

HOW SHOULD WE DEAL WITH HR DATA DURING THE DUE DILIGENCE PROCESS FOR A SHARE OR BUSINESS SALE UNDER THE GDPR?

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Suzanne Horne, partner at Paul Hastings (Europe) LLP, puts forward some top action items when dealing with HR data during the due diligence process on a share or business sale under the EU General Data Protection Regulation (GDPR).

by *Suzanne Horne*, Partner, Paul Hastings (Europe) LLP

“There was a guy on the bus talking about it this morning”, said one of our fantastic trainees who loves data. Yes, the General Data Protection Regulation (GDPR) is what that infamous man on the Clapham omnibus is now chatting about.

Over the last ten years, most companies have dutifully removed the names of employees before they upload the employee census to the data room or relied upon the ICO’s guidance note on Disclosure of Employee Information under TUPE to navigate the process as part of a business sale. But, we are about to enter a ‘brave new world’ where this approach is just one tip of the proverbial iceberg.

Here are our top action items:

- 1. The GDPR means privacy principles should be ‘baked into’ the whole deal lifecycle – from planning through to post-closing.
- 2. The GDPR’s extra-territorial effect means that if the non-EU target group holds EU data or offers goods and services to EU citizens, your deal is caught.
- 3. Engage a great virtual data room (VDR) vendor. Ask them to set out what they have done to change their processes in light of the GDPR and take a closer look at their standard Ts & Cs to make sure they have addressed key items such as data security and deletion of data post-close. Then take advantage of their safeguards and NDAs and make sure the team really do route everything through that system.
- 4. Adopt an auction style phased approach to disclosure. Then the data you initially upload is high-level, truly anonymised and not even covered by the GDPR.
- 5. You still need a lawful basis for processing. The reality is that the deal team is not going to approach each of the in-scope employees and ask if they will give their informed and unambiguous consent to the disclosure of their personal data to a range of potential buyers. Therefore, make sure your information notice is sufficiently transparent to cover M&A before you start the process and then do your balancing act on the legitimate interests basis.
- 6. Keep records. The new principle of accountability means you need records. Use a truncated privacy impact assessment setting out your analysis on the bases for processing even if the deal isn’t that big.

RESOURCE INFORMATION

RESOURCE ID

w-013-7667

RESOURCE TYPE

Articles

PUBLISHED DATE

16 March 2018

JURISDICTION

United Kingdom



- 7. Even when you get to Phase 2 or a preferred buyer, appropriately cull your data before you start uploading. Template contracts are fine. An employee census with material terms by reference to unique identifiers is sufficient. Apply these principles to the Q&A. The buyer does not need to know the ins and outs of those on maternity leave. In a business sale, you will continue to have an obligation to provide the Employee Liability Information but this is a later action item.
- 8. Make sure your GDPR compliance programme extends to HR data as that could impact price.
- 9. As a potential buyer 'diligencing' the HR data, we all need to dig a bit deeper and ask more questions. What questions depends on the nature of the target's business and where the HR data is stored. Your basics will be a review of the information notices, contracts of employment referring to consent to transfer personal data outside of the EEA, the privacy policy in the staff handbook, training, and any on-going or recent DSARs or data breaches. The potential sanctions means that a compliance with laws warranty is no longer adequate.

As we approach 25 May and given how deals move at pace, parties on both sides of the transaction need to be savvy to the issues flowing from handing HR data in the GDPR world.