

HEMPSONS

Accountable care and new care models:

Understanding the **workforce** implications



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Introduction

This guidance is part of a range of documents produced by Hempsons to assist your organisation in delivering the aims of Next Steps on the NHS Five Year Forward View (March 2017) and local STP plans.

This guidance focuses on the workforce implications for organisations developing new care models including in the context of evolving accountable care systems and organisations. The challenge to deliver high quality integrated services by adequately trained and developed staff is huge and significant barriers remain.

For new care models to be effective, organisations will need to embrace new cultures and ensure their workforce has the right skills, values and behaviours to work effectively. This could involve consideration of improving staff health and wellbeing, reducing obstacles to better performance, providing training and looking at whether terms and conditions support high performance and redesigned service provision. Organisations might also need a different skills mix to achieve their objectives, including utilising extended, advanced and new hybrid roles.

Significantly, if a new care model results in changes to an organisation's structure and working arrangements then complex employment law issues may arise and need to be managed carefully. This guide identifies the core employment issues that arise from the creation of new care models, specifically:

- creating a new culture
- creating the most appropriate organisation structure with the right skills mix
- changing contract terms
- restructuring/redundancy implications
- the application of TUPE

and provides a summary of the key employment law/personnel issues and practical guidance on how to handle these tricky areas.



New care model options

There are a wide range of new care models that can be implemented depending on the nature of your organisation, the healthcare economy around you and your objectives. In many STP areas, organisations are developing new care models in the context of evolving accountable care systems or organisations.

The most common forms of new care models are set out below:

Acute Care Collaboration

- Multi-Site Trust
- Hospital Chains
- Multi-Site Specialty Franchise
- Urgent and Emergency Networks

Integrated Health and Social Care

- Multi-specialty Community Providers (MCPs)
- Primary and Acute Systems (PACS)
- Enhanced Health in Care Homes

Integrated Primary Healthcare

- GP Federations
- Super-Practices

Whilst there may be workforce issues that are unique to a particular organisation there are a number of common employment law issues that are relevant to all of the care model forms, as set out on the opposite page.

General workforce considerations

The issues below are likely to be relevant to the majority of new care models and should therefore be considered early on when developing your organisational development plans:

- need to develop the **new leadership** (management team) structure and strategy
- need to undertake **due diligence** of the workforce to assess **scope and liabilities**
- need to create an **organisational development plan**, including issues such as: divisional structures; staffing levels; **skill-mix/flexibility**; and the benefit of **new/extended roles**
- **staffing models** should aim to deliver a capable, co-ordinated, sustainable and resilient workforce
- **secondment** – identify need for and terms of any secondment arrangements
- potential **redundancies/restructuring** exercises with associated consultation processes
- application of **TUPE** and the associated information/consultation processes. (Note: contract and pensions issues unlikely to arise where all parties involved are NHS employing bodies)
- need to develop an **integration plan** covering the organisation's vision, operation, policies and culture in which a cross-section of staff should be involved
- **new culture** of accountability that is likely to require staff training and education
- **co-working** – need to develop a clear strategy for collaboration/integration and a workforce plan, and identify benefit of standardising key policies and procedures
- **collaborative working** requires staff to have an understanding of other areas/sectors creating potential education/training needs
- identify the ability to **pool resources** and the anticipated benefits (i.e. shared back office functions such as HR/payroll/networked telephony services/new service offerings)
- need for **cross-site working/mobility** issues including mobility clauses, mileage/travel costs
- workforce requirements could give rise to the need to **change terms and conditions of employment/working arrangements** with individual and collective (TU) implications
- managing different contracts and procedures that may necessitate **new HR systems**
- need to develop measures to support **employee retention and development** and to enhance recruitment to the organisation
- identify the **education, training needs and regulatory requirements** of the current and future workforce, which may include new allied health professional roles



Culture

It is well-established that a healthy, safe and open culture in health sector organisations is crucial to the successful delivery of high-quality, compassionate and continually improving patient care.

