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Employment news

June 2017

European regulation on data protection: impact on employment law

On 25 May 2018, the European regulation No. 2016/679 – or General Data Protection Regulation – will enter into force. This regulation significantly modifies the declaration and monitoring of personal data processing systems, which are especially used by companies in employment matters (payroll, geolocalization, internal whistleblowing schemes...).

Removal of the prior declaration procedure before the CNIL

The regulation deletes **the prior declaration/authorization system before the data protection authority (in France, the CNIL)**, which reflects a new logic about personal data protection. The regulation emphasizes the responsibility of each actor: each processing system will have to fully comply with European regulation on data protection at any time as from its conception. The data protection authority will have an advising and monitoring role.

The processing of highly sensitive data (e.g. biometric access systems, trade union membership) will be subject to a **prior impact assessment** carried out by the company, focusing in particular on the adverse effects for the rights and freedoms of individuals and the actions contemplated to address those risks.

Implementation of a processing activities record

Companies using personal data processing systems will have to maintain an updated **record of processing activities** registering any relevant information with respect to those processing systems (purposes, data involved, storage, security measures...). From a practical standpoint, it will be a more comprehensive version of the current record kept by the IT and Freedoms Correspondent (in French, the CIL) of the company.

Appointment of a Data Protection Officer

Companies which (i) activities require regular and systematic monitoring of individuals on a large scale or (ii) process highly sensitive data on a large scale, will have to appoint a Data Protection Officer (DPO), who will assume the missions of the current CIL. Appointing a DPO will be optional for the other companies. Nonetheless, the European authorities recommend appointing a DPO in any event for the companies to fully understand the scope of their obligations with respect to personal data.

The DPO will notably be responsible to inform and advise its company on, and control compliance with, the personal data legislation. The DPO will liaise with the national data protection authority and act as its main contact point within the company. The DPO can be an employee of the company or an external provider, provided that the DPO has the required competences and the sufficient resources to perform his/her duties.

▪ *Regulation (EU) No. 2016/679 of 27 April 2016 on the protections of natural persons with regard to the processing of personal data and on the free movement of such data*

Steps to follow in order to be prepared for the entry into force of the regulation

- 1st step: appoint an adviser in personal data protection matters, intended to be later appointed as DPO.
- 2nd step: identify the personal data processing systems currently being used within the company and gather all relevant information in view of the "*record of processing activities*".
- 3rd step: identify the potential risks to the rights and freedoms incurred by some processing systems and carry out a prior impact assessment, when needed.

Transfer of a company belonging to a UES: situation of the protected employees

When a company, which (i) belongs to a business and social unit (in French, *UES*) and (ii) has no works council, is transferred to a third party, the transfer of the employment agreements made under article L. 1224-1 of the French labor code is deemed to be a "partial transfer", even if all the company's employees are transferred.

As a consequence, the transferred company **must request the authorization of the French labor Administration prior to the transfer of its protected employees** (e.g. the staff and trade union representatives).

Failing that, the transfer of the protected employees is null and void and those employees are notably entitled to damages equal to their remuneration of the last six months.

▪ *Cass. soc., 23 Mar. 2017, n° 15-24.005*

Clarifications on the scope of a settlement agreement

According to the French Supreme Court (*Cour de cassation*), a settlement agreement drafted with general terms does not allow the employee to bring a legal action for damages based on a damage, not specifically mentioned on the agreement.

In the referred case, the employee declared in the settlement agreement **having all his rights satisfied and no other complaint in connection with the performance or the termination of the employment agreement**.

This ruling confirms that the settlement agreement is one of the most secured ways to end a dispute.

▪ *Cass. soc., 11 Jan. 2017, n° 15-20.040*

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