BRIEFING NOTE

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The Legal Implications of thermal temperature screening technology in the wake of Covid-19

Executive Summary

The use of fever screening technology has the potential to be a General Data Protection Regulation ("GDPR") and Privacy minefield for both employers and employees and any customers who may be screened.

Equipment that stores, records and processes data is likely to require careful consideration which we explore in more detail within this briefing note. Technology that does not record or store personal information about an individual will not create the same problems. Those implementing the technology would only then need to consider how to deal with exceptional cases if people show positive for an elevated temperature.

Introduction

The impact of Covid-19 across the globe has been extreme and far reaching, and the affects thereof are likely to be felt for some time. As the world grapples with the question of how to return to a 'new normality', businesses are now looking to the use of technology to assist them with the transition from a wide spread lockdown to finding their feet once again, safely.

One form of technology being considered is 'fever screening'. The technology works by scanning a thermal image of an individual's body temperature from their forehead and raising an alert if a temperature recording is above average, which is likely to indicate an illness. More simply, a business could choose to take an employee's temperature manually using a no-contact handheld thermometer pointed at their forehead. For the UK this is all relatively new territory. But across the globe, particularly in Asia, such technology has been embraced for some time and is now embedded as part of daily life.

Whilst the use of this technology is developing at a rapid rate, legal considerations, even in an emergency situation as we have seen with Covid-19, should always be given careful attention. Whilst we do not see any major problems for organisations, those considering implementing fever screening technology may wish to consider some of the following aspects:

Privacy

There is no express right in the UK for employers to monitor their staff, nor is there a prohibition on monitoring taking place. There is, however, a right to privacy which has been recognised in English law for some time, especially to give effect to Article 8 of the European Convention for the Protection of Human Rights, which has been enacted into UK law by the Human Rights Act 1998 ("HRA"). Article 8 (1) provides individuals with the right to respect for their private and family life and correspondence. With an anticipated increase in the use of fever screening technology, a question will be asked as to whether its use could constitute a breach of Article 8.

Whilst Article 8 (1) specifically refers to public authorities not interfering with the exercise of the conferred right, the Article and the HRA itself is of relevance to employers, including those in the private sector, and they will need to ensure they do not commit a breach of an employees' human rights in using the technology.

In the context of the Covid-19 pandemic, in particular, the use of the technology could potentially be argued to be an interference with the conferred right contained in Article (8) (1), on the grounds that the data obtained by the technology is private, relatingto an individuals private life; namely their health. However, it is considered that the exceptions set out in Article 8 (2) could reasonably be expected to apply. This would include the use of the technology being (a) in the interests of national security, public safety or the economic well being of the country; or (b) for the protection of health.

As to whether fever screening technology could amount to a breach of Article 8 will depend largely on the technology itself. However, when generally considering its use in a global pandemic situation, and the reason for its use being to minimise the spread of a contagious disease and safeguard employees and the public as a whole, the doctrine of proportionality (namely looking at the objective to be achieved and whether the action does no more than is necessary to achieve the said objective) is likely to prevail such that a breach does not arise.

Data Protection

Fever screening technology could possibly involve the processing of personal data, meaning the GDPR and Data Protection Act 2018 ("DPA") will apply. Personal data is information that relates to an identified or identifiable individual. This will be the case if the system makes a recording or record of the persons being screened and those individuals can be identified from the recording. It could also be the case if a record is kept when an alarm is set off and an individual is interviewed or screened further. If, however, the technology simply scans for an increased temperature and does not in any way identify an individual nor records any data, GDPR is unlikely to apply.

If the technology does process data, the extent of the personal data being obtained will, again, depend largely on the nature of the technology itself. It will, however, be classified as special category personal data because it relates to data about an individual's health.

To comply with the GDPR it is necessary to show the processing of such data is lawful (Article 6) by falling into one of the following categories:

- Individual consent has been given by the person;
- It is necessary pursuant to a contract you have with the individual;
- It is necessary in order to comply with the law;
- To protect someone's life;
- To enable you to perform a task in the public interest;
- For the individual's legitimate interests or the legitimate interests of a third party.

