

Employment Essentials

Group 1

GDPR

Sexual harassment

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Employment Essentials tonight...

- GDPR
- Sexual harassment
- Drinks and nibbles
- Feedback

The Simmons & Simmons team



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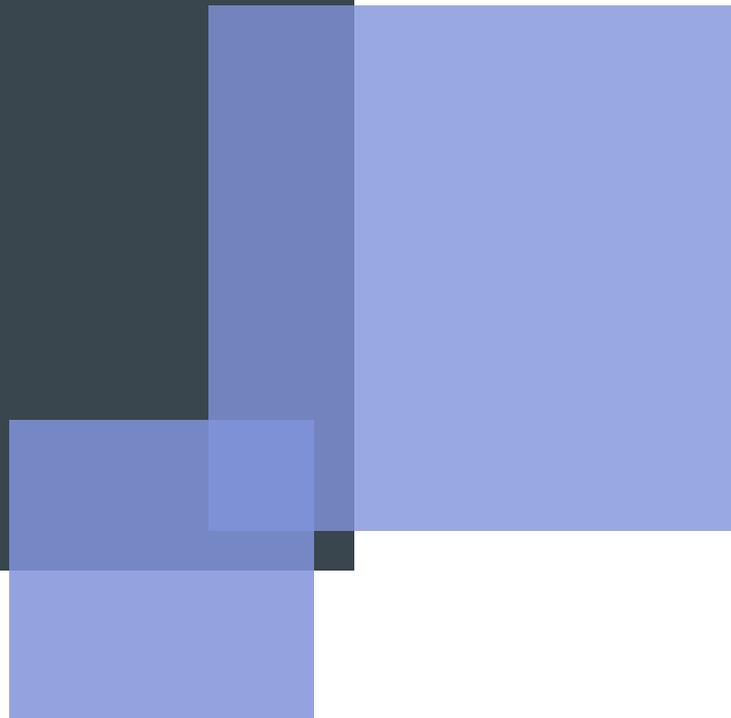


Roisin Murphy



Sarah Hayes

GDPR



What is the GDPR?

Overview of drivers for change

■ EU Data Protection Directive of 1995

- led to Data Protection Act 1998
- *output* focussed
- implementation patchy across EU
- since '90s huge advances in technology and our commercial use of data

■ General Data Protection Regulation

- *directly applicable* - greater harmonisation across EU
- prescriptive on *how* to achieve compliance
- more admin, bigger compliance burden and greater enforcement threat
- comes into effect on **25 May 2018** (regardless of Brexit)

What will change?

New and enhanced obligations

- Harder to obtain **consent**
- More **fair processing information** has to be provided to the individual
- Obligation to keep **comprehensive records** of processing activities
- Increased requirements for **contracts with data processors**
- New **rights for individuals** – e.g. ‘right to be forgotten’
- **Notification requirements** in the event of a data breach

What will not change?

Existing obligations to continue

- The GDPR builds on existing law
- **Data security** – remains a crucial area of compliance
- Requirements governing the **transfer of personal data** outside of the European Economic Area

Why is compliance with the GDPR important?

New penalties and other repercussions

- Maximum liability
 - under the current law, maximum liability in the UK is £500,000
 - under the GDPR, the highest of €20 million or 4% of annual worldwide turnover

- Litigation risk / reputational impact
 - poor privacy practices and data breaches are a hot topic in the media
 - customers and clients can lose trust following data breaches
 - *Morrison's case* – data controller was vicariously liable for a data breach carried out by a rogue employee (even though data controller had done as much as reasonably possible to prevent misuse of data). The application of this case could extend under the GDPR, given that data subject rights are paramount

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Key points in employee data lifecycle

- Consent and notification
- Data retention
- DSARs
- Criminal records checks

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Consent and notification (1)

■ **Consent** - personal data

- consent must be freely given, specific, informed and unambiguous
- ICO draft guidance suggests consent is agreement or clear, affirmative action
- consent can be withdrawn at any time
- imbalance of power in employment relationship – consent cannot be legal basis for processing

