Ius Laboris Belgium Global HR Lawyers
Claeys & Engels

Newsletter: **Today the long-awaited new General Data Protection Regulation (GDPR) has been published**

Ten things you need to know as an employer about these new European rules

4 May 2016

Table of contents

Dear reader,

Employers process personal data of their staff on a large scale.

“Personal data” is an umbrella term for any information by which one can identify a person, directly or indirectly, such as the name, the address, the national registry number, the salary data, the online profile, or the log-in details.

The concept of “processing” is defined so broadly that almost any operation performed on personal data is considered as processing, such as collection, recording, storage, adaptation, alteration, consultation, use, disclosure by transmission, dissemination, or erasure. However, one condition is that the processing is at least partially carried out by automated means or, if not, that the personal data are intended to be contained in a filing system.

Employers often do not realise how many processing operations are carried out within their company. Some examples:

- the payroll and personnel administration;
- a database with personal data of individual applicants or employees;
- specific HR software to follow up evaluations or training programmes;
- the publication of a photo book of staff members on the intranet;
- uploading or transmitting data by e-mail to the social secretariat, the group insurer;
- presence registration using a badge, through the fingerprint, the iris;
- monitoring employees’ use of e-mail and the internet, as well as their use of social media;
- camera surveillance at work;
- the storage of data relating to telephony and video files;
- tracking the movements of employees using track and trace systems;
- etc.

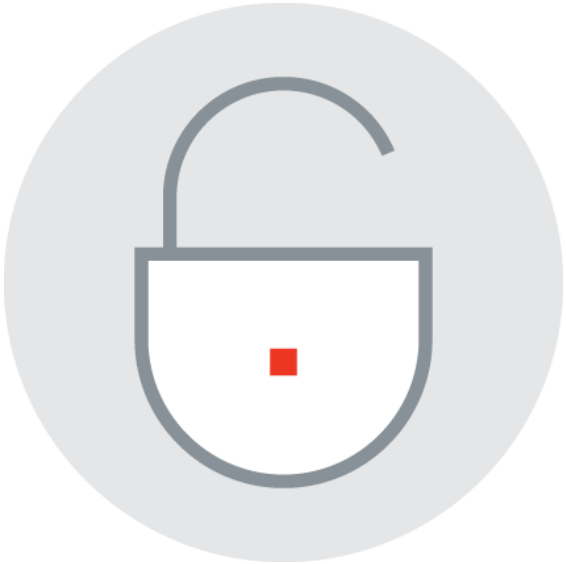
Today, 4 May 2016, the long-awaited General Data Protection Regulation has been published.

This Regulation will mark the beginning of a new era with respect to the protection of everyone’s personal data within the European Union.

Almost every employer will be impacted by the new rules and will have to adjust the way personal data of staff members are processed.

Below, we summarise 10 things you should know as an employer about these new European rules.

We hope you enjoy the read.



1 Harmonisation in a digital single market

Currently, the European Union has 28 different legislations concerning the processing of personal data. This is the result of an EU Directive adopted about 20 years ago and then implemented by each Member State individually into national legislation with its own character.

The new Regulation aims to get rid of this fragmentation. Unlike a Directive, a European Regulation is directly applicable in each Member State, without the need for transposition into national legislation.

However, this does not mean that separate national legislation will no longer exist.

Member States must ensure compliance with the Regulation and the protection it provides. But the Regulation itself for example stipulates that each Member State, by law or by collective agreement, may provide for more specific rules on the processing of employees' personal data in the employment context.

It can be expected that several Member States will make use of this possibility and that local specificities will continue to exist.

Furthermore, an important advantage of the new Regulation is that all companies who want to offer goods or services in Europe or to monitor the behaviour of European citizens (e.g., through online profiling) will have to comply with the Regulation, even if they are not based in the Union.

2 Confirmation and reinforcement of existing principles

The Regulation mainly confirms the existing principles, for example with respect to the processing of personal data in an acceptable, legitimate and secure way. The basic rules with respect to the transfer of personal data to countries outside Europe remain largely the same as well. Furthermore, the existing rights and obligations are reinforced. Think about employees' right to have access to, rectify or erase personal data (the so-called "right to be forgotten") or to transmit them to a third party ("data portability"). But also the employer's obligation to process personal data as securely as possible, using safeguards such as anonymisation, pseudonymisation or encryption, is reinforced ('data protection by design and by default'). Employers also will still have to enter into contracts with companies who process personal data on their behalf (e.g. payroll administrators, external IT service providers, insurance companies). However, the processors themselves will have greater responsibility than they have today.

3 The "one-stop-shop" principle

In the future, companies doing business in different European Member States will only have to work with one single central administration, whereas previously they had to verify in each Member State separately which actions they had to undertake.

