香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

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8 July 2010

By Fax and By Post
(Fax No: 2511 8142)

Mr Lam Woon Kwong
The Chairperson
Equal Opportunities Commission
19/F, Cityplaza Three
14 Taikoo Wan Road
Taikoo Shing
Hong Kong

Dear Mr. Lam,

Consultation on the Revised Code of Practice on Employment under the Disability Discrimination Ordinance

Thank you for your letter dated 8 April 2010 inviting my Office to provide comments on the Revised Code of Practice on Employment under the Disability Discrimination Ordinance ("Revised Code").

2. While the Revised Code serves as a comprehensive guide on the application of the Disability Discrimination Ordinance ("DDO") in the context of employment, my main concern is its implications on individuals' personal data privacy. In this connection, my Office has issued a Code of Practice on Human Resources Management [1] ("HR Code") which provides practical guidance to employers and their staff on how to properly handle personal data that relate to each phase of employment process. In providing my comments to your Revised Code, I have drawn reference to the relevant provisions in the HR Code. My comments on the Revised Code are provided below.

[1] Available at http://www.pcpd.org.hk/english/ordinance/files/hrdesp.pdf

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Recruitment

Application forms

3. Paragraph 6.16 of the Revised Code refers to application forms that request for unnecessary information that put a person with a disability at a disadvantage. I concur that requesting for unnecessary information from job applicants should be discouraged. In this connection, Data Protection Principle ("DPP") 1(1) in Schedule 1 to the Personal Data (Privacy) Ordinance ("the PDPO") provides that personal data shall not be collected unless they are necessary for a lawful purpose directly related to a function or activity of the data user and the data collected are adequate but not excessive for that purpose. In employment context, an employer may compile information about a job applicant to assess the suitability of potential candidates for the job provided that it does not in the process collect personal data that are excessive in relation to the purpose. (Clause 2.2.2 of the HR Code refers).

Aptitude or other tests

4. Paragraph 6.22 of the Revised Code deals with the situation where employees are required to take routine aptitude or psychological tests which may discriminate against individuals with particular disabilities. In general, the result of an aptitude test or a psychological test may be regarded as personal data of the applicant taking the test. From the privacy perspective, it is pertinent that prior to conducting such kinds of test, employers should assess whether routine testing is justified and to ensure that the employees are made known of the reason why frequent testings are required.

Medical test and health screening

5. Paragraphs 6.30 to 6.32 of the Revised Code provide for medical tests and health screening of job applicants. It is stated that in order to ensure a candidate is capable of performing the inherent requirement(s) of the job, a prospective employer may require the candidate to undergo a medical examination. It would be good practice that medical tests or health screening is only conducted after a conditional job offer has been made and a medical report that merely states that an applicant is "unfit for work" would be inadequate and require further elaboration.

6. As medical data of an individual is sensitive personal data in nature, an employer should not collect medical data from a job applicant unless they are directly related to the inherent requirements of the job and that the data are collected by means that are fair in the circumstances and are not excessive in relation the purpose (Clauses 2.9.1.1 and 2.9.1.3 of the HR Code refer). As regards the timing of the medical examination, it should only be done after a conditional offer of employment is made to a selected candidate (Clause 2.9.1 of the HR Code refers). Concerning the details of information to be included in the medical report, the employer needs only to be provided with minimum information about the applicant's health condition that supports the medical practitioner's opinion that the candidate is fit for employment. Details of the candidate's medical history and treatment may be relevant for the medical practitioner when conducting the medical check with the applicant, but these details may not be necessary for the employer to make an employment decision.

Current Employment

Medical Certificates

7. Paragraph 7.18 concerns the making of reasonable and appropriate enquiries by employers for verification of overseas medical certificates submitted by employees. I generally agree that employers may make reasonable and appropriate enquiries for verification if they are doubtful about the authenticity and/or validity of overseas medical certificates submitted by employees. Having said that, employers should be reminded that personal data collected through enquiries should be restricted to such an extent as they are adequate but not excessive for the purpose of verifying the relevant certificates only, e.g. patient's name, date of consultation and the diagnosis. Moreover, in making the enquiries, the amount of personal data to be disclosed to the overseas medical practitioners should be limited to the extent necessary for making the verification.

Medical Reports

8. I agree that there may be circumstances where it is necessary for an employer to obtain a medical report, in addition to medical certificate, in order

to assess an employee's sick leaves application. I am glad that the request for such a report is already qualified in paragraph 7.22 of the Revised Code by the phrase *"necessary and justifiable such as to help (employers) to determine whether employee's disability would prevent him or her from performing the inherent requirements of the job and to consider the provision of accommodation where possible."* One further point to add is that the extent of personal data required by an employer should be limited to those necessary for making the determination. Normally, medical history may not necessarily be relevant for assessing an employee's application for sick leave for a short period.

Disclosure of information to medical practitioner

9. When administering sick leaves application, an employer may consider it necessary to obtain advice from a medical practitioner under special circumstances, for example, when an unreasonable long period of sick leave is sought. I note that a list of information to be provided to medical practitioner by the employer concerning the duties of the employee with disability is stated in paragraph 7.23 of the Revised Code. In my view, those items in the list should be provided when there is a reasonable necessity for disclosure having regard to the special circumstances of the employee in question. In addition, some information e.g. intellectual and emotional demands, such as stress factor (paragraph 7.23.5) and updated record of sickness absences (paragraph 7.23.7) is sensitive in nature that should be handled with great care and security measures be adequately provided in the course of transmission of the information.

10. A list of questions is further provided in paragraph 7.24 of the Revised Code in order to help medical practitioner to compile a report that addresses the employer's concern. In my view, employers should be reminded to exercise independent judgment having regard to their own particular situation when deciding which questions are proper and necessary to determine whether an employee with disability should be retained.

Health and Safety consideration

11. Paragraph 7.31 of the Revised Code states that where there are reasonable concerns about an employee's ability to perform duties safely, an

employer should obtain supporting medical information from relevant professional. I agree that safety is of paramount importance in workplace. However, one should bear in mind that the employee has no statutory duty to accede to an employer's request to undergo medical examination. As provision of medical data by the employee should be voluntary and no undue inference should be exerted in the course of obtaining the employee's consent, I believe it is important to let the disabled employee know the underlying reason for conducting the medical examination, i.e. the employer's genuine concern about his safety as well as others. By then, the disabled employee will become more willing to accede the request.

Performance appraisal

12. Paragraph 8.10 of the Revised Code requires employers to retain records of promotion for a period of at least twelve months. That is an open-ended period. I note from footnote 28 that the timeframe for lodging a complaint with your Commission about discrimination is 12 months and that of bringing a civil claim to the District Court is 24 months. It is undesirable that the retention period is left open without prescribing a definite period. While one may say that an employer will have more flexibility in deciding on the retention period by taking into account various other factors, employers may find it more practical if the regulator prescribes a definite period for easy compliance. In this connection, DPP2(2) of the PDPO provides that personal data shall not be kept longer than is necessary for the fulfillment of the purpose for which the data are or are to be used. For your reference, it is specified in the HR Code that generally an employer may retain an employee's personal data no longer than 7 years from the date of cessation of employment (Clause 4.2.3 of the HR Code refers).

13. I hope you will take into account of my comments above in fine-tuning the Revised Code.

Yours sincerely,

(Roderick B. WOO)
Privacy Commissioner for Personal Data