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Processing of employee data

The CMS Employment and Pensions Group

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Processing of employee data

Introduction

Facing the multitude of personal data all employers process, the awareness of the legal framework involved becomes more and more important. The following will outline the most important legal issues to be taken into account before processing employee data within the European Union.

Legal Framework

Data Protection Directive

The Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter: "Directive") forms the legal basis for data protection in the EU.

National Data Protection Laws

The 27 Member States have introduced new data protection laws or have amended their existing laws in order to implement the mentioned Directive. They are also obliged to apply their respective data protection laws if the processing is carried out on their territory.

Rights of Employee Representatives

In some Member States, such as Austria, the processing of (personal) employee data requires the consent of the employee representatives. In Austria for instance, employers are obliged to conclude a works agreement with the works council providing for such measures.

Principles for Processing of Personal Data

Criteria for Legitimate Processing of Personal Data

According to the mentioned Directive, personal data shall be:

- processed fairly and lawfully
- collected for specified, explicit and legitimate purposes
- adequate, relevant and not excessive in relation to the purposes for which they are collected
- accurate, kept up to date
- kept for no longer than is necessary for the purposes for which it was collected.

If the data subject has given his informed and free consent, further justification drops.

Employers may process the employees' data without their consent for any of the following:

- performance of the employment contract
- compliance with tax, social security laws or other administrative requirements
- the purposes of the legitimate interest pursued by the employer or by the third party (or parties) to whom the data are disclosed.

The processing of "sensitive data" (i.e. personal data revealing racial or ethnic origin, etc.) is generally prohibited, except for some very restrictive exemptions.

Employees' Rights

Right of information

The employee has the right to be informed about the purposes of the processing for which the data are intended.

Right of Access to Their Data

The employee is entitled to rectify, erase or block data which has been processed in violation of the Directive.

Right to Object

Member States are obliged to ensure that data subjects are aware on their right to object to the processing of the data.

Confidentiality and Security Processing

Only authorised persons may process the employees' data. To assure the protection of personal data, adequate technical and organisational measures must be established, in particular where data are being transmitted over a network.

Transfer of Personal Data to Another Country

Transfer within the EU

The transfer of personal data between Member States may not be dealt with differently than the transfer within a Member State, as they are obligated to adhere to the principles for the processing of personal data.

Transfer to Third Countries

The third country has to ensure an adequate level of protection if personal data has to be transferred. If this level is not guaranteed, transfer of personal data may take place under a number of circumstances, such as the consent of the data subject itself to the proposed transfer.

United States – Safe Harbour Rules

In comparison to Europe, the United States takes a different approach to data protection. As the coming into force of the Directive would have essentially forbidden the transmission of personal data to non European nations that do not accomplish the European standards for privacy protection, the US Department of Commerce in consultation with the European Commission developed a "Safe Harbour" framework, which was approved by the EU in July 2000, to bridge this gap.

Standard Contractual Clauses

The Commission has introduced a set of voluntary standard contractual clauses for those countries, which are not recognised by the Commission as offering adequate data protection and for US companies, which have not joined the "Safe Harbour". These clauses contain a legally enforceable declaration ("warrant").

Binding Corporate Rules

The Commission is mean-while also working with the national data protection authorities on other possible alternatives, such as Binding Corporate Rules, i.e. the use of codes of conduct instead of the already mentioned model contracts for the transfer of personal data to third countries.

Notification of Supervisory Authority

One or more public authorities in the Member States are responsible for the monitoring and supervision of the application of the provision of the Directive. This supervisory authority is obliged to check that processing operations are examined prior to the start thereof and to keep and publicise a register of processing operations.

CMS Employment and Pensions Group

The Employment and Pensions group of CMS advises national and international organisations on all aspects of employment law issues that affect businesses across Europe. Our solutions are based on a broad experience in specific business environments and industry sectors.

We offer coordinated European advice through a single point of contact. Thus, clients can deal with a local firm in their own country using their own language whilst benefiting from the integrated expertise of a wide multi-jurisdictional team of more than 200 practitioners.

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- Compliance with national and international laws and standards
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- Employee share/stock ownership
- Employee pension schemes
- Social security contributions
- Labour/trade union issues/disputes
- Employee and pensions aspects of mergers and acquisitions, outsourcing, nationalisation, privatisation
- Litigation to prevent employees competing with their former employer
- Drafting employment contracts, company policies and collective agreements
- Works councils at company, national and international levels

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