Can I tell you a secret?
Ich verrate Dir mal etwas!
¿Me puedes guardar un secreto?
Je vais vous confier un secret?

Digital technology and employment

Tuesday 25 February 2014

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Agenda

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5.30pm Welcome and introduction

Identifying the next Snowden – vetting and monitoring workers and job candidates, including via social media, the current law and practice in the UK, France, Germany and Spain

Encouraging workers to report poor data practice

The potential impact of the upcoming EU General Data Protection Regulation

Protecting confidential information and the proposed new EU Directive on trade secrets

6.30pm Drinks and canapés

Identifying the next Snowden – vetting and monitoring workers and job candidates

The current law and practice in the UK

Melanie Lane, Olswang LLP

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Vetting and monitoring

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Types of vetting and monitoring

- Reference checks
- Interviews
- Credit checks
- Criminal record checks
- Medical questionnaires/record checks/examinations
- In employment vetting
- Social media scraping
- Email, telephone and internet usage monitoring
- Personal devices?
- CCTV
- Predictive analysis tools

Current law and practice - UK

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Overview

- Complex area of law
- No clearly defined boundary
- Balancing exercise required
- Generally legitimate to vet and monitor workers for defined lawful purposes
- Threat to business if fail to implement appropriate security measures

Current law and practice - UK

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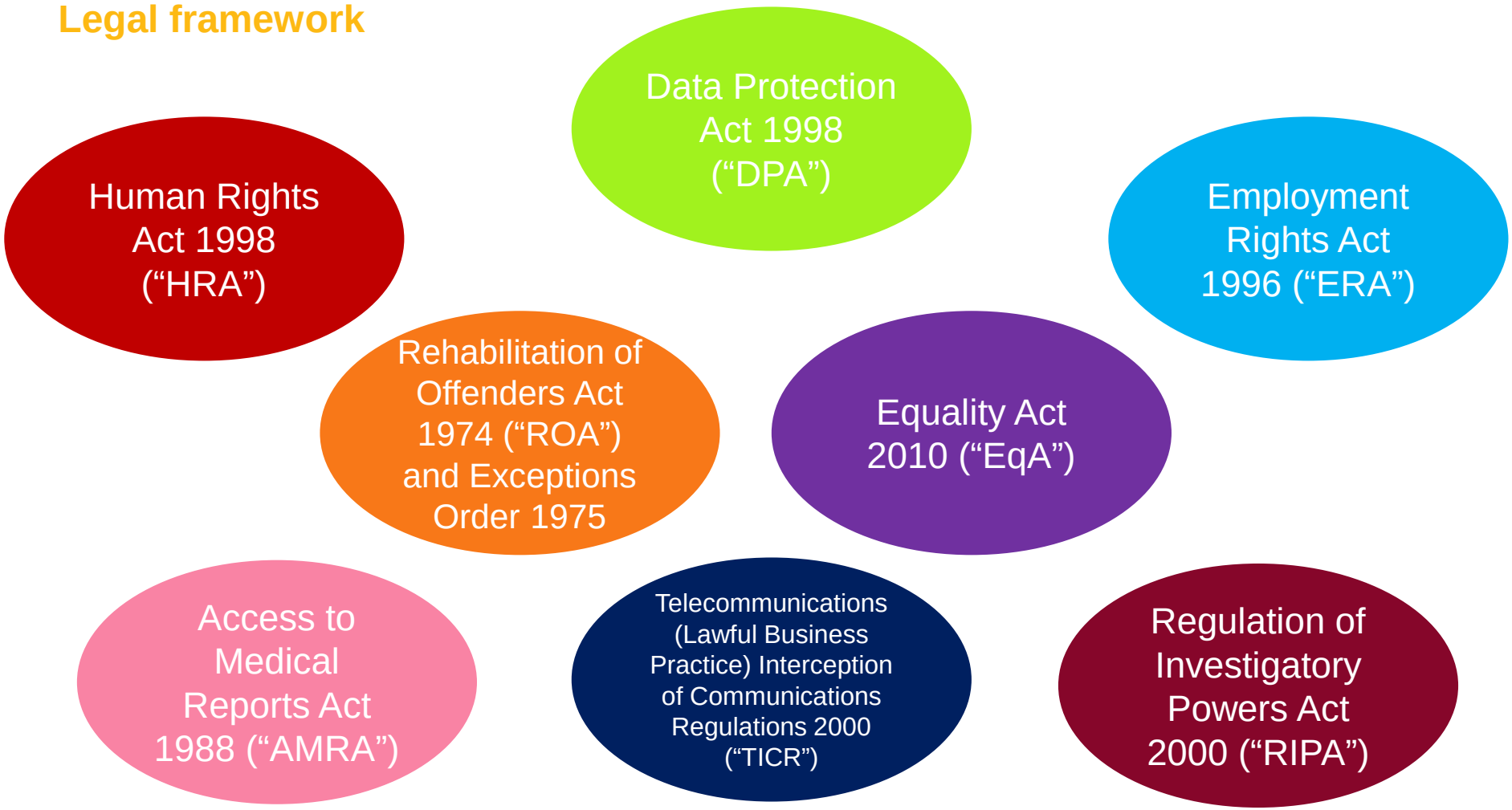
Legal framework