4 Reinforcement of the information obligation

Under the current rules, the employer has to provide specific information to (potential) employees when processing their personal data. For example, the persons concerned have to know for which purposes their data are processed, to whom the data are communicated and who they can contact to execute their rights.

This information obligation is further reinforced by the Regulation.

Henceforth, the employer will for instance have to indicate, in addition to the information which

is currently already required, on which legal ground the processing of personal data is based.

In the employment context, employees' personal data are often processed because it suits the employer's legitimate interests. This is one of the possible grounds on the basis of which data may be processed. The Regulation now obliges the employer to describe this legitimate interest in the information.

Employers will also, for example, have to communicate in advance if they intend to transfer data outside the European Union, the period for which the data will be stored, the right to lodge a complaint with the Belgian supervisory authority (the Data Protection Authority, formerly known as the "Privacy Commission") the right to withdraw consent (in case the processing is based on that, wholly or in part), the identity of the "Data Protection Officer" (if applicable).

This more extensive information has to be provided in an intelligible and easily accessible form, using clear and plain language. The information should, as a general rule, be provided in writing either on paper or electronically.

5 Consent as a legal ground for the processing

Under the current legislation, the employee's consent is already a potential legal ground for the processing of personal data. Nevertheless, there has always been some debate about whether employees can "freely" give their consent.

Although the Regulation maintains consent as a legal ground, this consent is subject to stricter conditions.

A declaration of consent should be freely given, specific, informed and unambiguous and should be provided by using clear and intelligible language. In this case, the employer will have to demonstrate that the employee has given consent. Therefore, consent must be explicit. The employee also has the right to withdraw consent at any time.

Furthermore, the European Data Protection Board (the former WP 29) advised that - in principle - for one specific processing only one legal ground can be used.

Consequently, consent has become a less solid legal ground. Therefore, in HR-related matters, we advise to only ask for your employees consent when it is strictly necessary (for instance for the processing of certain sensitive data). However, for the majority of processing activities in HR-related matters, consent will not be required, and the employer will be able to use other legal grounds (necessity for the performance of the employment contract, legal obligation or legitimate interests).

6 Record-keeping obligations

As of the entry into force of the Regulation, companies employing 250 employees or more will no longer be obliged to report to the Data Protection Authority, but will have to maintain a written or electronic register of all processing activities which are carried out under their responsibility. This register should contain a number of mandatory provisions and should be submitted at the request of the Data Protection Authority. In case a company employs fewer than 250 persons, this register will also have to be kept if the processing of personal data is likely to result in a risk to the rights and freedoms of data subject, is not occasional or if sensitive data are processed.

7 Mandatory appointment of a "data protection officer" for some companies

Some employers, such as public authorities or companies whose core activities consist in processing personal or sensitive data, will be obliged to designate a so-called "data protection officer". The data protection officer may be a staff member, or fulfil the tasks on the basis of a service contract. This person will advise the employer of the measures which have to be taken pursuant to the new Regulation and will also monitor compliance with the principles of this Regulation. This officer should be in a position to perform his duties within the company in an independent manner. He will have to report to the highest management level and may not be dismissed for performing his tasks.

8 Mandatory notification of breaches

If employees' personal data were to fall into the wrong hands, for example because the data have been hacked or due to a human or system error, the employer will in some cases be obliged to report this to the Data Protection Authority and to the individual concerned. Just think of an employee whose laptop, on which personal data are stored, is stolen or of an e-mail containing personal data which is accidentally sent to the wrong address. A policy with a description of the various possible situations and its affiliated actions can be useful.

9 Higher risk of penalties

Today, we feel that employers on the Belgian market do not see it as a top priority to comply with the rules on the processing of personal data. This is, among other things, due to the fact that under the current Belgian legislation, unlike in some of our neighbouring countries, there is no real risk of penalties: criminal sanctions are provided, but are rarely applied. The Data Protection Authority also does not have sanctioning powers.

This will change drastically under the new Regulation.

Employees will be able to lodge a complaint with the Data Protection Authority and may file a claim for damages.

Henceforth, companies that do not respect the rules will run the risk of being substantially fined by the Data Protection Authority, with administrative fines of up to EUR 20 million or 4% of the company's annual global turnover.

10 Finally, when will these new rules become applicable?

The Regulation enters into force 20 days after its publication, but will only be applied two years later, i.e. as of 25 May 2018.

This period is to give Member States the time to adapt national legislation and to give companies the chance to adjust their processing activities and to design an appropriate framework.

Claeys & Engels informs you

If you would like to learn more about the new European rules and the exact measures you should take as an employer, we invite you take part in a teleconference about this subject on 14 June 2016 in Dutch or on 28 June 2016 in French.

Shortly after the Summer holidays, an information session in English will be held in our Brussels office as well. On this occasion, several of our Ius Laboris colleagues from other European countries will share their experiences.

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