SPECIAL HR LEGAL BRIEFING

January 2005

Data Privacy - Workers' Health Data

In December 2004, the UK Information Commissioner released the fourth, and final, part of his Employment Practices Data Protection Code (Code) -- Information About Workers' Health. Section 51 of the UK Data Protection Act 1998 (DPA) requires the Commissioner to disseminate information about and encourage compliance with the DPA. The Commissioner's Code reflects his commitment to ensuring that UK employers understand and comply with the DPA. In this respect, the Commissioner is not alone. European privacy regulators have focused a great deal of attention on the employer-employee relationship since EU data protection legislation was enacted in the late 1990s.

Background

Part 4 of the UK Code concludes a process that began in October 2000, when the Commissioner published for consultation a draft document addressing workplace monitoring and surveillance. Since then, the Commissioner has released Parts 1 (recruitment and selection), 2 (record management), and 3 (monitoring and surveillance) of the Code. We have outlined the guidance contained in Parts 1-3 in previous Briefings.

Significantly, the Code does not have the force of law, although employers would be prudent to follow the guidance and recommendations that it contains. UK courts and the Commissioner are expected to rely on the Code when resolving future disputes and/or determining whether enforcement action is appropriate in a particular case. Although organizations that deviate from the Code may not necessarily breach the DPA, those that comply markedly reduce their compliance risk.

Overview

Part 4, like Part 3, reflects the Commissioner's aim to produce a concise, business-friendly document for UK employers. Earlier Sections of the Code had been widely criticised by industry because of their inordinate length and complexity. Part 4 comprises three separate sections: Section 1 (About the Code); Section 2 (Information About Workers' Health); and Section 3 (Good Practice Recommendations). The third Section is likely to prove of most practical benefit to employers. For those requiring additional guidance, the Commissioner has released a Supplementary Guidance document that contains a more detailed discussion, as well as notes and examples. There is also separate guidance for small businesses.

Part 4: Workers' Health Data

Section 1

Section 1 sets out the basic purpose, legal status, and scope of the Code, as well as describing some of the DPA's core terms, such as "personal data," and "sensitive data". This Section explains that the Code is meant to promote compliance with the DPA and encourage employers to adopt good practices when processing worker data. Although compliance with the Code will give rise to additional operational burdens, it is expected to produce increased trust in the workplace; enhanced protection against legal claims; improved compliance with other legal obligations; and better data handling practices among staff.

Section 2

Section 2 explains that Part 4 addresses the collection and subsequent use of information about a worker's physical or mental health or condition, which commonly arises from the completion of medical examinations or health questionnaires by employees or applicants. The routine handling of employee sickness or accident records, on the other hand, is dealt with in Part 2 (records management) of the Code. Other types of information likely to fall within the scope of Part 4 include:

- information or records concerning a worker's disabilities or special needs; and
- results of medical tests or examinations, such as eye, blood, urine, or genetic tests, conducted for any reason.

Because it involves "sensitive" personal data, employers will be required to justify their processing of health data based on one of the legitimising conditions set forth in the DPA. For example, employers can justify the processing on the ground that it is necessary to satisfy a legal obligation applicable to the employer, such as local health and safety regulations. More exceptionally, it may be possible to process health data based on an employee's express, informed consent or where "necessary" in connection with legal proceedings. Processing done in connection with an occupational health scheme is also allowed when undertaken by a health professional or someone under a similar duty of confidentiality.

Section 3

Part 3 contains the Commissioner's good practice recommendations, and is divided into 6 sub-sections:

- general considerations;
- sickness and injury records;
- occupational health schemes;
- medical examination and testing;
- drug and alcohol testing; and
- genetic testing.

General considerations

Employers are reminded that obtaining information about a worker's health is highly intrusive.

Employers engaged in processing workers' health data are reminded of certain "core" principles underlying the DPA. For instance, employers will need to (i) disclose the purposes underlying any processing to their employees, (ii) justify the processing on the basis of one of the conditions set out in the DPA, (iii) and allow a qualified health professional -- not a general manager -- to determine whether, and to what extent, any medical results relate to an employee's fitness for work. The issue of employee consent is also discussed. Where employee consent serves as the basis for processing health data, employers may not penalize employees who refuse to provide consent and the consent form should address any subsequent recording, use and disclosure of the data.

