tells you about your rights under the new Information and Consultation of Employees legislation[1]. It gives you:

- Background to the legislation, and explains why the new rights are important;
- An overview of the process; and
- A more detailed explanation of the new rights of particular interest to employees.

The guidance has been designed specifically for employees. It is important for employees to understand how these new laws affect them as in most cases they will need to take action to activate the rights. However, it is important to bear in mind that this guidance is not legal advice. It is simply designed to help you understand your rights.

If you require more detailed guidance on the Regulations themselves, this can be found on the Department of Trade and Industry's website at http://www.dti.gov.uk/er/ice.htm. You can also find additional practical advice on this subject, including types of topic employers and employees may agree to inform and consult on, on the Acas website at http://www.acas.org.uk/services/ic.html.

Overview of the legislation

The Information and Consultation of Employees Regulations 2004, implement an EU Directive[2]. The Regulations give employees in larger firms – those with 50 or more employees – new rights to be informed and consulted about issues in the businesses they work for, for example, about changes to the structure of the company, plans for employment, and changes in work organisation.

The new rights are very important. The Government strongly supports the principle of employers informing and consulting their employees on an on-

[1] The Information and Consultation of Employees Regulations 2004 (Statutory Instrument 2004 No.3426)
[2] Directive 2002/14/EC

going basis about matters that may affect them. It is good for employees themselves, and good for the organisations they work for. We want employees to feel valued, motivated and involved in the organisations they work for.

Coverage. The Regulations apply to "undertakings" with:

- 150 or more employees from 6 April 2005,
- 100 or more employees from 6 April 2007; and
- 50 or more employees from 6 April 2008.

"Undertaking" is essentially another word for a company or firm. It includes any organisation carrying out an economic activity, including non-profit making organisations and many in the public sector. The vast majority of organisations with 50 or more employees will come under the legislation. However, some public sector employers, in particular Civil Service Departments, may not.

The obligation on employers to inform and consult does not operate automatically. Once the legislation applies to an organisation, it is triggered either by 10% or more of employees asking for an information and consultation (I&C) agreement, or by the employer starting the process themselves (see Part 2 for further details). Employers and employees will normally then negotiate an I&C agreement that sets out how and when consultation will take place on an on-going basis, and which will be legally enforceable (called a "negotiated agreement"). See Part 4 for further details.

Alternatively, employees or employers can at any time agree **voluntary arrangements** (called a "pre-existing agreement"). These have to meet certain standards in the Regulations. See Part 3 for further details.

If the company concerned has a voluntary pre-existing agreement in place, employees may decide they are happy with this and it will simply continue to operate. But, under the new laws, if a significant number of employees formally request something different, then employers and employee representatives must negotiate to try to reach a new legally-enforceable I&C agreement. The resulting agreement may be based on the existing consultation arrangements or may be something completely new.

If a formal request has been made and an agreement cannot be reached, then certain "standard provisions" on information and consultation will apply. The standard provisions require employers to inform and consult employee representatives on certain subjects and in a certain way, described in Part 5.

What is the difference between a legal agreement and a voluntary agreement?