Culture is the engine of any establishment because it has a direct impact on key operational areas such as:

- the effective provision of services
- the organisation's values/goals
- the organisation's strategy/direction
- effective collaboration/partnership arrangements
- staff morale
- high levels of performance from staff
- good staff retention rates/reduced turnover

Consequently for new care models to be successful it will be essential, at an early developmental stage, to focus on the desired cultural identity of the organisation and how this can be best implemented and translated into policies, practice and decision-making at all levels. The organisation's culture will be shaped by its core values as both a health/social care service provider and an employer.

Key considerations

The factors below will be important in establishing and maintaining the right cultural identity for each new care model:

- **effective leadership** – establishing the right culture starts at the top of an organisation and filters through each level of the organisation, ending with patient contact
- **staff engagement** – establishing a successful culture requires the involvement and input of staff at all levels and across all areas to gain traction and create individual ownership
- **collaboration** – the culture will need to address the need for partnerships/more integrated and collaborative ways of working to ensure that one partner in a new care model does not dominate
- **transparency** – it is crucial that there is openness/honesty in the organisation's operation, to avoid an unhelpful and damaging blame culture
- **strategy/decision-making** – the organisation's strategy and strategic decision-making should align with the culture
- **practices and procedures** – the culture should be a thread running through the organisation's practices and procedures, including its employment policies/benefits, to embed specific behaviours in staff and reward them for high-quality performance
- **review and development** – maintaining a successful culture in the organisation will require regular review of performance, behaviours and achievement of goals, with a willingness to challenge and change areas of inefficiency/concern
- **celebrate success** – a successful culture will involve the celebration of success whatever that looks like in your organisation, for example: innovation; the achievement of goals; and/or reaching service delivery targets

Organisational culture – virtuous circle



Staffing arrangements/ workforce versatility

In establishing a new model of care, consideration needs to be given to the changes that will be required to roles to meet the increasingly complex care needs of patients. The ability for individuals and multi-disciplinary teams to adapt to provide care in different settings, at different times and in different organisational and team structures will be essential. To achieve this there will need to be an improved balance of generalist and specialist skills across the current health and social care workforce.

Integration and more collaborative forms of working will require a flexible workforce, including new roles and changes in skill mix to deliver the organisation's services. Changes may also be needed to terms and conditions, including to allow for greater geographical mobility (see page 12: 'Changing Terms and Conditions of Employment').

For some care models, the existing imperative to move to a seven day service will become even more important and will require contractual changes to hours and utilisation of e-rostering and job planning, amongst other things. For care models which require integration between sectors, staff may need extra training and learning and development support, and potentially a shift in mind-set to align with the new organisation's culture and strategy.

To support workforce versatility, extended and new roles are emerging across the health sector, including Physician Associates, Assistant/Associate Practitioners, Advanced Clinical Practice (ACP) nurses, Nursing Associates, Pharmacist Practitioners extending their roles into primary care, and the development of the support workforce. Extending roles and creating new roles can help meet the workforce operational/clinical needs and address workforce gaps.

Physician Associates (PAs), for example, have been introduced in some trusts to address a shortage of junior doctors. A PA is a dependent healthcare professional who has been trained in the medical model (two year postgraduate degree programme, generally after a life sciences degree). PAs can take on many junior doctor tasks, including assessing patients, performing examinations and undertaking (non-complex) procedures. PAs are generally paid at around AfC pay band 7. However, one drawback to the role is that PAs are not on a statutory register or formally regulated, which means that they cannot prescribe medicine.

Partnering arrangements are also being developed which may require joint posts or secondment agreements to allow for working across different sectors. Arrangements must be robust and fit for purpose to ensure that employees can work in a variety of suitable locations with appropriate professional indemnification and accountability.

Workforce planning from the outset is therefore essential to assess the current workforce profile and what is needed in the new organisation structure, including identifying what, if any, skill-gaps there are and how best they can be filled, and giving consideration to duplication of work/double funding.