Sickness and injury records

The Commissioner recommends that employers keep sickness and injury records separate from absence and accident reports, in order to prevent a worker's health being disclosed when only information on absence or accidents is required. Any holding of sickness and injury records must satisfy a sensitive data condition (as explained above). Also, disclosure of a worker's illness, medical condition or injury should only take place where there is a legal obligation to do so. For example, in the course of legal proceedings or where the worker has given his explicit consent. Consequently, individuals who deal with workers' sickness and injury records should be made aware of when a legal obligation to disclose may arise. Furthermore, workers' sickness, injury or absence records should not be made available to workers unless it is necessary for them to complete their jobs. In particular, managers should not have access to information which is not necessary and "league tables" of individuals records should not be published.

Occupational health schemes

The Commissioner recommends that employers inform workers, preferably in writing, about how information supplied or obtained for an occupational health scheme will be handled, and notes that employees are entitled to assume that information furnished to health professionals will be held in confidence. Moreover, employers should refrain from intercepting communications (e.g. emails or phone calls) between an employee and any health professional involved in the scheme.

Medical examination and testing

Where an employer requires medical exams or tests, they should produce and disseminate a policy explaining the reasons for and nature of the testing, as well as how any data generated will be processed. In the Commissioner's view, testing of applicants should only occur where it is a "necessary and justified measure" designed to: (i) assess whether the applicant is fit or likely to remain fit for a particular employment, (ii) meet a specific legal requirement, or (iii) determine the terms by which the applicant can participate in a pension or insurance scheme connected to the employment.

Testing of employees should occur either as part of a voluntary occupational health and safety programme or where it is a "necessary and justified measure" designed to: (i) prevent a "significant" risk to health and safety, (ii) determine fitness for continued employment, (iii) determine entitlement to health-related benefits, or (iv) prevent discrimination on grounds of disability. Under no circumstances should employers obtain test samples from employees covertly or use test samples or results for undisclosed purposes.

Drug and alcohol testing

Because of the increasing prevalence of drug and alcohol testing, the Code specifically addresses this type of testing. Here, employers should confirm that the tests are justified on health and safety grounds, and perform an initial impact assessment. Fearing that such tests often reveal more information than is strictly necessary, the Commissioner recommends that employers limit any testing to substances (and then only in sufficient amounts) that have a "significant bearing" on the reasons for the testing. In other words, employers should not be testing for trace amounts of substances that have little or no impact on the employee's performance of job duties. Employers also are advised to target their testing to the appropriate personnel. It would be difficult to justify subjecting an organization's receptionist or secretarial staff to the same tests used for employees occupying safety-critical roles. Employees should also be made aware of the policy for selecting test candidates, and "random" testing must be genuinely random. Importantly, tests should be designed to detect actual impairment at work, not the use of illegal substances generally, except where such use would (i) breach the contract of employment or disciplinary rules or (ii) cause substantial damage to the employer's business and/or reputation.

Genetic testing

The Commissioner also cautions employers that are engaged in any genetic testing of employees. Genetic tests should not be performed to predict a worker's future health. They should only be conducted where it is clear that a particular condition is likely to pose a serious safety risk to others or where the work environment represents a particular risk to persons suffering from a specific genetic disorder. Where the risk is only to the employee, the testing regime should be voluntary and any test results communicated to the employee. It is inappropriate to require or request that an applicant or employee disclosure the results of any previous genetic tests.

Conclusion

Part 4 of the Code is almost identical to the consultation version of the document that was released in December 2003 and many employers will already have included a review of the processing of medical records as part of an overall data privacy compliance audit. For other employers, ensuring compliance with the DPA and Part 4 of the Code will necessitate a careful assessment of their existing recruitment, sickness and document retention policies and practices. This is perhaps particularly true of European subsidiaries of US companies, which tend to consider matters such as medical checks and alcohol/drug testing to be reasonably routine.

This is a special Briefing issued jointly by Covington & Burling's European Data Privacy and Employment groups.

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