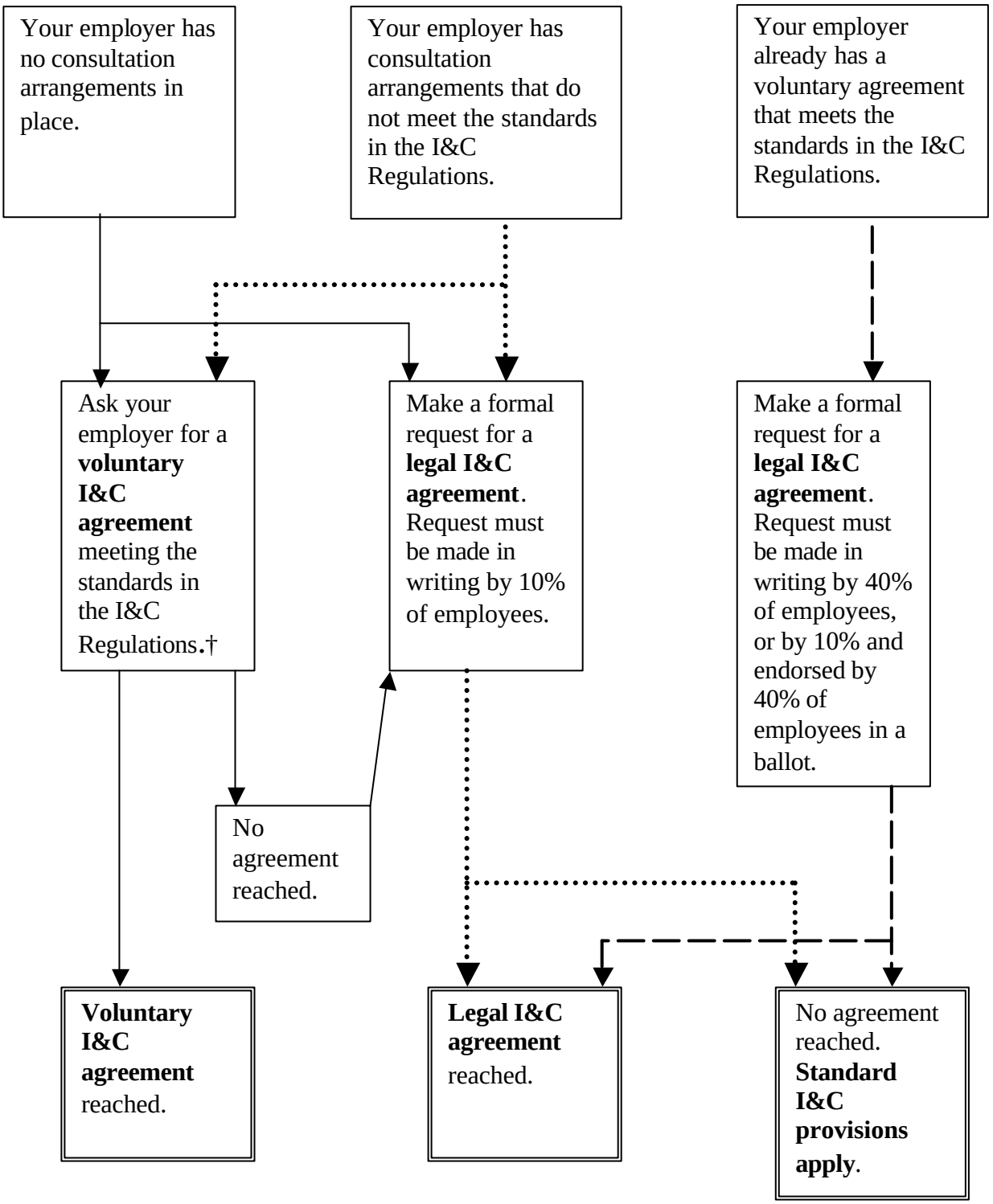
A legal agreement is an I&C agreement reached following negotiations under the new Regulations, once they come into force. The Regulations lay down how employees must formally request a legal agreement, what an employer who receives such a request must do, and how negotiations should be carried out. Where an agreement is reached, it will be legally enforceable at the Central Arbitration Committee (CAC), with the possibility of a financial penalty on an employer who breaches the agreement. If negotiations do not lead to an agreement, the new law states that "standard" fall-back rules apply requiring the employer to inform and consult employee representatives on certain subjects and in a certain way. These standard rules are also legally enforceable at the CAC. The law includes protections for employee representatives, such as the right not to be unfairly dismissed for using the new rights.

