Employee Data - Transfers Abroad

Section 11 of the Data Protection Acts 1988 and 2003 provide that personal data may not be transferred outside of the EEA unless the third country is deemed by the European Commission to have an adequate standard of data protection or at least one of the following eight conditions are met in that the transfer is

- consented to by the data subject
- required or authorised under an enactment, convention or other instrument imposing an international obligation on this State
- necessary for the performance of a contract between the data controller and the data subject
- necessary for the taking of steps at the request of the data subject with a view to his or her entering into a contract with the data controller
- necessary for the conclusion of a contract between the data controller and a third party, that is entered into at the request of the data subject and is in the interests of the data subject, or for the performance of such a contract
- necessary for the purpose of obtaining legal advice
- necessary to urgently prevent injury or damage to the health of a data subject
- part of the personal data held on a public register
- authorised by the Data Protection Commissioner, which is normally the approval of a contract, which is based on the EU model

The Commissioner considers, in all the circumstances, that it will be within the reasonable expectations of staff working for a multinational organisation, that routine, HR data will require to be transferred for routine HR purposes to the Corporate Headquarters of the organisation based outside of the EEA. Such data should comprise basic personnel information only. The Commissioner considers that the reasonable expectations of the employee entail an implied consent, which is inextricably linked with the employment contract and the employer/employee relationship. However, this view of the employee's reasonable expectations does not apply to the transfer of HR data which is defined as sensitive in the Acts, such as health data or criminal records data. The Commissioner also considers that it does not apply to data, such as employee assessments, which employees themselves would consider to be sensitive. If it is necessary to transfer such data, then one of the alternative conditions specified above must be met.

The Article 29 Working Party of European Data Protection Commissioners (Opinion No. 8/2001) has stated that where as a necessary and unavoidable consequence of the employment relationship, an employer has to process personal data, it is misleading if it seeks to legitimise this through consent. Reliance on consent should be confined to cases where the worker has a genuine free choice and is subsequently able to withdraw the consent without detriment.

The Commissioner considers that an implied consent, given in the employment context, is sufficient to legitimise the transfer of non-sensitive personal data to third countries. The Article 29 Opinion is relevant, however, in the context of sensitive personal data.

The European Commission provides both a model contract that can be used to legitimise a transfer outside the EEA and a list of countries outside the EEA that are deemed to provide adequate protection by virtue of their data protection law. The European Commission has also entered into a special arrangement with the USA known as 'the safe harbor'. The Article 29 Group of European Data Protection Commissioners are considering a procedure involving Binding Corporate Rules which would provide multi-national companies based in different EU States with a common means of transferring data to third countries. Further information on these can be obtained directly from the Commissioner's Office.