■ **Consent** – sensitive personal data

- if sought, consent must be explicit
- clear, affirmative action unlikely to suffice for explicit consent

■ Avoid use of consent as a legal ground for processing

- other grounds should be relied upon wherever possible

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Consent and notification (2)

■ **Notification** – fair processing information

- key right in Article 13
- where personal data is collected from a data subject, the data controller must provide certain information
- the information includes:
 - data controller identity
 - purpose for processing personal data and legal basis
 - recipients of personal data
 - detail of international transfers of personal data

■ **Data privacy notice**

- Employers are choosing to provide a data privacy notice setting out this information
- In order to provide this information, HR need to have a clear understanding of extent and nature of data processing activities

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Data retention

- Under Article 5, personal data should not be retained for longer than necessary for the purpose for which it was originally collected/processed
 - not prescriptive
 - however, should assess what personal data HR store and for how long (e.g. through a data retention policy)
- Keep in mind that minimisation of personal data processing is key for compliance the GDPR
 - avoid keeping employee documentation ‘just in case’ – an objective justification is required

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Data Subject Access Requests

- Key data subject right enshrined in Article 15
- Data subject right to:
 - a copy of the personal data
 - information relating to purpose of processing, categories of personal data processed, recipients of personal data, retention periods and others
- Timing
 - response without undue delay and within one month
 - extension of further two months possible if requests are complex / numerous
- Fee
 - information must be provided free of charge (no longer able to request a fee)
 - if request is manifestly unfounded or excessive, a fee may be charged in respect of administrative costs of providing information (i.e. should not be arbitrary fee)
- As yet, ICO have not published GDPR-specific DSAR guidance
 - previous guidance still helpful – concept of proportionality

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Criminal records checks

- Under Article 10 GDPR, personal data relating to criminal convictions and offences can only be carried out (1) under control of official authority or (2) when authorised by a Member State
- Legal grounds for processing are also required
- UK addresses this barrier of ‘authorisation’ in the Data Protection Bill:
 - The processing will be authorised by the UK if the following condition is met: *“the processing is necessary for the purposes of performing or exercising obligations or rights of the controller or the data subject under employment law, social security law or the law relating to social protection”*

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Practical tips (1)

■ Speak to your **organisation**

- is there an organisation-wide process taking place?
- can you seek input and knowledge-sharing from other divisions?

■ **Audit and scoping** exercise

- assess and establish what personal data you process
- map your dataflows (for example, intra-group, to third parties)
- establish what personal data you store and where, and for how long
- establish what security measures are in place (for example, who can access some categories of personal data)

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Practical tips (2)