Voluntary agreements are not made under the legislation, and can be drawn up at any time. There is no need to wait until the Regulations come into force. There are no specific rules about formal employee requests for a voluntary agreement, or stating how an agreement should be reached, but voluntary agreements must meet certain standards to be valid. Employers and employees can agree what remedies should be in place for failing to abide by the agreement, but it would not be enforceable at the CAC. Once a voluntary agreement is in place, employees could still seek to formally request a legal agreement under the I&C Regulations once they come into force. If employees do choose to make a request for new arrangements but there is already a voluntary agreement in place, then the request would have to be supported by a significant proportion of the workforce.

The new laws have been designed to give employees and employers the freedom to agree how information and consultation should take place in their organisation. With both legal agreements and voluntary agreements, employers and employees are free to put in place whatever arrangements best suit their particular circumstances. They can agree what subjects will be covered, and how and when the employer will consult employees. The important point to note though is that whatever arrangements are put in place they *must be agreed with employees*. Management cannot just impose them.

Remember: *The idea of informing and consulting with employees is not new. Many employers will already have consultation arrangements in place, e.g. through a staff forum, an employee council or a collective agreement with a recognised trade union. You should think about whether you are happy with these arrangements as they are, or whether you would like to see changes. If so, do you and other employees want to reach a voluntary agreement with your employer, or a legal agreement following the formal process in the Regulations? The diagram below illustrates the options that are available.*

Options for drawing up new consultation arrangements:



† you also have the option of asking for informal consultation arrangements that do not meet the standards in the I&C Regulations

PART TWO – Employee requests for a legal agreement

The process under the legislation can be started by a group of employees - at least 10% of the workforce - making a formal request to their employer for an information and consultation (I&C) agreement. However, before any formal request is made, you may wish to decide whether you think your company is covered by the new rules. Only if the organisation you work for falls within the scope of the legislation, and a sufficient number of you make a request, will your employer be obliged to do anything.

How do I know whether the organisation I work for has 150, 100, or 50 or more employees?

You can ask your employer for data on the number of employees in the organisation. Your request for this data should be in writing and dated. It may be made by any individual employee of the company, or anyone on behalf of the employees, such as a trade union official. Your employer will be obliged to provide the data in a way that enables you to work out how many employees the undertaking has, and how many would be needed (10%) to make a formal request for a legal I&C agreement.

How many employees need to make a request for a legal agreement?

An employee request to negotiate a legal I&C agreement must be made by at least 10% of the employees in the company, subject to a minimum of 15 employees and maximum of 2,500.

It is possible for different requests to be made from different parts of the workforce, over a period of time, and added together to achieve the 10% figure. Where a single request is made by less than 10% of the workforce, it would remain valid for up to six months, during which time any further request from employees could be added to it to achieve the 10% figure.

What does an "employee request" look like?

An employee request must be in writing, give the names of those making it, and state the date on which it is sent. It must be sent to the registered office, head office, or principal place of business of your employer (though it can also be sent to the Central Arbitration Committee if employees want to remain anonymous – see below). To avoid disputes about whether those named really support the request, it is advisable for each employee to sign it and date their signature, though this isn't a requirement of the legislation.

What if I wish to remain anonymous?

Employee requests may be sent to the Central Arbitration Committee (CAC), rather than directly to your employer, and the CAC will handle them on your behalf. See www.cac.gov.uk for contact details.

What does my employer have to do?

On receipt of a request from employees to negotiate an I&C agreement, employers are advised to acknowledge it, to inform the workforce as a whole of the request, and to explain how they intend to respond to it. After that, an employer will normally have to arrange for the employees to appoint or elect "negotiating representatives" to represent them (the exception is if your employer has a pre-existing agreement in place – see Part 3 below). The employer has 3 months from the date of the employee request to do this. Once these representatives have been chosen, your employer must inform all the employees who they are, and then invite them to enter into negotiations for an I&C agreement which will set out when, how and on what matters employees will be consulted (see Part 4 below).

Who are the negotiating representatives?

