

ICO'S WORKERS' HEALTH GUIDANCE

Response from the Employment Lawyers Association

26 January 2023

EMPLOYMENT LAWYERS ASSOCIATION

WORKING GROUP ON THE ICO'S WORKERS' HEALTH GUIDANCE

1 INTRODUCTION

- 1.1 This paper has been produced in response to the Information Commissioner's Office ("**ICO**") draft guidance about workers' health (the "**Draft Guidance**")¹.
- 1.2 The Employment Lawyers Association (UK) ("**ELA**") welcomes the opportunity to provide its observations on the Draft Guidance. ELA is a non-political group of specialists in the field of employment law and includes those who represent employees and employers in the Courts and Employment Tribunals of the United Kingdom. Therefore, it is not ELA's role to comment on the political merits or otherwise of the Draft Guidance, rather its role is to make observations from a legal and commercial standpoint.
- 1.3 The ELA Working Group on the Draft Guidance is made up of both barristers and solicitors who regularly work with, and consider the impacts of, privacy obligations on employers within the United Kingdom and abroad. The Working Group was set up by ELA's Legislative and Policy Committee under the chairmanship of Jonathan Chamberlain and Alastair Woodland to respond to the Draft Guidance. A full list of the members of the working group is annexed to this submission.

2 OUR RESPONSE

- 2.1 We have commented on the Draft Guidance as a whole, mindful of the specific questions the ICO have asked. When reviewing the Draft Guidance, we noted that the ICO has already taken on board a number of the suggestions that we made in our submissions to the ICO's call for views on the Employment Practices Code in October 2021 (the "**2021 Submissions**").² We are grateful that the ICO has taken many of our earlier proposals on board.

¹ Information Commissioner's Office 'Employment practices and data protection: information about workers' health' (27 October 2022) <<https://ico.org.uk/media/about-the-ico/consultations/4022057/employment-practices-workers-health-draft.pdf>> (the "**Draft Guidance**").

² Employment Lawyers Association, 'ELA response to Information Commissioner's Office Employment Practices Call for Views' (21 October 2021) <https://www.elaweb.org.uk/law-and-practice/consultation-responses/ela-response-information-commissioners-office-employment> (the "**2021 Submissions**").

3 2021 SUBMISSIONS

3.1 As such, our comments on the Draft Guidance are more specific and focused. As part of our response, we thought that it may be helpful to briefly summarise the points that we made in the 2021 Submissions which are already reflected in the Draft Guidance.

3.2 Clarifications on consent, explicit consent and other appropriate legal bases

The additional information that the ICO has provided in the Draft Guidance around worker consent and when explicit consent may be relied upon in an employment context is very helpful. The examples provided at pages 8 and 9 of the Draft Guidance are particularly relevant to questions that employers are considering. Further, we agree with the information that the ICO has included on the legitimate interests, compliance with a legal obligation and performance of a contract legal bases at page 10.

3.3 Health and wellbeing monitoring

As we set out at paragraph 99.6 of the 2021 Submissions, tools to monitor health and wellbeing have become increasingly important in the workplace, particularly following the Covid-19 pandemic. We agree with the specific information the ICO has provided in the Draft Guidance on this topic at pages 42 – 44 of the Draft Guidance.

3.4 Risk management and health and safety law

At various points in the 2021 Submissions³, we emphasised that the processing of health data creates an important overlap between employment law, data protection law and health and safety law. We therefore welcome the specific references that the ICO has included regarding health and safety obligations, such as under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 ('**RIDDOR**').

3.5 Mental health

As we noted at paragraphs 66 and 124 of the 2021 Submissions, employers are facing challenges to spot signs of mental ill-health and employers are more alive to the issues of mental health and wellbeing than they were previously. We agree with the specific inclusion of references to mental health and the monitoring of mental health and wellbeing within the Draft Guidance (e.g., on page 43).

3.6 Sickness and injury records

We also welcome the ICO's inclusion of a specific section on sickness and injury records within the Draft Guidance (from page 22). As outlined in the 2021 Submissions at paragraph 60, this is a specific issue that employers would benefit from additional guidance.

³ See, for example, paragraphs 119 – 124 of the 2021 Submissions.

4 FURTHER CLARIFICATIONS AND AMENDMENTS

The remainder of our commentary has been divided into the issues that we identified in the Draft Guidance that we believe could be clarified or supplemented with further information.

