

**IFDAT
Session Eight
Global Workplace Testing:
Legal Aspects and
Data Protection Review**



**September 11th and 12th 2014
Belfast, Northern Ireland**



Josephine Elizabeth Kenney, USA, Chair

Faye Caldwell, USA

Kerstin Bagus, USA

Disclaimer

The following Presentation is not offered as business, legal, medical, or business advice but is instead offered for informational purposes in a spirit of cooperation and information exchange. The Presenters are not offering this information as legal, medical or business consulting advice. This Presentation is not intended as a substitute for the legal advice of an attorney knowledgeable of the issues covered as they relate to a user's individual circumstances or a medical practitioner. The Presenters make no assurances regarding the accuracy, completeness, or utility of the following information. Legislative, regulatory, case law and medical developments regularly impact on general research and medical information.

Topics Presented

- ▶ Jo Kenney- Introduction and Scope/Report Research to date
- ▶ Faye Caldwell – Summaries and Example of Research Scope/United Kingdom, including Northern Ireland
- ▶ Kerstin Bagus – Data Protection Considerations Update



International Drug Testing Review

Country: United Kingdom (including Northern Ireland)



Drug testing remains controversial in the United Kingdom. Employers generally can only test for drugs and/or alcohol with an employee's consent, often as part of an employment contract. Testing must be justified, necessary and proportionate.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.

International Drug Testing Review

Country: United Kingdom (including Northern Ireland) cont.



Date of Last Review: 8/18/14

Screening Resources Referencing Drug Screening:

- ELA Global Handbook: <http://www.employmentlawalliance.com/globalemployerhandbook?R1=0>
The Global Employment Handbook is copyrighted and may be reproduced in part or in whole only with the express written permission of the Employment Law Alliance.
- GTDT: <http://gettingthedealthrough.com>
<http://gettingthedealthrough.com/terms/>
- LexMundi Global Employer Guide: <http://www.lexmundi.com/Document.asp?DocID=3903>
- Practical Law Employment: <http://uk.practicallaw.com/resources/multi-jurisdictional-guides/employment-mjg>
- Practical Law Drug & Substance Abuse Testing: <http://uk.practicallaw.com/3-541-0547?source=relatedcontent>

DPA: <http://ico.org.uk/>

Northern Ireland Website: http://www.ico.gov.uk/about_us/our_organisation/northern_ireland.aspx

Data Protection Regulation: <http://www.legislation.gov.uk/ukpga/1998/29/contents>

International Drug Testing Review

Country: United Kingdom (including Northern Ireland) cont.



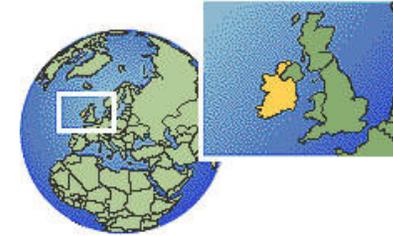
Practical Law Drug & Substance Abuse Testing:

<http://uk.practicallaw.com/3-541-0547?source=relatedcontent>

Jurisdiction	Can employers carry out drug/substance abuse testing on employees in your jurisdiction?	If yes, can drug/substance abuse testing be carried out: • Before the employee is employed? • During the course of employment?	Please provide website address links to the governing legislation or "best practice" guidance notes for employers if drug/substance abuse testing can be carried out in your jurisdiction.
<u>UK (England and Wales)</u>	Yes, but only in limited circumstances, for example, where working under the influence of drugs could give rise to health and safety considerations (where staff drive, or operate machinery) or serious damage to the employer's business.	Before employment: yes, with the applicant's express consent. During employment: yes, if the use and application of testing is justified, necessary and proportionate. Testing should be done with employee consent (although an employer may make withholding consent a disciplinary matter). Employers must also comply with the data protection principles relevant to sensitive personal data.	https://www.gov.uk/monitoring-work-workers-rights/drug-testing http://www.hse.gov.uk/pubns/indg91.pdf https://ico.org.uk/Global/~media/documents/library/Data_Protection/Practical_application/quick_guide_to_the_employment_practices_code.ashx http://ico.org.uk/for_organisations/data_protection/topic_guides/~media/documents/library/Data_Protection/Detailed_specialist_guides/the_employment_practices_code.pdf

