■ Data protection and workers' health

Charles Wynn-Evans of Dechert LLP reports on the recently published Part 4 of the Employment Practices Data Protection Code, which recommends how employers should comply with the 1998 Data Protection Act (DPA) in the context of workers' health.

Scope of the Code

The Code addresses the collection and subsequent use of information about workers' physical or mental health. Examples of information to which the Code may apply include health questionnaires, information about disabilities/special needs, results of eye, blood, alcohol, drug and genetic tests, assessments of fitness for work or to determine entitlement to benefits and records of vaccination and immunization status. Once this personal information is held electronically or retained in a structured filing system, it comes within the scope of the DPA. The Code does not address the issue of whether consent is required for particular steps, such as the physical intervention involved in taking a sample from the worker in the course of medical testing.

Sensitive data

The Code reminds employers of the crucial point that information about workers' health constitutes "sensitive data" for the purposes of the DPA and that, therefore, before it can be "processed", one or more of the DPA's sensitive data conditions must be satisfied. The conditions considered most relevant in the health context are:

- processing necessary to enable the employer to meet its legal obligations
- processing for medical purposes (eg the provision of care or treatment)
- processing connected with actual or prospective legal proceedings
- explicit consent being given. The worker must be told clearly what personal data is involved and be properly informed about the use that will be made of them. A positive indication of agreement must be given, such as a signature, and there must be no penalty imposed for refusing to give consent.

Impact assessment

When one of these conditions is met, an employer needs to be clear either that it is under a legal duty to process information about a worker's health (for example due to health and safety requirements) or that the benefits gained justify the intrusion or other adverse impact. Employers are encouraged by the Code to conduct impact assessments to decide whether and how to collect the information. This involves identifying the purpose and any likely adverse impact of doing so, considering alternatives to the proposed course of action and judging whether it is justified.

Employers are encouraged to consider issues such as whether health questionnaires will suffice (instead of tests), whether workplace changes can remove the need to obtain health information, whether medical testing can be targeted rather than general, whether it can be confined to areas of highest risk and whether access to information can be strictly limited. In weighing the benefits, the Code emphasises the need to be fair to individual workers, to ensure that any intrusion is no more than absolutely necessary and to consult with any relevant unions or workers' representatives.

Good practice

The Code sets out various good practice recommendations. Employers should identify who can authorise or carry out the collection of information about workers' health and ensure they are aware of the employer's DPA responsibilities.

Interpretation of medical information should be left to those who are appropriately qualified. Information about workers' health should be protected by adequate security measures. No more information should be collected than is necessary. League tables of sickness and absences should not be published since the consequent intrusion would be disproportionate. Employers are reminded that monitoring of e-mails, telephone calls, Internet use or any other similar activities should not compromise confidential communications.

Sickness and injury records

Sickness and injury records should, where possible, be kept separate from absence and accident records. If records of absence suffice for a particular purpose, sickness and injury records should not be used. Information from sickness or injury records about an identifiable worker's illness, medical condition or injury should only be disclosed where there is a legal obligation to do so, where it is necessary for legal proceedings or where the worker has given explicit consent to the disclosure.

Medical examinations

Information about applicants should only be obtained through medical examination or testing at an appropriate point in the recruitment process, ie where there is a likelihood of appointment. Testing should only be conducted on a voluntary basis or, if it is a necessary and justified measure, to determine fitness for work, meet any legal requirements or determine the terms on which a potential worker is eligible to join a pension or insurance scheme.

Drugs and alcohol

Employers should ensure that the benefits of drug or alcohol testing justify any adverse impact (unless testing is required by law). The amount of personal information obtained through drug and alcohol testing should be minimised. The criteria used for selecting workers for testing must be justified, properly documented, adhered to and communicated to workers. If the criteria for selection are truly random, then this should be made clear. If other criteria are used, then the employer should ensure that workers are aware of the true criteria that are being used.

The obtaining of information through random testing should be limited to those workers who are employed to work in safety critical areas. Information from testing should be gathered to ensure safety at work rather than to reveal the illegal use of substances in a worker's private life.

Genetic testing

The Code recommends that genetic testing should not be used in an effort to obtain information that is predictive of a worker's future general health. Genetic testing should only be used where it is clear that a worker with a particular genetic condition is likely to pose a safety risk or where it is known that a specific working environment might pose specific risks to workers with particular genetic variations. Employers should not insist that workers disclose the results of previous tests.

Health questionnaires

If a medical report on a sick worker is commissioned to assess suitability for continued employment, only relevant information should be sought. Therefore, the request should be for a specific assessment, for example whether the worker is fit to attend work and whether adjustments need to be made to accommodate his or her disability. Where general practitioners are consulted, the worker should not normally be asked to consent to the disclosure of the entire general practitioner records. An occupational health physician may need access to full records but specific relevant questions to elicit the information needed should be the priority.

Part 4 of the DPA Code of Practice is a timely reminder of the need for employers to exercise caution when considering health issues and to ensure that the steps they take are as limited as possible and are proportionate to the particular circumstances and concerns being addressed. ❑