

# A Regional Guide to Employee Data Privacy

ASIA

# Introduction

Data privacy is a priority for all employers but especially those with operations in more than one country. It impacts all aspects of the employment relationship and, with the increase in data transfers between businesses and across borders, employers often need to comply with multiple laws to minimize the risk of significant fines and liabilities.

A Regional Guide to Employee Data Privacy is designed to help employers navigate the specific, and increasing, challenges of handling employee data in different jurisdictions. Covering 18 key countries, the guide contains the following:

- **Key Questions & Answers** – covering applicant and employee personal data, privacy statements and policies, retention periods for employee data, transfers of employee data overseas and to third parties, sanctions for breach and potential pitfalls for employers; and
- **“In Brief” and “In Detail” Guidance** – providing both quick reference and more detailed content across all jurisdictions.

We hope that you will find this publication useful. It has been compiled by lawyers from a major international law firm as well as partner law firms in other jurisdictions.

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# User Guide

The image shows a laptop displaying a website for Hong Kong. A circular callout on the left shows a 'Contents' menu with a list of countries including Australia, Hong Kong, India, Indonesia, Japan, Korea, Malaysia, Myanmar, New Zealand, Pakistan, PRC, Philippines, Singapore, South Korea, Sri Lanka, Taiwan, Thailand, and Vietnam. An arrow points from this menu to the 'Select country' text. On the laptop screen, the 'Hong Kong' page is visible, featuring a city skyline image and two buttons: 'In Brief' and 'In Detail'. A callout box on the right highlights these buttons with the text 'Switch between "In Brief" and "In Detail" guidance'. At the bottom of the laptop screen, three icons are shown: a house, a globe, and a group of people. Arrows point from these icons to the text: 'Click to return to introduction', 'Click to select another country', and 'Click to browse the directory of contacts'.

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# Macau



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 In Brief

 In Detail

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# Macau

## In Brief

### 1. Is there a law regulating applicant personal data?

Yes. Personal data in Macau is regulated by Law No. 8/2005 (the “**Data Protection Law**” or “**MDPL**”). MDPL regulates the legal regime for collecting, processing and transferring personal data and applies generally to everyone, including applicants.

### 2. Is there a law regulating employee personal data?

Yes. Besides the general protection granted by MDPL, there are legal provisions in the Macau Labor Relations Law and in scattered authorizations and guidelines from the Macau Data Protection Office addressing employee personal data issues.

### 3. Do I need to have a privacy statement or agreement?

Privacy statements or agreements are not compulsory. It is recommended, however, that employers have a Personal Information Collection Statement executed by employees.

### 4. How long must I retain employee data? What is best practice?

Employment legislation requires an employer to retain employee data during the whole duration of the employment relationship and for a period of three years after its termination. This is subject to the limitation period for potential claims.

### 5. Can I transfer employee data overseas?

Yes, subject to certain requirements.

### 6. Can I transfer employee data to a third party?

Yes, subject to certain requirements.

### 7. What are the consequences of breach?

The legal consequences of a breach range from monetary fines to imprisonment and accessory sanctions.

### 8. What are the main pitfalls?

The main pitfalls are generally associated with the failure to obtain an unambiguous consent from employees when processing their personal data and the failure to comply with the notifications and prior authorization requirements set forth in the MDPL.





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## In Detail

### 1. Is there a law/Code or other similar document regulating the collection, use and/or handling of an applicant's personal data in your jurisdiction?

Data protection in Macau is regulated by Law No. 8/2005 (the “**Data Protection Law**” or “**MDPL**”), which establishes the legal regime for collecting, processing and transferring personal data. This applies generally to everyone, including applicants.

For the purposes of MDPL, “personal data” is defined as “*any information of any type, irrespective of the type of medium involved, including sound and image, relating to an identified or identifiable natural person*” (Article 4 No. 1), whereas the concept of “processing of personal data” is defined as “*any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction*” (Article 4 No. 3).

The public regulatory entity charged with monitoring and enforcing the compliance with the provisions of the Data Protection Law is the Macau Data Protection Office, created under the Chief Executive's Dispatch No. 83/2007 (the “**MDPO**”).

Besides MDPL, which establishes the general framework for personal data collection and treatment, MDPO has issued the Authorization No. 01/2011, under which employers are exempted from notifying the MDPO when processing certain data relating to job applicants, such as name, place of birth, gender, résumé information, etc., under and for the purposes of a recruitment procedure.