International Drug Testing Review

Country: Ireland, Republic of

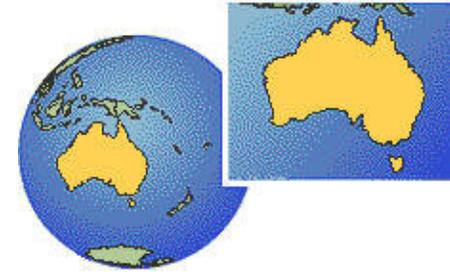


Employee drug and alcohol testing is not common in Ireland, and appears to be generally restricted to reasonable suspicion (“intoxicant testing”), although there appears to be no mandatory requirement that an employee submit to testing absent consent. A clear, concise and appropriate intoxicant policy appears to be necessary to uphold dismissal.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.

International Drug Testing Review

Country: Australia



In general, there does not appear to be a federal legislative prohibition on workplace drug and alcohol testing in Australia, with no restrictions on test panel, analytes or specimen type. However, employment contracts and agreements may limit the specimen types, analytes and scope of the program. Termination without payment of severance may be allowed when an employee reports to work under the influence of alcohol or drugs but many factors undermine this general principle. Determining “under the influence” may be a challenge relative to drugs.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.

International Drug Testing Review

Country: Brazil

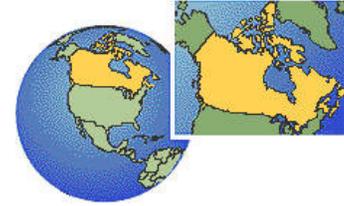


As a practical matter, drug and alcohol testing generally appears to be quite limited in Brazil. For pre-employment, there does not appear to be any specific legislation restricting or prohibiting the practice. However, given the privacy laws, case law considers such testing to be an intrusion into an applicant's private life, and employers can not refuse to hire an applicant who refuses to submit to such test. For current employees, employers cannot generally force them to undergo drug and alcohol testing.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.

International Drug Testing Review

Country: Canada

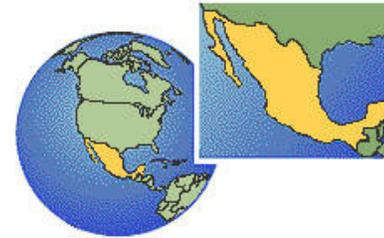


Workplace drug and alcohol testing in Canada is extremely restricted with the Canadian Human Rights Commission taking the position that drug and alcohol testing is discriminatory and can be used only in limited circumstances. Pre-employment drug testing is very controversial except for some safety-sensitive worksites. Random drug testing is often not allowed, even for safety-sensitive positions, given that a positive drug test does not demonstrate current impairment. Post-accident may be acceptable in specific circumstances, but probably not as a blanket policy. Even if a drug or alcohol test is permissible, a positive result may not be cause for termination, but rather require an employer to accommodate if the applicant or employee suffers from a drug or alcohol dependency.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.

International Drug Testing Review

Country: Mexico



In general, workplace drug and alcohol testing is permitted in Mexico, with no restrictions on test panel, analytes or specimen type. Termination without payment of severance is allowed when an employee reports to work under the influence of alcohol or non-prescription drugs. Determining “under the influence” may be a challenge relative to non-prescription drugs.

In all cases, legal advice should be obtained from an attorney knowledgeable of your individual circumstances, including but not limited to, a review of legal authority in the Country in which you are considering conducting workplace drug and/or alcohol testing.



Roadmap

Country Specific Data Privacy Regulations & Drug
Screening Data Flows:
Kerstin Bagus Presenting

REVIEW

Items for this Industry to Consider

- **How does drug testing intersect with global privacy regulations?**
 - ✓ In countries with privacy regulations, processing the PII collected during drug testing and cross border data transfer must be done according to privacy regulations.
 - ✓ Important to provide the proper Notice (and obtain consent).
- **Do we process Personally Identifiable Information (PII)?**
 - ✓ Yes. Name, ID number, Signature, Date of Birth, specimen itself.
- **Does our information fall under the definition of Special PII?**
 - ✓ In some countries it will.
- **Do we transfer PII across country borders?**
 - ✓ In some situations cross border transfer will be done by
 - ✓ Employer / customer
 - ✓ Lab
 - ✓ Background Screening Company / TPA
- **Who is the Controller? Who is the Processor?**
 - ✓ In most cases the Controller is the customer.

