Code read?

Your employer can no longer play fast and loose with your health information. A firm could be breaking the law if it fails to respect new rules on workers’ privacy. And the new code warns them to think twice about the health records they hold and the hoops they ask you to leap through, whether this is health screening, medical, drug, alcohol or genetic tests.

A new code on obtaining and handling information about workers’ health published by the Information Commissioner’s Office (ICO) in December 2004 puts strict limits on the health information that can be obtained by employers and says in most instances alcohol, drug and genetic testing are an unwanted intrusion.

The fourth and final part of the Employment Practices Data Protection Code – Information about Workers’ Health – is intended to help employers comply with the Data Protection Act (DPA). ICO says it “addresses the collection and subsequent uses of information about a worker’s physical or mental health.”

David Smith, assistant information commissioner, said: “Information about people’s health is very sensitive and requires effective protection.” He added: “Employers may devise alternative ways of meeting their legal requirements under the Data Protection Act when handling information about workers’ health, but if they do nothing to apply the principles behind the code they risk breaking the law.”

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Workers’ health, workers’ privacy

The ICO code covers sickness and injury records, occupational health schemes, information from medical examinations and testing, and drug, alcohol and genetic tests. It applies to job applicants, former applicants, and former and current employees, agency staff, casual staff and contract staff. Others in the workplace – for example, volunteers and work experience people – are also covered.

The code spells out core principles. An employer should “identify who within the organisation can authorise or carry out the collection of information about workers’ health on behalf of the organisation and ensure they are aware of their employer’s responsibilities under the Act.”

Those handling the information should be properly briefed about the law and the code and the employer should ensure anyone involved in health information collection or medical testing is properly trained. Interpretation of medical information should be left to properly qualified personnel, it says – which means the human resources manager can’t decide that your henna isn’t that serious after all, and tell you to stop wearing it and get back to work.

Sensitive data rules

Employers holding and processing information about workers’ health must first meet one or more “sensitive data conditions.”

◆ Is the processing necessary to enable the employer to meet its legal obligations, eg. to ensure health and safety at work, or to comply with the requirement not to discriminate on grounds of sex, age, race or disability?

◆ Is the processing for medical purposes, eg. the provision of care or treatment, and undertaken by a health professional or someone carrying out a safety programme under an equivalent duty of confidentiality, eg. an occupational health doctor?

◆ Is the processing in connection with actual or prospective legal proceedings?

◆ Has the worker given consent explicitly to the processing of his or her medical information?

The code says consent must be freely given, with no penalty for refusal. The worker must be clear about the data referred to and how it might be used.

Supplementary guidance to the code lists other sensitive data conditions, including considering reasonable adjustments to accommodate workers with disabilities and supplying information on accidents where industrial injuries benefit may be payable.

The ICO code says: “The collection and use of information about workers’ health is against the law unless a sensitive data condition is satisfied.”

Impact assessments

Once a sensitive data condition is satisfied, an employer needs to be clear that either: there is a legal right of access to the information and not passed on to others. Set out clearly to workers, preferably in writing, how information they supply in the context of an occupational health scheme will be used, who it might be made available to and why.

Medical exams and testing

The ICO code warns that for medical examinations and testing just obtaining a worker’s consent or meeting a sensitive data condition is not enough to satisfy the requirements of the DPA. It says: “There is still an obligation to ensure the information obtained through medical examination is relevant, is up to date and is kept secure.”

For job applicants, medical tests are only justified where there is a likelihood of appointment. Tests are only appropriate if they are needed to determine whether a person is fit or likely to remain fit to do a job, meet any legal testing requirements, or to determine eligibility to join pension or insurance schemes.

On employees, the ICO code says: “Only obtain information through a medical examination or medical testing of current workers if the testing is part of an occupational health and safety programme that workers have a free choice to participate in, or you are satisfied that it is a necessary and justified measure to: prevent a significant risk to the health and safety of the worker or others, or determine a particular worker’s fitness for carrying out his or her job, or determine whether a worker is fit to return to work after a period of sickness absence, or when this might be the case, or determine the worker’s entitlement to health related benefits, eg. sick pay, or prevent discrimination against workers on the grounds of disability or assess the need to make reasonable adjustments to the working environment, or comply with other legal obligations.”

Information obtained in the course of medical tests that is not relevant to the purpose of the test must be permanently deleted.

…workers are entitled to assume that information they give to a doctor, nurse or other health professional will be treated in confidence and not passed on to others.”

Drug, alcohol and gene tests

On drug and alcohol testing, the code says: “Very few employers will be justified in testing to detect illegal use rather than on safety grounds,” adding: “Even in safety critical businesses such as public transport or heavy industry, workers in different jobs will pose different safety risks. Therefore collecting information through the random testing of all workers will rarely be justified.”

On genetic screening it says: “Only seek information through genetic testing as a last resort, where: it is not practicable to make changes to the working environment or practices so as to reduce risks to all workers, and it is the only reasonable method to obtain the required information.”

Safety reps’ rights

The ICO code says: “Safety representatives should be provided with anonymised information unless any workers concerned have consented to the provision of information in an identifiable form.” The new HSE accident book takes account of this requirement, with a tick box allowing workers to indicate all their information can be revealed to the safety rep.

The ICO’s supplementary guidance says safety reps have the “legal right of access to information they need to fulfil their functions.” It adds: “The law does not prevent an employer from providing anonymised information to a safety representative. Where the disclosure of identifiable information is required (such as might be the case under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995), the Data Protection Act 1998 does not prevent the disclosure taking place.”

References