

New Data Protection Act in Switzerland:
highlights for employers

Beginning next month, on September 1st, 2023, all companies falling within its scope will have to comply with the requirements of the new Data Protection Act and its ordinances, which grant new rights to data subjects, including employees in the frame of their work. A range of new obligations for businesses and a reinforcement of existing requirements accompany this substantial legislative revision.

Main impacts for the employers

The new federal Data Protection Act (nDPA) introduces several major changes. The following will particularly impact companies, as they are data controllers of their employees' personal data.

- **Extraterritoriality:** the new regime applies to “circumstances that have an effect in Switzerland, even if they were initiated abroad.”.
- **Introduction of the “privacy by design” and “privacy by default” concepts:** “Privacy by design” concepts entails integrating data protection and user privacy into the core design of systems collecting personal data. “Privacy by Default” requires automatic activation of data protection measures without any user input. HR departments need to be aware of these requirements, which will be fundamental for HR projects.
- **Genetic or biometric data:** Whilst many companies that requested employees to submit biometric data as identifiers for security purposes had understood that such data belonged to the sensitive data category, the nDPA now explicitly classifies genetic and biometric data, which can be used to identify an individual as sensitive data necessitating explicit consent for their processing. Therefore, employers having implemented systems based on the processing of such sensitive information should confirm that they have properly collected the express consent of the concerned individuals and make sure that said sensitive information are processed according to their classification.
- **Additional information:** whilst many employers are used to having privacy policies on their websites, employees must now be provided with a more comprehensive list of information regarding the processing of their personal data. Therefore, employers need to make available or present to their staff, detailed privacy policies containing mandatory information related to the types of information, the various recipients, the locations of processing and the safeguards protecting the personal data processed.

- **Inventory of the processing activities:** the nDPA provides for the obligation to create and maintain a registrar of processing activities containing a number of mandatory information pertaining to the type of data processed, their recipients, locations where they are transferred as well as measures applied for their security. There are exceptions to this obligation; they mainly apply to smaller businesses: However it is strongly recommended to keep such register in order to properly fulfil the enhanced information duties and the new right to portability.
- **New right to portability:** employees, as any other data subjects, will have the right to receive their own personal data in a commonly used electronic format.
- **Profiling and new technologies:** in the age of emerging artificial intelligence, employers need to be aware that under the nDPA, employees as well as other people potentially affected (candidates), must be informed when a decision based on automated processes is made about them, if such decision has a legal or an otherwise significant effect on them. They must also be able to have such decision reviewed by a human person.
- **Notification of data security breaches:** controllers will have to notify to the Federal Data Protection and Information Commissioner (FDPIC) of certain serious security data breaches “as soon as possible” and they may also have to notify the individual affected to allow them to mitigate their risks. Employers routinely hold sensitive personal data of their employees; it is therefore likely that they would have to inform the authority in the event of a breach of their employees’ personal data.
- **Outsourcing:** whilst it is possible for an employer to outsource some of the processing of its employees personal data - often it will in relation to payroll or recruitment - additional obligations exists. Data controllers have the obligation to assess the appropriateness of the security level provided by the data processor, especially concerning the sensitivity of the processed personal data; this obligation is made more complicated when such processing is done abroad. The data processor will not be allowed to subcontract without the prior approval of the data controller; this in turn implies that said data controller has the obligation to verify that the personal data will not be submitted to higher risks as a result of the subcontracting.
- **Fines:** the nDPA introduces criminal fines for intentional violations of its provisions. It is important to note that said fines (up to 250,000 CHF) will fall on the person in charge (compliance officer, data protection officer, IT director, HR director....) rather than the employer.

Timeframe

The new provisions and regulations will enter into force on the 1st of September 2023. There will be no grace period.

Conclusions

Employers falling under the scope of the nDPA should take the following steps to ensure compliance:

- Review or draft employee's privacy policies to meet extended information requirements;
- Establish or update procedures addressing data subject requests (information and portability), and promptly handling data breach notifications;
- Develop or update data processing inventories;
- Consider whether appointing a representative in Switzerland is necessary.

Differences exist between the nDPA and GDPR. As a result, data controllers already in compliance with GDPR should still evaluate and adapt their processes to fulfill the increased documentation requirements.

Please do not hesitate to contact us should you have queries or need assistance:

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