How Not to Get Lost

In last year's session we discussed the fact that **data** collected in the drug testing process contains PII that is governed by data protection laws.

Now we will look at a road map for looking at **data** protection regulations and the impact of drug screening in a specific country.

How to find information about a country's data protection regulation.

Areas to **focus on** in the data protection law:

- Definition of personal information

- Definition of sensitive or protected information

- Cross border transfer restrictions and obligations

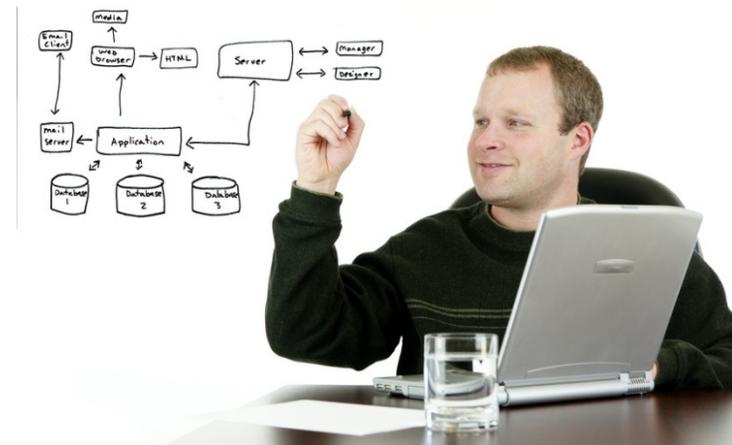
- Additional obligations you may have with "vendors" (or you have as a vendor to your customer)



