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## cookies

This briefing gives you a simple overview of the legal requirements for using cookies on your website and looks at how best you can achieve compliance with the law.



### What are cookies?

Cookies are small text files downloaded to a user's computer when they visit a website. Cookies are used for many purposes from counting visitors to storing shopping basket items to targeting specific advertising.

### What is the so called "Cookie Law"?

Very broadly websites must ensure they have user's consent to the setting of non-essential cookies before they are set.

Websites are not required to obtain consent for essential cookies that are strictly necessary for a service requested by the user. These are very limited in scope, for example, a cookie to ensure when a user of your site has chosen the goods they want to buy that the site remembers what they chose when they click through to the checkout.

All other cookies, for example, those used for analytical purpose like counting visitors, or those used for advertising and those used to personalise advertising or providing tailored greetings or optimised landing pages require consent.

### What is consent?

Since the rules came into force there has been a huge amount of debate around this question and specifically whether consent must be opt in.

Despite earlier ambiguous guidance on the point, the Information Commissioner's Office issued revised guidance in May 2012 making it clear that "implied consent is a valid form of consent". See:

[http://www.ico.org.uk/for\\_organisations/privacy\\_and\\_electronic\\_communications/the\\_guide/cookies](http://www.ico.org.uk/for_organisations/privacy_and_electronic_communications/the_guide/cookies).

However, the guidance states that in order to rely on implied consent you need to be satisfied your users understand that their actions will result in cookies being set and you should not just rely on the fact that they might have read a privacy policy that is hard to find or difficult to understand.

So although you do not need a banner or pop-up that specifically requires users to "click here" (although many sites do and that is fine) it is not enough simply to have terms and conditions which allow you to set cookies.

#### More information

If you have any queries about the content of this checklist, please contact Amanda Doyle on [amanda@doylelaw.co.uk](mailto:amanda@doylelaw.co.uk).

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You need to go a step further and inform the user on a prominent place on your website that the site is using cookies and that his continued use of the site implies his consent.

There may be circumstances, for example where you are collecting sensitive personal data such as health information, where you might feel that explicit consent is more appropriate anyway.

## Can consent be withdrawn after it is given?

The regulations say that users are entitled to withdraw consent at any time. The Information Commissioner's guidance says that and so you should ensure your privacy policy provides information about how to do this. Typically referring users to their browser's help function does this.

## Can browser settings be used to indicate consent?

Although the regulations suggest that browser settings may be one means of obtaining consent the Information Commissioner's guidance states that most browser settings are currently not sophisticated enough to allow an assumption that the user has given their consent.

The guidance states specifically that you must not rely solely on browser settings.

## What are the penalties for failing to comply?

In most cases, if the Information Commissioner receives a complaint about your website, you can expect to be given a chance to respond setting out how you have considered the complaint and providing a realistic plan to achieve compliance.

Failure to do anything at that point could well lead to formal action by the Information Commission who has a range of options from requiring you to give an undertaking to take a particular course of action to improve compliance, through an enforcement notice compelling you to take certain action, all the way up to a fine. The maximum fine for severe cases is £500,000.

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