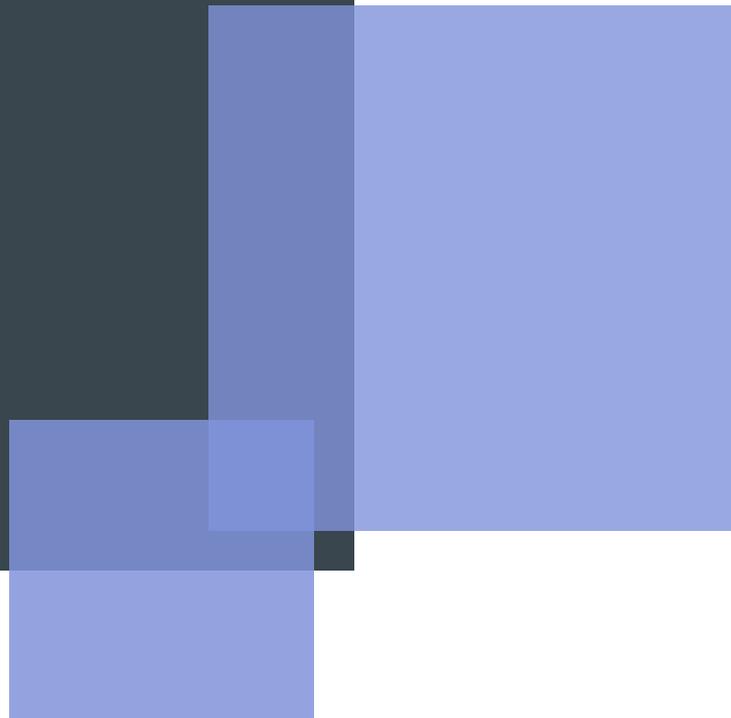
■ **Triage** approach

- the amount of change can be overwhelming
- take a risk-based approach by looking at the risk of the personal data processing activity against the level of corrective action required to comply with the GDPR and allocate a Red/Amber/Green status
- work through items on your RAG action list methodically

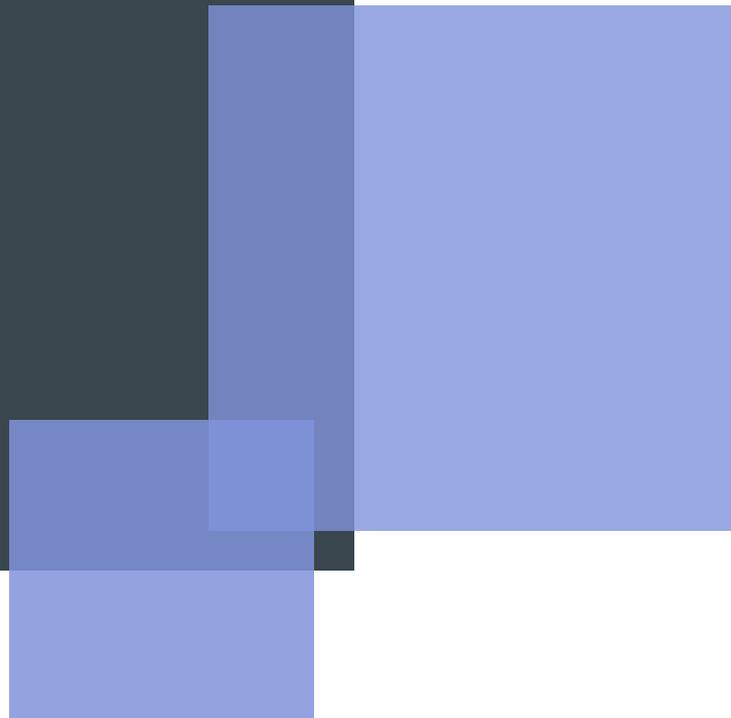
■ Update **documentation, policies and systems**

- using the information you have gathered in your scoping exercise, make informed changes
- concept of **data privacy ‘by design’** in your department
 - you can create an environment where data privacy is in-built
 - by having template employee documentation, creating/updating policies to be used day to day, organising training and increasing awareness of data protection principles, you can ensure the ‘way of doing things’ is GDPR-compliant

Any questions?



Managing complaints of sexual harassment



In the news

Weinstein suit may be turning point, experts say: 'They'll bring him down'



Sexual harassment

Startup workers see sexual harassment on 'breathtaking' scale in Silicon Valley

🏠 > News

Oxfam to set up independent commission to investigate claims of sexual exploitation

Oxfam scandal: report reveals sacked staff accused of sexual abuse were given new charity jobs despite warnings

SEAN MORRISON | 3 hours ago



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In the news – financial services

“Sexual harassment is horrific in the financial recruitment industry”

The Presidents Club scandal Show articles ▾

Men Only: Inside the charity fundraiser where hostesses are put on show



A furore has erupted over a men-only fundraising dinner in London for the Presidents Club charity after an FT investigation revealed hostesses at the event were groped, sexually harassed and propositioned. Here is the FT coverage of the event and its aftermath

DEBATE: With sexual harassment in the news, does the City need to confront its own problem?