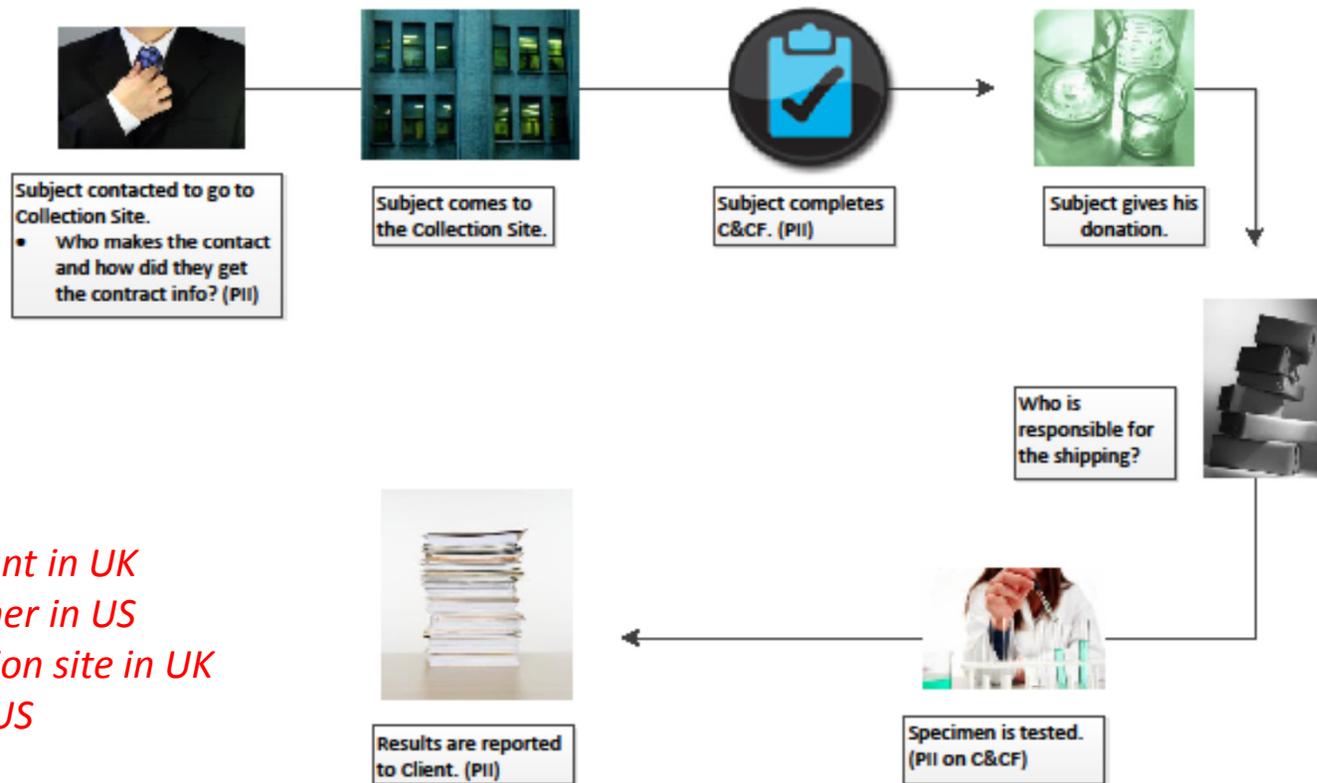
Map Your Data Flow

It's 5 o'clock. Do you know where your PII is?

- Who collects what?
- Who transfers what?
- Across what country borders, if any?
- What, if any, are the transfer restrictions / requirements?



Map Your Data Flow



*Applicant in UK
Customer in US
Collection site in UK
Lab in US*

*Applicant in UK
Customer in UK
Collection site in UK
Lab in UK*

Look at the Regulation & Guidance

Areas to focus on in the data protection law:

- **Definition** of personal information
- Definition of sensitive or protected information
 - Processing can have additional restrictions or requirements
 - Health information is often in the sensitive category
- **Data retention** requirements
 - Typically “only as long as necessary”
- **Collection limitation**
 - Collect only what you need, not what you want
 - Is any specific type of information restricted from processing?
- **Cross border transfer** restrictions and obligations
- Additional **obligations with vendors**

Some privacy regulators will also provide industry or topic specific guidance.

Finding Data Privacy Regulations

DLA Global Data Protection:

<http://www.dlapiperdataprotection.com/#handbook/world-map-section>

Hunton & Williams Privacy Blog: <https://www.huntonprivacyblog.com/>

LexMundi Data Privacy:

<http://www.lexmundi.com/lexmundi/Data Privacy Guide.asp>

Linklaters Data Protected:

<https://clientsites.linklaters.com/Clients/dataprotected/Pages/index.aspx>

MoFo Privacy Library:

<http://www.mofo.com/privacylibrary/PrivacyLibraryLanding.aspx?xpST=PrivacyLibraryLanding>

Practical Law Data Protection: Country Q&A tool:

<http://uk.practicallaw.com/2-502-1510?service=ipandit#>

Finding Data Privacy Regulations

The screenshot shows a Dogpile search engine interface. The search bar contains the text "angola data protection" and a green "Go Fetch!" button. Below the search bar, there are navigation tabs for "Web", "Images", "Video", "News", "Local", and "White Pages". The search results are categorized into "Ads" and "Web Results".

Are you looking for?

- Data Protection
- Data Recovery
- Data Backup
- Backup Solutions
- Data Protection Act
- Data Breach
- Data Security
- Data Storage

Recent Searches

- angloa data protection
- angloa data protection co...

Hide **Clear all**

Ads

- McAfee Data Protection - McAfee.com**
www.mcafee.com/B2BDataProtection
Prevent **Data** loss and Leakage w/ McAfee Today. Learn More.
McAfee Network Security McAfee Endpoint Solutions
McAfee Data Protection
- Protecting Since 2002 - Fast & reliable data protection**
www.dataprotection.com/
VaultLogix **data protection** service.
Start a Free Trial Get a Price Estimate
White Papers Blog
Case Studies Webinars
- Data Breach Protection - Kroll.com**
info.kroll.com/Data-Breach
Data Breach Protection Services. Learn More at Kroll Cyber Security!
- FalconStor® Official Site - falconstor.com**
www.falconstor.com/
Innovative **Data** Recovery And **Protection** Software. Contact Us!
Data Migration Business Continuity
Data Protect + Recovery Data Optimization
- CDW Data Loss Prevention - CDW.com**
www.cdw.com/Security
Secure Your **Data** with a **Data** Loss Prevention Solution. Learn More!