Considerations for (re)designing your staffing arrangements

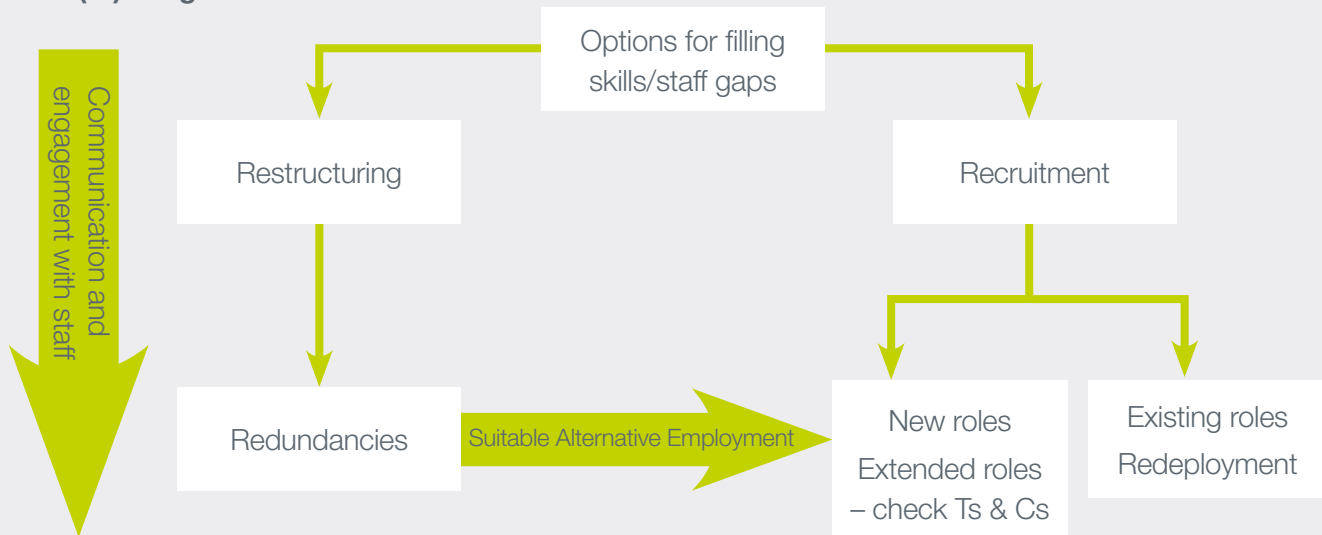
Key initial questions:

- what type of organisation are we?
- what is our culture and strategy?
- have we got a strong leadership structure in place?
- what services are we going to be providing and where?
- what are our patients' needs?

The following questions then become relevant:

- what is our current staff mix – numbers, roles, skills, terms and conditions?
- what is the staff mix of our partner organisation – numbers, roles, skills, terms and conditions?
- are there any staffing/skills gaps? How can they be filled?
- does this create any educational/training/needs/issues?

Staff (re)design issues/solutions



Development and review

Once the new staffing structure is in place, you will need to:

- keep the structure under review and implement changes as the organisation develops
- identify new needs – impact, barriers and enablers
- develop measures to support employee retention and development
- review and address education, training needs and any regulatory requirements

Changing terms and conditions of employment

In order for a new care model to operate effectively employers may need to make changes to staff terms and conditions to:

- allow for new and more collaborative ways of working
- provide for greater flexibility including in relation to mobility
- allow for the effective provision of services, including 24/7 service provision and the provision of services across different sites/locations, etc

Current contract terms

To determine what contract terms will be necessary for some/all staff to have in a new care model, employers will need to undertake a due diligence exercise to identify what the existing contract terms are for staff/staff groups in their organisation and any organisation with which there is to be collaboration/integration.

