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PERSONALITY ASPECTS OF THE EMPLOYEE AND THEIR EXPLORATION FROM THE GDPR PERSPECTIVE

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Abstract

The paper addresses the issue what impact the personal aspects have on work performance in the light of the current European legislation on protection of personal data. The authors focus on two selective issues (mental ability and physical ability) with a practical impact on the activity of the employer. The goal of the submitted contribution is to assess whether the information about the mental and physical health of the employee is considered to be a personal data or sensitive information, and what legal basis the employer has for processing this data. Assessed is the holistically perceived personality of the employee with an emphasis on information about his mental and physical health, since it affects the legislation handling personal data. The second part of this study examines the legitimacy of processing personal data in the work environment of the employer. A resolved partial issue is the possibility of the employer to receive information about the mental health of the employee even if specific legislation does not provide such a prerequisite for work performance. To examine the defined legal issue we applied qualitative methods, critical in-depth analysis of the law and logico-cognitive methods. Based on the legal background and personal opinion, the authors consider determining the concept advocated by WP29, which provides a broad meaning of the term personal data regarding the health condition. According to this, the employers should consider not only the specific information about the health condition of the employee, but also the data concerning the health condition that can be deduced from the existing data.

Key words

mental health, physical health, personal data of the employee, employer

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Introduction

With an effect from 25 May 2018, a single regime of personal data protection is applied in the member states of the EU in the form of Regulation (EU) 2016/679 of the European Parliament

and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 94/46/EC (General Data Protection Regulation, hereinafter referred to as regulation). The regulation represents the basic legal framework for protection of personal data in all cases personal data are processed, including the work environment. The Collection of Laws under the number 18/2018 Coll. about the protection of personal data (hereinafter referred to as „GDPR“) is applied in cases not covered by material scope of the regulation.

The Regulation and the Personal Data Protection Act also applies when selecting the appropriate candidate for the job, since it is a process in which general data and sensitive personal data about the candidate is processed. The volume of processed personal data differs regarding the position the candidate is applying for and being shortlisted i.e. depending on the requirements to perform the agreed work determined by the employer in internal regulations of the workplace or according to assumptions stipulated by legislation. The basic guide is determined by Article 11 of Act No. 311/2001 Coll. of the Labor Code. According to this, the employer may collect only the personal data regarding the qualification and professional experience of the employee, which may be essential in terms of work to be conducted by the employee. This involves information about the mental and physical health of the employee and his capability for work to be conducted. The first part of the study focuses on the issue whether information about mental and physical health of the employee is a general or sensitive personal data. Processing sensitive personal data requires the fulfillment of several specific obligations not possessed by the employer if they process only general personal data. The second part of the paper analyses the legal conditions of processing this information, indicating how to respect the legal regulation and apply in practice.

Theoretical background

Mental and Physical Health – general or sensitive personal data?

According to the Act. § 41 par. 2 of the Labor Code *if a specific legal regulation requires a certificate of mental and physical health or other preconditions to conduct the work, the employer may conclude a contract with a natural person mentally and physically competent for the position or a natural person who fulfills other assumptions.* Assessing the physical and mental health of the natural person in order to perform a particular type of work is intended to ensure the employer that the employee is mentally and physically capable to perform the work, as well as his health and life will not be endangered. The research of mental and physical health of the job seeker is a very sensitive field to study, but also important issue in terms of labor relations. This kind of research interferes with the physical integrity of the person and undoubtedly can be considered a personal data.

The law makes difference between the general and sensitive personal data. The sensitive personal data form a subcategory of personal data that reveals *racial or ethnical origin, religious or philosophical beliefs, membership in trade unions, processing genetical and biometric data for identification of the individual, **data concerning health condition** or data related to the sexual life and sexual orientation of the individual* (Article 9 (1) of the Regulation, resp. § 17 (1) of the Personal Data Protection Act). Processing of these data compared to general

