

Employment & Employee Benefits Group

Enforced Data Access Requests - Now an Offence

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It is now a criminal offence for employers to require an employee or prospective employee to make a data access request or to supply the employer with the data obtained as a result of such a request.

Background

Any individual can freely make a request to an organisation for personal data that may be held about them and they can do what they want with that information. However, employers cannot make a request for personal data about an employee or a prospective employee. Up until recently, some employers may have required employees or prospective employees to make a data access request and furnish it with the result.

New Development

Section 4(13) of the Data Protection Acts 1988 and 2003 has now been brought in to force and makes it unlawful for employers to require employees to make a data access request seeking copies of their personal data (such as their criminal record from the Garda Síochána) which is then made available to the employer or prospective employer. In addition to the employer-employee relationship, the section also applies to contractors and service providers. The section has existed for a number of years but has only been brought into force with effect from 18 July 2014.

A breach of the section is a criminal offence punishable by a fine not exceeding €3,000 on summary conviction or a fine not exceeding €100,000 on indictment.

What should Employers do?

In light of this, employers should:

- review their recruitment procedures to ensure these requests are no longer made as part of any pre-employment screening; and
- review their template contracts of employment to ensure that submitting the results of a criminal record check is not a pre-condition of employment.

Instead, prospective employees may be asked, either as part of a pre-employment screening questionnaire, or by way of a pre-condition in the contract of employment, to confirm if they have any criminal convictions which are relevant to the role. This will mean that employers will have to go by the word of the prospective employee rather than getting that confirmed. Then, if it transpires at a later date that an employee gave a false declaration, this could be grounds for disciplinary action.

It should be noted that the above section applies to employment generally and is separate from the vetting service provided by the Gardaí for prospective employees in a number of specific areas, including where employees will have access to children or vulnerable adults.

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