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Target Audience:
All Inspectors

ENFORCEMENT OF REGULATIONS REQUIRING CONSULTATION WITH EMPLOYEES

This OC gives guidance on the enforcement of regulations which require employers to consult with their employees.

BACKGROUND

1 Consultation with workers is an essential element of successful health and safety management and the development of a positive health and safety culture.

2 Inspectors should take all available opportunities to remind employers of their legal duty to consult. In some instances it may be also be appropriate to make a proactive assessment of consultation arrangements, e.g. as part of a management inspection of a larger employer.

3 Formal legal duties to consult are placed on employers in the following principal regulations:

(1) The Safety Representatives and Safety Committees Regulations 1977 (SRSCR); and

(2) The Health and Safety (Consultation with Employees) Regulations 1996 (HSCER) (see OM 1996/132).

4 In addition, the following regulations include specific requirements regarding employee consultation:

(1) Offshore Installations (Safety Representatives and Safety Committees) Regulations 1989;

(2) Mines and Quarries Act 1954 s.123;

(3) Quarries Regulations 1999, reg.40;

(4) Construction (Design and Management) Regulations 1994 reg.18; and

(5) Railways (Safety Case) Regulations 1994 regs.9(11) and 9(12).

The guidance in this OC should be applied to these requirements as appropriate.

5 HSE has a duty to enforce these Regulations and to take appropriate action where

dutyholders fail to comply with the requirements. Decisions on what constitutes appropriate action should be made in line with the basic principles of proportionality, consistency, transparency and targeting.

GENERAL ENFORCEMENT POLICY

6 Both SRSCR and HSCER deal with some matters which are best resolved through the normal industrial relations machinery. Inspectors should not be drawn into industrial relations disputes. Disagreements between employers and trade unions or employees should be settled through the normal machinery for resolving industrial relations problems, with recourse to the Advisory, Conciliation and Arbitration Service (ACAS) as appropriate. Formal enforcement action should not normally be considered until all voluntary means of resolving disputes have been exhausted.

7 Complaints alleging non-compliance with the consultation Regulations should be dealt with according to the complaints handling procedure. When deciding what action to take enquiries should be made to determine whether a specific health and safety issue underlies the complaint. If so, this should be considered separately in line with the complaints handling procedure. It is also important that reasonable steps are taken to ensure that the complaint is truly an industrial relations issue before deciding to defer action in line with the general policy in para 6.

SPECIFIC ENFORCEMENT ACTION

8 Enforcement action under SRSCR and HSCER should be informed by the *Enforcement Management Model* (EMM). Their provisions are principally administrative in that they do not directly involve risk, so the Compliance and Administrative Arrangements Table (EMM v.2.0 Table 5.2, page 26) should be used. [Table 1](#) in the Appendix to this document should be used in conjunction with the EMM to inform enforcement decisions under SRSCR and HSCER. [Table 2](#) also gives additional guidance on the 'Local factors, Strategic factors' elements of EMM.

9 Both sets of regulations state that complaints concerning paid time off for safety representatives and employee representatives of health and safety can be heard by an employment tribunal (SRSCR regs.4(2) and 11 and HSCER regs.7(1)(b), 7(2) and Schedule 2). HSE staff should therefore, not attempt to enforce these aspects of the Regulations, but advise the complainant to contact the appropriate ACAS office.

10 It is possible that failure to comply with the Regulations could be a significant underlying factor leading to an incident. In such cases it is appropriate to consider the level of compliance with these Regulations when deciding what enforcement action to take under EMM with respect to other legal requirements. Further guidance on this is given at the Appendix.

