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Amendments to Data Protection legislation

The Data Protection Act was created in order to implement the EU Data Protection Directive 1995 (95/46/EC) into Maltese law. The Act came into force on 15th July 2003. This Legal Notice was made to have retroactive effect and its provisions are deemed to have come into force on the 15th July, 2003.

The main scope of these regulations was to review the fee structure and to extend and simplify the notification process. The first period for notification and annual payment was extended from nine months to one year. Thus the date by when data controllers had to submit their notification was moved from the 15th of April 2004 to the 14th July 2004 and now the notification fee payable shall be of one year (and not for nine months). This amendment provides another opportunity for data controllers to adopt the necessary measures to comply with the data protection legislation.

The area which saw the most radical changes was that involving the fee structure. The previous tariff was based on the number of employees employed with the data controller at the time of notification. The fees ranged between Lm20 for those who have less than 20 employees to Lm1000 for applicants who had more than 500 employees. This had put a great strain on many local business and organisations since the fees were very high especially in comparison to other European states. Another problem with this was that this did not take into consideration that a number of organisations had registered with them a big number of part-timers which they seldom used. Moreover the minimum rate also applied for applicants who did not have any employees.

All this has been changed to a flat fee of Lm 10 for all employers (independently of the number of persons employed), with no charge being imposed for persons who carry on a trade, business, profession or other economic activity as a self-employed and who

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Working Time Regulations

Legal Notice 247 of 2003 has brought Maltese law in line with the requirements of the European Union Council Directive 93/104/EC, which has laid down the minimum requirements for encouraging improvements, especially in the working environment, to ensure a better level of protection of the safety and health of workers, specifically through rest periods, breaks and vacation leave. This new law will come into force on the 5th April 2004 (L.N. 414 of 2003) and therefore it is very important that all employers are fully aware of the significant changes which the Working Time Regulations will bring into effect.

Regulation 3 establishes that the Regulations shall apply to:

- minimum periods of daily rest, weekly rest and annual leave, and to breaks; and
- maximum weekly working time; and
- certain aspects of night work, shift work and patterns of work; and
- to all sectors of activity, both public and private unless otherwise provided in the regulations or in any other applicable law.

The Regulations, as with the Directive, are not applicable where there are more specific provisions relating to working time in other legislation, and where a collective agreement is more favourable to the protection of the safety and health of workers. Moreover the legislator provides that the regulations shall be read and construed together with the provisions of any applicable health and safety legislation and in the case of conflict, these regulations shall apply.

In defining 'Night time' - our law goes further than the Directive as it establish that this comprises the period between 10 p.m. of one day and 6 a.m. of the following day. The directive sets a minimum of seven hours during the night including the period between 12 p.m. and 5 a.m.

Every worker is entitled to a minimum rest period of 11 consecutive hours per 24-hour period during which the worker performs work for his employer.

Every worker working a working day of longer than six hours is entitled to a rest break. Moreover the details regarding the rest break, including duration and the terms on which it is granted, has to be in accordance with any provisions laid down in a collective agreements or agreements entered into between employers and employees. Furthermore, the break must be of not less than fifteen minutes and that the worker is entitled to spend it away from his workstation, if he has one.

Workers are entitled to a minimum of uninterrupted weekly rest

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do not have any employees.

Moreover an exemption from the payment of the annual fee, but not from the duty of notification, has been granted to the following organisations as long as such organisations are exempt from income tax: philanthropic institutions and other similar organisations; bona fide band and sports clubs; registered trade unions; and political parties and their clubs. Those submitting the notification form and who are exempted from the payment of the fee, shall, when submitting the form, state in writing why they are so exempted.

The amendments provide an exemption from notification to companies which only process the personal data contained in their Memorandum and Articles of Association as filed with the Registrar of Companies. In other words companies who only process the details of their shareholders, Directors and company secretary are exempt from notifying since the data regarding such persons is found in the Memorandum and Articles of Association of the company. Thus much of the holding companies, ITCs or other such companies, and dormant companies which do not really process information about individuals are now exempt from notification. If such companies start processing data about individuals other than those in the M&A then they will once again have the duty to notify and pay the fee.

In consequence of the above amendments the notification form itself has been amended so as to incorporate such changes and is available for download from the Data Protection Commission website www.dataprotection.gov.mt.

All the abovementioned amendments have improved our data protection law and the three months extension granted should be well utilised by all companies, business or organisations involved which have not complied with this law. Such data controllers need to first of all ascertain that they understand their obligations emerging out of the Act.