4.1 Appropriate Policy Documents (“APD”)

As stated in the 2021 Submissions at paragraph 37, APDs are one of the more often overlooked policies for organisations trying to ensure that they meet their data protection obligations. We therefore suggest that the ICO should add further detail on APDs than what has been included at pages 12 and 13 of the Draft Guidance, including examples as to when additional safeguards may be needed, as this would be very beneficial to employers.

4.2 Legitimate Interests Assessments (“LIAs”)

While the additional information that the ICO has included in the Draft Guidance on legitimate interests at page 10 is helpful, no reference is made to the requirement to carry out and document a LIA in order to rely upon this legal basis. As with APDs, we often see employers struggle to understand what is required here. We therefore recommend that the Draft Guidance is updated to include further information and specific examples in a health data context on how to complete an LIA.

4.3 Automated decision-making

We note that page 19 of the Draft Guidance briefly discusses the possibility of employers using automated decision-making tools on workers; however, as we set out in our responses on the [ICO's draft guidance on employee monitoring](#)⁴ at paragraph 4, it would be helpful if the ICO provided more detail on each of the elements of Article 22 of the UK GDPR in an employment context (either by including that information here or by cross-referring to the ICO's revised guidance on employee monitoring with our suggestions incorporated). A worked example of automated processing involving health data that may or may not fall within the scope of Article 22 would also be useful for employers. We refer again to paragraph 4.13 of our response on the ICO's draft guidance on employee monitoring, which contains an example where health and safety monitoring is carried out in a construction/warehouse context.

4.4 Anonymous Data

As described at paragraph 13.5 of the 2021 Submissions, we recommend that the Draft Guidance includes further information on how employers should approach the issue of collecting health data on an anonymised basis – for example – as part of workplace wellbeing monitoring. This could be a useful privacy risk mitigation strategy that employers should be aware of when engaging in such activities. Further information on how to anonymise health data at the end of a retention period (to supplement the information on retention at page 16 of the Draft Guidance) would also be helpful, and such information could also refer to the ICO's guidance on anonymisation (which we note is also under review).

⁴ [\[ICO Response Link.\]](#)

4.5 Remote working and health and safety risk assessments

While information has been included in the Draft Guidance on sickness, injury and absence records and the example at page 25 on reasonable adjustments in the workplace is helpful, we recommend that the Draft Guidance includes more information about remote working and the collection of health data when considering a flexible working request. Following the Covid-19 pandemic, many employers are grappling with how to handle flexible working requests and would therefore appreciate specific information on this issue. Similarly, references and examples based on employers' obligations to carry out health and safety risk assessments in the workplace would be helpful.

4.6 Consultation obligations

As we set out at paragraph 119 of the 2021 Submissions, one further point the ICO should consider adding is the requirement to inform and consult on health and safety matters. The extent of these obligations depend on whether the employer recognises a trade union who has appointed safety representatives or whether (in a non-unionised workforce) there are elected representatives dealing with employee safety. For example, under Regulations 4A and 7 of the Safety Representatives and Safety Committee Regulations 1977, safety representatives appointed by a union can require information and consultation about the health and safety consequences of introducing any new technologies (such as to process health data) into the workplace.

4.7 Collection from third parties

As set out in paragraph 58.4 of the 2021 Submissions, employers and workers would benefit from guidance on the collection of health data from third parties, such as workers' dependants in the context of the administration of employment benefits (such as health insurance). No information on this issue is currently contained within the Draft Guidance.

4.8 Diversity and Inclusion Data

As we set out in the 2021 Submissions⁵, we strongly recommend that the ICO publishes additional guidance on the collection and use of diversity and inclusion data in a workplace context, either by broadening the scope of the Draft Guidance to cover special category data more generally or by publishing separate guidance on this topic. Given the increased focus upon diversity in the workplace, employers are struggling with questions on how to lawfully process personal data to: (i) monitor the existing make-up of a workplace, (ii) inform decisions and measures to improve diversity and (iii) report externally (to regulators, markets, clients/customers and the public at large) about workplace diversity (for example, the existing gender pay gap reporting obligations and the proposed ethnicity pay gap reporting regime as well as where clients/customers seek information on how diverse their client/customer teams are).

⁵ See, for example, paragraphs 13.3, 66.2 and 128 of the 2021 Submissions.

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