Current law and practice - UK

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Vetting and monitoring candidates and workers – DPA

- Processing of personal data – including sensitive personal data
- Eight data protection principles
- Proportionality test

Current law and practice - UK

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Vetting and monitoring candidates and workers – DPA

- ICO's Employment Practices Code and Supplementary Guidance
- Privacy impact assessments:
  - Identify purpose and benefits
  - Identify likely adverse impact
  - Consider alternatives
  - Take into account obligations e.g. to inform workers
  - Judge whether justified

Current law and practice - UK

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Vetting and monitoring candidates and workers – DPA

- Vetting only justified where specific risks and no less intrusive alternative
- Provided:
  - subjects informed and allowed to make representations
  - information obtained stored securely and destroyed as soon as possible
  - vetting carried out as late as possible in recruitment process
- Objectives of vetting must be clear
- Must be proportionate

Current law and practice - UK

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Vetting candidates and workers - criminal record checks

- Significant legal and practical limits, particularly those imposed by ROA
- Not obliged to disclose/ employer not entitled to rely on spent criminal convictions unless role within Exceptions Order (e.g. involves working with children)
- In practice, checks require individual's consent

Current law and practice - UK

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Vetting candidates and workers - disclosure of medical records

- AMRA – information, consent, right to see and request changes, right to refuse
- DPA – sensitive personal data
- EqA – disability discrimination (reasonable adjustments), prohibitions on pre-employment health questions
- Limits of contractual obligations

Current law and practice - UK

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Vetting candidates and workers - withholding offers and dismissals

- In absence of industry specific guidance, employer generally entitled to exercise judgment when deciding whether to employ, provided doesn't discriminate
- ROA says:
  - can refuse to employ for having/failing to disclose unspent conviction
  - can't if spent (and role not with Exceptions Order)

  but candidates no claim

Current law and practice - UK

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Vetting candidates and workers - withholding offers and dismissals

- Existing workers – EqA, ERA
- Dismissals for having spent conviction = unfair (unless role within Exceptions Order)
- Dismissals for having unspent conviction = fair (if within range of reasonable responses)
- Lying = gross misconduct/breach of duty of trust and confidence?
- Dismissals for refusing to submit to ongoing vetting = potentially fair, if within range of reasonable responses and preceded by formal warnings?

Current law and practice - UK

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Social media scraping

- Form of vetting/monitoring – same principles apply
- Monitoring non-work related social media usage = particularly intrusive, so need to justify on basis of strong business need
- Employers generally allowed to rely on comments, videos or posts revealing misconduct in Employment Tribunals
- However, usual unfair dismissal principles apply
- Tribunals not sympathetic to privacy/freedom of expression arguments
- Importance of clear social media policy

Current law and practice - UK

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Vetting and monitoring candidates and workers - practical steps

- Comply with DPA and endeavour to comply with Code and Supplementary Guidance
- Consider objectives
- Carry out formal privacy impact assessment
- Ensure candidates and workers informed/ give consent where possible
- Have clear policies/ contractual terms
- Use automated systems where possible
- Consider training for managers/ process for reporting concerns about behaviours or attitudes
- Ensure appropriate security/ destruction measures in place
- Exercise caution if dismissing for failing to submit to/the results of vetting and monitoring

Identifying the next Snowden – vetting and monitoring workers and job candidates

The current law and practice in France

Karine Audouze, Olswang LLP

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Current law and practice - France

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Overview

- Privacy is protected by article 9 of the French Civil Code
- Privacy must be complied with in the workplace and during the recruitment process (culturally, strong expectation of privacy in workplace)
- The French Data Protection Authority (CNIL) was set up in 1978 in order to protect privacy with the increase of IT
- Generally deemed suspicious to vet and monitor workers: hence strict legal framework

Current law and practice - France

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Vetting candidates

- Employers, recruitment agencies and temp agencies subject to strict discrimination laws
- Law requires that information requested from candidate must have direct and necessary link with job/ evaluation of skills
- Illegal to request information about candidate's private life, including health and sexual orientation, membership in unions…
- May request excerpt of candidate's criminal record only if direct and necessary link with job
- Specific rules on methods of assessing candidates
- No specific legislation on social media screening, but same principles apply

