Department for Business & Trade

Consultation on the Statutory Code of Practice on Dismissal and Re-engagement

Government response

Published 19 February 2024

Contents

Ministerial Foreword

The government is committed to making the UK the most dynamic place in the world to work, and to launch, grow, and do business. The UK's flexible labour market is key to economic growth and helping business to thrive. However, labour market flexibility must be balanced with appropriate safeguards.

Specific cases of dismissal and re-engagement, also known as 'fire and rehire', attracted significant media attention and raised the profile of the practice during the pandemic. Concerns were raised about threats of dismissal being used as a pressure tactic in the early stages of negotiations to implement changes to employment contracts.

The statutory Code of Practice on Dismissal and Re-engagement clarifies and gives some legal force to accepted standards about how employers should behave when seeking to change employees' terms and conditions. Its purpose is to ensure that employers take all reasonable steps to explore alternatives to dismissal and re-engagement, and that they engage in meaningful consultation with a view to reaching an agreed outcome with individual employees or trade unions in good faith and with an open mind. The Code also aims to ensure that employers do not raise the prospect of dismissal unreasonably early or threaten dismissal where it is not envisaged.

The Code has been designed to strike the right balance between supporting employers to grow their businesses through a flexible labour market and protecting workers from unfair practices that undermine employment protections.

We are grateful to all those who contributed to the consultation.

Kevin Hollinrake – Minister for Enterprise, Markets, and Small Business

Introduction

The government consulted on a draft Code of Practice on Dismissal and Re-engagement ("the Code") between 24 January 2023 and 18 April 2023.

The Code sets out how employers should act when seeking to change employment terms and conditions, if the employer envisages dismissal and re-engagement. It requires employers to consult employees and explore alternative options, without raising the prospect of dismissal unreasonably early or using the threat of dismissal as a negotiating tactic to put undue pressure on employees in circumstances where the employer is not envisaging dismissal. The Code seeks to ensure dismissal and re-engagement is only used as a last resort.

We received 50 responses to the consultation. Sixteen responses were received via the online consultation platform Citizen Space and 34 responses were received via email. Thirteen responses were from trade union or employee representative groups (26%), 10 responses were from legal representative groups (20%), 9 responses were from business or employer representative groups (18%), 8 responses were from individuals (16%), 5 responses from employers (10%), 2 responses from HR professional bodies (4%), 2 responses from public bodies (4%), and 1 response from a non-departmental public body (2%).

The government is very grateful to all respondents to the consultation for their considered and helpful responses. This document sets out feedback received in the consultation, the government's response and next steps.

Responses to consultation questions

Question 1: Scope

Paragraphs 6-10 of the Code set out the situations in which it will apply. Do you think these are the right circumstances?

The points raised in response to this question included:

Number of employees affected: Some respondents agreed that the Code should apply regardless of the number of employees affected. Some respondents felt that the Code should only apply in circumstances where 20 or more employees are affected, in line with collective consultation requirements in the Trade Union and Labour Relations (Consolidation) Act 1992.

Negotiation: Some respondents raised the language of the Code and commented that the language tended to relate to larger employers undertaking negotiations with recognised trade unions for collective bargaining purposes, rather than to smaller employers, who would for the most part conduct consultations rather than negotiations.

Redundancy: Some respondents said they thought it was good that the Code would not apply to redundancy scenarios as defined in the Employment Rights Act 1996 ("the 1996 Act"), some of these noted that there were already well-established legal principles on redundancy. Some legal and trade union representatives said that the Code would not cover scenarios where an employee was dismissed and was replaced by a non-employee worker, as these scenarios would be classified as redundancies as defined in the 1996 Act.

Business reasons: There were mixed views on whether the Code should apply in specific business situations. Some respondents suggested that the Code should specify that dismissal and re-engagement can only be used where employers were in financial difficulty. Conversely, other respondents said the Code should not apply where employers were in financial difficulty.

Government response

The Code retains the same scope as the draft Code published for consultation. It captures scenarios regardless of the number of employees affected or the business reasons for the proposed changes to the employees' terms and conditions.

References to "negotiation" in the Code have been removed to make clear that the Code applies both to scenarios where there is no collective bargaining agreement in place, as well as to scenarios where there is.

The Code published for consultation excluded redundancy scenarios and the Code retains this approach. Where there is a genuine redundancy situation under the 1996 Act, there are well-developed legal principles as to what an employer should do. The Code has been

amended to clarify that, while it won't apply where an employer is only envisaging making employees redundant under the 1996 Act, in scenarios where an employer is envisaging both redundancy and dismissal and re-engagement in respect of the same employees, the Code will apply for as long as dismissal and re-engagement remains an option.

Question 2: Re-examination of business plans

If employees make clear they are not prepared to accept contractual changes, the Code requires the employer to re-examine its business strategy and plans taking account of feedback received and suggested factors. Do you agree this is a necessary step?

The points raised in response to this question included:

Re-examination: Some respondents supported the re-examination stage and stressed its importance for ensuring that alternative solutions were considered and helping to mitigate the long-term damage of unilaterally imposing changes. Some business and legal representatives indicated that employers would usually already undertake this step.

Business burdens: Some respondents indicated that re-examination would be overly burdensome for employers, suggesting a lighter-touch approach with employers reviewing only specific proposals, rather than their entire business strategy.

Order of the Code: Some respondents suggested that the re-examination of business strategy and plans came too early in the Code, and that it should follow the information-sharing and consultation sections.

Government response

The Code will retain the re-examination step, but the Code has been re-ordered so that the information-sharing and consultation provisions come before the section on the employer's reassessment. The Code has been amended so that it now only requires employers to re-examine its plans rather than both its business strategy and its plans.