### 2. Is there a law/Code or other similar document regulating the collection, use and/or handling of an employee's personal data in your jurisdiction?

Apart from the generic provisions set out in the MDPL, Law No. 7/2008 (“**Labor Relations Law**” or “**MLRL**”) establishes specific rules regarding the collection and keeping of employee personal data.

Under Article 13 of the MLRL, the employer is obliged to keep, for a period of not less than three years after termination of the employment relationship, the records of employee data, which should include:

- (a) personal data of the employee, including his/her name, sex, age and form of contact;





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- (b) the date of admission;
- (c) the professional grade or function;
- (d) detailed pay slips;
- (e) the normal working hours;
- (f) the holidays taken;
- (g) the total number of days' absence and the number of days' paid sick leave or accident leave;
- (h) occupational accidents and diseases; and
- (i) all data provided by the employee that contribute to the protection of his/her interest.

Violation of any of the above obligations is considered to be an administrative misdemeanor, punishable with a fine, ranging from MOP 1,000 to MOP 5,000 for each employee involved.

Further to the above, MDPO has also issued a detailed Guideline in respect of employee monitoring in the workplace. Under this Guideline, prior to conducting employee monitoring, the employer must formulate Personal Information Collection Statements (“**PICS**”), which clearly address the following points:

- (a) The purpose of employee monitoring;
- (b) The categories of the personal data to be collected for monitoring;
- (c) The uses of the personal data collected for monitoring, which should not deviate from the purpose of monitoring;
- (d) The criteria for using the personal data collected for monitoring;
- (e) Authorized personnel with access to the data processed from monitoring, such as the personnel operating and monitoring the video and recording facilities, and the personnel with the right of access to the relevant data;





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- (f) Generally, the duration of the data processed for monitoring should not exceed six months, unless the law or contract terms stipulate a longer duration or the relevant records have become evidence of disciplinary, administrative or criminal infringement;
- (g) The employees' right to information, right of access and to rectify data, and right to object should be clearly stated, as should the regulations on the reasonable fees charged for the employees to exercise their right of access and right to consult data. The fees charged are on a case-by-case basis but the employees concerned should be informed of the fees before exercising this right; and
- (h) The formulation of "house rules" regarding employees using the institution's facilities for private or personal use.

### 3. Is there a legal requirement to have a document (e.g., privacy policy, personal information collection statement, agreement) to deal with an employee's personal data?

Under Article 6 of the MDPL, the collection and treatment of personal data are only admissible if the relevant data subject provides his/her unambiguous consent to the said treatment or if the processing of personal data is required:

- (a) for the performance of a contract or contracts to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract or a declaration of his/her will to negotiate;
- (b) for compliance with a legal obligation to which the controller is subject;
- (c) in order to protect the vital interests of the data subject if he/she is physically or legally incapable of giving his/her consent;
- (d) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
- (e) for pursuing the legitimate interests of the controller or the third party to whom the data are disclosed, except where such interests should be overridden by the interests for fundamental rights, freedoms and guarantees of the data subject.





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Article 10 of the MDPL sets out the Right to Information of the data subject, which must be ensured by the entity collecting and treating personal data in Macau, under which the holders of personal data are entitled to receive information regarding the data they provide, namely:

- (a) The identity of the entity collecting and treating the data and of its representative in Macau, if necessary;
- (b) The purposes of the processing;
- (c) Other information such as:
  - (i) The recipients or categories of recipients of the data;
  - (ii) Whether replies are obligatory or voluntary, as well as the possible consequences of failure to reply; and
  - (iii) The existence and conditions of the right of access and rectification.

The information to be provided must be set out in the documents supporting the collection of data (e.g., on the website).

Therefore, although it is not compulsory to enter into a privacy statement with employees, it is recommended that employers have a PICS executed by the employees to guarantee that the employees' Right to Information is duly complied with and their unambiguous consent has been duly obtained.

#### 4. For how long must an employer retain an employee's personal data? What is best practice?

MLRL requires employers to keep records of employee data, with the information listed in question 2, throughout the entire duration of the employment relationship, and for a period of not less than three years after it terminates.

However, from a litigation perspective, the statutory limitation period for credits resulting from labor relations (e.g., salaries, commissions, subsidies, overtime payments, etc.) is 15 years under the Macau Civil Code. This period runs from two years after the termination of the employment relationship. For full protection against future claims, therefore, it is best practice for employers to keep employee data for 17 years after termination of employment.





