

EMPLOYEE CONSENT

Do I have to obtain employees' consent in order to collect their personal data?

The processing of any personal data may impose obligations to the individuals the data is related to, the data subjects. Some jurisdictions only recognize processing personal data as lawful if the data subject has provided express consent. Other jurisdictions require a legal obligation to process the data and may not require consent. The processing of HR personal data has raised questions and court decisions in a few countries, and interpretations may vary based on data privacy and labor law requirements.

The concept of employee consent has been increasingly criticized because there is doubt as to whether consent can be given freely in the subordinate employee/employer relationship. There are more prescriptive requirements for obtaining consent under the European General Data Protection Regulation, including the ability to withdraw consent at any time.



The legitimate interest of employers can sometimes be invoked as a legal ground for processing personal data, but only if the processing is strictly necessary for a legitimate purpose and the processing complies

with the principles of proportionality and subsidiarity. A proportionality test should be conducted in order to consider whether all data collected is truly necessary, and measures must be taken to keep personal data processing limited to the minimum necessary.



Clear communications should be provided to employees, informing them how their personal data is being processed. Where possible, such as in the event of monitoring technologies, employees should be given the option to prevent their data from being captured.

Where employees are expected to use online applications which process personal data, they should consider enabling employees to designate certain private spaces to which the employer may not gain access under any circumstances, such as a private mail or document folder.

Criminal Data

Ireland's Data Protection Act allows the processing of criminal conviction data, such as for background checks, in specific situations, including: with the individual's consent; when necessary and proportionate to perform a contract to which the individual is a party or to take steps at the request of the individual prior to entering a contract; or, the processing is necessary for legal advice/proceedings or for establishing/exercising/defending legal rights. That said, it's generally illegal for employers to request criminal records on employees and job applicants. When an employee or job applicant will have access to, or contact with, children or vulnerable individuals, employers are permitted to

request that the employee or job applicant obtains their criminal records. Employers cannot request these records directly.



HR Best Practices:

As consent on its own might not be enough to justify lawful processing of employee personal data, other processes should be documented and implemented. Consider legitimate requirements, such as processing bank account numbers for purposes of payment, or, processing personal data for health insurance. Commit to properly informing employees, documenting legal rationales for data collection and offering consent/correction/deletion where possible.

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