Question 3: Business reasons

Do you have any comments on the list of factors which an employer should consider, depending on the circumstances, in paragraph 22 in the Code?

The points raised in response to this question included:

Discriminatory impacts: Some respondents welcomed the reference to assessing the risk of any discriminatory impacts on employees. Some respondents suggested that the Code should include an obligation to carry out an equality impact assessment.

Balance between employers and employees: Some trade unions commented that the factors listed focused largely on the needs of the employer and that there should be a clearer focus on detrimental impacts on employees. Other respondents indicated that the factors should include the consequences for the employer of not making the proposed changes.

Clarity: Some respondents commented that it was unclear which factors had to be considered and suggested that an employer's circumstances should instead determine whether their re-assessment was meaningful, reasonable and proportionate.

Government response

The list of factors will remain the same as in the draft Code published for consultation. The list of factors already obliges employers to consider the impact of their proposed changes on employees, by requiring them to consider the potential damage to their relationships with employees or trade unions, the potential for strikes, and the risk of losing valued employees.

It is not necessary to add the consequences of the employer not making the changes to the list of factors, this will be covered by the 'objectives the employer is seeking to achieve', which is already on the list.

The Code will not require all employers to conduct an equality impact assessment. The Code is clear that employers should consider if their proposals could have a greater impact on some employees than others, including on the basis that they have a protected characteristic under the Equality Act 2010.

Question 4: Information-sharing

The Code requires employers to share as much information as possible with employees, suggests appropriate information to consider, and requires employers to answer any questions or explain the reasons for not doing so. Do you agree this is a necessary step?

The points raised in response to this question included:

Meaningful consultation: Some respondents felt that information-sharing was a fundamental step to allow for meaningful consultation with a view to reaching agreement on proposed changes and that many employers would already do this.

Ordering: Some respondents commented on the order of the information-sharing and consultation provisions in the draft Code. They felt that the information-sharing and consultation sections should come early in the Code, before the section on the employer's reassessment. They suggested that this re-ordering would more logically follow procedural sequencing and provide greater clarity to employers, as well as aligning with other best practice guidance, such as the Acas guidance on making changes to employment contracts.

Format of information: Some respondents said that the Code should require employers to share all information in writing.

Government response

The government has revised the sequencing of the Code and brought forward the information-sharing and consultation sections so they come early in the Code and before the section on reconsidering the need for changes. The revisions also remove the duplication of the information-sharing provisions.

The Code has been amended to say that it is best practice for employers to provide information in writing.

Question 5: Types of information

Is the information suggested for employers to share with employees at paragraphs 25 and 33 of the Code the right material which is likely to be appropriate in most circumstances?

The points raised in response to this question included:

Type of information: Some respondents suggested additional information to be shared, including the employer's financial position, the detrimental impact of the changes on employees, the process to be followed and the impact of not making the changes on employers. Some said that the list should mirror the Acas Code of Practice on the disclosure of information for collective bargaining purposes.

Non-provision of information: Some respondents said that the Code should recognise that employers would not be able to share commercially sensitive information.

Duplication**:** Some respondents said that the two lists of information at paragraphs 25 and 33 should be amalgamated.

Business behaviours: Some employer representative groups commented that good employers typically already shared the information listed in the Code as this practice was more likely to secure agreement to proposed changes and good industrial relations.

Government response

The Code has been amended so that the two separate lists that had been at paragraphs 25 and 33 are merged to form one list. In addition to what had already been on the list, 'proposed next steps' has been added, as suggested by respondents. It is not necessary to clarify that employers may not be able to share commercially sensitive information, as the Code notes that an employer may occasionally reasonably be unable to provide information, and that they should explain the reason(s) for this as fully as reasonably possible.

Question 6: Re-assessment of factors

Before making a decision to dismiss staff, the Code requires the employer to reassess its analysis and carefully consider suggested factors. Do you agree with the list of factors employers should take into consideration before making a decision to dismiss?

The points raised in response to this question included:

Test for dismissal: Some respondents said that the Code set too high a bar in stating that an employer had to consider whether it was "truly necessary" to impose the new terms and whether the decision to dismiss and re-engage was "a last resort". Some respondents argued that this did not reflect the test for unfair dismissal, which, broadly, requires an employer to act "reasonably" in dismissing an employee. In contrast, other respondents suggested that the Code should use a tighter definition of when dismissal could be used, for example when the employer has shown that it is required to ensure the survival of its business.

Business burdens: Some respondents said employers should consider whether anything had changed since the last assessment and should only need to re-assess if there had been a change in circumstances. Reasons given included that employers should not be required to repeat earlier assessments as this risked being disproportionate and overly burdensome.

Other factors: Some respondents suggested other factors that an employer should consider, including damaging employee morale.

Government response

Following the re-ordering of the Code, the government considers that this step was duplicative of the re-examination that employers have to do after information-sharing and consultation. The Code has therefore been amended so that employers no longer have to conduct a full re-assessment of their plans at this stage. The section still contains an obligation on employers that dismissal and re-engagement should only be used as a last resort.

Question 7: Mitigations

The Code requires employers to consider phasing in changes, and consider providing practical support to employees. Do you agree?

The points raised in response to this question included:

Support: Some employer representative groups said that employers would already provide practical support to employees in the relevant circumstances. Some respondents suggested additional support that employers could offer employees that could be added to the Code, including re-training or time off for interviews. Some respondents commented that the Code should provide that employers should not be able to unreasonably refuse any requests for support.

Phasing in changes: Some trade unions commented that the Code should require employers to phase in changes. Some respondents said that phasing would sometimes not be possible, for example where changes were time-critical, and that it could lead to uncertainty about which version of the contract was in force.

Certainty: Some respondents commented that the Code needed to have regard to the principle of contractual certainty and that phasing in changes could cause disruption and uncertainty.