The contract terms may be:

- express (those agreed between the parties and usually set out in the written contract)
- implied (commonly via custom and practice)
- incorporated (via statute or a collective agreement)

Varying contract terms

Contractual terms can only be varied in accordance with any variation provisions in the contract or by the agreement of the parties.

Therefore, employers will need to establish first of all if there is a contractual right to vary the contract in the manner proposed, which can be relied upon. For example, the contract terms may be sufficiently wide to accommodate the proposed amendments or there may be an express variation clause allowing changes to be made.

However, care must be taken if an employer seeks to rely on a variation clause in an employment contract because such clauses are construed narrowly by the courts, meaning that ordinarily only minor and non-detrimental changes can be made via this route.

Binding changes

In order to make binding changes to employment contract terms where there is not a contractual variation clause, employers have three options, namely:

- obtain the express agreement (ideally in writing) of the employee to the change
- impose the change unilaterally (if the employee does not object this would amount to an acceptance of the change)
- dismiss and re-engage (offer continued employment on the new contractual terms)

See the Guide opposite for the process to follow when changing terms and conditions of employment.

None of these options are straightforward given the need to consult collectively with recognised TUs in respect of key contract terms and the issues/grievances/claims that can arise via unilateral contract variations and a dismissal process. Therefore, care will need to be taken and effective communications (collective and individual) will need to be prepared in advance, to minimise these risks and to maximise employee buy-in to proposed changes.

Changes post TUPE transfer

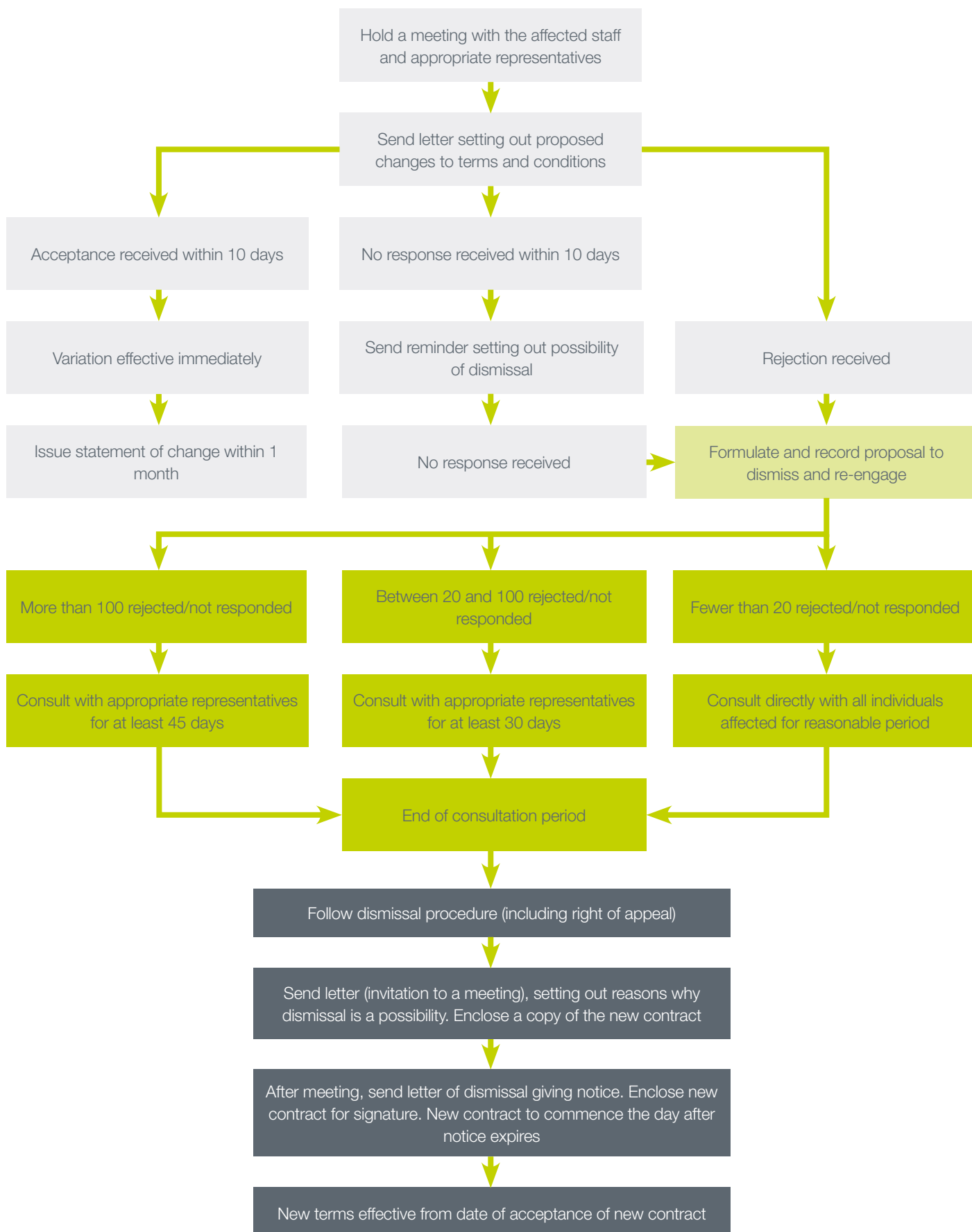
Following a TUPE transfer, employers often find they have employees with different terms and conditions working alongside each other and wish to harmonise those Ts & Cs. However, TUPE protects against change/harmonisation for an indefinite period; if the sole or principal reason for the change is the transfer, any such changes would be void.

