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GDPR and Employees

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JSC

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Fundamental principles

- Employees are data subjects in their own rights, and enjoy all of the same rights and freedoms
- The same data protection principles apply to employees, irrespective of technology
- Consent is highly unlikely to be the legal basis for processing, unless employees can refuse without adverse consequence

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Reconsideration of employee data

- New technologies – enables more systematic processing and monitoring of employee data
  - Apps, smart devices, mobile devices, online services (MyView); data location on mobile devices; vehicles, wearable technology – less visible to employees that monitoring is taking place
  - Boundaries have blurred between home and the workplace, including travel
- Has created significant challenges to privacy and data protection and new risks
  - Potential of monitoring in a private context
  - Employer data more at risk of disclosure in non-work environments, so need to educate employees
- New assessment of the balance between employer's interests and expectation of privacy by employees
- Definition of "employee" in guidance is:
  - anyone in a employment relationship whether or not an employment contract exists (clergy?)

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Lawful basis for processing

- Employees are seldom in a position to freely give, refuse or revoke consent; "the legal basis cannot and should not be consent"
  - Dependency relationship
- Performance of a contract – where the employer must process personal data to meet a contractual obligation (pay)
- Employment or other laws may impose legal obligations (tax; salary administration; pension)
  - But this does not override the rights and freedoms of employees
  - Employees must be fully informed of such legal obligations

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Legitimate interest

- Where no other lawful basis is established and the employer is relying on legitimate interest to process data
- Requires a proportionality test to assess:
  - Whether the processing is necessary to achieve a legitimate purpose
  - Processing must be proportionate to business needs i.e. purpose for which it is required
  - Demonstrate that specific mitigating measures have been put in place to ensure a balance between employers' interests and employee rights and freedoms
    - e.g. limitations on monitoring to ensure employee's privacy is not violated e.g.
    - geographical (exclude specific areas of the building);
    - data oriented (personal electronic files and communications should not be monitored).
    - Time-related (sampling rather than continuous monitoring)
  - Employee still retains the right to object

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Cyber Monitoring

- Employees must be clearly and fully informed of the processing of their personal data gathered "automatically" e.g. cyber monitoring
- Employees must be clearly and fully informed of existence of any monitoring
  - Specific monitoring activity by employer
  - Use of monitoring data collected automatically
- There are detailed and specific risks associated with cyber monitoring which will need to be considered and addressed through policies, privacy notices, protocols for use, and clarity regarding what technology is being used, how, why and when e.g. acceptable use policy outlining permissible use and detailing the processing taking place

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Employer's checklist

- The processing activity is necessary and lawful basis applied
- The purpose is fair to employees
- The processing activity is proportionate
- The processing activity is transparent

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HR implications

We will need to review, update or develop:

- HR-related Privacy Notice/s;
- All employee-related policies, across IT, Information Governance, Facilities (possibly Pensions and Finance) and consult with JSC as necessary;
- Policies being applied by Church House Corporation (CCTV policy?) where employee data is being processed (3rd party supplier but also place of employment);
- Lawful bases being used in HR and HR contractual/legal obligations;
- HR policies and processes relating to application of individual rights to employees (SAR, objection, restriction etc);
- Retention and handling policy for managers and employees holding employee data;
- Policy and practice regarding employees under 18 years old.

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Policy changes

We will need to review and potentially revise HR/IT/Data Protection policies and privacy notices to cover:

- IT acceptable use and processing
- Cloud services
- IT security software deployment (at work and remotely)
- Monitoring
- Recruitment
- Whistleblowing
- Employee screening in-employment
- Bring Your Own Device
- Mobile Device Management
- Time and attendance
- Video or CCTV
- Vehicle use and tracking and in-vehicle recording
- Disclosure of employee data to 3rd parties
- International transfers of employee data