The predominant idea behind the law is not the prohibition from having personal data about individuals but that one must only possess and use any data he possesses in a manner that conforms with the law. Thus it is important for data controllers not to collect unnecessary information and to notify the data subject as to the intended purposes of processing. The Controller should ensure that such data is treated in an appropriate way and that the data is safeguarded. The duty to maintain the data as much as possible correct and up to date is also imposed on the controller. The controller also cannot retain unnecessary data and all data must be maintained in a secure manner. Every individual has a right to make a request to the

period of 24 hours, apart from the 11 hours per 24 hours as established in Regulation 4. This signifies that the Regulations afford to the workers a minimum of 90 hours rest every week. The Regulations allow the rest period of 24 hours not to be uninterrupted, where objective, technical or work organisation conditions so justify.

Article 16 (1) of the Directive gives an exemption in so far as it provides for a reference period of 14 days. This means that to arrive at the 90-hour rest period for every seven day period, a 14-day period is to be taken into account. This has also been incorporated in our Regulations whereby where the law gives the employee two alternate rights. These rights are that the two uninterrupted rest periods are not less than 24hours each. Alternatively the worker is entitled to a rest period of 48 hours preceded by a daily rest period.

The maximum average working time is of not more than 48 hours, including overtime. Moreover the Regulations establish that in computing the average working time does not include with it periods of annual leave, sick leave, and other leave which the worker is entitled to according to the any collective agreement or pursuant to relevant legislative provisions.

Here the Maltese Regulations are slightly more generous than the minimum set out in the Directive. The Directive sets a minimum of annual paid leave of four weeks whilst the Regulations set the minimum at four weeks and four days. This is to be calculated on the basis of a 40-hour working week and an 8-hour working day. As found in the Directive the four weeks minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. The additional four days may be replaced by an allowance in lieu. Moreover our law stipulates that an agreement to the contrary of the above is null and void.

Regulation 8 also provides that with the exception of the hours of annual leave entitlement which may be availed of as urgent leave, leave shall be availed of as whole working days, with the equivalent number of hours being deducted from the annual leave entitlement calculated in hours, unless otherwise provided for in a collective agreement or established by mutual consent:

The Regulations also establish that only up to 50% of the annual leave entitlement, may, by mutual agreement between employer and employee, be carried over to the next calendar year. Such vacation leave carried forward from the previous year will be utilised first, and may not be carried forward again.

Employees is in employment for less than 12 months in any calendar year are entitled to such annual leave as is in proportion to the period in employment.

Every whole-time employee shall be entitled to the national holidays and to all public holidays with full pay. When a national holiday or public holiday falls on a worker's day of rest, the worker shall be credited with extra hours of annual leave equivalent to the number of hours of a normal working day. However workers on irregular

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data controller as to what data he holds about him and the individual is also given the right to access and/or rectify the data and even the right to ask for the deletion of the data. The law also brings in the notion of sensitive personal data. This involves data which is of a sensitive nature such as race, religion, trade union membership, health and sex life. Such data is given added protection under the Act and cannot be used unless there is the specific consent of the data subject or for a necessary purpose as provided for in the Act itself.

In order for data controllers to maintain an ongoing monitoring of their duties it is advisable for them to appoint an internal Data Protection Officer. This is not a position envisaged in the law but such an appointment would help the smooth running in this regard. The law itself provides for the establishment of an independent Personal Data Representative. Such an appointment is optional but such a post is mostly advisable for large organisations which have substantial amounts of personal data. The role of such a PDR would be to independently ensure that the personal data is processed in a correct and lawful manner. The appointment of a PDR would exempt the controller from the need of certain notifications to the Commissioner.

Only after the above aspects have been rectified can data controllers proceed to fill in the notification form. Such notification must be rigorously completed so as to truly show what data the controller has and the purposes of processing it is used for. The scope of such notification is for the Data Protection Commissioner to keep control of the data held by the different data subjects. The Commissioner has the duty to create and maintain a public register of all the processing operations of the controllers as these emerge from the notifications. The Commissioner is empowered to verify, whether the processing that is being carried out is in accordance with the provisions of the Act and may issue directions as required, and also has the power to institute civil and criminal legal proceedings where the provisions of the Act have been violated.

Achieving compliance with the Data Protection Act is a valuable opportunity for businesses to enhance the treatment and use of personal data in a manner that respects the right to privacy of the individual and the needs of the business. ❖

schedules or where the hours of work vary from day to day, the hours of work equivalent to a working day which are to be credited to the annual leave entitlement of such workers when a public holiday or a national holiday falls on a day of rest shall be calculated on the basis of the number of normal hours scheduled to be worked in a 17 week period, divided by the number of working days in that same period."

