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A legal update from Dechert's Labor and Employment Group

Consultation with Employees – Extension of Legislation

From 6 April 2008 the Information and Consultation of Employees Regulations 2004 ("**the ICE Regulations**") and the Pension Schemes (Consultation by Employers, etc) Regulations 2006 ("**the Pension Regulations**") will extend to all UK employers with 50 or more employees. Previously, these provisions applied to UK employers with 100 or more employees. Many more employers will now fall within the scope of these provisions and therefore need not only to be aware of their potential application, but also to consider what steps they may need to take to anticipate their potential impact.

ICE Regulations

Under the ICE Regulations, employers must, if requested, establish information and consultation arrangements to ensure that their employees are informed and consulted about a variety of workplace issues. There is no automatic obligation to establish information and consultation arrangements – the obligation is only triggered if and when at least ten percent of the workforce (subject to a minimum requirement of 10, and a maximum requirement of 2,500, employees) makes a request complying with the legislation.

Where a request is made under the ICE Regulations, the parties have six months to agree the circumstances in which the employer will inform and consult (a "negotiated agreement"). The parties are free to agree the extent and method of consultation. However, if they cannot agree, default information and consultation provisions prescribed by the legislation will apply.

Under the default provisions, employers must:

- **inform** representatives of recent and probable developments in the undertaking's activities and economic situation;
- **inform and consult** regarding the situation, structure and probable development of employment within the undertaking, especially where there is a threat to employment; and
- **consult with a view to reaching agreement** in respect of decisions likely to lead to substantial changes in work organisation or contractual relations, including collective redundancies or under TUPE.

Where an employer fails to comply with the terms of any negotiated agreement, or with the default provisions, employees or their representatives may present a complaint to the Central Arbitration Committee ("**CAC**"). Whilst the CAC cannot prevent or rescind particular action, the ultimate penalty for breach which may be awarded (by the Employment Appeal Tribunal) is a fine of up to £75,000.

In contrast, where an employer already has written consultation arrangements in place which cover all employees, set out how the employer is to inform and consult, and which have been approved by the employees (a "pre-existing arrangement"), there are no statutory penalties if the employer subsequently breaches the terms of the agreement.

Pre-existing arrangements have other advantages. Where there is a pre-existing arrangement, any request under the ICE Regulations for information and consultation arrangements to be adopted to replace the pre-existing arrangement must be made (or approved) by at least 40 percent of the workforce. Under a pre-existing agreement employers are free to agree the extent and subject matter of consultation and cannot be bound by the default provisions detailed above.

Accordingly, whilst employers do not necessarily need to take any immediate action as a result of falling within the expanded scope of the

legislation, they should review their existing consultation arrangements and consider whether they should proactively seek to introduce a pre-existing arrangement in order to reduce the risk and avoid the consequences of a formal request under the ICE Regulations.

Pension Regulations

The Pension Regulations require employers to consult with affected employees in relation to certain prescribed changes to occupational pension schemes and to personal pension schemes to which the employer contributes directly on behalf of its employees.

The Pension Regulations impose information and consultation obligations on employers when they propose to do a number of things, including:

- increasing the normal pension age;
- closing the scheme to new members;
- preventing existing members from accruing further benefits;
- introducing, or increasing the level of, member contributions;
- removing, or decreasing the level of, employer contributions; or
- changing the scheme from a final salary to money purchase basis.

Consultation must last for a minimum of **60 days**, and the parties are under a duty to work together in a "spirit of co-operation".

The maximum penalty for non-compliance with the Pension Regulations is a £50,000 fine. As with the ICE Regulations, the Pensions Regulator does not have the power to reverse changes implemented without proper consultation. Nonetheless, in planning changes to their pension arrangements, employers need not only to establish that they have the contractual power validly to introduce the changes (to avoid a challenge to their efficacy) but also to ensure that they comply with the Pension Regulations (to avoid facing a penalty).

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For a more detailed briefing note on these two sets of regulations, as well as a summary of employers' consultation obligations more generally, please contact Charles Wynn-Evans (+44 20 7184 7545; charles.wynn-evans@dechert.com@dechert.com), Karen Ferries (+44 20 7184 7892; karen.ferries@dechert.com) or the Dechert lawyer with whom you regularly work.

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