Government response

The Code has been amended so that phasing in changes is now a best practice recommendation rather than an obligation. This is because it won't be appropriate in all circumstances covered by the Code. The list of practical support that employers should consider offering employees has not been amended as it is a non-exhaustive list.

Question 8: Industrial relations

Do you think the Code will promote improvements in industrial relations when managing conflict and resolving disputes over changing contractual terms?

The points raised in response to this question included:

Impact on industrial relations: There were mixed views on whether the Code would improve industrial relations. Some respondents agreed that the Code would improve industrial relations as it would promote transparency and information-sharing, and would encourage greater consultation and engagement between employers and employees. They noted that the Code would be a useful reference for employers unable to afford specialist employment law advice. Some respondents noted that the Code reflected what was already best practice for employers. Other respondents disagreed and commented that the Code was too weak and that it would legitimise the practice of dismissal and re-engagement, which they felt should be banned.

Risks: Some respondents felt that the Code would not improve industrial relations due to the risk of increased litigation by parties bringing cases to a court or employment tribunal to clarify their respective interpretations of the Code.

Government response

The government considers that the Code will promote improvements in industrial relations by seeking to ensure that an employer takes all reasonable steps to explore alternatives to dismissal and re-engagement and engages in meaningful consultation with a view to reaching agreement with employees and/or their representatives in good faith, with an open mind.

Question 9: Balance of employee protection and business flexibility

Does the Code strike an appropriate balance between protecting employees who are subject to dismissal and re-engagement practices, whilst retaining business flexibility to change terms and conditions when this is a necessary last resort?

The points raised in response to this question included:

Balance: Respondents were split on whether the Code struck the right balance between protecting employees whilst retaining business flexibility. Some felt it struck the right balance, others felt there were too many obligations on employers and not enough on employees or their representatives. Others felt there were not enough obligations on employers.

Ban: Some respondents said the Code was too weak and the practice of dismissal and re-engagement should be banned.

Meaningful consultation: Of the respondents who said there should be more obligations on employees, many suggested the Code could include more obligations on meaningful consultation.

Government response

The government considers that the Code strikes the right balance between protecting employees who are subject to dismissal and re-engagement practices, whilst retaining business flexibility to change terms and conditions. It would not be appropriate to ban dismissal and re-engagement as there are some situations in which it can play a valid role.

Question 10: Other comments

Do you have any other comments about the Code?

The points raised in response to this question included:

Compliance: Some employers and employer representative groups welcomed the practical guidance set out in the Code as it represented a fair, proportionate, and constructive approach. Some commented that the Code would not introduce major changes for responsible employers who would already proceed in line with what is set out in the Code, but they said that some employers would need to keep more comprehensive records in order to demonstrate compliance with the Code.

Level of detail and length: There were a range of comments relating to the length and level of detail of the Code. Some respondents commented that the Code should be shorter and more concise so that it is more accessible, especially to small employers. Some respondents suggested the Code should be set out as a step-by-step guide, while others suggested changing it to a principles-based code in order to prevent employers adopting a “tick box” approach that would not be conducive to good industrial relations.

Guidance on legal obligations: Some respondents suggested that the Code should provide guidance on how to comply with the legal obligations referenced in the Code.

Obligations in the Code: Some respondents said that the obligations in the Code were not precise enough and should be made more specific or clarified.

Raising dismissal and re-engagement: Some respondents said there was a tension between the Code saying employers should not use the threat of dismissal to put undue pressure on employees to agree to proposals and the requirement for employers to be honest and transparent about the fact that they would be prepared, if negotiations fail, to dismiss and re-engage employees. Other respondents noted that, while the use of the threat of dismissal and re-engagement as a negotiating tactic sometimes results in worsened industrial relations, so too does raising it unreasonably early in the consultation process. Respondents noted that this could sour consultations and lessen the likelihood of agreement being reached, and that this point wasn't addressed in the Code.

Acas: Some respondents said that the paragraph suggesting parties contact Acas if they haven't been able to reach agreement should be strengthened to make it an obligation under the Code.

Ongoing review: Some respondents disagreed with the Code requiring employers to continue to engage in discussions which remain open to the possibility of reaching agreement on the new terms after dismissal and re-engagement has taken place. Respondents noted that, if employees had only dismissed as a last resort, then agreement would be an unlikely prospect.

P&O Ferries: Some respondents cited P&O Ferries' dismissal of nearly 800 of their employees in March 2022. They observed that the exclusion of redundancies as defined in the 1996 Act from the scope of the Code meant that the P&O Ferries scenario would not be captured and that the Code would not prevent similar redundancies in the future.

Deterrent: Some respondents commented that the potential 25% uplift in compensation in the event of a successful employment tribunal claim was not sufficient to deter employers from seeking to dismiss and re-engage employees. Some respondents suggested additional options for increasing the deterrent of the Code, including adding the protective award for non-compliance with collective consultation requirements to the list of claims that could attract the 25% uplift in compensation.

Government response

The length of the Code has been significantly reduced, and where possible it has been made less technical and more accessible. This process has led to many changes throughout the Code. Where duplication existed, it has been removed, and paragraphs have been made more concise wherever possible. As far as possible, the Code uses plain English and avoids language that would be hard to understand for users who do not have detailed knowledge of employment law. There are some places in the Code where this has not been possible, this is generally where the language relates to legal obligations and so precision is important.

The government has intentionally not included guidance in the Code on how to comply with other legal obligations that users may be subject to in circumstances covered by the Code. The Code will apply in a broad range of scenarios, where different users will be subject to different legal obligations. If the Code sought to explain how users could comply with all their legal obligations, it would become very long and technical. It would also mean that large parts of the Code would not be relevant to many users. The Code signposts legal obligations that are likely to apply to many users of the Code and users must ensure they comply with those obligations, as well as any other relevant legal obligations, as is currently the case.