In addition, one of the conditions set out in Article 9 for processing special category data will need to be satisfied, such as:

- Explicit consent is provided by the individual concerned;
- Employment/social protection (if authorised by law);
- Health and social care (with a basis in law);
- Public health (with a basis in law).

Following the implementation of the GDPR and DPA, the Information Commissioner's Office ("ICO") produced an Employment Practices Code to assist employers with the GDPR obligations they generally face. One particular aspect the ICO Code focuses on is the monitoring of employees in the place of work. Subject to the nature of the technology, the screening of an employee would constitute monitoring, for which the employer needs to carefully ensure their compliance with the legislation.

To ensure there is no breach of the GDPR and DPA, employers should carefully consider the ICO Code alongside the legislation itself. A prudent approach to implementing the technology would be to provide information about the monitoring taking place to all employees. Typically, this can be achieved by introduction of a written data protection policy which, in addition to other aspects the employer needs to address, details the technology and the use of the data it obtains.

The employer would also need to satisfy themselves that the monitoring is justified and meet a proportionality test, where it will be necessary to consider (1) if there is a justification into the intrusion of the employee's private life, and (2) if the means used to carry out the monitoring are proportionate to meet the need.

Given the reasoning behind the implementation of the technology into the place of work, namely to minimise the spread of a contagious disease, providing the employer ensures they comply with GDPR and DPA, there would be strong grounds for its implementation to work compatibly with the applicable laws.

Overall, anyone looking to implement this technology will need to have a thorough understanding of the way in which it works and whether it''s functionality captures data that would fall within the GDPR.

Employment law

There are a number of employment aspects to consider when fever screening technology has been implemented in the workplace and an employee goes on to tests positive for having a high temperature. One question an employer will ask is whether they should send that employee home and, if so, what the employee's entitlement to pay is.

There are a number of reasons why an employer may require an employee to stay away from the workplace, one being health and safety grounds due to a possible risk of infection of others. If an employee has an increased temperature it is likely to indicate an illness which could pose a risk to others. Where the employee is able to continue their work from home and self-isolate then, subject to any provision in the contract of employment to the contrary, the employee will continue to be entitled to their normal rate of contractual pay and be able to carry out their duties at home, away from the workplace.

However, if the employee is unable to work from home due to the nature of their work (for example a factory or shop worker), and they are suspended on health and safety grounds due to a risk of infection, it is likely the employee will be entitled to receive full pay from their employer on the basis of the employer's implied duty to pay wages. However, regard would need to be had to the contract of employment to confirm that there is no express provision to the contrary, and also that the employee is contractually entitled to work. That said, if the employee is exhibiting symptoms and unable to work because of this, the employer is likely to be entitled to treat the employee as on sick leave rather than being suspended from their duties. The entitlement to pay will be subject to the terms of the individual contract of employment and, in the absence of any such provision, the employee may qualify for statutory sick pay.

Recommended Action

If an employer is considering implementing fever screening technology that records data, it would be prudent for them to make provision for such in a written policy. The policy should explain the reasons for the implementation of the technology and the procedures the employer has in place for complying with data protection in processing the data and the retention and erasure of such, as well as other safeguarding measures that are in place. The policy document should be reviewed and updated regularly.

Because the provision of information to an employee does not amount to consent, the employer should also consider taking their compliance a step further. One such way would be to obtain the employee's written consent to their participation in the screening and the processing of the health data produced, possibly by inserting a relevant clause into the contract of employment. This may give the employer extra peace of mind to ensure they do not fall fowl of the laws surrounding these issues.

Whilst fever screening technology is not a definitive answer as to whether someone has Covid-19, given that one symptom of the disease is typically a high fever, the technology may go some way to recognise those that may be unwell (whether with Covid-19 or other illnesses which cause an increased body temperature) and enable those individuals to be isolated so as not to cause wide spread infection.

Employers are responsible for protecting the health and safety of their employees in the workplace. At a time when employers are grappling with this responsibility and the need to get the wheels of their business firmly back in motion once again, the use of the available technology may go some way to strike a balance. It may also give comfort to employees, in knowing steps are being taken to protect them and the workforce as a whole when attending their place of work. By instilling confidence in both the employer and employee, it is hoped technology can be used to assist the recovery of the economy from some of the devastating effects of this disease.

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