Negotiating representatives are chosen by the employees to represent them in discussions with their employer to draw up a legally-enforceable I&C agreement. They can be elected in a ballot, or simply appointed by the employees directly without an election. For example, your employer may invite different parts of the workforce to each choose their own representative, or volunteers could simply be invited to put themselves forward. If a ballot is held, your employer must ensure it is fair and that all employees have the right to vote in it. Union representatives in workplaces where a trade union is recognised are likely to be well-placed to act as negotiating representatives, though the law does not give them an automatic place. But it should not be assumed that trade union representatives can automatically represent <u>all</u> the employees in an organisation.

Negotiating representatives may also represent the employees in the on-going consultation arrangements that are set up by an agreement, though they do not have to if they don't want to.

How long can negotiations go on for?

Negotiations between the parties may last for up to 6 months, though this period is extendable without limit by agreement between the employer and a majority of the negotiating representatives.

What happens if my employer does not respond to a request?

An employer who fails to start negotiations following a valid employee request, will become subject to the standard (fall-back) provisions (see Part 5 below). This means that employers cannot avoid informing and consulting their employees by failing to respond to a valid request.

PART THREE – Voluntary agreements ("pre-existing agreements")

As explained in Part 2, where employees ask to negotiate an I&C agreement, their employer will normally have to enter into negotiations with representatives of the employees within 3 months of the request. But there is an exception where the organisation already has a voluntary I&C agreement in place before any valid employee request is made.

Where a voluntary agreement is in place, and 10% of employees ask to negotiate a new legal agreement, the employer has the option to ballot the whole workforce to find out whether there is widespread support for the request for something new. If there is no such support, then the voluntary agreement can continue[3].

To be valid, a voluntary ("pre-existing") agreement must meet certain standards. It must:

- be in writing
- cover all the employees of the company
- set out how the employer is to give information to employees or their representatives and to seek their views on it
- have been approved by the employees

The main purpose behind these requirements is to ensure that voluntary agreements are genuine agreements with employees and have not simply been imposed by management. But they give a lot of flexibility to decide how employees or their representatives will be informed and consulted, what topics will be covered, and when and how often consultation will take place.

If your employer decides to run a ballot to see whether there is support for a request for a new I&C agreement, 40% of the workforce and a majority of those who vote must endorse the employee request. If that happens, your employer will have to negotiate a new agreement (described in Part 4 below). Otherwise, the existing voluntary agreement can continue.

***Remember**: A voluntary agreement which qualifies as a valid "pre-existing" agreement can be set up at any time before a valid employee request is made.*

[3] The employer does not have to ballot the workforce - they can also decide to act upon the employee request and start negotiations for a new I&C agreement

What are the benefits of a voluntary (pre-existing) agreement?

It means that arrangements that are working well and have the support of employees can continue. A voluntary agreement can be drawn up at any time – you do not have to wait until the legislation applies to your organisation. The agreement must meet the standards set out in the Regulations – in particular, it must be approved by the employees. But the process of drawing it up is not subject to the same requirements as apply to legal (negotiated) agreements.

How can a voluntary agreement be approved by employees?

A voluntary agreement can't just be imposed on employees by their employer, or by management. It has to be approved by the employees. This could be done in a number of ways, for example, a ballot could be held to approve the agreement, or a majority of the employees in the organisation could give their support for it in writing, or representatives who represent a majority of the workforce could agree it.

Can I campaign to drum up support to negotiate a new agreement?

Yes. The fact that there is already a voluntary agreement in place does not affect the rights of employees to campaign for new arrangements under the legislation. You can encourage other employees to join you in a formal employee request to negotiate a new agreement. And you can encourage them to vote in support of the request if your employer decides to hold a ballot to see if the wider workforce endorses it. The law protects you against dismissal or detriment by your employer if you seek to do this.

What if the employees do not vote in favour of drawing up a new I&C agreement?

Where fewer than 40% of the workforce or a minority of those voting in a ballot endorses an employee request to negotiate a new agreement, the employer would not be under an obligation to do so – the existing voluntary agreement could continue.

