Flexible Regulation in the Time of COVID

Crisis and Recovery In the United States

The United States government has struggled to contain the virus and the associated fallout. In addition to killing nearly two hundred thousand people across the country, the coronavirus wreaked havoc on employment markets. During a two-month span from mid-March to mid-May, over 36 million Americans filed for unemployment, more than the populations of Belgium and the Netherlands combined. Minority communities were hit hardest. In April, less than half of the adult black population in the United States had a job.

In recent months, however, the job market in the United States has made a significant recovery. Employment increased by 4.8 million in June. July and August also saw millions of job gains. The unemployment rate in the United States currently sits at 8.4%, which is not far off the unemployment rate in Europe.

One key factor in this recovery is that the regulatory framework in the United States has been flexible enough to give governmental bodies and private industry the ability to adjust to the crisis. This includes flexibility with the collection and use of personal health information ensuring that infected persons would not enter the worksite. This flexibility allowed many businesses to reopen quicker and safer, aiding the employment recovery. If the United States had adopted a more stringent privacy standard, like the GDPR, the employment crisis may have been worse and the recovery much slower.

Employers Collecting Health Information

In normal circumstances, the Americans with Disabilities Act (ADA) prohibits employers in the United States from collecting personal health information from their employees or requiring employees to undergo a medical examination. If, however, individuals with a specific health condition pose a “direct threat” to themselves or others, the ADA’s restrictions do not apply. To qualify as a direct threat, an individual must pose "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

Typically, employers need to run through an analysis to determine whether a given situation rises to a “direct threat,” which could take weeks and may necessitate an opinion from an attorney. But in the case of COVID-19, the Equal Employment Opportunity Commission (EEOC) declared the pandemic a “direct threat,” which allowed employers to confidently take aggressive measures to protect their workforce, such as screening employees for COVID-19 before entering the workplace, or taking their temperature as they arrive. These measures allowed employers who could not work offsite to safely stay open during the crisis--keeping their workforce employed and businesses running.

Unlike the ADA and EEOC, there is no clear way to suspend certain measures of the GDPR under an emergency like COVID. At the very least, employers would have to run a Data

Protection Impact Assessment before implementing screening procedures or temperature checks, which could take weeks or months. And it's not clear that those measures would be allowed at all. The Netherlands does not allow health screening questionnaires, and France does not allow temperature checks. The governments of these countries dealt with the coronavirus better than the United States government, so the business community may not have needed as much help or flexibility. But in the United States, that rigidness would have prevented countless jobs returning.

Conclusion

One key lesson from COVID-19 is that regulations passed during good times are often impediments during an emergency. And privacy laws are no exception. When governments fail to provide the necessary regulatory flexibility, minorities and other at-risk communities bear the brunt of the burden.