The Code has been revised to provide greater clarity on obligations. A paragraph has been added in to specify that, where the Code states that a party “must” do something, this indicates that the party is subject to a legal requirement, and where it states that a party “should” do something, this indicates an obligation under the Code. All obligations in the Code have been made more specific wherever possible (bearing in mind the wide range of circumstances covered by the Code). The language of reasonableness has been added in in relevant places throughout the Code.

The government recognises that the way the Code published for consultation required the employer to be transparent about the prospect of using dismissal and re-engagement whilst also not using it as a negotiating tactic caused concern amongst some respondents to the consultation. This part of the Code has been amended to make it clearer for employers. The amended Code explains that, if an employer expects to opt for dismissal and re-engagement, then it is important that the employer is clear about that fact. It then places obligations on the employer not to raise the prospect unreasonably early and not to use dismissal and re-engagement as a negotiating tactic where they are not envisaging dismissal. This paragraph, as well as the paragraph on contacting Acas, has now been put into a new section in the Code.

The paragraph on contacting Acas has been strengthened so that employers now have to contact Acas before raising the prospect of dismissal and re-engagement. This does not change the general position that Acas can be contacted wherever the Code applies. Making contacting Acas an obligation reflects the government’s view that this will help ensure that the employer really does only opt for dismissal and re-engagement as a last resort. Changing the point at which the employer contacts Acas to before they raise the prospect of dismissal and re-engagement will likely oblige employers to contact Acas earlier in the process, when it is more likely that Acas will be able to help the parties reach an agreed outcome.

The Code no longer states that it is important that employers and employee representatives continue to engage in discussions which remain open to the possibility of reaching agreement on the new imposed terms after dismissal and re-engagement has taken place. As noted in consultation responses, this could be regarded as an open-ended obligation and could contradict the position that dismissal should only be used as a last resort. The Code now says that it is good practice for the employer to invite feedback about the changes, and consider what might be done to mitigate any negative impacts on employees.

The government condemned P&O Ferries' appalling treatment of its staff, but this was not a case of 'fire and rehire' – just 'fire'. The government has taken action in response to what P&O Ferries did. This includes legislating through the Seafarers' Wages Act 2023 and the ongoing Insolvency Service civil investigation.

The effect of failure to comply with the Code is not set out within the Code itself. It is set out in S207A of the Trade Union and Labour Relations (Consolidation) Act 1992. The government will bring forward secondary legislation to amend the Act so that the protective award for non-compliance with collective consultation requirements is added to the list of claims that could attract the 25% uplift in compensation.

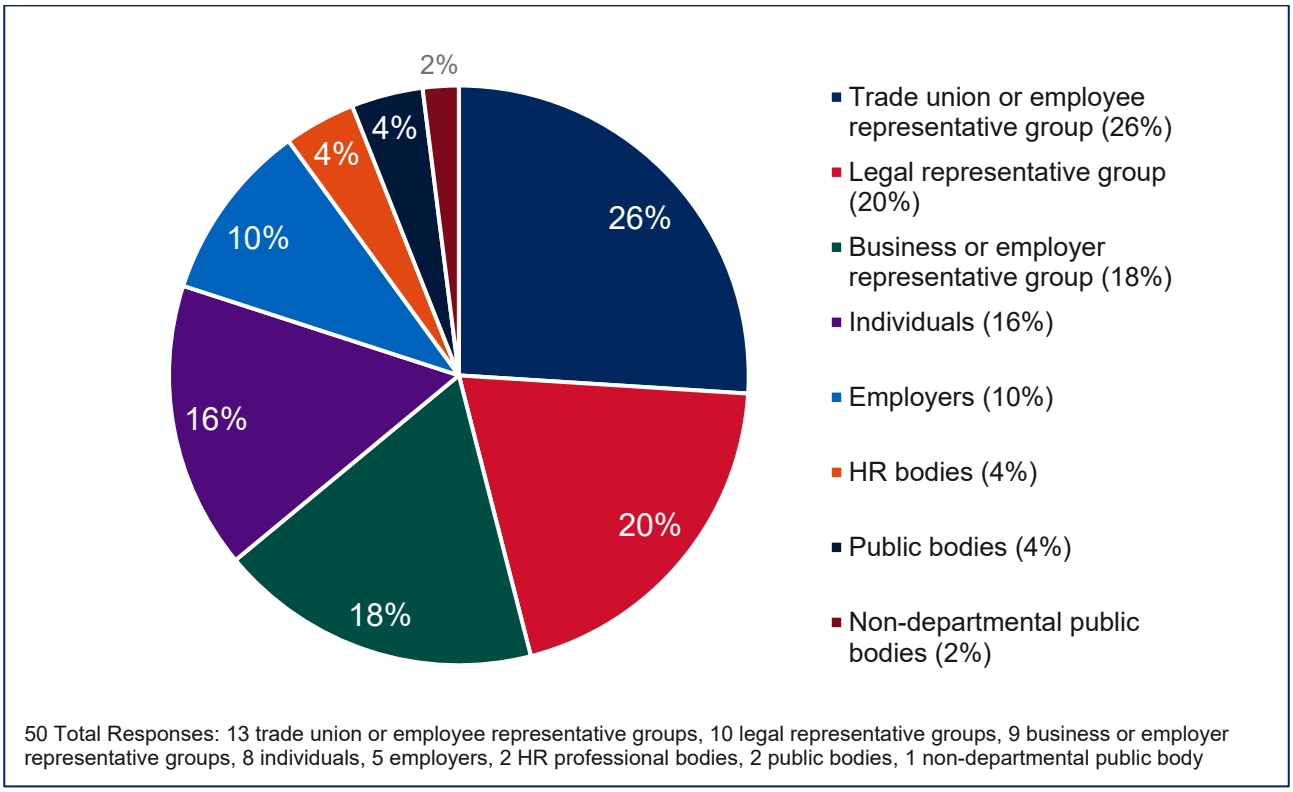
Other changes have been made to the Code, including in response to additional points made by respondents to the consultation, as well as to address issues identified while the Code was being redrafted.

