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Data Protection Team
Department for Culture, Media & Sport

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Our ref:

Dear Data Protection Team

Response to call for views on derogations to the GDPR (Theme 7)

This is the response of Lewis Silkin LLP to the above. It is confined to Theme 7 and Article 9 of the GDPR and relates to health records and to monitoring of equality of opportunity and treatment, primarily in an employment context.

Lewis Silkin

Lewis Silkin is a firm of solicitors. With over 100 employment lawyers, it is recognised as having one of the UK's leading employment practices. These views are drawn from our experience, in particular that of our workplace data team.

Health records in the workplace

Health records in the UK in an employment context

1. In the UK it is routine for employers to keep records relating to staff and their health/sickness. These will typically be either "self-certification" during the first seven days of sickness or a "fit note" provided by a doctor – though they may of course be more extensive.

   Information processed will include the period of absence, information on the reason for absence and other information – on, for example, the prognosis.

   The information will be personal data, much of it special (sensitive) data.

   In its 2006 guidance to HR Managers in the Civil Service on employee personnel records, the National Archives recommends retention of medical certificates in cases where there is no industrial injury for four years. It recommends that medical reports be kept until the date at which the employee would be 100 years old. Although these retention periods are longer than those applied by most employers, they go to show keeping of medical records is an entrenched practice.

Health records in other countries

2. What I have identified above is the UK approach; but it is not universal. In Germany, for example, employers will not typically receive health information regarding employees. A doctor would certify (Arbeitsunfähigkeitbescheinigung) only that someone was or was not fit for work - without explaining the underlying condition. Likewise, in France, an employer will not be given access to any medical information; that is reserved for the healthcare organisations.

   Unless an appropriate derogation can be established, the long-standing practice in the UK would need to change.

Legal position currently - potential justifications for processing

3. In a data protection context, the legal justification for routine processing of medical records is relatively flimsy. In the DPA, the most obvious justifications for processing such records are consent and paragraph 2(1) of Schedule 3 of the DPA.

   Consent

   (a) There are obvious difficulties with using consent in this context. First, the employer may use the information for the purposes of deciding whether or not to dismiss an employee. In such circumstances consent may not be forthcoming. Secondly, if consent is given, it may be withdrawn at any time.

   Legal rights and obligations

   (b) The employment carve out in para 2(1) of Schedule 3 only applies if the processing is necessary for exercising or performing any right or obligation conferred by law in connection with employment.

   Although there are circumstances in which an employer will be performing a legal obligation (e.g. determining what adjustments would be reasonable where an employee has a disability), in many cases there is no legal obligation or right to process data. For example, an employee may have a fit note specifying 'flu or food poisoning. There is no legal obligation to process such data.

   Until April 2014, there was an obligation to keep medical evidence in relation to statutory sick pay under regulation 13 of the Statutory Sick Pay General Regulations 1982. But that was repealed. Retention of medical data is generally voluntary (and so not required by law).

   ICO's approach

   (c) In its supplementary guidance to the Employment Practices Code (page 72), the ICO says in relation to this:

   > "Employers are more likely to need the consent of workers if they are processing sensitive personal information such as health records rather than non-sensitive personal information. In the case of sensitive personal information the consent must be explicit. However, even then, sensitive personal information can be processed without explicit consent in a number of circumstances, for example where the processing is necessary to enable the employer to comply with any legal obligation. .... [S]ickness records of workers may be kept in order to enable employers to meet

> both the requirements imposed on them by the law in relation to statutory sick pay and the requirement not to dismiss workers unfairly on the grounds of absence"

And in response to an FAQ 'What about sickness records?" the ICO says::

> "Sickness records will almost certainly contain information about workers' physical or mental health. They will therefore include sensitive data. Where they are kept in order to enable employers to meet the requirements imposed on them by the law in relation to statutory sick pay it is clear that a sensitive data condition can be satisfied and consent will not be needed. With more general sickness records the position is less clear-cut. The Commissioner recognises that employers need to keep some sickness records and it is unsatisfactory if they have to rely on the consent of workers to do so. He also understands the argument that without sickness records employers will be unable to ensure that workers are not dismissed unfairly on the grounds of absence. He therefore takes the view that an employer keeping and using sickness records in a reasonable manner can rely on the condition that the processing is necessary in order to enable the employer to comply with any legal obligation associated with employment. The Data Protection Act, as it currently stands, does not place the question beyond doubt but the Commissioner understands that Government is considering changes to the law that will do so."

There are two main problems with the ICO's reasoning. First, the rules on SSP records have been repealed. Secondly, the supposed justification relating to unfair dismissal is unsound. An employer has a duty not to dismiss unfairly. Although that is a legal obligation conferred by law (so in the scope of paragraph 2(1) of Schedule 3), using that as the justification for keeping medical certificates involves treating every employee as though he or she were at risk of dismissal on health grounds. In effect it amounts to an employer saying "I keep your medical certificates because, though I have no reason to believe they will ever be relevant, there might conceivably be circumstances in the future in which I wish to consider ending your employment for health reasons. Although I have no reason to believe your certificates for (e.g.) 'flu/food poisoning will be relevant at that point, they might be. So I keep them."

