

### [Data Protection Series: Managing Records and Retention Periods]

Further to our previous [GDPR update](#), this article will examine data retention in the workplace and provide guidance for employers on how to establish appropriate retention periods when processing employee data.

Article 30 of the GDPR requires employers to maintain a record and description of its processing activities, including the purpose of the processing and the envisaged time limits for erasing personal data. This is usually contained in the employer's data retention policy, which should be made available to all staff.

The GDPR states that personal data may only be kept in a form which permits identification of the individual for no longer than is necessary for the purposes for which it was processed.<sup>1</sup> As it does not set out specific retention periods, employers should consider the following factors when deciding if and for how long personal data should be retained:

- (i) Mandatory retention periods under legislation;
- (ii) Legislative guidance; and
- (iii) Other relevant factors.

#### Mandatory retention periods under legislation

When establishing appropriate retention periods, employers should firstly consider any legislation which sets out a mandatory retention period.

Records	Retention Period	Rationale/Legal justification
Employee's terms and conditions of employment	The duration of the employee's employment plus 1 year.	Terms of Employment (Information) Act 1994
Employee's wages	3 years	National Minimum Wage Act 2000
Records of weekly working hours	3 years	The Organisation of Working Time Act, 1997
Employment records relating to persons under 18 years of age	3 years	The Protection of Young Persons (Employment) Act 1996
Records relating to collective redundancy	3 years	Protection of Employment Acts 1977-2007
Records showing the dates and times an employee availed of paternity, force majeure, adoptive and carer's leave	8 years	Under the Parental Leave Acts 1998-2019, Paternity Leave and Benefit Act 2016 and Carer's Leave Act 2001
Records of the dates and times an employee availed of parental leave	12 years	Parental Leave Acts 1998-2019
Tax Records	8 years	Companies Acts and Taxes Consolidation Act 1997
Employee permit records	Permit records must be retained for 5 years or a period equal to the duration of employment.	The Employment Permits Act 2003 to 2014
Records relating to an accident	10 years from the date of the accident	Safety, Health and Welfare at Work (General Applications) Regulations 1993

If employers are concerned about potential litigation at the end of the above listed periods, they may decide to retain the relevant data beyond the mandatory period. However, as the statutory period for bringing a claim is usually within 6 months (which may be extended by a further 6 months in limited circumstances), unless otherwise required, it is unlikely that the extension will be permitted outside of this 1 year period. Employers should review the retention of such data on a regular basis and bear in mind that unless there is a good reason for retaining such data, such personal data should not be retained.

<sup>1</sup> Article 5(e) GDPR

## Legislative guidance

Employers may choose to retain certain data which is not subject to a statutory retention period. If so, they must be able to rely on a legitimate basis. This may include retaining data to defend a legal claim, including:

- **Breach of contract:** Under the Statute of Limitations (Amendment) Act 2000, a claim for breach of contract can be brought up to six years from the date of the breach. It is generally advised that contracts (and any information relating to the contractual relationship) are retained for 7 years, as the plaintiff has 12 months to serve the proceedings after proceedings have been issued.
- **Personal injury claim:** Personal injury claims (including claims for psychological damage such as stress) must generally be taken within 2 years of the date of the cause of action (i.e. the event that caused the damage). A minimum retention period of 3 years is generally recommended, again to allow for the period of 12 months to serve the proceedings.
- **Access to employment/equality claims:** Individuals have a maximum of 12 months to refer a complaint to the Workplace Relations Commission (the “WRC”) under the Employment Equality Acts 1998-2015. As there is no statutory retention period for personal data relating to unsuccessful job candidates, it is advised that records relating to the interview/recruitment process are retained for at least 12 months from the date the position is filled to allow the employer to adequately defend any claim in the WRC.
- **Medical Records:** While there is no specific provision relating to the retention of medical records, Section 46 of the Data Protection Act 1988-2018 provides that the processing of special category data shall be lawful where it is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed under law on the employer or the employee in connection with their employment. As such, a balancing test should be applied between the right of the employer to retain medical data versus the relevant rights of an individual employee. Additional security measures should also be applied for storing medical records e.g. encryption of documents containing medical records of staff.

## Other Relevant Factors

If legislation or potential litigation do not provide guidance in respect of the appropriate retention period, the data should be retained for as long as is appropriate and necessary for the purpose for which the data was processed. This will be considered on a case-by-case basis. Employers should also consider:

- (i) **Internal policies:** For example, the disciplinary policy will usually state how long a sanction should be retained on an employee’s HR file. If the employer wishes to retain the data for any other purpose however, it must clearly identify this in its data retention policy.
- (ii) **Guidance issued by the Data Protection Commission (“DPC”):** For example, the DPC has previously advised that data submitted as part of the vetting application should be routinely deleted one year after it is received except in exceptional circumstances.<sup>2</sup> Such updates should be considered on a case-by-case basis as appropriate.

The employer may also anonymise data once it is no longer necessary that the individual be identified or identifiable. Data is truly anonymous, and no longer personal data, if the individual is no longer identifiable.

Provided that the retention periods adopted are justified and fully evidenced, employers should be in a position to demonstrate that the selected retention period is in accordance with the GDPR.

## Key Takeaways

1. Employers should conduct a **data mapping exercise** to capture the scope of personal data that is being processed in respect of its employees and the categories of personal data. As part of this exercise, employers should review the appropriateness of the data being processed and its purpose.
2. If the organisation retains data for longer than is required under statute, it must establish a valid reason for extending the retention period and determine when such data should be deleted. **Data minimisation** requires continuous assessment of the personal data being retained and why. If there is personal data being retained that is not considered appropriate and necessary for the specified purpose it should not be kept “*just in case*”.

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<sup>2</sup> As referenced in the DPC’s Annual Report 2017, available [here](#)

3. Employers must have a clear **retention policy** in place outlining their reasoning for retaining the data and ensure that the policy is accessible and applied to all staff in a consistent manner.
4. A **review of the organisation's data retention schedules, data retention policy and data storage locations** should be conducted on a consistent and regular basis. This should be performed in conjunction with data protection training being provided to staff. Documents which are no longer retained should be safely and securely deleted in accordance with the organisation's **destruction policy**.

*Our Employment & Corporate Immigration Department regularly advise employers in respect of data protection issues within the context of employment disputes. If you or your organisation has any queries regarding the issues outlined in this article, please contact Bláthnaid Evans or Sheila Spokes on +353 1 639 3000 or visit [www.leman.ie](http://www.leman.ie).*