Next Steps

The government will lay the updated Code of Practice on dismissal and re-engagement in Parliament for approval by both Houses of Parliament. Subject to that approval, a commencement order will then bring the Code into effect.

Annex

Breakdown of respondents



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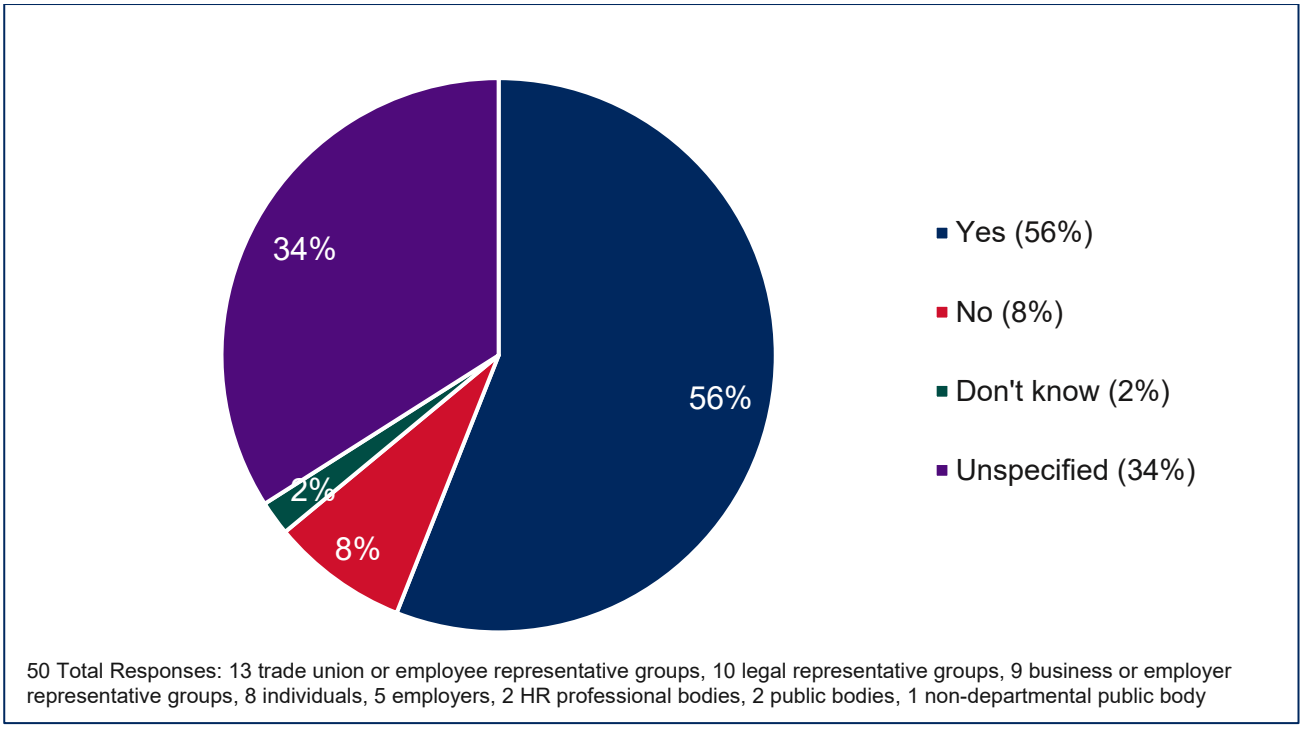

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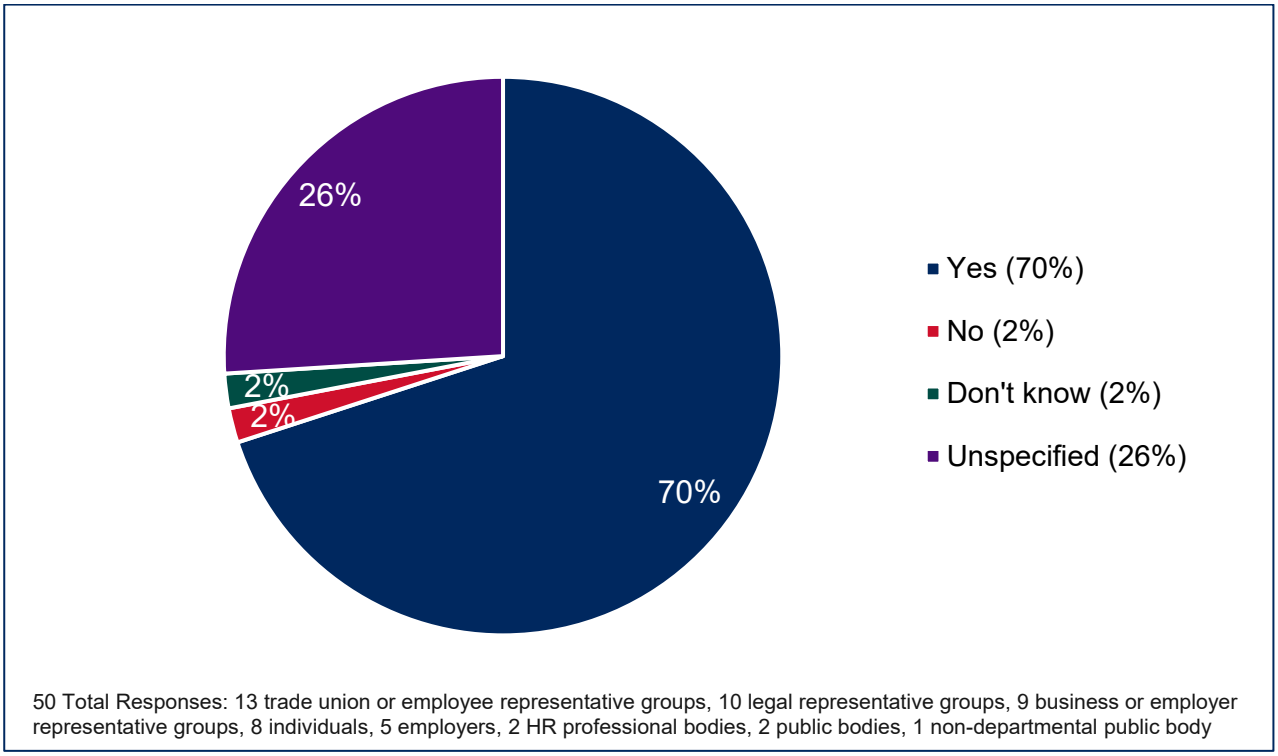