Following a TUPE transfer, changes to terms and conditions will only be allowed if they are:

- unrelated to the transfer
- for an economic, technical or organisational reason entailing changes in the workforce (e.g. a restructuring)
- permitted by the employment contract
- incorporated by a collective agreement

(See page 16: 'Application of the TUPE Regulations 2006')

Changing terms and conditions of employment process



Restructuring and redundancies

A core workforce issue arising from the creation of a new care model will be the need to restructure current working arrangements, including staffing levels/ structure and locations in order to have an effective and functioning organisation from day one.

The key elements of an effective restructure are planning and communication. Ideally a restructure will take place across a 3-6 month period, depending on size and complexity, to allow for the mapping out of the new organisation structure, redeploying or recruiting staff to new positions and handling any potential redundancies.

As a minimum a restructuring plan should include:

- appointing a restructuring/transition team from across the affected organisations
- creation of the new workforce structure, including need for new skills/roles
- identification of new roles, redeployment (retention) opportunities and/or the need for recruitment
- identification of potentially redundant roles and the necessary consultation exercises
- creation of effective communication strategies (for collective and individual purposes)

Redundancies

An inevitable consequence of a restructuring exercise is the potential for redundancies. It is important to ensure compliance with minimum contractual and statutory rights, and to minimise the risk of complaints, claims and financial liabilities it will be necessary to identify potential redundancies early, in order that the appropriate consultation processes can be mapped out and undertaken.

A redundancy situation will arise in one of the following scenarios:

- closure of a business/cessation of an organisation
- closure of the place of business where an employee was employed to work
- reduced requirement for employees to carry out work of a particular kind

Consultation obligations

An employer's consultation requirements are dependent on the number of potential redundancies, specifically:

- if 20 or more redundancies are being proposed in a 90-day period then there must be a collective consultation process (see flowchart opposite) and the Secretary of State (BIS) must be notified
- if fewer than 20 redundancies are proposed then a fair individual consultation procedure in relation to each employee at risk of redundancy must be followed (see redundancy procedure – below)

