GLAISYERS ETL GLOBAL

PART 2

Employment Guide to GDPR

Under the Data Protection Act 1998 (DPA), employers are currently able to process employee data with their consent. The most common way of obtaining consent is via a clause in the employment contract where the employee confirms that by signing the contract they are providing their consent to the processing of their data, amongst other things.

The consent problem

Under GDPR, this will no longer be possible and employers will have to look at alternative grounds for justifying the processing of employee data.

The Information Commissioner's Office (ICO) has published draft guidance stating that it doesn't believe consent can be freely given in an employment relationship where the alternative is not being offered the job or a penalty being imposed. GDPR states that consent cannot be given freely if there is an imbalance between the parties and expressly refers to the employment relationship as an example. The ICO also states that employers shouldn't rely on consent as a basis to process data where there are other lawful grounds to do so under GDPR because seeking consent would be misleading and unfair.

However, consent does have its place in a one-off context, such as when you are trying to obtain a medical report regarding an employee who has been off sick. What do you do if you are no longer able to rely upon consent? The answer to this question is simple: rely upon one of the other lawful processing grounds, namely:

- For the performance of an employment contract
- For the compliance of legal obligations
- For the legitimate interests of the employer

As an example, there will be a lot of data you are required to process in the performance of the employment contract such as payroll and employee benefits-related information. Similarly, there will be a lot of information you will need to process if you are to comply with various legal obligations whether statutory or contractual. Examples of this include payroll data for HMR purposes, records on matters relating to issues such as equality and diversity and any information which demonstrates you are complying with your legal obligations to make reasonable adjustments where, for instance, you have employees who suffer from

a disability. Finally, if you find you still have categories of data which do not fall under the two above categories, the likelihood is they will fall under the grounds of "legitimate interests of the employer", given that there are numerous examples of processing which an employer needs to carry out for legitimate interests which do not override the interests of the employee. Examples include holding appraisal records, annual leave and sickness data, disciplinary and grievance-related documentation and so on.

What action should you be taking?

The first thing you need to do is amend your employment contract so you no longer rely upon the consent clause. Strictly speaking, there is no harm in still obtaining consent but it will be of no benefit. You may also want to bear in mind that if all you are relying upon is consent, it can immediately be withdrawn without notice, resulting in you automatically being in breach of GDPR.

Employers should issue all employees with a copy of their privacy notice, explaining which of the lawful processing grounds they are relying upon and which categories of employee data they use. This should be signed, returned and held by the employer in advance of 25th May 2018.

Going forward, when making an offer of employment to any individual it should be conditional upon the individual agreeing to sign a privacy notice (to confirm they have received it) as well as the employment contract.

Finally, employers may also want to consider updating their data protection policy in order to explain that they will no longer be relying upon consent as a lawful ground for processing data relating to their employees.

Manchester Office:
One St. James's Square,
Manchester
M2 6DN
T: 0161 832 4666

London Office:
Pinners Hall,
105-108 Broad Street,
London,
ECNZ 1ER
T: 0207 842 8000

hello@glaisyers.com
www.glaisyers.com