What if I don't think the pre-existing agreement meets the four criteria mentioned above?

A complaint may be brought to the Central Arbitration Committee (CAC) that an employer does not have a valid pre-existing agreement. For example, that it was not approved by the employees. Complaints may be made by any individual employee of the company, or by a representative of the employees, such as a trade union. However, before making a formal complaint to the CAC, you are advised to consider discussing the matter with your employer to see if a solution can be found, or you could seek assistance from ACAS.

PART FOUR – Legal agreements ("negotiated agreements")

Negotiated agreements are Information and Consultation agreements drawn up in negotiations between an employer and representatives of employees ("negotiating representatives"). They are different from voluntary ("pre-existing agreements"), which are described in Part 3 above. Employees who want a negotiated agreement must make a formal request under the legislation (see Part 2 above). Alternatively employers can start the process themselves by notifying their employees that they will be doing so. The process for negotiating such agreements is explained in Part 2 above. Negotiated agreements can be enforced at the Central Arbitration Committee (as distinct from voluntary pre-existing agreements which cannot).

As with voluntary agreements, the law gives a lot of flexibility to decide how employees or their representatives will be informed and consulted under a negotiated agreement, what topics will be covered, and when and how often consultation will take place. These are things that are to be agreed between the employer and negotiating representatives. If they can't reach agreement, standard provisions for informing and consulting employees apply – see Part 5 below.

What must a negotiated agreement look like?

Negotiated agreements must:

- Set out how the employer will inform and consult their employees
- Provide either for the appointment or election of Information and Consultation representatives, or for information and consultation directly with employees (or both)
- Be in writing and dated
- Cover all the employees in the organisation
- Be signed by, or on behalf of, the employer
- Be approved by the employees. This means it must either:

  (a) be signed by **all** the negotiating representatives; or

  (b) be signed by a majority of the negotiating representatives, and either (1) be approved in writing by at least 50% of the employees in the undertaking, or (2) be approved by 50% of employees who vote in a ballot.

Does a negotiated agreement have to comply with the standard I&C provisions?

No. The standard provisions (see Part 5 below) set out the subjects, method, timing and frequency for information and consultation, but with a negotiated agreement these things are to be freely decided by the employer and

negotiating representatives. They can agree quite different arrangements from those set out in the standard provisions if they wish, though these can be used as a guide.

Is there any guidance on what to include in a negotiated agreement?

Yes. The DTI's comprehensive guidance on the legislation includes an annex with suggestions for negotiated agreements – available at http://www.dti.gov.uk/er/consultation/i_c_regs_guidance.pdf. ACAS has also published some good practice advice which is available at http://www.acas.org.uk/info_consult/consultation.html.

I am a union member. Will my union be my representative?

It will be up to the negotiating representatives and the employer to agree between them whether on-going consultation of employees should take place through representatives (called Information and Consultation representatives), and if so, who they should be and who they should represent. Union representatives in workplaces where a trade union is recognised are likely to be well-placed to act as I&C representatives, though the new law does not give them an automatic role. But it should not be assumed that trade union representatives can automatically represent all the employees in an organisation. I&C agreements are struck on behalf of all the employees, not just trade union members or those employees covered by a union agreement.

PART FIVE – The Standard Information and Consultation Provisions

The standard provisions are in effect a fall-back. They will only be relevant where the employer fails to initiate negotiations for an information and consultation agreement following a valid employee request, or where those negotiations have failed to lead to an agreement. If this happens employers will be required to inform and consult representatives of employees ("I&C representatives") in the way set out in the standard provisions.

Employers have 6 months to set up the necessary information and consultation structures under the standard provisions. This time period runs from the date of an employee request if the employer failed to start negotiations, or from the end of the period for negotiating where negotiations took place but failed to lead to an agreement. The 6 month period gives employers time to arrange the election of I&C representatives.

How are the I&C representatives elected?