This is utterly disproportionate. Keeping historical medical certificates is not "necessary". If an employer wanted to consider dismissal, it could (and should) establish the position at the time.

Privately, the ICO accepts that this is a difficult area – and that its reasoning is weak.

What is to be done?

4. So, the question is what is to be done? The options are to bring the practice of employers in the UK in line with, say, France or Germany, to legislate requiring retention of records or to come up with a more effective derogation.

   Even if desirable, adopting the French/German approach is not something that can sensibly be achieved in the next 12 months without full consultation. As the Government has just repealed the statutory requirement to keep records, reversing that repeal is not a promising approach – though it may be the best option if a suitable derogation cannot be found.

In my view, Article 9.2(b) of the GDPR has the same drawbacks in this context as para 2(1) of Schedule 3 of the DPA.

In most cases, Article 9.2(h) will not be relevant because the data is being processed for record keeping and not, merely, for assessment of working capacity. In addition it would not routinely be processed in circumstances in which Article 9.3 applies.

5. The best option is to use the power in Article 9.4 to introduce a further derogation with regard to processing data concerning health. The conditions might be:

   (a) That processing relates to records concerning an employee's health provided to the data controller by the employee or by a [health professional] consulted by the employee or the data controller;

   (b) The data is processed in connection with the employee's employment;

   (c) That processing does not involve disclosure of personal data to a third party (other than a [health professional] consulted by the data controller or with the consent of the employee;

   (d) That processing occurs with due regard to the rights and freedoms of the employee."

   To avoid conflicting with Article 9.2(b) – by simply being wider – it may be sensible to broaden this beyond employment to individual contractors and other contexts in which a data subject's health data may be relevant.

Derogation relating to equality of opportunity and treatment

Current position

6. Currently there are derogations relating to monitoring for racial and ethnic origin (para 9 of Schedule 3 of the DPA) and health and religion and belief (para 7(1) of the Schedule to the Processing of Sensitive Data Order 2000).

7. The Equality and Human Rights Commission encourages monitoring in relation to protected characteristics (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation). Employer practice in relation to monitoring varies – but it would not be unusual for employers to monitor age, disability, maternity, race, religion, sex and sexual orientation. An employer would typically use the monitoring data to assess whether there was any difference in the characteristics of those that are, for example, recruited, or promoted or the terms offered to them and, if there is a difference, to consider the underlying reason and whether there may be unlawful discrimination.

Proposed approach

8. In my view, the derogation should be extended to a wider category of special data than currently. Personal data relating to some of the protected characteristics mentioned about would be special (sensitive) data under the GDPR – though the position is not always entirely clear.

   (a) Information on disability is clearly personal data – as it relates to health. There should be a derogation – along the lines of the existing derogation.

   (b) Rather surprisingly, information on gender reassignment does not appear to be special data. It is not information on sex life or sexual orientation. A derogation is not required.

(c) Information on civil partnership is aligned to sexual orientation as civil partnership is only available to gay/lesbian couples. Marriage embraces both heterosexual and gay/lesbian relationships. From a monitoring perspective, it is sufficient to monitor sexual orientation. See below.

(d) Information on pregnancy and maternity is probably special data – either because it relates to health (though in a discrimination context pregnancy is not treated as an aspect of "health") or more obviously sex life.

Although I cannot see any justification for a general derogation relating to information on "sex life", there should be a derogation relating to monitoring of pregnancy and maternity. This would enable employers to track, for example, whether taking maternity leave affects career prospects, bonuses etc.,

(e) "Race" has a broad meaning in the Equality Act (see section 9). It is defined to include not only ethnic and national origin but also colour and nationality. Much information on "race" would be special data. The existing derogation in Schedule 3 of the DPA relates to "racial and ethnic origin". There is no direct equivalence between racial and ethnic origin as special data and the race-related protected characteristic. For example, information on colour and nationality would not, in all cases, be special data – but it may of course be associated with racial or ethnic origin.

In my view, there is a strong policy argument for extending the derogation to cover monitoring of "race" with the extended Equality Act meaning. In some contexts that might embrace information that is not special data – but it is preferable at a policy level that employers can monitor without needing to draw fine distinctions. For example most people who are "British" will be born in the UK – and their national origin will be "British" – special data. Some people who are British may have recently naturalised – and information that they are British will not relate to their racial or national origin. Employers may want to monitor the nationality of their workforce. To avoid doubt the derogation should extend to nationality and other aspects of "race".

(f) There should be a derogation relating to religion and belief. The existing derogation is sufficient.

(g) There should be a derogation relating to sexual orientation (which would include data relating to heterosexuality, homosexuality and bi-sexuality).

9. In summary, there should be derogations relating to health (embracing disability), pregnancy and maternity, race (extended meaning) and sexual orientation in the context of equality of opportunity or treatment.

These derogations should be subject to conditions along the lines of those in the Processing of Sensitive Personal Data Order:

(a) Does not support measures or decisions relating to a particular data subject without explicit consent;

(b) Does not cause substantial damage or distress to the data subject or others.

10. The GDPR basis for the derogation would be Article 9.2(g) or, if confined to employment, Article 9.2(b).