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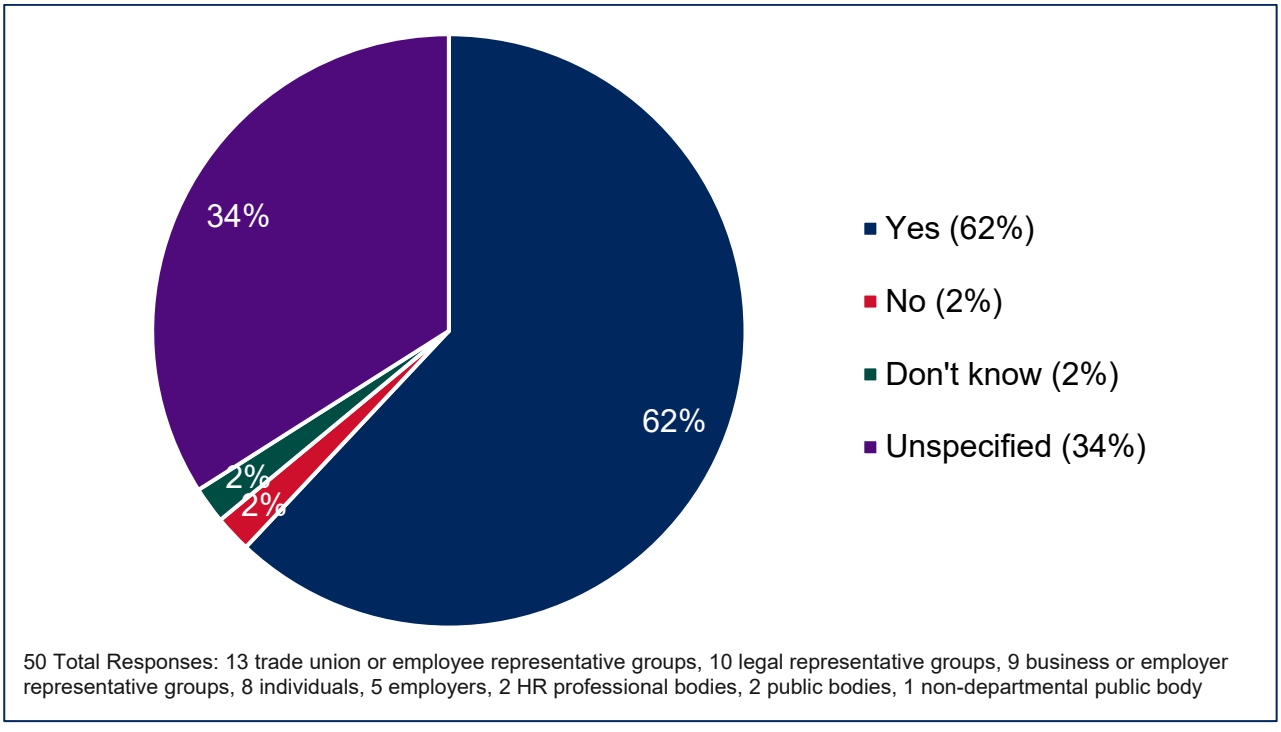

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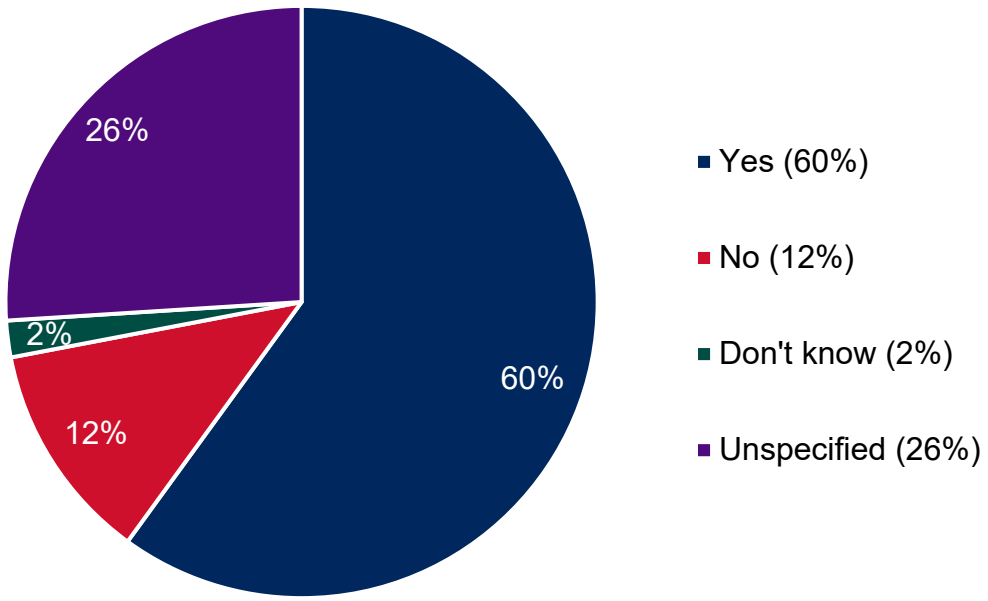