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APPENDIX (paras 8 and 10)

GUIDANCE FOR USE WITH ENFORCEMENT MANAGEMENT MODEL

Initial enforcement expectation for breaches of Safety Representatives and Safety Committees Regulations 1977 and Health and Safety (Consultation with Employees) Regulations 1996

1 The following table gives a selection of examples of situations which might be encountered with respect to particular regulations. These are mapped against 'descriptors' and 'standards' for administrative arrangements which can be used to establish an initial enforcement expectation. The status of the standard varies between 'defined' or 'established' depending upon whether it is presented as part of the regulations or the code of practice/published guidance respectively. These examples are not intended to be exhaustive, but will help inspectors to come to an appropriate conclusion when considering actual situations. **NB:** Enforcement by HSE should normally only be considered when all voluntary means of resolving disputes have been exhausted ([see para 6](#)).

Table 1: Examples of breaches

RELEVANT REGS	REGULATORY REQUIREMENT WITH EXAMPLES OF BREACH(ES)	Compliance & Administrative Arrangements	
		Descriptor	Standard
HSCER 7(1) (a)	Requirement: to provide elected representatives with training to ensure they are adequately equipped to fulfil their function, e.g.:		
	1 Employer has not provided any training.	Absent	Defined
	2 Training is provided for elected representatives but is clearly inadequate for the nature of the undertaking, e.g. training in representational skills is adequate but the representative is not given full appreciation of health and safety issues for the site.	Inadequate	Established
	3 Minor deficiencies in training, e.g. sufficient training has been provided for elected representatives to fulfil their roles adequately, but this is not being reviewed on a regular basis to ensure currency.	Minor	Established
SRSCR 4A(1) HSCER 3	Requirement: to consult with safety representatives and/or employees on matters relating to their health and safety at work e.g.:		
	1 Employer introduces new process but fails or refuses to consult on safety issues.	Absent	Defined
	2 Information on new process provided, but no evidence that representative's views were sought in return or given serious consideration.	Absent	Established
	3 Evidence of productive consultation process, but employer yet to take account of issues identified.	Minor	Established

<p>SRSCR 4A(2), 5(3), 6(2)</p>	<p>Requirement: to provide representatives with reasonable facilities and assistance for the purpose of carrying out their functions, inspections or investigation, e.g.:</p> <p>1 Employer refuses to provide any support to SR in carrying out their functions, denies access for an inspection to be carried out by a SR, or denies access to information which would contribute to an investigation of an accident being carried out by a SR.</p> <p>2 The employer has cooperated with the SR and agreed to a programme of inspections but has varied the plan without the prior agreement of the SR.</p> <p>3 It is clear that appropriate and effective remedial action has been taken by the employer following an inspection by SR, but the employer has not formally arranged a follow-up inspection for SR when requested.</p>	<p>Absent</p> <p>Inadequate</p> <p>Minor</p>	<p>Defined</p> <p>Established</p> <p>Established</p>
<p>SRSCR 7(1)</p>	<p>Requirement: to allow representatives to inspect and take copies of relevant documents, egg:</p> <p>1 Employer refuses access to any relevant documentation.</p> <p>2 Access not deliberately restricted but documents difficult or impossible to locate, or employer lacking a coherent filing system for relevant documents making access impracticable.</p> <p>3 Systems in place to allow representatives to inspect and take copies of relevant documents, but not openly promoted or advertised, e.g. access to documentation exists but it is not formally provided to SR, or is available through some other means which is not made clear.</p>	<p>Absent</p> <p>Inadequate</p> <p>Minor</p>	<p>Defined</p> <p>Defined</p> <p>Defined</p>
<p>HSCER 5</p>	<p>Requirement: to provide employees or employee representatives with such information as is necessary for them to participate fully in consultation process, e.g.:</p> <p>1 No information provided by employer, or employer refuses to provide information.</p> <p>2 Employer has identified hazards and risks, but nothing provided on what to do when encountering these.</p> <p>3 Overall, employer has provided a lot of information but has failed to inform all employees of a relevant injury, disease or dangerous occurrence.</p>	<p>Absent</p> <p>Absent</p> <p>Minor</p>	<p>Defined</p> <p>Established</p> <p>Defined</p>