Regulation 9 establishes that a night's worker's normal hours of work shall not exceed an average of eight hours in any 24-hour period. The number of hours worked each night is worked out according to the number of hours worked in a reference period. Now a reference period is defined either by a collective agreement or else by any period of 17 weeks in the course of employment. However if the employee has been in employed for less than 17 weeks then the reference period is the period that has elapsed since the commencement of the employment.

The Regulations are coherent with the directive as they cater for the night workers whose work involves special hazards or heavy physical or mental strain. As stipulated in the Directive these must not work more than eight hours in any period of 24 hours during which night work is performed.

The Maltese Regulations lay down the manner in which special hazards or heavy physical or mental strain is recognised. These are identified by means of either:

- (a) a risk assessment carried out by the employer pursuant to article 6 of the Occupational Health and Safety Authority Act; or
- (b) appropriate provisions in collective agreements pursuant to regulation 3(4) of these regulations specifying particular work activities, taking account of the specific effects and hazards of night work.

Health assessment and transfer of night workers to day work (Regulation 10)

Regulation 10 delves into the issues of non-disclosure of a health assessment. No person shall disclose a health assessment made for the purposes of this regulation to any person other than the worker to whom it relates, unless -

- (a) the worker has given his consent in writing to the disclosure, or
- (b) the disclosure is confined to a statement that the assessment shows the worker to be fit or unfit as the case may be prior to undertaking an assignment, or to continue to undertake an assignment.

The duty of the employer to ensure that night workers undergo suitable health assessments can be said to have been introduced as one of the guarantees envisaged by the Directive in Article 10.

The law stipulates that if a registered medical practitioner demands that due to health problems which he considers to be night work

related and if in this eventuality the employer has the possibility of transferring the worker to work which is more suitable for him and which is not undertaken during such periods, then the employer shall transfer the worker accordingly.

Regulation 11 imposes the duty on the employer to keep adequate records on any workers carrying night work to show that there is suitable compliance with the provisions the Regulation. Moreover the employer has the duty to furnish the Director with information, whenever requested, related to night work.

The duty of the employer to ensure the safety and health protection appropriate to the nature of their work of night and shift workers. Employers have to ensure that workers are given adequate rest breaks and these must be to the satisfaction of the Director especially when it is shown that the manner of the work pattern is such as to put the health and safety of a worker employed, at risk.

Regulation 13 provides a number of exceptions where Regulations 4, 5, 6, 7 and 9 do not apply. These do not apply in relation to a worker where, on account of the specific characteristics of the activity in which the worker is engaged, the duration of the working time is not measured or predetermined or can be determined by the worker, as may be the case for, but not limited to –

- (a) managing executives or other persons with autonomous decision-taking powers;
- (b) family workers; or
- (c) workers officiating at religious ceremonies in churches and religious communities.

Regulation 15 gives a number of instances where there is a derogation due to particular circumstances. These include activities where the worker's place of work and place of residence are distant from one another; where due to security and surveillance purposes permanent presence is required as may be the case for security guards and caretakers or security firms; activities involving the need for continuity of service or production, as may be the case in relation to – services in provided in hospitals, residential institutions and prisons; work at docks or airports; work in telecommunications services; work involving civil protection services; work in agriculture, tourism and postal services when there is a foreseeable surge of activity; and a number of other instances where interruption is not possible.

Regulation 16 also gives some other exceptions with regards to Shift Workers. The regulations relating to daily rest and weekly rest do not apply respectively the worker changes shift and cannot take daily and/or weekly rest periods between the end of one shift and the start of the next one. The daily rest provision also does not apply to workers engaged in activities involving periods of work split up over the day, as may be the case for cleaning staff.

Legal Notice 247 of 2003 on Working Time will come into force on the 5th April 2004 (L.N. 414 of 2003) and therefore it is very important that all employers are fully aware of the significant changes which the Working Time Regulations will bring into effect. ❖

CDF

ADVOCATES

20, Cannon Road, St. Venera HMR 07 MALTA
Tel. (356) 21223334 Fax & Ans. (356) 21248594
E-mail: info@cdf.com.mt Web Site: http://www.cdf.com.mt

Regulatory Monitor is a free electronic service of CDF Advocates available to subscribers at our web-site www.cdf.com.mt

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