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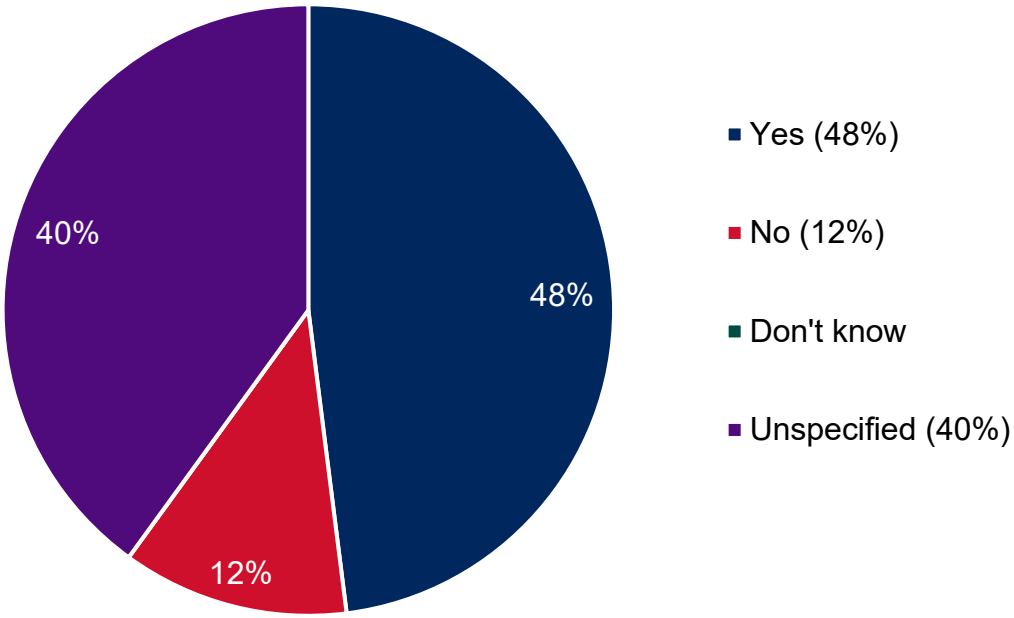

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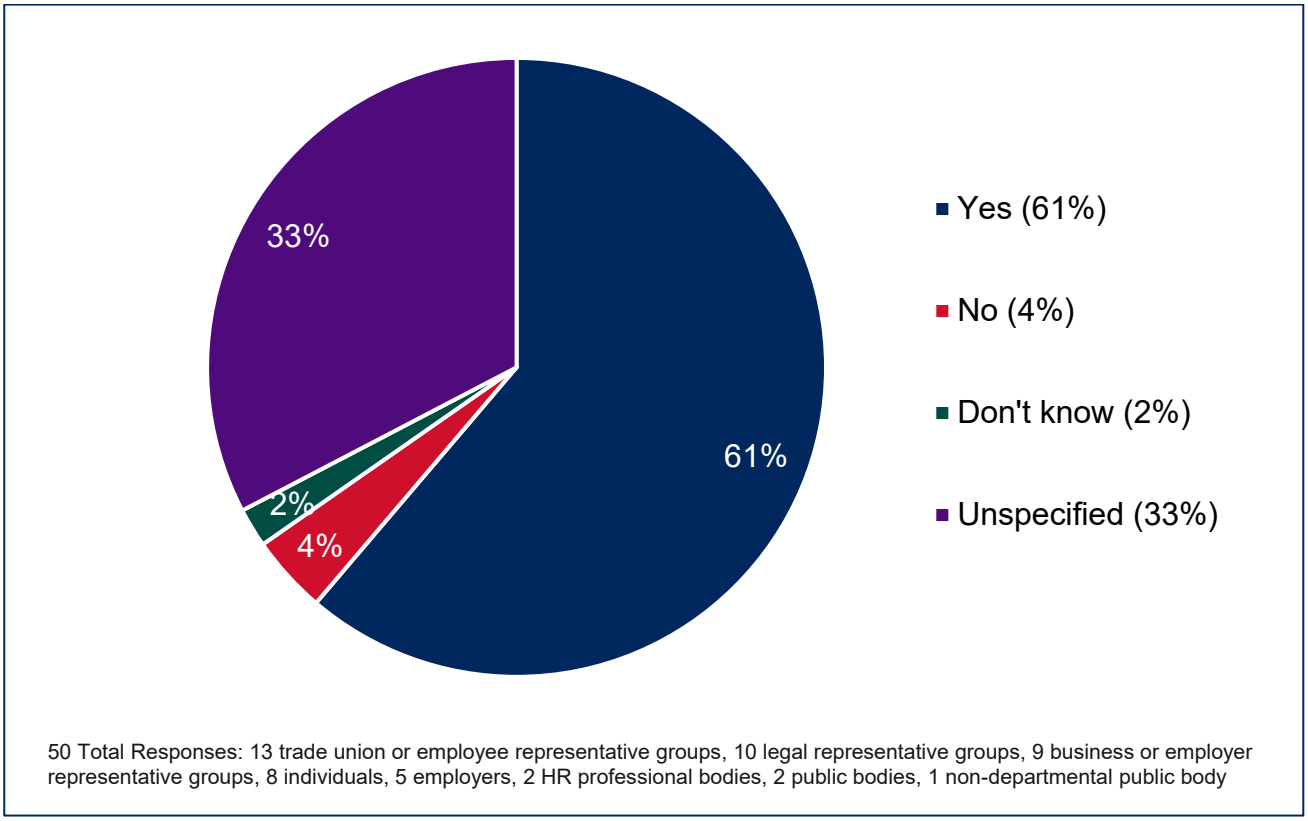

