Much has happened since the European Union (EU) General Data Protection Regulation (GDPR) went into effect on May 25, 2018. Many EU countries have enacted national legislation to implement and expand the requirements of the GDPR, while other developments have directly affected employers and created new obligations regarding the collection and processing of human resources (HR) data.

This article, which addresses threshold issues of GDPR coverage, is the first in a four-part series of articles examining national legislation, opinions, and guidelines that have been enacted or promulgated clarifying the GDPR’s requirements. Subsequent articles in the series will cover data protection impact assessments, claims alleging violations of the GDPR, enforcement actions, and fines that have been issued.

On November 16, 2018, the European Data Protection Board (EDPB) issued for public comment guidelines on the territorial scope of the GDPR. The EDPB—the successor to the pre-GDPR Article 29 Working Party—consists of representatives from the supervisory authorities or data regulators of each EU country and the European Data Protection Supervisor. The EDPB issues opinions, guidelines, and recommendations for best practices regarding the GDPR.

The EDPB Guidelines provide that the GDPR applies to the processing of personal data in two circumstances. First, the GDPR applies to data processing in connection with the activities of an “establishment” within the EU. An organization will be deemed to have an establishment in the EU if it exercises a real and effective activity through stable arrangements within the territory of the EU, regardless of its legal form (e.g., subsidiary, branch, or office). The presence of a single employee or sales representative in the EU will be sufficient to create an establishment in the EU so long as the employee or sales representative acts with a sufficient degree of stability. However, a non-EU entity will not be deemed to have an establishment in the EU solely because (1) its website is accessible from the EU, (2) it is using a data processor located in the EU, or (3) it is required to designate a representative in the EU.

If an entity has an establishment within the EU, any data processing that is inextricably linked to the activities of the establishment will be covered under the GDPR regardless of where the processing takes place. Thus, if an employer with an establishment in the EU outsources its HR data processing to a third-party service provider, parent company, or other affiliated company, such processing will be covered under the GDPR even though the outsourced data processing takes place outside the EU. Further, if an establishment as part of its business activities in the EU processes the HR data of employees or job applicants who are not located in the EU,
then such processing will be covered under the GDPR. For example, if a French parent company processes the personal data of its U.S.-based employees, such processing will be covered under the GDPR.

Second, even if an organization does not have an establishment in the EU, the GDPR will apply to the data processing of individuals who are in the EU if “the processing activities are related to (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the [European] Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the [European] Union.”

The Guidelines state that offering employment is not considered to be “offering goods or services.” Thus, employers that do not have establishments in the EU will be covered under the GDPR only if they monitor the behavior of job applicants, employees, and former employees in the EU. The Guidelines also provide that data subjects “in the [European] Union” are persons who are located in the EU at the time they are monitored for their behavior. The nationality, residence, or legal status of the individual is irrelevant. Thus, non-EU expatriate employees working in the EU will be covered. Finally, the Guidelines confirm that “monitoring” includes online tracking, closed-circuit television (CCTV) video surveillance, the monitoring of mobile devices, and other offline activities such as the monitoring of health status if the purpose for processing the data is to analyze or predict personal preferences, behaviors, and attitudes.

Based on the Guidelines, the following types of HR data processing are covered under the GDPR:

- All HR data processing performed by an EU company or a subsidiary or affiliate of a non-EU company located in the EU that employs one or more employees and regularly conducts business within the EU. This is true even if the processing of the HR data is performed on behalf of the establishment by a processor such as a third-party service provider, parent company, or affiliated company, regardless of the location of the processor. Further, data processing of employees or job applicants who are located outside the EU will be covered if such data processing is inextricably linked to the activities of the EU company.

- HR data processing performed by a non-EU company that employs one or more remote employees or that contracts with one or more sales representatives who exercise real and effective business activity within the EU.

- Data processing performed by a non-EU company (such as a U.S. parent company) that involves the monitoring of employees based in the EU, including the monitoring of employee computer, email, and Internet usage; the monitoring of employee location data through GPS, access controls, or surveillance cameras; or the monitoring of employees’ personal social media accounts.

- Data processing performed by a non-EU company that recruits job applicants from the EU if the company monitors their behavior as part of the recruitment process (such as monitoring social media accounts) and makes predictions regarding their suitability for employment based on such monitoring.

On the other hand, the following types of HR data processing are not covered under the GDPR:

- Data processing of EU job applicants performed by a non-EU based company that does not have an establishment in the EU where the company does not
recruit and monitor EU job applicants and the EU job applicants simply have access to the company’s online application process.

- Data processing performed by a non-EU based company that does not have an establishment regarding EU citizen job applicants who reside outside the EU and, therefore, are not present in the EU at the time of the collection or processing of their data.

The EDPB accepted comments from all interested stakeholders and citizens on the draft Guidelines until January 18, 2019. The final Guidelines are expected to be issued in the next several months.

Part two of this series will address additional data protection requirements imposed by individual EU Member States implementing the GDPR.