personal data may represent a higher risk to the person concerned and his interests protected by law, also providing information about the privacy of the individual in unwanted measure. The misuse of these data may have irreversible and long-term effects on the social status of the individual. This is the reason why distinctive, strict legal regulations apply to process these data, as well as increased requirements for data protection. Processing of sensitive data requires further obligations. The first is to keep a record about the activity of processing data according to Article 30 of the Regulation resp. § 37 of the Personal Data Protection Act. Furthermore, processing sensitive data on large scale is cited as an example, when it will be necessary to conduct impact assessment on protection of personal data according to Article 35, resp. § 42 of the Personal Data Protection Act. Finally, if the main activity is focusing on processing sensitive personal data on a large scale, it is obliged to appoint a person responsible to conduct this activity according to Article 37 of the Regulation, resp. § 44 of the Personal Data Protection Act (Žul'ová, Valentová & Švec, 2018; Žul'ová & Švec, 2018). While assessing personal data on large scale it is necessary to consider the amount of data being processed, the diversity of data, the geographical extent of the territory the processed data originates from and the data retention policy. It is important for the employer to be informed whether the information about the physical and mental health to conduct work is a data regarding the health condition of the employee or it can be considered to be a sensitive personal data.

Health-related data are defined in Article 4 (15) of the Regulation resp. § 5, letter d) of the Personal Data Protection Act *personal data regarding the physical and mental health of the person, involving the data about providing health services that reveal information about the health condition of the individual*. Article 35 of the recitals of the Regulation explains that *personal data should include all the information regarding the health condition of the person concerned, providing information about the past, present or future physical and mental condition of the individual*. For example, data referring to health condition of the individual is *the information about the natural person obtained via registration to provide health services for the individual: number, symbol or specific data obtained by the person for individual identification to provide access to health services, information obtained conducting health tests, regular checks, genetic data and biological samples, any kind of information about illnesses, disability, risk of diseases, health record, clinical treatment, physiological or biomedical condition of the individual regardless to the source of information, whether the information is obtained from the doctor or other healthcare professional, information from hospital or healthcare institution or conducting a diagnostic test in vitro*. The term disease risk refers to data about the future health condition of the individual. According to WP, personal health information also includes the information about obesity, information about high and low blood pressure, hereditary or genetic predisposition, excessive consumption of alcohol, smoking or drug usage, and any other information that is scientifically proven or commonly perceived as a disease risk for the future. Based on the standpoint of WP 29 this type of data is also an information whether the individual is wearing glasses or contact lenses, information about IQ, information about smoking and drinking habits, information about allergies, membership in support groups (alcoholic anonymous group, weight loss support group, support group for cancer treatment...) and also providing a fact that someone is ill in terms of labour relations. Personal data referring to health condition of the individual according to Article 8 (1) of

Directive 95/46 (currently Articles 4 (15) and 9 (1) of the Regulation) is also a data that the individual concerned had a leg injury or temporarily unable to work, Case C-101/01 Bodil Lindqvist, the Court of Justice of the EU. According to the EU Court of Justice, it is necessary to interpret health information broadly in order to include information about all health aspects of the individual, physical and mental condition as well. It is clear that the scale of personal data that may fall within the category of personal data regarding health is wide, and the WP 29 advocates an extensive interpretation of the concept of health data.

With reference to § 41 (2) of the Labor Code in case of required physical and mental capability for work, the content of information of the employer can only be oriented at the results of such assessments e.g. whether the individual is physically and mentally capable to conduct the work. The result of the pre-employment medical examination shows, whether the job applicant is capable to perform the work with temporary limitations or not capable in long-term to conduct the work he is applying for. The employer cannot use the details of such information with respect to detailed description of the health condition of the individual. Is the information about the physical and mental health of the candidate considered to be a data about the health condition?

The Czech Office for the Protection of Personal Data represents an opinion that certificates of a health institution or a doctor (e.g. pre-employment medical examination, preventive medical examination) whether the applicant is capable or not to conduct the work he is applying for is not treated as sensitive information about the health record. They argue that the documentation does not reveal specific information about the health condition of the employee, it reports whether the employee is capable to conduct the work required (Janečková & Bartík, 2016).