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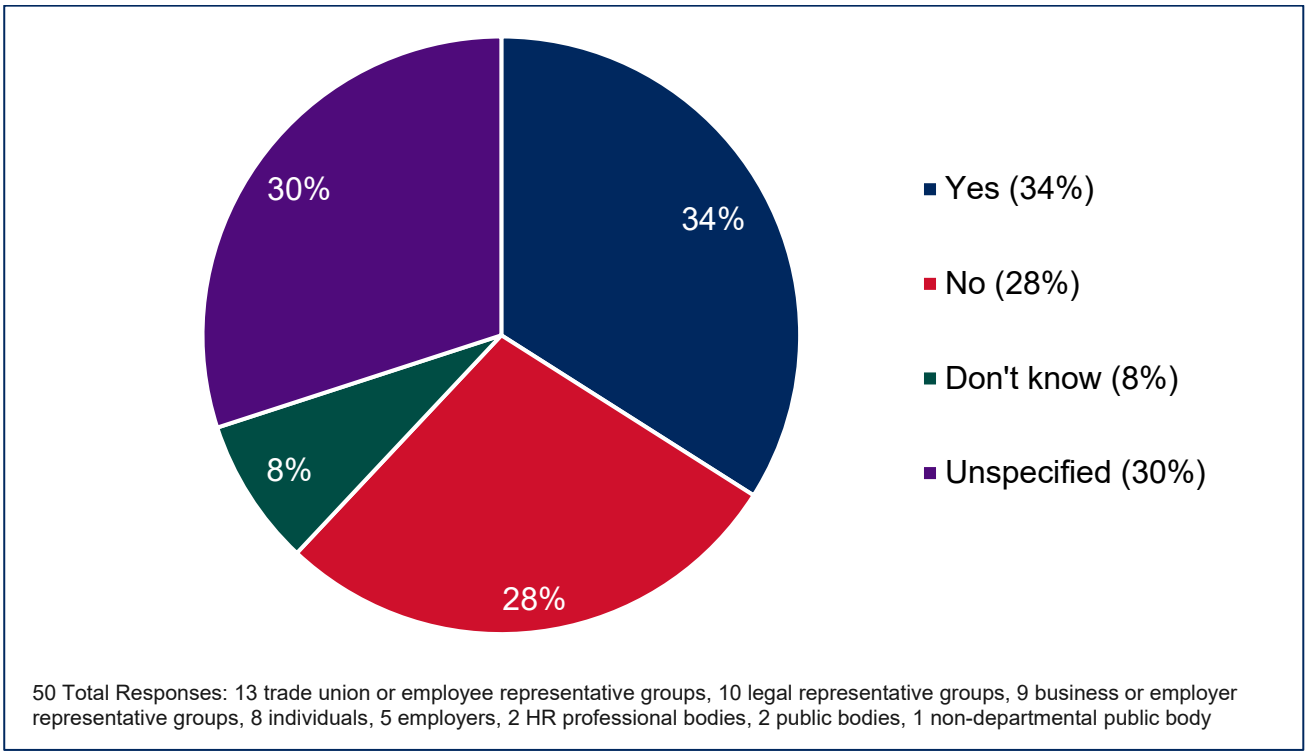

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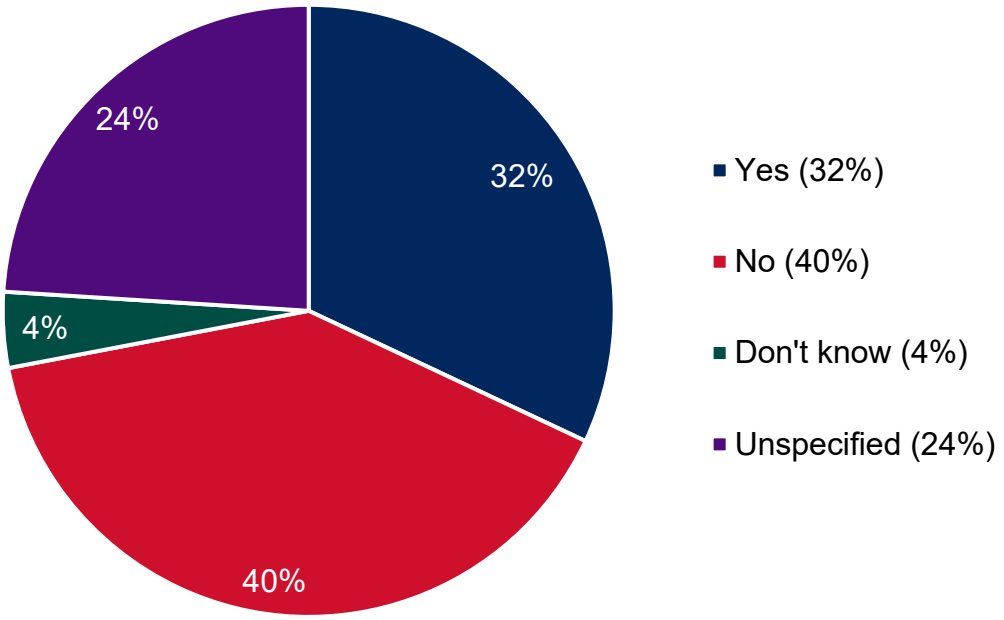

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