

ARTICLE 29 WORKING PARTY OPINION¹ ON THE PROCESSING OF PERSONAL DATA IN THE EMPLOYMENT CONTEXT

EXECUTIVE SUMMARY

The processing of personal data in the employment context is the subject of debate at both the Community and the national levels. Governments and Data Protection Authorities in the Member States have produced or are in the process of producing legislation, codes, or recommendations addressing several data protection issues in the employment context. The European Commission, in the framework of the Social Policy Agenda, has launched a consultation with social partners on data protection in the employment context.

In order to contribute to the uniform application of the national measures adopted under the Data Protection Directive 95/46/EC², the Working Party has set up a subgroup to examine this question³ and has adopted an **extensive document** which can be found on the Internet in the following address⁴:

http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/index.htm

Employers and workers must be aware that **many activities performed routinely in the employment context entail the processing of personal data of workers**, sometimes of very sensitive information.⁵ Any collection, use or storage of information about workers by electronic means will almost certainly fall within the scope of the data protection legislation. This is also the case of the monitoring of workers' email or Internet access by the employer. **The monitoring of email necessary involves the processing of personal data.** The processing of sound and

¹ The Article 29 Working Party is an advisory group composed by representatives of the data protection authorities of the Member States, which acts independently and has the task, inter alia, of examining any question covering the application of the national measures adopted under the Data Protection Directive in order to contribute to the uniform application of such measures;

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regards to the processing of personal data and on the free movement of such data. OJ L 281, 23.11.95, p. 31

³ The following supervisory authorities have contributed to the work of this subgroup: AT, BE, DE, EL, ES, FR, IR, IT, NL, UK.

⁴ The document includes a catalogue of the most relevant data protection legislation in the Member States with some impact in the employment context.

⁵ Examples of employment records usually involving the processing of personal data covered by Directive 95/46/EC. Application forms and work references, payroll and tax information-tax and social benefits information, sickness records, annual leave records, unpaid leave/special leave records, annual appraisal/assessment records, records relating to promoting, transfer, training, disciplinary matters, records relating to accident at work, etc.

image data in the employment context falls within the scope of the data protection legislation and video surveillance of workers is covered by the provisions of the Directive and the national laws transposing it.

When processing workers' personal data, employers should always bear in mind

FUNDAMENTAL DATA PROTECTION PRINCIPLES SUCH AS THE FOLLOWING:

- **FINALITY:** Data must be collected for a specified, explicit and legitimate purpose and not further processed in a way incompatible with those purposes.
- **TRANSPARENCY:** As a very minimum, workers need to know which data is the employer collecting about them (directly or from other sources), which are the purposes of processing operations envisaged or carried out with these data presently or in the future. Transparency is also assured by granting the data subject the right to access to his/her personal data and with the data controllers' obligation of notifying supervisory authorities as provided in national law.
- **LEGITIMACY:** The processing of workers' personal data must be legitimate. Article 7 of the Directive lists the criteria making the processing legitimate.
- **PROPORTIONALITY:** The personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. Assuming that workers have been informed about the processing operation and assuming that such processing activity is legitimate and proportionate, such a processing still needs to be fair with the worker.
- **ACCURACY AND RETENTION OF THE DATA:** Employment records must be accurate and, where necessary, kept up to date. The employer must take every reasonable step to ensure that data inaccurate or incomplete, having regard to the purposes for which they were collected or further processed, are erased or rectified.
- **SECURITY:** The employer must implement appropriate technical and organisational measures at the workplace to guarantee that the personal data of his workers is kept secured. Particular protection should be granted as regards unauthorised disclosure or access.
- **AWARENESS OF THE STAFF:** Staff in charge or with responsibilities in the processing of personal data of other workers need to know about data protection and receive proper training. Without an adequate training of the staff handling personal data, there could never be appropriate respect for the privacy of workers in the workplace.

CONSENT. The Article 29 Working Party has taken the view that where as a necessary and unavoidable consequence of the employment relationship an employer has to process personal data it is misleading if it seeks to legitimise this processing through consent. Reliance on consent should be confined to cases where the worker has a genuine free choice and is subsequently able to withdraw the consent without detriment.

WORKERS ARE DATA SUBJECTS who benefit from the rights conferred by the Data Protection Directive. The most important of these rights is the right of access provided for in Article 12 of the Directive.⁶

INTERACTION BETWEEN LABOUR LAW AND DATA PROTECTION LAW. The Working Party would like to point out that data protection law does not operate in isolation from labour law and practice, and labour law and practice does not operate in isolation from data protection law. This interaction is necessary and valuable and should assist the development of solutions that properly protect workers' interests.

SURVEILLANCE AND MONITORING. Data protection requirements apply to the monitoring and surveillance of workers whether in terms of email use, Internet access, video cameras or location data. **Any monitoring must be a proportionate** response by an employer to the risks it faces taking into account the legitimate privacy and other interests of workers. **Any personal data** held or used in the course of monitoring must be **adequate, relevant and not excessive for the purpose for which the monitoring is justified.** Any monitoring must be carried out in the least intrusive way possible.

TRANSFER OF WORKERS' DATA TO THIRD COUNTRIES. Article 25 of the Directive establishes that transfers of personal data to a third country outside the EU can only take place where the third country ensures an adequate level of protection for the data. It must be remembered that whatever the basis of the transfer under Articles 25 and 26 processing involved in the transfer must still satisfy Article 6 to 8 and all the other provisions of the Directive.

The Working Party believes that **it is preferable to rely on** adequate protection in the **country of destination rather** than relying on **the derogations listed in Article 26, for example the workers' consent.** Where consent is relied on, it must be unambiguous and freely given. Employers would be ill-advised to rely **solely** on consent other than in cases where, if consent is subsequently withdrawn, this will not cause problems.

FURTHER GUIDANCE. The Working Party is considering further guidance on the issues where the application of general principles of data protection raises particular

⁶ Every data subject is entitled to obtain from the controller (the employer in this case):

- a) without constraint at reasonable intervals and without excessive delay or expense:
 - ❑ Confirmation as to whether or not data relating to the worker are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipient or categories of recipients to whom the data are disclosed,
 - ❑ Communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,
 - ❑ Knowledge of the logic involved in any automatic processing of data concerning him at least in the case of automated decisions
- b) as appropriate the rectification, erasure or blocking of data the provisions of which does not comply with data protection law, in particular because of the incomplete or inaccurate nature of the data;
- c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with the previous obligation, unless this proves impossible or involves a disproportionate effort.

problems relevant to the employment context, such as the surveillance and monitoring at the working place, employee evaluation data and others.