Redundancy procedure

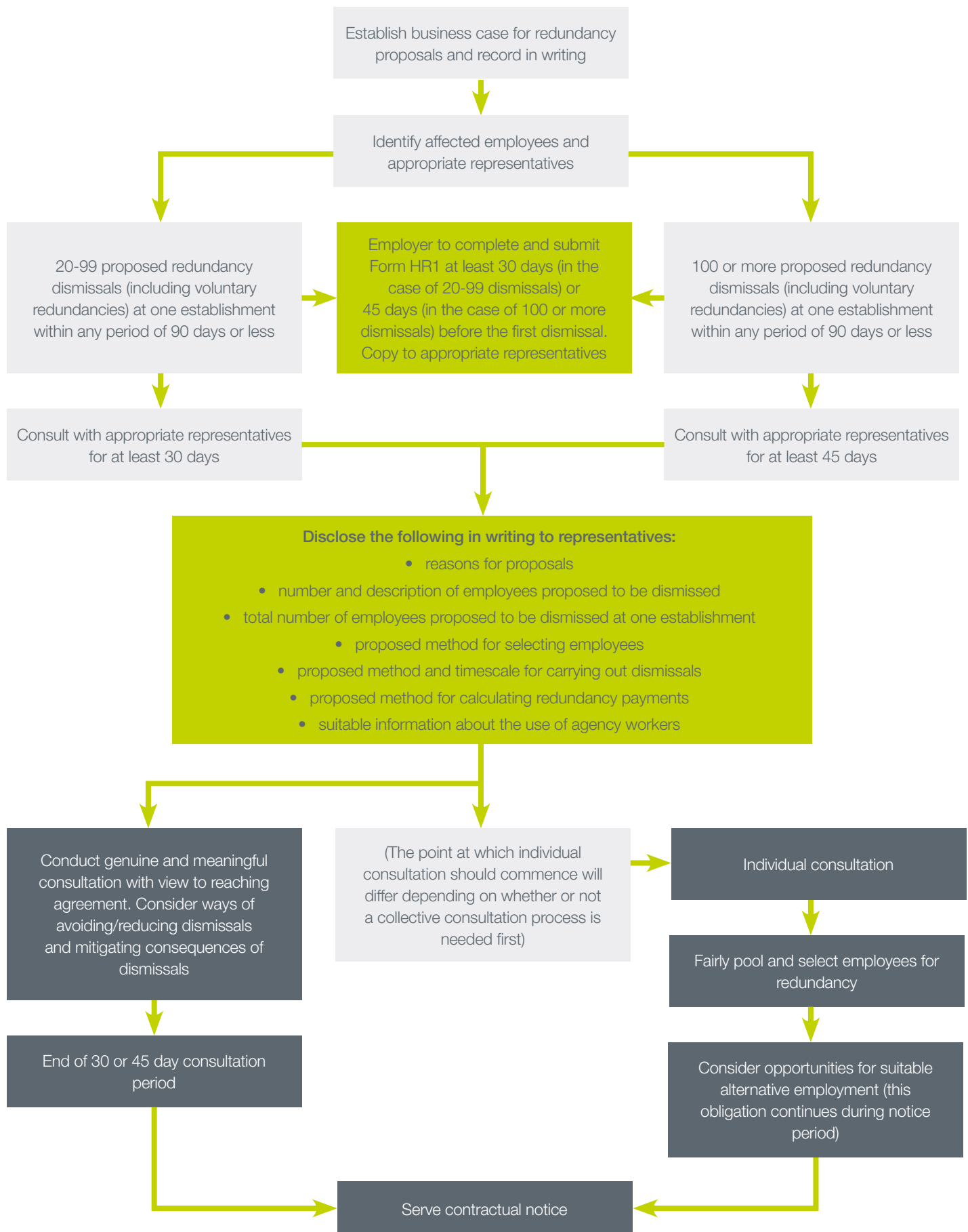
As a minimum, to reduce the risk of unfair dismissal claims, an individual redundancy consultation process should include:

- identification of an appropriate pool for the selection of employees
- establishing objective selection criteria to apply to those in the pool
- consulting with those employees in the pool
- considering means of avoiding compulsory redundancies, such as:
 - seeking volunteers
 - suitable alternative employment/trial periods
 - sector wide redeployment opportunities
- issuing notice of termination of employment
- terminating employment and remitting contractual/statutory redundancy pay
- offering a right of appeal

Any redundancy process should adhere, unless there are compelling circumstances, to the organisation's established Redundancy Procedures, as well as good employment law practice – as set out above.