Current law and practice - France

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Monitoring workers

- Automated monitoring requires prior authorisation by CNIL (or significant sanction)
- French Labor Code requires monitoring to be necessary and proportionate and workers to be informed
- Must inform and consult Works Council, or face criminal sanctions
- May also need to consult Health and Safety Committee

Current law and practice - France

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Monitoring workers – emails and telephones

- Employees right to privacy in workplace, particularly confidentiality of private correspondence
- Unlawful to monitor personal emails even if sent using company equipment – BUT employee's obligation to mark as private
- However, employer may monitor emails (even personal emails) if specific business risk, provided necessary and proportionate
- Permanent monitoring of telephone communications not permitted unless expressly authorized by specific regulation, e.g. on trading floors
- Any monitoring of telephone communications must be for a lawful purpose and necessary and proportionate
- CNIL recommends private calls not recorded
- No case law on monitoring of personal phones

Current law and practice - France

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Monitoring workers – CCTV

- Local authorities must authorise CCTV systems in public places
- Must be justified and proportionate
- Use of CCTV in public places to monitor professional activity of employees illegal
- Employers must inform employees before introducing CCTV in private work spaces
- Monitoring of “risky” work areas permitted
- Illegal in toilets, changing rooms etc.

Identifying the next Snowden – vetting and monitoring workers and job candidates

The current law and practice in Germany

Manteo Heikki Eisenlohr, Olswang LLP

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Current law and practice - Germany

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Overview

- German public very aware and highly sensitive on data protection issues
- Various major German employers have been accused of a massive breach of employees' data protection rights (Lidl, Deutsche Bahn)
- Political demand for a special "employees' data protection codification", initial draft codes issued as early as 2010, however no codification so far, but expected
- Social media issues subject to an inflationary number of court cases, no codification exists
- Parliament is beginning to tackle the issues ("Enquête Kommission Internet und Digitale Gesellschaft")

Current law and practice - Germany

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Vetting candidates - before employment begins

- Vetting of social media not generally allowed:
  - "*Lex Facebook*": Vetting social media meant for private use only is forbidden
  - "*Lex LinkedIn*": Vetting social media meant for professional display is allowed
- Pre-employment medical checks generally allowed, if reasons exist to believe that the candidate may not be sufficiently able to perform the work
- Pre-employment criminal record checks

Current law and practice - Germany

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Vetting and monitoring employees during employment

- **Monitoring employees' work** generally possible, if the monitoring is proportional, i.e. if the interest of the employer in monitoring supersedes the employees' interest in privacy
- Works Council (*Betriebsrat*) has **co-determination rights**: Must give consent to the monitoring, if the monitoring can potentially review the employees' performance and/or conduct
- Legal opinion regarding **video surveillance** has changed: Formerly in general possible, limited only by the employees' fundamental rights; Today only possible in "risky" work situations or if an employer has no other possibility to protect its rights (e.g. against theft by employee)
- Review of e-mails and internet activities only possible if private use of internet access is **explicitly forbidden by employment guidelines**
- Massive challenges in the scope of the **expanding BYOD practice**

Current law and practice - Germany

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Vetting social media

- Subject to various cases of jurisdiction – Germany is lacking legislation; therefore business by-laws (guidelines, works agreements) are becoming common
- Main issue: Finding a balance between
  - the individual freedom of opinion vs. loyalty obligations/expectations
  - the civic duty to report a breach of the law vs. secrecy at work
  - the rights of one employee vs. the rights of another employee
  - safeguarding and respecting the private sphere vs. employee loyalty
  - public postings vs. private postings

Current law and practice - Germany

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Any changes ahead?

- Following the Coalition Agreement between CDU/CSU and SPD:
  - Legal standards for the protection of the rights of **whistleblowers** will be introduced and observe “international standards”
  - **Employee data protection rights** will be developed following the issuing of the new European directive

Identifying the next Snowden – vetting and monitoring workers and job candidates

The current law and practice in Spain

Daniel Cifuentes, Olswang LLP

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Current law and practice - Spain

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Overview

- No specific legislation
- Supreme Court and Constitutional Court have set limits for employers seeking to monitor private access to internet including social media:
  - ✓ Implement a policy regarding the use of the company's devices eliminating the expectation of privacy
  - ✓ Monitoring cannot be done on an arbitrary basis, it should be **necessary, adequate and proportional**
  - ✓ Monitoring should be temporary and can only concern the suspected wrongdoer
  - ✓ Monitoring must be carried out in a way that causes the **minimum invasion in the employees' privacy**
- Regulated under company policies and handbooks (often not very sophisticated nor updated)
- Not currently a hot topic in Spain (although it was before the financial crisis started)

Current law and practice - Spain

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Vetting candidates and workers

- Vetting and monitoring job candidates not common practice in Spain (social media or background checks)
- Discrimination issues
- Illegal to ask information about candidate's private life as it may be considered discriminatory
- Proportionality test
- Requesting candidate's criminal record is only allowed if it is a requirement for the job position (e.g. policeman)
- Same limits on requesting drug tests

The potential impact of the upcoming EU General Data Protection Regulation

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EU data protection reform

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- January 2012, EC published proposals for reform of EU data protection law
- Draft Regulation to replace existing Data Protection Directive
- Aim to harmonise data protection processes and enforcement across EU and address privacy online
- In force during 2016?

