



Human Resources & Health and Safety



Do you employ staff?

April Employment Law Update

Preparing for the Data Protection Bill 2017 (which incorporates GDPR)

The information contained within this newsletter may be subject to change depending upon the information published by the Government on or before 25th May 2018. We will provide any updates necessary, in due course. Please note this newsletter focuses on Data Protection from a HR perspective.

Background

On 14 April 2016, the European Parliament adopted the General Data Protection Regulation (2016/679 EU) (GDPR) which will come into effect on 25 May 2018 throughout the EU and which will replace and update the “20 year old” Data Protection Directive (95/46/EC), which is implemented in the UK through the Data Protection Act 1998.

The new legislation will apply to the UK, despite Brexit, because it is coming into force before our withdrawal from the EU is complete, and because they will apply to any employer not located in the EU that processes the data of people within the EU.

The “headlines” of the new legislation only have been communicated in the press, by the ICO (Information Commissioner’s Office) and by solicitors / legal advisors across the UK, but the exact details of exactly how the legislation will be applied in the UK have not yet been published.

These details will be published in due course, as the UK specific Data Protection Bill 2017 (which will incorporate the GDPR) and which will come into force on 25th May 2018.

What We Know So Far

The majority of data protection rules will remain the same, but changes are being introduced to remove inconsistencies that have arisen because of country-specific implementation of the former Data Protection Directive. The changes will also ensure the rules are fit for the digital age in which an ever-increasing amount of data is being processed.

Employers will have increased responsibilities to manage “personal data” in line with the revised legislation and they will also face higher financial penalties for non-compliance with the possibility of a maximum financial penalty of £17million being levied for the most serious of breaches.

Data Protection Risk Management Culture

Employers will be required to consider the data protection of employees' data at every stage of their internal processes. In other words employers will be required to incorporate a data protection risk management culture within their organisations. For example, when an employer is designing a new policy, process or service etc. they should consider data protection risks at all times, making sure that the appropriate measures are taken from the outset to ensure they are always compliant with data protection legislation.

Consent

Employers will no longer be able to gain an employee's consent to process their data by including a specific data protection clause in the contract of employment. Employee consent (to process their personal data) must be “freely given”. Therefore a separate informative, specific and explicit employee consent form must be created, for this purpose.

Legal Basis for Processing

Employers must also ensure they are processing data for a legally justified reason, as stated in the legislation. This particular area could become complex, for example, if an employee refuses to consent to their data being processed, even for a legitimate reason. We will of course provide advice about how to handle this scenario, should it arise, in due course.

Information for Employees and Job Applicants

More detailed information about data processing will have to be provided to employees and job applicants. So open, clear and transparent communication about what data is being processed, why it is being processed, who is processing it, and how long the data will be retained for, will be required. Employees and job applicants will also have the right to know if their data is going to be processed by anyone other than their employer, i.e. any third parties, and they need to be fully informed of their rights to withdraw their consent or lodge a formal complaint with the supervising authority. This information must be given at the point of data collection and employees should also be reminded of this information if their data is ever processed for a different reason than the reasons given originally.

Data Subject Access Requests

Currently many employers charge £10 for a data subject access request, but after 25th May 2018 data subject requests must be free and responded to without undue delay i.e. within one month, unless it is a particularly complex request in which case the employer should respond within three months. An employee may be charged for a request if their request is excessive e.g. requesting copies of all their data for no legitimate reason or making repeated requests.

Accountability Principle

Employers will now be required to demonstrate their compliance with the data protection principles by keeping detailed records about their data processing activities. These records should be available on request, for review by the supervisory authority.

Automated Decision Making

The revised legislation will give employees a new right not to be subject to a decision made solely by automated processing – including profiling – where that decision will significantly affect them. The legislation contains exceptions to this rule, including where automated processing is based on explicit consent or where it is necessary for entering into or performing the employment contract. If employers want to continue automated processing, a human intervention should be incorporated to balance the procedure / check any decisions that have been made. That way, decisions significantly affecting employees will not be solely made via automation.

Criminal Convictions and Offences

Because employers will be restricted to only processing data that is strictly necessary, this may limit the processing of sensitive personal data and data relating to criminal records. Where employers will need to process data relating to criminal records they will be required to ensure they have a policy in place on the use, retention and erasure of the data, to protect employees from any data protection breaches.

Preparing For The New Forthcoming Legislation

Even though the Data Protection Bill 2017 is yet to be published, employers can still take steps to prepare for this legislative change. The Information Commissioners Office currently recommends employers do the following:

- Hold an information audit to check what personal data you hold and who you share it with.
- Review current privacy notices and form a plan to update them if necessary
- Review current policies and procedures, are they compliant with individual's updated rights? If not, form a plan to update them.
- Plan how you will respond to Subject Data Access Requests under new legislation.
- Identify your lawful basis for processing personal data, and then ensure this is clearly stated in your documentation.

- Review how you obtain your employee consent for data processing, does this need updating? If so, formulate a plan for this.
- Check you have the right procedures in place to manage any data breaches.
- Familiarise yourself with the ICO's code of practice on Privacy Impact Assessments and decide how this will be implemented within your Company.
- If appropriate, formally designate a Data Protection Officer. If this is not a requirement you may still find it beneficial to choose someone to take charge of ensuring your compliance with the updated legislation.
- If you operate in more than one EU member state you need to determine your lead data protection supervisory authority.

How Can We Help?

If you are retained client, then you will already have a meeting scheduled with us. At this meeting we will discuss the legislation with you, confirm what it will mean to you from a practical HR perspective, confirm what you are specifically required to comply with, discuss and answer any specific queries you may have, and you will be provided with any necessary updated HR documentation thereafter.

If you are not currently a client, and would like support as outlined above, then please get in touch via hradvice@hasslefreehr.co.uk

If you have any questions based upon the contents of this newsletter, please do not hesitate to contact us via hradvice@hasslefreehr.co.uk