The system that is set up must provide for employee representatives. This means that it is not possible just to inform and consult directly with employees. I&C representatives must be elected in a ballot. The employer is responsible for organising it. The number of I&C representatives is proportional to the number of employees in the company – one per 50 employees or part thereof, subject to a minimum of 2 representatives and a maximum of 25. So, 2 representatives if there are 50-100 employees, 3 if there are 101 to 150, 4 if there are 151 to 200 and so on.

What happens if my employer does not arrange for I & C reps to be elected?

If no ballot is arranged to elect I&C representatives during the 6 month period, a complaint can be made to the Central Arbitration Committee (CAC). Complaints can be made by any individual employee, or a representative of the employees such as a trade union official. If the complaint is upheld, the CAC will order the employer to arrange the ballot. The complainant can apply to the Employment Appeal Tribunal for a financial penalty to be imposed on the employer of up to £75,000.

What is the difference between the standard provisions and a negotiated agreement? What do they require?

There is far less scope to tailor the arrangements to suit the need of individual organisations under the standard provisions. The I&C representatives must be :

- Informed about the company's activities and economic situation

- Informed and consulted about employment prospects

- Informed and consulted with a view to reaching agreement about decisions likely to lead to substantial changes in work organisation or in employees' contractual relations. This includes collective redundancies and business transfers

Information must be given to the I&C representatives so that they can adequately study it and, if necessary, prepare to be consulted about it.

What does consultation mean?

Consultation involves exchanging views and establishing a dialogue. It is not just management giving information and saying what is going to happen. It must be genuine, not simply going through the motions. It must take place before any final decision is taken by management. It must be conducted in a way that allows the representatives to fully understand what is being discussed, to give an opinion on it, and to meet with the employer at a level of management relevant to the subject under discussion. The employer must conscientiously consider the representatives' opinion and give them a reasoned response.

But consultation does not mean the employer is obliged to follow the representatives' opinion. At the end of the day, decisions remain the responsibility of management, and sometimes agreement on decisions will not be possible.

Can we still try to reach an I&C agreement after the standard provisions apply?

Yes. The fact that the standard provisions are in force is no barrier to an agreement being negotiated by the employer and the I&C representatives once they have been elected, if they decide they want to do things differently from the standard provisions.

PART SIX – Other points of interest

What happens if employers do not inform and consult as required?

Both negotiated agreements and the standard information and consultation provisions can be enforced at the Central Arbitration Committee (CAC).

Employers who have a negotiated agreement but do not inform and consult in the way they have said they will in the agreement can be taken to the CAC. The CAC will decide the matter, and if necessary, order the employer to take steps to rectify the situation. Similarly, employers who are subject to the standard provisions, but do not inform and consult in the way they require, can be taken to the CAC.

Complaints must be brought within 3 months of the alleged failure. If the CAC upholds a complaint against an employer, the complainant can then apply to the Employment Appeal Tribunal for a financial penalty to be imposed on the employer of up to £75,000. However, before making a formal complaint to the CAC, it is advisable to consider discussing the matter with your employer to see if a solution can be found, or you could seek assistance from ACAS.

Who can complain to the CAC?

Where there are I&C representatives, one or more of them (but no-one else) can bring a complaint to the CAC that the employer has not informed and consulted properly. Where there are no I&C representatives, any individual employee can bring a complaint, or else a representative of the employees such as a trade union official can do so.

Confidential information

An employer can restrict any information provided to I&C representatives on confidentiality grounds so that it may not be passed on to anyone else. This can only be done where it is in the legitimate interest of the business. It would include information that is share price-sensitive. Also, employers may withhold information altogether where disclosing it to representatives would seriously harm the functioning of the undertaking, or be prejudicial to the business.

Disputes about whether information is really confidential can be taken to the Central Arbitration Committee, which will rule on the matter.