New EU rules: top changes

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- Current principles amplified + new principles e.g. RTBF/erasure
- Anti-trust style fines – up to 2% of enterprise's global turnover (or maybe 5%!)
- Data breach notification requirements
- More prescriptive tick box / documented / auditable compliance
- DPO requirement
- Direct obligations and liabilities for data processors
- Data controllers stronger obligations for processor selection
- National rules to govern processing in employment context

Protecting confidential information and the proposed new trade secrets directive

Catherine Taylor, Olswang LLP

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Protecting confidential information - UK

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- Little or no statutory provision unless overlap with intellectual property or data base rights
- No readily available criminal sanctions
- During employment:
  - Duty of fidelity/fiduciary duty
- After employment:
  - No duty of fidelity
  - Limited implied duty in relation to “trade secrets”

Protecting confidential information - UK

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- Reliance on express terms post-termination:
  - Express non-disclosure of confidential information
  - Restriction on competition - “no further than is strictly necessary”
  - Increasing use of incentives **not** to disclose confidential information – deferred consideration
  - Still difficult for the employer to retain LinkedIn and equivalent contacts

Protecting confidential information - UK

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Remedies

- Interim and final injunctions (including springboard)
- Damages

Protecting confidential information - UK

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Recent cases – employee competition in the digital world

Fairstar Heavy Transport -v- Adkins and Another

Information in emails recoverable under agency principles

East of England Schools -v- Palmer

Availability of information on social media means no protectable interest in a client connection?

Whitmar Publications Ltd -v- Gamage

Springboard relief and misuse of LinkedIn data

Trade Secrets Directive - UK

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- To protect “undisclosed know-how and business information (trade secrets)”
- Standardisation of civil protection and available remedies across Europe
- Intellectual property background
- Currently under consideration by the European Parliament – implementation at European level in the next 12 months
- Member state implementation within 24 months

Trade Secrets Directive - UK

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What will it cover?

- Information which:
  - is secret in that it is **not**, as a body or in the precise configuration and assembly of its components, **generally known** among or **readily accessible to persons** in circles that **normally deal with that kind of information**
  - has commercial value because it is secret
  - has been subject to **reasonable steps** under the circumstances, by the person lawfully in control of the information, **to keep it secret**
- Provides remedies for the unlawful acquisition, use or disclosure of such information

Trade Secrets Directive - UK

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Remedies

- Two year limitation period
- Injunctions – general principles of proportionality
  - Interim and final
  - “IP light” corrective measures
- Damages – “commensurate with the actual prejudice suffered” including moral prejudice
- Publicity orders

Trade Secrets Directive - UK

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UK issues

- Supplemental or replacement for existing law?
- Uncertainty as to how the UK courts will apply “Euro” concepts

Protecting confidential information and the Trade Secrets Directive – France

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- In France, no legal definition of trade secrets and no legislation on protection of trade secrets
- Only protection of confidential information via contractual provisions
- Non-compete provisions are valid, subject to three conditions: limited in geographical scope, limited in time and subject to financial consideration
- French Intellectual Property Code includes criminal sanctions for employees who reveal or attempt to reveal “manufacturing secrets”
- New Directive considered positive as defines trade secrets (more broadly than “manufacturing secrets”) and imposes sanctions/will improve protection in France

Protecting confidential information and the Trade Secrets Directive – Germany

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- Trade secrets broadly protected under German law by various codifications (e.g. general civil law, commercial law, competition law, penal law)
- German government has commented on the Directive and has especially welcomed the clear and unified definition of “trade secrets” as a possibility to create a common European standard of protection of trade secrets
- A new regulation is currently however not considered to be legally required

Protecting confidential information and the Trade Secrets Directive – Spain

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- No definition of trade secrets in Spain
- Civil courts currently referring to definition supplied by article 39.2 of the Agreement on Trade Related Aspects of Intellectual Property Rights
- No specific legislation. Spain relies on the Unfair Competition Act
- Secret violation is also punishable under the Criminal Code:
  - penalties of imprisonment (up to 5 years) and monetary fines
- From an employment point of view: trade secrets are indirectly protected by the principle of good faith that imposes the duty of confidentiality on employees either during the employment or after its termination
- Restrictive covenants help to secure the enforcement of the duty of confidentiality
- Likely that new rule enacted in future to unify current disperse regulations – but no major changes with respect to the current framework expected

Questions?

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