



Human Resources & Health and Safety



Do you employ staff?

Preparing for the forthcoming revised Data Protection legislation (which incorporates GDPR)

In our April Employment Law update, which we published on 16 April 2018, we notified you of the forthcoming Data Protection legislation, which will incorporate GDPR. Due to the GDPR coming into force on 25 May 2018, we are expecting that the Data Protection Bill (which has now passed from the House of Lords to the House of Commons and which is expected to be at the report stage/third reading stage on 9th May 2018) will receive royal assent to become the Data Protection Act 2018 at the same time as the GDPR, comes into force i.e. 25 May 2018, or possibly sooner.

When this happens we will clarify our advice. In the meantime, we would like to recap as follows:

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, you will already have a meeting scheduled with us. We will be sending you some pre-meeting preparation work to undertake, and at our 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, and discuss and answer any specific queries you may have. 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.

Our e-newsletters

We issue approximately two e-newsletters each month: one is an employment law update, which provides you with information about forthcoming employment legislation; the other is a HR Update which provides you with useful HR related articles, hints and tips. You currently receive these because you have either previously agreed to receive our e-newsletters or because you have specifically requested to receive them.

We want to ensure you only receive emails from us if you genuinely want them - we don't want to be just another unwanted email cluttering up your inbox. If you are happy to continue to hear from us via email then you do not need to do anything whatsoever. But if you no longer wish to receive further e-newsletters from us, then you can opt out now by clicking unsubscribe at the bottom of this email

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