Part-time employees

For almost all purposes, part-time employees are treated in exactly the same way as full-time employees, with the same rights to make an employee request to negotiate an I&C agreement, to be a representative of employees, and to vote in any ballots. They will also normally be counted as though they were full-time employees for the purpose of calculating whether an organisation has 50, 100 or 150 employees. However, for the purpose of this calculation only, the employer may (but is not obliged to) count a part-time employee as representing half a full-time employee. They can only do this if the employee in question worked under a contract for 75 hours or less in any month during the period for calculating employee numbers.

If you ask your employer for data on employee numbers to work out whether the organisation is covered by the legislation (see Part 2 above), then your employer must tell you if they intend to count part-time employees as representing half a full-time employee for the purpose of this calculation.

Rights and protections for I&C representatives and employees

Employees who act as negotiating representatives or I&C representatives are entitled to take reasonable paid time off during working hours to perform their functions as representatives. Employees may complain to an employment tribunal if their employer unreasonably refuses to let them take time off, or fails to pay them for it.

Employees are protected from suffering unfair dismissal or detriment by their employer when acting as representatives of employees under a legal ("negotiated") agreement or under the standard information and consultation provisions. They are also protected when standing as candidates for election. However, the protections do not apply where an employee has disclosed confidential information in breach of a restriction imposed by the employer. A claim for unfair dismissal, or a complaint of detriment, may be brought before an employment tribunal.

Glossary of terms and abbreviations

Acas	Advisory, Conciliation and Arbitration Service. Acas provides up-to-date information, advice and training to help employers and employees solve problems and improve employment relations.
Anonymous request	An employee request to negotiate an I&C agreement sent via the CAC which will handle it on the employees' behalf if they do not want to divulge their identity to their employer.
CAC	Central Arbitration Committee. The CAC has the main enforcement role under the Regulations, and also handles requests from employees who wish to remain anonymous to their employer.
Confidentiality restriction	A restriction on information given by an employer to employee representatives preventing them passing it to anyone else except as permitted by the employer.
Employee request	A formal request made by the employees to their employer to negotiate a legally enforceable I&C agreement.
Employer notification	A notification by an employer to his/her employees of an intention to negotiate a legally enforceable I&C agreement. This allows an employer to start the statutory process without waiting for an employee request.
Endorsement ballot	A ballot of all the employees in an undertaking to see if they support an employee request to negotiate a legally enforceable I&C agreement. The ballot is allowed where the employer already has a valid pre-existing agreement. At least 40% of the workforce and a majority of those who vote must support the employee request in order to require the employer to negotiate a new I&C agreement.
I&C representatives	Information and Consultation representatives who are informed and consulted either under a negotiated agreement or under the standard I&C provisions.
Negotiated agreement	A legally enforceable agreement negotiated between the employer and negotiating

	representatives, following an employee request, or an employer notification. The agreement must meet the requirements in the legislation and can be enforced at the CAC.
Negotiating representatives	Representatives of the employees elected or appointed by them to negotiate a legally enforceable agreement following an employee request or an employer notification.
Pre-existing agreement	A voluntary agreement approved by employees before an employee request is made, and that meets the four criteria in the Regulations.
Standard I&C provisions	The standard information and consultation provisions that apply where an employer fails to initiate negotiations for an I&C agreement when required to do so, or where negotiations have failed to lead to an agreement. The standard provisions can be enforced at the CAC.
Undertaking	In the case of companies, a separately incorporated legal entity as distinct from an organisational entity such as an establishment (site) or business unit.

Contact details

Central Arbitration Committee
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London SE1 1ZG

Tel: 020 7904 2300
http://www.cac.gov.uk/

ACAS
Brandon House
180 Borough High Street
London SE1 1LW

Tel: 08457 474747
http://www.acas.org.uk/

Employment Tribunals
(Offices throughout Britain)

Tel: 0845 795 9775
http://www.employmenttribunals.gov.uk/

Employment Appeal Tribunal
Audit House
58 Victoria Embankment
London EC4Y 0DS

Tel: 020 7273 1040
http://www.employmentappeals.gov.uk/