

Information/Consultation

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The number of situations in which employers must inform and consult employee representatives has grown over the years backed up with very significant financial penalties for non compliance. These include:-

- Collective Redundancies
- TUPE/Transfer of Businesses
- Information and Consultation Agreements

While the above remain the most frequent occasions for provision of information and consultation employers may also have obligations where they are involved with the European Works Council, in relation to health and safety issues, changes to pensions or where there has been a public offer to purchase all the shares of a listed company.

In relation to TUPE transfers and collective redundancy the employer must inform and consult the union where a union is recognised in respect of affected employees. Where there is no union recognised, the employer must invite employees to elect representatives or may choose to consult with any standing employee representative body if it has authority to consult on business transfers or collective redundancy. For example, these might be the representatives where there is an existing agreement under the Information and Consultation Regulations. Where employees have been invited to elect representatives and fail to do so within a reasonable period the employer must give the information to the employees themselves but is not required to consult with them.

In relation to **business transfers** falling within TUPE, the information to be given to the appropriate employee representatives must be provided in writing and include:-

- Confirmation when the transfer is to take place and the reasons for it.
- The legal, economic and social implications of the transfer for the affected employees, whether the buyer and seller envisage taking any measures in connection with the transfer in relation to the affected employees and if so what measures.

Where measures are envisaged the employer must consult with the representatives with a view to reaching agreement in relation to the measures.

Where an employer is consulting in relation to collective redundancies it must provide, in writing, to appropriate representatives the following information:-

- The reasons for the proposed dismissal
- The numbers and descriptions of employees whom it is proposed to dismiss as redundant
- The total number of employees of any such description employed by the employer at the establishment in question
- The proposed method of selecting employees who may be dismissed

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- The proposed method of carrying out the dismissal, with due regard to any agreed procedure, including the period over which the dismissals are to take effect
- The proposed method of calculating the amount of any redundancy payments to be made (over and above the statutory redundancy payment)
- A copy of the notification to the Department of Economic Development.

Consultation must be with a view to reaching agreement and must include consultation about ways of avoiding dismissals as well as reducing the number of employees affected and reducing the impact on those made redundant. The latest case law indicates that meaningful consultation about ways of avoiding dismissals must include consultation about the reasons underpinning the business decision which has led the employer to propose redundancies.

Timing of Consultation: In relation to both business transfers and collective redundancies, consultation must begin “in good time”. However, where collective redundancies are proposed certain minimum time periods for consultation are legal requirements. Where 100 or more redundancies are proposed, consultation must begin at least 90 days before the first dismissal takes effect. Where between 20 and 99 redundancies are proposed, the consultation must begin at least 30 days before the first dismissal takes effect.

Employers who have entered into Information and Consultation Agreements may well have obligations to consult in relation to business transfers and the possibility of redundancies under such agreement as well as complying with the information and consultation specifically required by the collective redundancy and TUPE regimes.

The sanctions for failure to comply with these obligations are significant. An employee may be awarded up to 13 weeks/90 days pay. This is gross pay and there is no statutory cap. A Tribunal's starting point in assessing how many days or weeks pay to award will normally be the maximum which may be reduced depending on the seriousness of the employer's failure to comply with its information and consultation obligations. A failure to comply with the obligation to inform and consult when closing a factory and making 150 employees redundant, whose average gross pay is £20k, produces a liability of roughly £750k (150 x £5k).

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