

EFFECT A COLLECTIVE REDUNDANCY CONSULTATION

In certain redundancy situation, there are additional steps which an employer should go through to ensure compliance with its collective consultation obligations.

This “How To” guide sets out the key legal and practical issues for businesses to be aware of.

INDIVIDUAL CONSULTATION V COLLECTIVE CONSULTATION

Individual consultation is required in all cases. However, where 20 or more employees are being made redundant over a period of 90 days or less, an employer also has a duty to consult collectively, which means they should:

- inform appropriate employee representatives;
- consult appropriate employee representatives for a set period of time depending on the number of employees affected;
- notify the Secretary of State.

In this guide, we will focus on the collective consultation obligations.

WHEN IS COLLECTIVE CONSULTATION NEEDED?

- In the UK, the obligation to collectively consult is triggered when there is a proposal to dismiss as redundant 20 or more employees at one establishment within a 90-day period. However, the European Directive, the source of the UK rules, states that the trigger is when redundancies are contemplated, which is generally accepted to be an earlier point than the proposal stage. This discrepancy can make it difficult for employers to identify the proper trigger point for collective consultation.
- As a general rule, employers should start collective consultation once an identifiable plan is formulated which could result in redundancies, but well in advance of any final decisions being made. It is worth remembering that an employer can be at the proposal stage even if other alternatives are still being considered.
- The wide definition in the European Directive means the obligation to consult collective will arise not only in a conventional redundancy situation, but also in a contract variation situation, where there is a proposal to bring existing employment contracts to an end with the offer of re-engagement on new terms (subject to the same number thresholds of 20 or more employees and a 90 day period).
- If collective consultation is needed, certain steps need to be taken which are summarised below:

Ensure that appropriate employee representatives are in place

- Appropriate employee representatives is an umbrella term, covering three separate potential categories of representatives:
 - representatives of a recognised trade union;
 - representatives directly elected by affected employees for consultation on a specific redundancy proposal; and
 - a standing body of elected or appointed representatives not specifically elected for the purpose of redundancy consultation but whose remit covers such consultation.
- Where an employer recognises a trade union, it must consult with representatives of that trade union in respect of any employees in the bargaining unit who are affected by the proposals. It does not matter whether the employees are themselves members of the trade union, only that they fall within the bargaining unit for which the union is recognised. Only where there is no recognised trade union can the employer then look to other categories of employee representatives instead.

Notify the Secretary of State

- This duty is also triggered where there is a proposal to make 20 or more employees redundant at one establishment in a 90-day period. This is usually done by completing an HR1 form and the timescales for making the notification reflect the minimum consultation periods set out below.
- Failure to so notify is a criminal offence for which an employer may receive an unlimited fine.

Provide information to the appropriate representatives

- Certain written information must be provided to the appropriate representatives as a minimum. This includes:
 - the reason(s) for the proposed dismissals;
 - 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;
 - the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which 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) to employees who may be dismissed;
 - suitable information about the use of agency workers.
- Consultation cannot commence until sufficient information has been provided to the appropriate representatives.

Consult with the appropriate representatives

- The consultation process must include consultation 'with a view to reaching agreement with the appropriate representatives' on ways of:
 - avoiding the dismissals;
 - reducing the number of employees to be dismissed;
 - mitigating the consequences of the dismissals.
- Consultation should be carried out with an open mind, and proper consideration should be given to any points made by the representatives.
- Consultation must last for certain minimum periods as follows:
 - where the employer is proposing to dismiss 100 or more employees consultation must begin at least 45 days before the first dismissal takes effect;
 - where the employer is proposing to dismiss between 20 and 99 employees consultation must begin at least 30 days before the first dismissal takes effect.

WHAT IF THESE STEPS ARE NOT FOLLOWED?

The consequences of not following the collective consultation obligations can be significant. Successful protective award claims can result in awards of 90 days' gross pay per affected employee, which in a large scale redundancy situation can add up to a substantial sum of money, when the employer will already have incurred notice (if notice is not worked) and statutory redundancy payments. Given the risk involved, it is certainly worth employers taking time to ensure the correct process is followed.

For any further information please contact howto@shoosmiths.co.uk

Disclaimer: This document is for informational purposes only and does not constitute legal advice. It is recommended that specific professional advice is sought before acting on any of the information given.