Collective redundancy consultation process



Application of the TUPE Regulations 2006

Summary of the key legal issues

TUPE is an acronym for the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended).

There are two situations when TUPE may apply, namely: business transfers and service provision change transfers:

- business transfer – where a business or part of a business transfers to a new owner or merges with another business to create a new organisation
- service provision change transfer – meaning:
 - a contractor takes over activities from a client (known as outsourcing)
 - a new contractor takes over activities from an outgoing contractor (known as re-tendering or second generation outsourcing)
 - a client takes over the activities from a contractor (known as insourcing/bringing in-house)

When TUPE applies it automatically transfers employees to the new organisation/or service provider and protects the employment rights of the transferring employees, including their terms and conditions of employment and continuous service.

TUPE creates obligations for the old employer (“transferor”) and the new employer (“transferee”), specifically both the transferor and transferee must inform and consult with their affected employees, through the employees’ elected representatives, about the proposed transfer. This must take place “in good time” before the transfer to allow for a meaningful consultation.

The information that must be provided is:

- the fact that the transfer is to take place, the date of the proposed transfer and the reasons for it
- the legal, economic and social effects of the transfer e.g. a change in location
- any measures that the transferor or transferee intends to take in relation to the affected employees (or that there are none)
- details of the use of any agency workers

An obligation to consult arises if there are “measures” that may be taken (usually by transferee). The obligation is to consult with your staff only in relation to measures that you are taking. Measures include any changes to employment arrangements after the transfer, for example:

- redundancies
- relocation
- different working patterns
- different pay dates
- changes to pensions and other benefits

The transferor is also obliged to provide Employee Liability Information (ELI) about the transferring employees to the transferee at least 28 days prior to the transfer. ELI consists of:

- identity and age of the employees
- principal terms and conditions (s1 Employment Rights Act 1996)
- details of any disciplinary or grievance matter related to any of the employees in the previous two years
- details of any claim related to any of the employees in previous two years (or potential claim)
- collective agreements that apply to any of the employees

Dismissals post TUPE transfer

TUPE provides transferring employees with extra protection against unfair dismissal. The dismissal of a transferring employee will be automatically unfair if the sole or principal reason for it is the transfer and the employer does not have an ETO (Economic, Technical or Organisational) reason that entails changes in the workforce for dismissing the employee.

Electing employee representatives process (redundancy and TUPE situations)

Required where there are no recognised trade union representatives

Preparation questions

who will run the election? (e.g. Employer/Third Party)

what voting system will be used? (e.g. first past the post)

how many representatives will be elected? (will constituencies be needed?)

how long will they stand for?

who can nominate and how many nominations will they have? (e.g. all employees)

