News & views

Business Law

How to comply with new rules on cookies

May 2011 saw the introduction of new rules governing cookies. In this article, we consider what the change means for businesses and offer a checklist to ensure you comply with the new rules.

Cookies gather information about website visitor activity, a process which has been shown to lead to increased dissemination of personal data.

The changes

Before May 2011, website visitors had the right to 'opt-out' of having cookies downloaded onto their computers or mobile devices. Without proper information relating to the effects of the cookies, visitors rarely did so. The changes mean that the visitor's consent will be actively required before cookies can be downloaded onto their devices. Website operators will need to give sufficient information to allow the visitors to make their decision. Businesses have been given a year's grace, to May 2012, to deal with the practicalities of this change.

Scope of the changes

The new rules will apply to every type of cookie except where the use of the cookie is 'strictly necessary' for a service requested by the user. The Information Commissioner's Office (ICO) gives as an example when a website visitor has chosen goods that they wish to buy and clicks the 'add to basket'. The site 'remembers' the selections from a previous page. Here there is presumed consent to the cookie being downloaded as part of the purchase process. It remains to be seen how this exception will be applied in practice.

Action to take

1. Prepare a cookie inventory

The ICO has suggested that a starting point for website operators will be to audit their websites to ascertain which cookies are strictly necessary and might not need consent and identify those that will. Continued on page 2

From the Editor

Welcome to the December 2011 edition of Business Law, Thomson Snell & Passmore's newsletter highlighting some key issues relating to business law.

If you would like further advice on any of the issues covered please contact **James Herbert**, Partner and Head of **Corporate & Commercial**.

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Businesses have been given a year's grace, to May 2012, to deal with the practicalities of this change.

2. Understand your cookies

The new rules will give a higher level of privacy protection to internet users. By asking 'how intrusive are the cookies?' it will be possible to determine whether consent is required.

3. Formulate a consent mechanism for intrusive cookies

Browser settings may act to give implied consent. Other possible approaches include pop-ups, terms and conditions, website settings and website features.

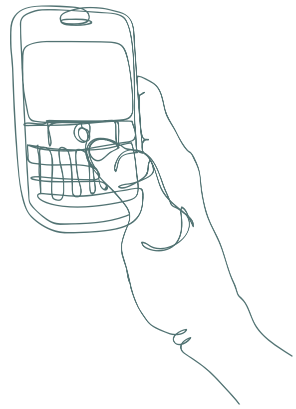
Irrespective of the mechanism used to obtain consent, website operators must tell users what cookies are used and what information will be taken.

4. Take action to demonstrate that you are planning to comply with the new rules

The Information Commissioner has said that it will not take enforcement action against businesses and organisations while they are actively working to address their use of cookies.

5. Keep up to date with official guidance

Both the ICO and the Department for Culture, Media and Sport have issued guidance and commentary on how the new rules will be implemented. See www.ico.gov.uk and www.culture.gov.uk. ■



The Bribery Act finally comes into force and the first conviction is handed down

The Bribery Act came into force on 1 July 2011 after delays caused by uncertainty over its implementation and effects.

The Serious Fraud Office will want to send a message to 'big business' that it will not tolerate corruption.

The Bribery Act introduces new criminal offences relating to the making and receipt of bribes. It also introduces a new criminal offence for businesses with a UK presence that fail to prevent bribery carried out by people working on their behalf. To defend themselves against this charge, businesses will need to show that they have adequate measures in place to prevent bribery.

Guidance from the Ministry of Justice makes clear that businesses should implement bribery prevention policies that are proportionate to the scale and complexity of their activities. They should also ensure high level engagement in the creation of bribery policies and keep the policies under constant review.

The guidance is available through the Ministry of Justice website:

http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm

The first prosecution began soon after the Act came into force and has resulted in a conviction. At the time of going to press, the sentence had not been published. In the case, an administrative court clerk from Redbridge Magistrates' Court was charged under the Act over allegations that he asked for and accepted a £500 bribe in relation to a motoring offence.

The Serious Fraud Office will want to send a message to 'big business' that it will not tolerate corruption. For now, we will have to wait for a significant prosecution before assessing the true impact of the Act. In particular, it will be interesting to see how the Act affects international businesses with a UK presence. These businesses frequently engage intermediaries in various jurisdictions and they will be under pressure to comply with the new rules.

For more information, please visit our website www.ts-p.co.uk and search for 'Bribery Act'.