Web Results

- Angola Passes Personal Data Protection Law :: Privacy and ...**
www.huntonprivacyblog.com/2011/09/articles/
On June 17, 2011, the National Assembly of the Republic of Angola passed Law 22/11 on Personal Data Protection. The omnibus privacy legislation applies to the ...

A red arrow points to the first web result.

Country Specific Guidelines – SG

<http://www.pdpc.gov.sg>



HOME ABOUT US PERSONAL DATA PROTECTION ACT INDIVIDUALS ORGANISATIONS NEWS RESOURCES FAQs

Safeguarding Your Personal Data

Only disclose your personal data to organisations if you know what it will be used for.

Do Not Call Registry

- #### DATA PROTECTION & YOU
- ▶ Things to know about personal data protection
 - ▶ Keeping your personal data safe
 - ▶ Lodge a complaint or apply for a review

WHAT'S NEW



18 Jun 2014
Do Not Call Registry Results to be Valid for 30 Days



09 Jun 2014
An Introduction to the Fundamentals of PDPA for Non-Legal Personnel



06 Jun 2014
Sign up for the Introduction to PDPA Briefings

- #### DATA PROTECTION & YOUR ORGANISATION
- ▶ Your organisations' obligations
 - ▶ Managing personal data
 - ▶ Enforcement of the Act
 - ▶ Do Not Call Registry and your business
 - ▶ Advisory Guidelines

SG Data Protection Act

<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3Aea8b8b45-51b8-48cf-83bf-81d01478e50b%20Depth%3A0%20Status%3Ainforce;rec=0>

Definition of Personal Information



“personal data” means **data, whether true or not, about an individual who can be identified —**

- a) from that data; or
- b) from that data and other information to which the organisation has or is likely to have access.

Advisory Guidelines: Transfer Limitation Obligation

[www.pdpc.gov.sg/docs/default-source/advisory-guidelines/the-transfer-limitation-obligation-\(chapter-19\).pdf?sfvrsn=0](http://www.pdpc.gov.sg/docs/default-source/advisory-guidelines/the-transfer-limitation-obligation-(chapter-19).pdf?sfvrsn=0)

Conditions for Transfer



...an organisation may transfer personal data overseas if it has taken appropriate **steps to ensure that it will comply with the Data Protection Provisions** in respect of the transferred personal data while such personal data remains in its possession or under its control; and if the personal data is transferred to a recipient in a country or territory outside Singapore, that the **recipient is bound by legally enforceable obligations to provide to the personal data transferred a standard of protection that is comparable to that under the PDPA.** In this regard, legally enforceable obligations include obligations imposed on the recipient under:

- a) any law;
- b) any contract that;
...
- c) any binding corporate rules that;
...
- d) any other legally binding instrument.

SG Data Protection Act

<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3Aea8b8b45-51b8-48cf-83bf-81d01478e50b%20Depth%3A0%20Status%3Ainforce;rec=0>

Definition of Sensitive Information

There is no definition of
'sensitive personal data' in the
Act.



SG Data Protection Act

<http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3Aea8b8b45-51b8-48cf-83bf-81d01478e50b%20Depth%3A0%20Status%3Ainforce;rec=0>

Cross Border Transfer Mechanisms



26.—(1) An organisation shall not transfer any personal data to a country or territory outside Singapore except in accordance with requirements prescribed under this Act to ensure that organisations provide a standard of protection to personal data so transferred that is **comparable to the protection under this Act.**

SG Data Protection Act

<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3Aea8b8b45-51b8-48cf-83bf-81d01478e50b%20Depth%3A0%20Status%3Ainforce;rec=0>

Obligations with vendors

<http://www.pdpc.gov.sg/faqs/faqs-for-organisations#OG10>



<http://www.pdpc.gov.sg/faqs/faqs-for-organisations#OCPD2>

An organisation shall be considered a data intermediary if it processes data on behalf of another organisation. Where the organisation processes personal data as a data intermediary pursuant to a **contract which is evidenced or made in writing**, the data intermediary will be subject to fewer obligations, namely those pertaining to protection and retention of personal data.

