Data Protection implications of the Return to Work Safely Protocol

Employers and employees are currently in the process of implementing, or preparing to implement a phased return to work as part of the Government's 'roadmap for reopening society and business'. In order to support employers and employees with this initiative, the Department of Business, Enterprise and Innovation ("the **DBEI**") and the Department of Health recently published a Return to Work Safely Protocol ("the **Protocol**"). The DBEI has also recently published explanatory guidance to support employers where the implementation of measures recommended by the Protocol result in the processing of personal data.

The purpose of this guidance document is to provide advice to employers on the implementation of the recommendations of the Protocol in a manner that complies with their obligations as data controllers under the GDPR and Data Protection Act, 2018.

Contact Tracing Logs

The Protocol recommends that employers keep a log of contact/group work to facilitate contact tracing. The DBEI's explanatory guidance clarifies that:

> *"A Log of Contact/Group Work should be maintained by Employers for Workers who are in close contact for extended periods of the work shift (e.g. working together in spaces where social distancing guidelines may be difficult to maintain). The meaning of close contact here should be based on guidance issued by the Public Health Authorities."*

The DBEI's explanatory guidance further clarifies that the purpose of the contact-tracing log is to facilitate the HSE's official contact-tracing procedures and to act as a memory aid for employees in providing relevant information relating to close contacts in the event of a COVID-19 diagnosis. Personal data held in a contact log should generally not be processed by an employer for any other purpose. Employers should avoid disclosing information relating to a particular employee's COVID-19 diagnosis to other employees. The data should be retained only for as long as considered necessary for this purpose.

Return to Work Form

The Protocol recommends that employers establish and issue a pre-return to work form for employees to complete at least three days in advance of their planned return to work. The DBEI's explanatory guidance clarifies the objective of the form as follows:

> *"The purpose of this Form is to highlight to Workers the symptoms of COVID-19 before they enter the Workplace and potentially put themselves or others at risk of infection, and to allow Employers to make informed decisions about employee's return to the workplace."*

Return to work forms should be tailored such that they collect the minimum information necessary to achieve the above objective and should generally not be processed for any other purposes. The DBEI explanatory guidance advises that the form should not be retained once an employee has returned to the workplace.

Temperature Testing

The Protocol recommends that employers implement temperature testing "in line with Public Health advice". The DBEI's explanatory guidance clarifies that:

> *"This measure should only be introduced by Employers in line with Public Health advice. The recording of temperature checks with the names or images of Workers is not required. The purpose of taking a Worker's temperature is to let the Worker know if they have a raised temperature which is one of the symptoms of possible COVID-19 infection. Temperature testing should only be conducted in line with current public health advice."*

The DPC is not aware of any current Public Health advice recommending the implementation of temperature testing in the workplace. Accordingly, temperature testing should not be considered a requirement of the Protocol at this time.

Employers currently considering the implementation of temperature testing as a COVID-19 response measure, perhaps in the context of a particularly high-risk workplace and in response to a particular risk that has been identified, must be in a position to justify why any consequent processing of personal data is necessary for the purpose of mitigating against the identified risk. In general, the advice of the public health authorities, in this respect, will be a key element in the assessment of the necessity and proportionality of the implementation of such a measure. Where such measures are under consideration, employers should remember to consider whether a Data Protection Impact Assessment ("**DPIA**") might need to be carried out before any personal data is processed in conjunction with the measure. Further information on DPIAs can be found here.

Legal Basis for Processing

When processing personal data, in the context of implementing the measures recommended by the Protocol or otherwise, an employer must have a 'legal basis' for doing so (by reference to the options set out in Article 6 GDPR). When processing special category personal data such as data relating to an employee's health, an employer must also be able to satisfy one of the requirements of Article 9 GDPR. Detailed guidance on the lawfulness of processing can be found here.

Consent is unlikely to constitute a suitable legal basis for the majority of processing operations concerning employee data in the workplace. Where an employee has no real choice in the matter, because, for example, his/her personal data is going to be processed in connection with a measure that is introduced to meet a legal obligation or for public health reasons, then the employee is not in a position to decline consent and, accordingly, consent is not an appropriate legal basis for the processing in question.

Employers have a legal obligation, under the Safety, Health and Welfare at Work Act, 2005 ("the **2005 Act**"), to ensure the health and safety of individuals in the workplace. It is a matter for an individual employer to identify what measures should be implemented in the workplace so as to mitigate any risks that have been identified further to a risk assessment. Where the implementation of a measure necessitates the processing of personal data, an employer may be able to rely on Article 6(1)(c) GDPR to support the processing, but only if the processing is necessary for compliance with the employer's obligations pursuant to the 2005 Act.

Where the implementation of a measure necessitates the processing of special category data, an employer may be able to rely on Article 9(2)(b) GDPR to support the processing, but only if the processing is necessary for the purpose of carrying out its obligations in the field of employment (such as the obligations arising under the 2005 Act).

When considering whether Article 6(1)(c) and/or Article 9(2)(b) might provide a suitable legal basis for the processing of personal data in a health and safety context, employers should remember that any processing of personal data should be limited to that which is necessary to achieve the objective being pursued. In addition, the processing must comply with all of the principles of data protection as set out in Article 5 GDPR. Further information on the application of these principles can be found here.

In circumstances where employers act under the direction of public health authorities, or other relevant authorities where national measures are undertaken to protect against COVID-19, Article 6(1)(e) and Article 9(2)(i) GDPR and Section 53 of the Data Protection Act 2018 may permit the processing of personal data, including health data, where it is deemed both necessary and proportionate, and once suitable safeguards are implemented. Such safeguards may include limitation on access to the data, strict time limits for erasure, and other measures such as adequate staff training to protect employees' data protection rights.