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### 5. What are the legal restrictions on transferring employees' personal data outside your jurisdiction?

According to Article 19 of the MDPL, the transfer abroad of data collected in Macau is subject to authorization by the MDPO, upon verification of whether the target jurisdiction to which the data is transmitted affords an adequate level of protection.

Despite the above, Article 20 of the MDPL sets out certain exceptions to this requirement of prior authorization, by allowing the transfer, *inter alia*, (a) in the case of unambiguous consent by the data holder; (b) when the transfer of data is necessary for the performance of a contract between the data holder and the entity collecting and treating the data; (c) when the transfer of data is necessary for the performance or execution of a contract executed or to be executed, in the interest of the data subject, between the controller and a third party; or (d) when the transfer of data is necessary or legally required on important public interest grounds, or for the establishment and exercise of defense of legal claims.

In these cases, set out in Article 20, number 1, paragraphs (1) to (5) of the MDPL, the notification to the MDPO shall suffice for the purposes of validly effecting a transfer of data to a jurisdiction outside of Macau.

### 6. What are the legal restrictions on transferring employees' personal data to a third party?

Unambiguous consent must be obtained before transferring employees' personal data to any third parties within the territory of Macau.

However, the transfer of data, as one of the ways to process data, must be:

- (a) processed lawfully and with respect for the principle of good faith and the general principle, under which the processing of personal data shall be carried out transparently and with strict respect for privacy and for other fundamental rights, freedoms and guarantees set out in the Basic Law of Macau, the instruments of international law and the legislation in force;
- (b) carried out for specified, explicit, legitimate purposes and for purposes directly related to the activity of the employer and not further processed in a way incompatible with those purposes;
- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;





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- (d) accurate and, where necessary, kept up to date (adequate measures must be taken to ensure that data that are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified); and
- (e) kept in a form that permits identification of their subjects for no longer than is necessary for the purposes for which they were collected or for which they are further processed.

### 7. What are the consequences of breaching privacy laws in your jurisdiction?

The MDPL sets out in Articles 30 to 43 the applicable administrative and criminal sanctions applicable to infractions of the MDPL.

From an administrative perspective, these infractions may entail fines ranging from MOP 2,000 to MOP 200,000, depending on the nature of the infractions.

Moreover, conduct such as intentionally omitting the statutory requests for notification and/or authorization set out in Articles 21 and 22 of the MDPL may result in prison sentences of up to two years or a fine of up to 240 days, up to the amount of MOP 2,400,000 (one day is defined under Macau law as an amount ranging between MOP 50 and MOP 10,000, to be determined by the court depending on the infringing party's financial status and capability). From a practical perspective, it is highly unlikely that prison sentences would be applied for these infractions, and, if so, it is likely that suspended sentences would be applied.

Moreover, Article 43 sets out additional penalties such as (a) temporary prohibition of collection of treatment of personal data; (b) an order to partially or fully erase the unduly collected data; (c) publication of the judgment against the infringing entity in the Macau newspapers and/or (d) public warning or censure of the infringing entity.

Violation of the employer's obligation under the MLRL to retain employee personal data (please see question 2) may also give rise to a fine, ranging from MOP 1,000 to MOP 5,000 for each employee involved.

### 8. What are the main pitfalls or areas to watch out for in your jurisdiction regarding the collection, use and/or handling of an employee's personal data?

Due to the increase in complaints associated with the mishandling of personal data and issues such as the regularity of collection of video footage by CCTV, there has been increased activity from the MDPO in respect of inspection and





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compliance actions with companies that collect, treat and transfer personal data in Macau, as well as an increase in the number of fines and sanctions applied to local entities for failure to comply with local provisions on data protection, particularly with respect to failure to communicate to the regulator the treatment and/or transfer of personal data in Macau.

As a general rule, the collection, treatment and transfer of personal data are subject to the issuance of a notice to the MDPO whereby the entity proposing to carry out these activities declares its intention to collect, treat and/or transfer personal data, within eight days after the commencement of treatment of personal data.

Moreover, notification requirements extend to the collection of all data, and not just data collected by means of CCTV, with specific provisions and requirements for collection and treatment of data of (a) employees (which may entail further requirements if the employer collects data such as health data for insurance coverage purposes); and (b) clients. As such, companies should have notifications in place for the collection, treatment and transfer of all of its data in Macau – or at least the data that are not covered by exemptions established by the MDPO – to minimize the risk of fines and potential criminal liability.

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