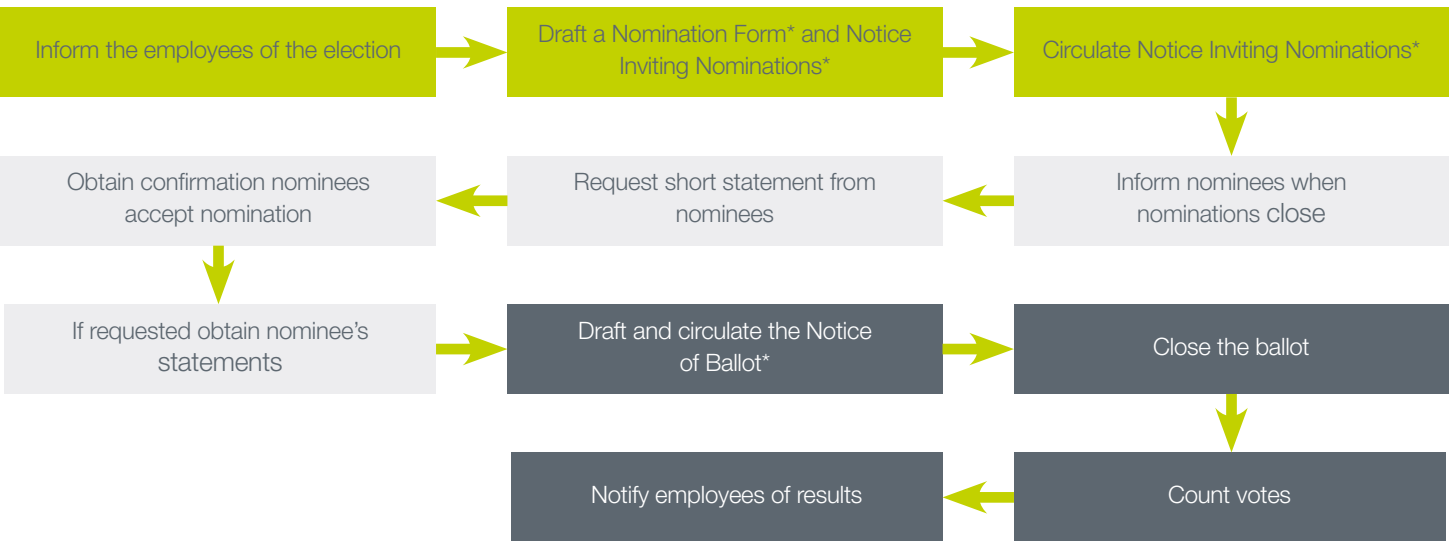
who can be a candidate? (e.g. candidates have to be affected employees and be employed on the date of election)

who can vote? (e.g. all affected employees as at the date of the election)

what are the time scales? (e.g. provide dates for the process below)

how will the vote be conducted? (e.g. duration, admission, spoilt votes, counting process)

The process



*We can provide examples of these notices upon request

Conclusion

There are a number of different challenges involved in delivering and implementing new care models, and this publication sets out some of the general issues and themes that apply across all the models. This publication aims to provide you with an overview of the key workforce implications but we can advise on specific issues relating to specific care models/your proposals.

This is an evolving area with opportunities and challenges. The full extent of the barriers and enablers are not yet known and sharing knowledge and co-operation within the NHS is a key part of making the transformation happen effectively.

Tackling change is never easy but by focusing first on the paramount areas/issues, including: leadership, skills and culture, and also planning ahead to identify issues and allow for them to be managed in line with legal obligations and in communication with staff affected, the necessary changes can be implemented and can deliver essential efficiencies and a workforce fit for the future.

If you would like any further information or advice please do get in touch.



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Our sector knowledge means we can quickly get to grips with the key issues facing you and your organisation

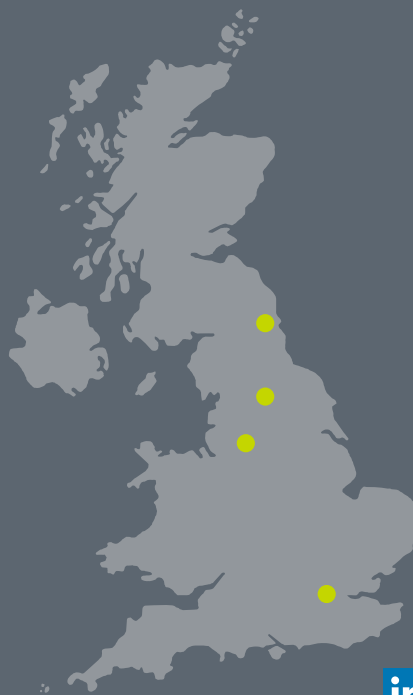
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- Commercial Dispute Resolution
- Competition law
- Construction
- Corporate
- Crime
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- Environment and Sustainability
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