We are ready to argue against the opinion above in the light of the interpretation of the concept of health-related data advocated by WP 29. We can agree that based on „positive“ assessment about work capability (capable to conduct the work required from the employee, health condition of the employee is acceptable to conduct the work) it is difficult to gain information about the specific health condition of the employee. However, it is necessary to reflect on generalization of the Personal Data Protection Authority of the Czech Republic. If the conclusion of the medical report says that the employee is capable for work with temporary or permanent limitations, the doctor provides a list of operations and tasks the employee can cope with. It cannot be excluded that in combination with the medical report it is defined in the decree (Professional Guideline of the Ministry of Health of the Slovak Republic about the preventive medical examinations related to work In: Bulletin of the Ministry of Health of the Slovak Republic, chapters 1-10, 29 January, 2014.) the conclusion about the health condition and health risks of the individual will be assessed. Regardless of whether these conclusions are accurate or inaccurate, legitimate or not, appropriate or inadequate are regarded to be relevant data related to health condition of the individual according to WP 29. Moreover, as it is stated by WP 29, in order for this data to be qualified as a health-related data it is not always important to specify „bad health“. Information gained from medical examination is considered to be health-related, does not matter whether the results are within „healthy“ limit or not. We represent the opinion that sensitive data related to health might be positive or negative information about the capability of the employee to conduct the required work (Slávik, 2014).

Crucial point is whether the personal data related to health is considered to be sensitive data or not in terms of the definition provided by the Regulation resp. the Personal Data Protection Act. Assessing the nature of data is not enough. At first, it might seem to be a „raw“ data, which can hardly provide any detailed information about the health condition of the individual. However, potential utilization of this data should be considered. If there is a chance to gain information about the actual and possible health condition of the individual, information will be considered to be a sensitive personal data related to health condition of the individual.

Material and methods

The main objective of the presented scientific article is to assess the compliance of legal and regulatory requirements brought about by the new legislation on the protection of personal data, applied by small and medium-sized enterprises mainly in relation to identify personal data and sensitive personal data as well as utilization of these in employment relations. The subject of the research are the legal regimes, the General Data Protection Regulation puts emphasis on the assessment of information as a personal data and the sensitive personal data focusing on the information about the health condition of the individual as well as introducing the theoretical-legal background, which should be the determinant of the employer's behaviour when implementing employment relations.

The partial objective was to identify the criteria and possibilities of applying the new legal framework for protection of personal data, with an impact on direction of the company's personnel management in order to implement relevant changes required by the new legal framework, primarily determined by the General Privacy Protection Regulation. Primary data was obtained in the framework of the research project conducted by the Slovak Research and Development Agency (APPV) 16-0002: „*Mental Health in the Workplace and Employee Health Assessment.*“ Secondary data was obtained partly from domestic, but mainly from foreign scientific literary sources. While drafting the article, it was necessary to focus on underlying material based on primary and secondary sources. Due to the nature of the problem we decided to apply the selected qualitative methods. Critical in-depth analysis of the legal status and the logico-deductive methods were applied.

Results and discussion

Processing of information about the physical and mental health with an impact on work performance

As mentioned above, processing of sensitive personal data has its own legal rules and further requirements from the employer. In general, processing of sensitive personal data is prohibited until there are no exemptions determined (Article 9 (2) of the Regulation, resp. § 17 (2) of the Personal Data Protection Act). The employer is authorized to process personal data related to the health of the employees according to the exemption formulated in Article 9 (2b), resp. § 17 (2b) of the Personal Data Protection Act, if *processing data is necessary to meet the obligations regarding specific rights of the employer or the responsible person concerned in the field of labor law and the social security law as permitted by the law of the EU or the law of a member*

state of the EU resp. collective agreement in accordance with the law of the member state guaranteeing the protection of fundamental rights and interests of the individual concerned. The purpose of protecting life, health and property is ensured by the exemption the employer is entitled for in the framework of the employment relationship to process the information about the physical and mental health of the job applicant.

The existence of an exception is the primary condition for processing sensitive personal data. The second condition requires a legal background for data processing (Nulíček, 2017). These are listed in Article 6 (1) of the Regulation, resp. § 13 (1) of the Personal Data Protection Act. Simplification is about the following six legal titles: agreement; execution of contract; legal license; protection of life, health and property; public and legitimate interest.

In order to avoid administrative offenses in processing of personal data, the „safest“ legal title for data procession of the employer regarding the health issues of the employee is the legal license. Processing is necessary to fulfill the statutory duty of the employer resp. processing of personal data is necessary under a special regulation or an international treaty, the Slovak Republic is bound to (Article 6 (1) (c) of the Regulation, resp. § 13 (1) (c) of the Personal Data Protection Act). The employer is authorized to process the information (consent of the employee is not necessary) about the mental and physical health of the employee based on § 41 (2) of the Labor Code. If a particular type of work under a specific legal regulation requires physical or mental capability of the candidate, the employer can sign a contract with an applicant who fulfills the specific requirement. The fulfillment of this legal duty requires processing of data related to health condition of the candidate. It cannot be forgotten that assumptions about the physical and mental health and its impact on work performance must be laid down in a legal regulation.

