
Workforce engagement: what quoted companies need to do

There has been a great deal of discussion regarding how quoted companies will implement the new workforce engagement requirements under the 2018 version of the UK Corporate Governance Code (Code) but most companies are still undecided as to how best to approach the changes.

This note seeks to assist companies in complying with their obligations under the Code to engage with their workforce in order to understand their views and concerns. Particular attention is given to the issues to be addressed where the company chooses to: (i) appoint a director from the workforce; or (ii) designate a non-executive director to represent the views of the workforce in the boardroom.

Irrespective of the method chosen, companies that report against the Code are expected to put in place appropriate mechanisms to:

- gauge the views of the workforce on a regular basis. For companies that are used to engaging with their workforce only occasionally, or on an ad hoc basis, this will represent a significant change. Of course, companies may well also want to (continue to) consult affected workers when a change is proposed that could affect them, whether or not the company is legally obliged to do so;
- identify any areas of concern;
- escalate such concerns to senior management via appropriate channels;
- address such concerns;
- ensure that the views and concerns of the workforce are taken into account by the directors, particularly when they are making decisions that could affect the workforce; and
- feed back to the workforce on what steps have been taken to address their concerns or to explain why particular steps have or have not been taken.

Companies Act

Under section 172 CA 2006, when deciding what would be most likely to promote the success of the company, a director must have regard to, among other things, the interests of the company's employees. In any event, listening to the views and concerns of the workforce is likely to be an important ingredient to running a business successfully and sustainably.

All quoted companies are likely already to have in place one or more mechanisms to gauge the views of the workforce from time to time and/or to consult the workforce, or relevant sections of it, on particular occasions – for example, when a redundancy programme or structural reorganisation is planned. However, such mechanisms may be rather ad hoc or used only occasionally, and in some circumstances there may be practical and legal difficulties with consulting the workforce – for example, where a transaction is being

negotiated that is likely to affect the company's share price or other price sensitive information is involved. Companies with a unionised workforce or formally elected employee representatives are of course likely to have more sophisticated mechanisms in place.

In addition, under the Companies (Miscellaneous Reporting) Regulations 2018, "large" companies must include a description in their strategic report of how the directors have had regard to the matters in section 172 CA 2006. Companies with more than 250 UK employees must include in their directors' report a summary of how the directors have engaged with employees, how they have had regard to employee interests and the effect of that regard, including on the principal decisions taken by the company.

Code

The Code places greater emphasis on areas such as workforce and shareholder engagement, corporate culture, board succession and diversity and remuneration.

Provision 5 (engagement with workforce via one of three specified methods) requires the board to understand the views of the company's key stakeholders (other than shareholders) and describe in the annual report how their interests and the matters set out in section 172 CA 2006 have been considered in board discussions and decision-making. For this purpose, the board should engage with the workforce using one or a combination of the following three methods:

- a director appointed from the workforce;
- a formal workforce advisory panel;
- a designated non-executive director (Designated NED).

If the board does not choose one or more of these methods, it must explain in the annual report what alternative arrangements it has put in place and why the board considers them to be effective. In any event, the chosen engagement mechanism(s) should be kept under review by the board.

In this context "workforce" has a broad meaning, covering not only individuals with a formal employment contract, but also other workers who are affected by the decisions of the board, such as agency workers. All such workers are included wherever they work (in the UK or elsewhere) and whichever company in the group is their employer or contracting party.

If the first method – a director appointed from the workforce – is chosen, a number of issues will need to be addressed:

Director appointed from the workforce: issues to be addressed

- An individual appointed to this role will be subject to the same legal duties and responsibilities as other directors. However, they will be particularly expected to bring the views and experiences of the workforce into the boardroom.
- The individual will need to keep information that is provided to the board confidential, unless the board agrees otherwise. The board may want to set out in writing details of which types of information can be shared with the workforce and in what manner. In addition the individual will be subject to the disclosure restrictions in MAR.
- The individual will need to have the appropriate knowledge and skills to be effective as a director.
- The company may need to provide specialist training and support.
- The company will need to put in place procedures for the workforce to select the individual and for them to be appointed to the board.
- The individual will be capable of being removed by shareholders using the power in section 168 CA 2006.
- The company's articles may need to be amended to cater for the appointment and removal of the workforce director in accordance with agreed rules.

Designated NED

We expect many small and mid-sized quoted companies, and some large quoted companies, to choose the third method – the Designated NED. Where the company chooses to have a Designated NED, their role is to help ensure that the views and concerns of the workforce are brought to the board and taken into account in board decision-making. For this purpose, they will need to:

- Understand the views and concerns of the workforce, including particular sections of it.
- Articulate those views and concerns in board meetings, using their experience and judgement to decide the best time and manner to articulate those views and concerns. It may help to include a suitable standing item in the board agenda.
- Ensure that the board as a whole, and particularly the executive directors, takes appropriate steps to evaluate the impact of proposals and developments on the workforce and considers what steps should be taken to mitigate any adverse impact. In some cases, the board may want to instruct members of the executive management team to prepare an impact assessment and possible mitigation strategies and to make recommendations to the board (in the form of a board paper dedicated to the impact of a proposal on the workforce).
- Challenge the executive directors on their views as to the way in which workforce engagement is undertaken; steps to be taken to address workforce concerns arising out of business-as-usual activities; and proposed steps to mitigate the adverse impact on the workforce of a particular proposal.
- Feed back to the workforce on how the board plans to respond to their views and concerns.

The Designated NED should not be expected to take on responsibilities that are properly those of an executive director or the HR team. The Designated NED should probably not be involved in the company's whistleblowing procedure in their capacity as Designated NED.

The board will need to review whether the Designated NED will need to spend more time on the company's business. If so, the board will need to agree with the Designated NED any increase in the fees payable to them and document this and the scope of the role to be undertaken in a revised letter of appointment.

The board as a whole should decide which workforce engagement mechanisms to use, and assess their effectiveness and ensure this is documented in a workplace engagement policy which is approved by the board, shared with the workforce and kept under review.

Market practice

Recent polls suggest that more than half the FTSE100 are still deciding how best to approach stakeholder engagement. It very much depends on the size, structure and culture of the organisation. Many companies seem to be adopting the approach most similar to their existing systems but taking steps to enhance them to meet the requirements of the Code.

AIM companies

Most AIM companies choose to report against the Corporate Governance Code published by the Quoted Companies Alliance (QCA Code), rather than the Code. Principle 3 of the QCA Code requires companies to "take into account wider stakeholder and social responsibilities and their implications for long term success". In applying this principle, boards need to "identify their stakeholders and understand their needs, interests and expectations"; and the company should disclose in its annual report and/or publish on its website details of "how it has obtained feedback from stakeholders and the actions that have been generated as a result of this feedback".

AIM companies following the QCA Code must therefore put in place one or more mechanisms to understand the views of the workforce and to enable the board to take into account the views and interests of the workforce, and must describe such arrangements in their annual report. But the QCA Code does not include an equivalent to Provision 5 of the Code: those AIM companies are therefore not required to engage with their workforce using one or a combination of prescribed methods, although they may of course choose to do so.

How we can help

We have discussed the new requirements with a number of clients, and have put together a "toolkit" for quoted companies to use. If you would like to discuss the new workforce engagement requirements, please get in touch with the author below or your usual CMS contact.



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