An organisation shall make **reasonable security arrangements** to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks.

Country Specific Guidelines – UK

<http://ico.org.uk>

ico.
Information Commissioner's Office

The UK's independent authority set up to **uphold information rights in the public interest**, promoting openness by public bodies and data privacy for individuals.



ICO fine manager of car rental firm

A former rogue manager at a branch of the car rental company Enterprise Rent-A-Car has been prosecuted by the ICO after unlawfully stealing the records of almost two thousand customers.

Data breach at Welsh health board
9 July

ICO welcomes action by Wolverhampton City Council
7 July

The ICO e-newsletter
Sign up now to receive this month's new edition

[Read all latest news](#)

Take action

[Register your organisation](#)

[Search the register](#)

[Report a concern](#)

➔ For the public

We're here to help

[Find out what information is held about you](#)

[Nuisance calls and spam texts?](#)

[Get official info from a public body](#)

[Frequently asked questions](#)

➔ For organisations

Public bodies, private sector, sole traders

[Data protection](#)
How to get it right

[Freedom of information](#)

[Electronic marketing](#)
Emails, cookies...

[Topic guides](#)
CCTV, data sharing...

[Sector guides](#)
Education, health...

[Guidance index](#)
Read our full A-Z list

UK Data Protection Act

<http://www.legislation.gov.uk/ukpga/1998/29/contents>

Definition of Personal Information



“personal data” means **data which relates to a living individual who can be identified—**

- a) from those data, or
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller

and **includes any expression of opinion about the individual** and any indication of the intentions of the data controller or any other person in respect of the individual.

UK Data Protection Act

<http://www.legislation.gov.uk/ukpga/1998/29/contents>

Definition of Sensitive Data



In this Act “sensitive personal data” means personal data consisting of information as to—

- a) the racial or ethnic origin of the data subject,
- b) his political opinions,
- c) his religious beliefs or other beliefs of a similar nature,
- d) whether he is a member of a trade union (within the meaning of the [M1](#)Trade Union and Labour Relations (Consolidation) Act 1992),
- e) his **physical** or mental **health or condition**,
- f) his sexual life,
- g) the commission or alleged commission by him of any offence, or
- h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

UK Data Protection Act

<http://www.legislation.gov.uk/ukpga/1998/29/contents>

Cross Border Transfer Mechanisms

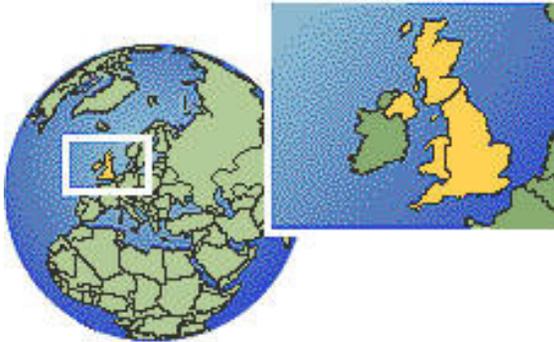


- “Adequate” country
 - US EU Safe Harbor
- Model Contracts / Binding Corporate Rules
- Authorized by DPA
- Consent (issues in employment relationship)
http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114_en.pdf
- Sensitive personal data cross-border transfers requires explicit consent

UK Data Protection Act

Obligations with vendors

http://ico.org.uk/for_organisations/data_protection/the_guide/principle_7#data-processor



- you must choose a data processor that provides **sufficient guarantees about its security measures** to protect the processing it will do for you;
- you must take reasonable steps to **check** that those **security measures are being put into practice**; and
- there must be a **written contract** setting out what the data processor is allowed to do with the personal data. The contract must also require the data processor to take the same security measures you would have to take if you were processing the data yourself. A model data processing contract has been published by the [European Committee for Standardization](#).

**Thank you for your attention for participating
in Session 8:**

**Global Workplace Testing: Legal Aspects and
Data Protection Review**

Jo, Faye, and Kerstin