<p>SRSCR 7(2)</p>	<p>Requirement: to make information available to safety representatives to enable them to fulfil their functions, e.g.:</p> <p>1 Employer refuses to provide any information to safety representative.</p> <p>2 Employer provides most information but retains results of future plans or fails to pass on relevant info from suppliers of substances/articles used.</p> <p>3 In the main, a good effort is made to make information generally available but it is not formally provided to SR, or is available through some other means which is not made clear to the SR.</p>	<p>Absent</p> <p>Inadequate</p> <p>Minor</p>	<p>Defined</p> <p>Established</p> <p>Defined</p>
<p>SRSCR 9(1) & 9(2)(c)</p>	<p>Requirement: To establish a safety committee within 3 months of it being requested by at least 2 safety representatives, e.g.:</p> <p>1) Employer refuses to cooperate with employees or SR on the establishment of a safety committee;</p> <p>2) Employer can demonstrate good consultation process and has agreed to act but has not delivered within the designated 3-month period;</p>	<p>Absent</p> <p>Absent</p>	<p>Defined</p> <p>Defined</p>
<p>SRSCR 9(2) (a)</p>	<p>Requirement: to consult with representatives when establishing a Safety Committee, e.g.:</p> <p>1 Employer establishes safety committee but refuses to cooperate with SR on the issue or seeks to avoid consultation on how this is achieved.</p> <p>2 Employer can demonstrate a good consultation system but the number of management representatives on safety committee exceeds employee representatives.</p> <p>3 Safety Committee established and evidence of consultation but lack of appropriate or effective action on representatives views by employer, or no suitable justification offered for discarding representatives views.</p>	<p>Absent</p> <p>Inadequate</p> <p>Minor</p>	<p>Defined</p> <p>Established</p> <p>Defined</p>
<p>SRSCR 9(2) (b) HSCER 4</p>	<p>Requirement: To provide employees with information concerning composition of safety committee, or details of the consultation arrangements under HSCER, e.g.:</p> <p>1 Employer refuses to provide information on committee composition.</p>	<p>Absent</p>	<p>Defined</p>

	2 System for safety committees and SR consultation in place but no guidance provided to employees on how they can give their views to their employer.	Absent	Established
	3 Good representation and safety committee systems in place with information made available but information concerning composition of committee not considered to be displayed in a prominent enough place or not enough effort to make it easy to read by employees.	Minor	Defined

Enforcement conclusion

2 The following table contains additional guidance to that in the EMM on some, but not all, of the EMM elements to help inspectors consider local and strategic factors and targeted enforcement in line with the EMM. It relates solely to possible breaches of consultation Regulations. For consideration of how compliance with these Regulations might affect the enforcement conclusion when considering compliance with other regulations, see para 3 below.

Table 2: EMM factors

EMM ELEMENT	ADDITIONAL GUIDANCE
Local factors (EMM Figs. 7,8 and 9)	
1 Relevant incident history	Includes history of non-compliance with any aspect of the consultation Regulations.
2 Intention of the duty holder	Deliberate failure to consult.
3 Attitude of the duty holder	Consider factors such as whether the employer considers employees' views or regards them as being important. Breaches of SRSCR or HSCER will inform inspectors' assessment of the employer's management arrangements for communicating and cooperating with employees. Depending on circumstances they may be the subject of a targeted enforcement action in their own right. It is, however, more likely that they will influence enforcement action taken under other Regulations (see para 3 below).
Strategic factors (EMM Fig.10)	The strategic factors are not expected generally to affect the final enforcement conclusion. Inspectors should, however, remember that effective employee consultation can have a positive effect on health and safety. It is also a priority area for HSC/E

Considering employee consultation arrangements as part of enforcement decisions under other Regulations

3 When considering a possible breach of other health and safety legislation, it may become apparent that poor or non-existent consultation was a contributory factor (e.g. if an employee representatives had brought a matter to the attention of the employer who then

ignored it). If so, this should be taken into account. It would be relevant when considering the 'relevant incident history' or 'standard of general conditions' elements of local factors, when applying the EMM process to the health and safety breach. It is therefore possible that deficiencies in consultation could result in a higher level of enforcement action, although this will depend on its significance in the light of all the other local factors.