Times are tough – terminating a contract early and dealing with late payments

As economic conditions alter, it sometimes becomes necessary for businesses to reassess their existing trading arrangements. Two areas on which we are regularly asked to advise are whether it is possible to exit a contract early and how to deal with late payers. This article considers the options.

The aim should be to maintain a good relationship with the other party.

The early exit route

Half way through the contract term, a business considers whether to renegotiate early to reflect the pricing pressure it is under.

The legal position

It is not possible to break or renegotiate a contract before the end of the contract period, unless it allows you to. Early renegotiation clauses are unlikely. More likely are clauses that allow for price variation as supplier costs fluctuate.

Contracts do often include a right to terminate early. This could provide leverage to open negotiations. Common termination clauses operate after a breach of contract or the insolvency of one party. Termination may also be possible by giving notice. Consider whether any of these rights can be triggered.

The commercial position

Ultimately it will be necessary to approach the other party in order to renegotiate. The aim should be to maintain a good relationship with them. Where contracting parties are anxious to preserve their relationship, a sensible commercial discussion may be possible.

If early renegotiation is not possible, action can be taken at renewal time. Termination rights, flexible pricing clauses or pricing linked to minimum orders could be negotiated at this time.

Strategies for renegotiating and, possibly, exiting unprofitable contracts should only be carried out with legal help. The repercussions of getting it wrong are serious and could have a negative effect on the profitability of your business.

Dealing with late payers

A business's terms and conditions require payment within 60 days. Despite this many customers pay late, with the resulting negative impact on cash flow.

The legal position

There is an EU Directive in place intended to help with this very scenario. The Directive creates a mandatory 30 day period for most payments. In addition, it sets a statutory rate of interest at 8% above base rate. Defaulting customers are liable to pay compensation and reimburse reasonable recovery costs, if they have to be pursued for payment.

The commercial position

In practice, it is hard to enforce these rights against important customers. Even so, it is important to put down a clear marker in relation to payment periods and interest at the outset.

Be consistent in pursuing late payers and debtors. Terms should be amended to require payment within the shorter 30 day period. Remember to ensure that your existing customers receive a copy of any revised terms, with the changes highlighted.

Successfully defending an Employment Tribunal claim

It is quick and easy for an aggrieved employee to start a claim in an Employment Tribunal. This leaves the employer with a difficult decision – to defend the claim or settle. In this article, Susanna Gilmartin, Partner in Employment, gives guidance to employers.

To issue an Employment Tribunal claim simply requires an employee to complete a form online and email it to an Employment Tribunal. There is no issue fee and there are no costs awarded to the successful party. This means that an employee can start a claim on a purely speculative basis in the hope of triggering a settlement offer from the employer.

Faced with the costs and the time-consuming nature of defending a claim it is tempting for an employer to try and settle the claim on a commercial basis. Companies often feel that the odds are stacked against them and that tribunals are employee-biased making it more cost- effective to settle. However, the benefits of settling a claim need to be weighed up against the costs to a business of being seen as a 'soft touch'. This can result in an increased number of claims and disputes with employees who believe that they may be able to secure a quick compensation win.

The key for employers is to take charge of the claim from the start and follow these key steps:

- prepare a defence setting out clearly and concisely the chronology of events and the processes applied;
- identify the legal weaknesses of the claim. Highlight these from the start and keep highlighting them throughout the case;
- attack the credibility of the claim by drawing out inaccurate and false information used by the employee to support his/her claim;
- make appropriate cost warnings during the conduct of the case. Tribunals will award costs for unreasonable conduct during the course of the proceedings – pursuing a claim that has no prospects of success is unreasonable conduct;
- recommend to an employee who is not legally represented that they seek independent legal advice as to the merits of their claim. There are many free employment advice centres and Judges are not sympathetic to claimants who do not seek advice, particularly when they are invited to do so and their claim has little legal merit;
- invest time in preparing detailed witness statements setting out the background to the claim and putting the issues in dispute into context;
- admit from the start if part of a process has been missed out or not followed. Nothing will irritate a Tribunal more than an employer trying to justify actions and processes it has not implemented. Do however provide an explanation for failing to follow a process.

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The employment team holds regular mock tribunal events, designed to give you a chance to experience the realities and drama of a tribunal hearing. You can view a video podcast of a recent mock tribunal on our website at http://www.ts-p.co.uk/our-services/employment/managing-claims-and-employment-disputes. For more information, please contact Susanna at susanna.gilmartin@ts-p.co.uk.