

**EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT CODE OF PRACTICE (ACCESS AND UNFAIR
PRACTICES DURING RECOGNITION AND DERECOGNITION BALLOTS)
ORDER 2005**

2005 No. 2421

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order, 2005 No. [], brings into force, on 1st October 2005, the Code of Practice on Access and Unfair Practices during Recognition and Derecognition Ballots (“the Code”), which is issued by the Secretary of State under section 203 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

2.2 A statutory procedure for the recognition and derecognition of trade unions for collective bargaining purposes was established in June 2000. That statutory procedure may involve the balloting of workers in the relevant bargaining unit on the question of whether a union should be recognised or derecognised. Where such ballots occur, the union is entitled to have reasonable access to the workers (usually on the employer’s premises) to put across its case. The Employment Relations Act 2004 (“the 2004 Act”) amended the union’s entitlement to access and established new obligations on both the union and the employer not to commit “unfair practices” when campaigning during ballots. The Code of Practice provides practical guidance on those rights and obligations.

2.3 This Order contains transitional provisions.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 Schedule A1 to the 1992 Act sets out a statutory procedure for the recognition or derecognition of trade unions for the purpose of collective bargaining. Schedule A1 includes provisions relating to access to workers and the duties of employers, unions and workers at stages of the recognition and derecognition process. Section 203(1)(a) of the 1992 Act gives a general

power to the Secretary of State to issue codes of practice containing practical guidance for the purpose of promoting the improvement of industrial relations.

- 4.2 Paragraphs 26(8) and (9)(b), 118(8) and (9)(b) and 27A(5) and 119A(5) of Schedule A1 to the 1992 Act provide that the Secretary of State's power under section 203(1)(a) includes the power to issue codes of practice about reasonable access and unfair practices during the period of a recognition or derecognition ballot. The Code is made under these powers. It provides guidelines on behaviour for those involved in a recognition or derecognition ballot. The Code does not impose legal obligations and failure to observe it does not render anyone liable to proceedings. However, section 207 of the 1992 Act provides that any provisions of the Code are admissible in evidence and are to be taken into account in any proceedings before any court, tribunal or the Central Arbitration Committee where they consider them relevant.
- 4.3 Section 204 of the 1992 Act provides the procedure for the issue of a new or revised code by the Secretary of State. Under section 204(2) of the 1992 Act the Secretary of State must lay any draft code before both Houses of Parliament and, if it is approved by resolution of each House, issue the Code in the form of the draft. The Code was laid in draft before both Houses of Parliament and on 18 July 2005 was debated and approved by a resolution of the House of Commons. The Code was also debated and approved by a resolution of the House of Lords on 19 July 2005. Prior to these Parliamentary debates, a copy of the Code and an accompanying Explanatory Memorandum were sent to the Joint Committee on Statutory Instruments and to the Merits Committee for their consideration. The Secretary of State is therefore now proceeding to make this Order to bring the Code into effect.

5. Extent

- 5.1 The Order applies to Great Britain.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 The statutory recognition and derecognition procedure was reviewed in 2002/2003 as part of the Review of the Employment Relations Act 1999 ("the Review"). To implement the Review's recommendations, Part 1 of the Employment Relations Act 2004 contains provisions which amend the statutory procedure.
- 7.2 Since the statutory procedure was established, the employer has been obliged to provide the union with reasonable access to the workers in the run-up to

ballots. A Code of Practice on Access to Workers during Recognition and Derecognition Ballots, which came into effect when the statutory procedure commenced in June 2000, provides practical guidance on reasonable access. The 2004 Act addressed several problems regarding access, through provisions that secure the privacy of union meetings and to ensure that the employer does not unreasonably make offers to workers not to attend meetings. The Government has revised the existing Code of Practice to take account of these new aspects of the access duty.

- 7.3 The 2004 Act also contains provisions, which require both the union and the employer not to commit unfair practices during the period of ballots. “Unfair practices” are defined by sections 10 and 13 of the 2004 Act: they include the making of offers of financial or similar inducements and the threatened or actual punishment of workers with a view to influencing the outcome of the ballot. The Code provides practical guidance on unfair practices.
- 7.4 The Government issued a public consultation on a draft of the Code in Autumn 2004. The Code has been revised in various ways in response to consultation responses received. For example, these revisions include the addition of text urging both parties to keep their individual campaigners informed about the outcome of high-level contacts between the union and the employer; examples of possible union misconduct during the balloting period ; and the addition of text emphasising the desirability of parties exchanging information about their campaigning plans.

8. Impact

- 8.1 The Code of Practice has been amended to reflect various provisions (sections 9, 10 and 13) within the 2004 Act. The Regulatory Impact Assessment on the 2004 Act assesses the impact of those sections. In contrast, the Code of Practice does not impose of itself any regulatory requirements on either unions or employers. Its aim is to assist parties in applying the law in practice. There is therefore no requirement to provide a separate Regulatory Impact Assessment on it.

9. Contact

- 9.1 Bernard Carter at the Department of Trade and Industry (Tel: 020 7215 2760 or e-mail: Bernard.Carter@dti.gsi.gov.uk) can answer any queries regarding the instrument.