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Carrie Osman and Alex Deane

ASSET MANAGEMENT

Two fifths of women in fund management suffer sexual harassment



What is sexual harassment?

- A harasses B if A engages in unwanted conduct of a sexual nature AND has the purpose OR effect of:
 - (i) violating B's dignity OR
 - (ii) creating an intimidating, hostile, degrading humiliating or offensive environment for B

- Different from harassment related to sex

Case study

ABC plc has received a complaint from an employee, Rana, that a senior manager within the firm, John Smith (“JS”) and his direct reports, have created an atmosphere where women are demeaned.

The complaint includes the following allegations:

- When individuals raise concerns about JS or his conduct, those concerns are ignored
- Inappropriate banter involving/about women in the team
- JS has made suggestive comments/advances to women in the team and those who have rejected JS’ advances/complained about him have been dismissed/not promoted/receive lower salary/bonus

The complaint has been passed to Sarah in HR.

Step 1: Evaluate the complaint

The complaints:

- JS has created an atmosphere where women are demeaned
- That where individuals raise concerns about JS or his conduct, those concerns are ignored
- That there is inappropriate banter involving women in the team and about women in the team
- JS has made suggestive comments/advances to women in the team and those who have rejected JS' advances/complained about him have been dismissed/not promoted/receive lower salary/bonus

Vague/unspecific
Difficult to investigate

Details - when made, by
whom or to whom /
documents?

When? Current? Historic?

Step 2: Carrying out the investigation – data and documents

- Have any concerns been raised previously **about JS**?
- Have **other individuals in that team** previously raised concerns of a similar nature?
 - Check HR records
 - Check exit interviews
- What is the gender balance of the team?
 - Promotions
 - Exits
 - Pay
- Email Searches
 - Do you have enough information?



Step 2: Carrying out the investigation – interviews

Scenario 1

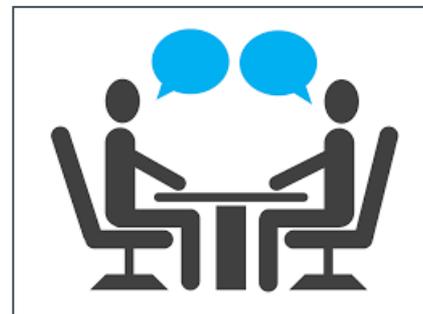
- Rana has been on a performance improvement plan over the last 3 months. HR are due to sit down with her at the end of next week to discuss her progress. Rana has been reluctant to engage and does not accept that her performance needs to improve.
- John came to HR 4 weeks ago raising concerns about Rana's communication style with him and with others in the team.

Scenario 2

- An anonymous letter was delivered to HR 8 months ago raising concerns about JS's management style.
- A search of JS's emails identified an email sent from him to a personal email account which described women in a derogatory manner.

Interviews

- Order of interviews
- Can you carry out interviews without the need to refer to the alleged perpetrators? Is it appropriate to do so?
 - Possible impact on JS' reputation
 - Could it be obvious who complainant is/might be?
 - Fairness of process if JS/direct reports are not aware of why they are being interviewed
- How much detail should you go into about the allegations?
- Balancing act
 - Review progress throughout
 - Consider corroborating evidence
 - Consider evidence that might suggest allegations are fabricated



Step 3: Conclusion of investigation

- Is there evidence to corroborate the complaints?
 - If so, consider whether appropriate to commence disciplinary proceedings/disciplinary investigation

- Do you need to take any general remedial steps?
 - Workplace communications
 - Additional training
 - Mechanism for raising issues

Tips to insulate the employer from potential problems

- Keep the number of individuals who know about the complaint to a minimum
- Educate the workforce
- Short term measures
- Have people of both sexes trained to hear complaints of sexual harassment
- Avoid making judgments
- Consider whether non-disclosure provisions are appropriate in any settlement agreement

Questions?

simmons-simmons.com
elexica.com