EVERSHEDS SUTHERLAND

Welcome Guidance by the DPC on the 'Return to Work Safely Protocol'

On 15 May we hosted a webinar focusing on the practical application of transitioning a workforce back into the workplace. In this webinar we considered the implications of the Government's "Return to Work Safely Protocol" (the "**Protocol**"). You can access this webinar here.

The Data Protection Commission (**"DPC"**) has now issued welcomed guidance to employers on the implementation of the Government's recommendations set out in the Protocol in a manner that complies with employers' obligations as data controllers under the General Data Protection Regulation (**"GDPR"**) and Data Protection Act 2018 ("**DPA 2018**").

The DPC's report touched on the following aspects:

1. Contact tracing logs

The Protocol recommends that employers keep a log of contact/group work to facilitate contact tracing in workplaces where employees are in close contact for long periods of time and social distancing is difficult. In order to remain compliant with the GDPR and the DPA 2018, the DPC recommends that "*personal data held in a contact log should generally not be processed by an employer for any other purpose*" and that "*employers should avoid disclosing information relating to a particular employee's COVID-19 diagnosis to other employees*". In addition, the DPC reminds employers to remain cognisant that employee personal data should be retained only for as long as considered necessary for this purpose.

You can find more information on the data protection implications of contact tracing apps set out in our recent article accessible here.

2. Return to work forms

The Protocol also recommends that employers establish and issue a pre-return to work form for employees to complete in advance of returning to work. This form should be completed at least three days in advance of their planned return to work. The forms should outline the symptoms of COVID-19 before employees enter the workplace and should allow employers to make informed decisions about employee's return to work. In order to adhere to the GDPR and the DPA 2018, the DPC provides that the "*return to work forms should be tailored such that they collect the minimum information necessary to achieve the above objective and should generally not be processed for any other purposes*".

Interestingly, the DPC also provides that the form should not be retained once an employee has returned to work. With this in mind, it is advisable for employers to maintain a record of the fact the form was completed by employees returning to work (so as to show compliance with the Protocol, if required).

3. Temperature testing

In addition, the Protocol also recommends that employers implement temperature testing '*in line with Public Health advice'*. However, it is important to note that temperature testing is not a requirement of the Protocol. Furthermore, the DPC has gone as far as to state that it is not "*aware of any current Public Health advice recommending the implementation of temperature testing in the workplace*".

It is essential that employers check for and reflect on any relevant guidance. For example on 30 June 2020 the HSE issued interim guidance to meat factories in Ireland that recommends temperature testing at a permanent screening site at the point of entry to the workplace which includes a staff temperature check.

The DPC recommends that employers considering the implementation of temperature testing as a response measure to COVID-19, perhaps in the context of a particularly high-risk workplace and in response to a particular risk that has been identified, "*must be in a position to justify why any consequent processing of personal data is necessary for the purpose of mitigating against the identified risk*". The DPC maintains that "*the advice of the public health authorities, in this respect, will be a key element in the assessment of the necessity and proportionality of the implementation of such a measure*".

The DPC also recommends that employers should consider whether a Data Protection Impact Assessment (**"DPIA"**) might need to be carried out before any personal data is processed in conjunction with the measure.

4. Legal basis for processing

In order for employers to be compliant with the GDPR and the DPA 2018, the DPC notes that employers must have a legal basis for processing any personal data (by reference to the options set out in Article 6 GDPR), that relates to any measures introduced by the Protocol. In addition, the DPC also acknowledges that when processing special category personal data such as data relating to an employee's health, an employer must be able to satisfy one of the requirements of Article 9 of the GDPR.

The DPC maintains that:

"*consent is unlikely to constitute a suitable legal basis for the majority of processing operations concerning employee data in the workplace. Where an employee has no real choice in the matter, because, for example, his/her personal data is going to be processed in connection with a measure that is introduced to meet a legal obligation or for public health reasons, then the employee is not in a position to decline consent and, accordingly, consent is not an appropriate legal basis for the processing in question*"

In addition, the DPC reminds employers to remain cognisant of their legal obligation, under the Safety, Health and Welfare at Work Act, 2005 (the "**2005 Act**"), to ensure the health and safety of individuals in the workplace. Where the implementation of a measure necessitates the processing of personal data, an employer may be able to rely on Article 6(1)(c) of the GDPR to support the processing, but only if the processing is necessary for compliance with the employer's obligations pursuant to the 2005 Act. Similarly, where the implementation of a measure necessitates the processing of special category data, an employer may be able to rely on Article 9(2)(b) of the GDPR to support the processing, but only if the processing is necessary for the purpose of carrying out its obligations in the field of employment (such as the obligations arising under the 2005 Act). However employers should remember that any processing of personal data should be limited to that which is necessary to achieve the objective being pursued and the processing must comply with all of the principles of data protection as set out in Article 5 of the GDPR.

The DPC recommends that Article 6(1)(e) and Article 9(2)(i) of the GDPR along with Section 53 of the Data Protection Act 2018 may permit the processing of personal data, including health data, where it is deemed both *necessary* and *proportionate*, subject to suitable safeguards being implemented. This is in circumstances where employers act under the direction of public health authorities, or other relevant authorities where national measures are undertaken to protect against COVID-19. The DPC suggests that "*such safeguards may include limitation on access to the data, strict time limits for erasure, and other measures such as adequate staff training to protect employees' data protection rights*".

You can find more information and articles on data protection and COVID-19 in our Coronavirus hub accessible here.

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