A wide-spread practice of HR professionals to shortlist the appropriate candidate is to apply psychometric tests. Psychometric tests reveal information about the candidate they did not intend to reveal themselves, and also provide information about the mental health of the candidate, the personality, ability to work under pressure etc. (Olšovská & Švec, 2017). If the purpose of the psychometric test is to gain information about the mental health of the candidate as a precondition to conduct particular work requires a specific legal regulation set out in Article 6 (1) (c) of the Regulation resp. § 13 (1) (c) of the Personal Data Protection Act. What happens if such specific legal regulation does not exist? Is the employer entitled to apply psychometric test if no specific legal regulation is provided?

Requiring medical examination from the applicant results in assessment of the mental capability of the job applicant to conduct the work he is applying for. The § 63 (1) (d) point 3 of the Labor Code empowers the employer (although indirectly) to require medical examination from the applicant resp. employee. According to the existing legislation, the employer is entitled to determine requirements for the proper performance of the agreed work, which are laid down in the document about the internal regulations of the company. There is no legal provision to prohibit the employer specifying the requirements and require a medical examination from the candidate resp. employee about the mental health to prove the ability to conduct the agreed work. According to our research and perspectives about the protection of personal data, it is necessary to respect the legal requirements while processing this kind of personal information.

The lawfulness of processing information about the mental health requires the existence of **derogation** (Article 9 (2) of the Regulation, resp. § 16 (2) of the Personal Data Protection Act) and the **legal basis** (Article 6 (1) of the Regulation, resp. § 13 (1) of the Personal Data Protection Act).

When processing information about the mental health, while this information is obtained as a requirement by the employer to conduct specific work, the employer may also rely on exemption according to Article 9 (2) (b) of the Regulation, resp. § 16 (2) (b) of the Personal Data Protection Act. Thus, the law of the member state permits processing of data about mental health in order to exercise specific rights in the field of labor law. The employer should be careful about the importance of processing this type of information. It is necessary to consider it from certain aspects. The purpose of psychological assessment with the help of psychodiagnostic methods should focus on determination of personality traits of the employee i.e. performance, temperament, motivation that are necessary and relevant in order to perform the agreed work. Test about mental competence of the employee is necessary to conduct in case of performing specific work. If the employer cannot justify why test on mental competence is required to perform a particular job and that job can be performed without meeting this requirement, we cannot talk about a necessity.

As we have presented, apart from exemption, processing of personal data also requires legal basis. If the internal regulations of the employer require mental competence as a necessary requirement to conduct a particular job, two legal bases are available for processing this personal data. Legitimate interest of the employer according to Article 6 (1) (f) of the Regulation, resp. § 13 (1) (f) of the Personal Data Protection Act, when information about the mental health of the employee is processed without the consent of the employee. The second applicable legal basis is the consent of the person concerned according to Article 6 (1) (a) of the Regulation resp. § 13 (1) (a) of the Personal Data Protection Act, which must be explicit since it is about processing sensitive personal data. However, the employers are recommended to restrict the processing of personal data in employment relationship on the legal basis of employee's consent to the maximum extent possible. According to WP 29, the employee's consent might not be valid at all, since specific position of employee-employer relationship will always be doubt whether the consent was given freely by the employee.

In summary, if a particular work requires the employer to set requirements about the mental health of the candidate resp. employee, it is also possible for the employer to require statement about the mental competence and require the employee to undergo examination about the mental health. Area regulation of psychological examination of employees regardless to the type of work and specific tasks employees perform, we consider unjustified and inappropriate, and it is not in accordance with the Labor Code and the legislation about protection of personal data. In case of work positions where mental capability of the employee is required, we can list all those positions where organizational and leadership skills are required to exercise authority and manage stressful situations etc.

Conclusion

According to labor relations, health of the employee is a value that the employer is legally bound by law. The aim is to perform work that does not harm or threaten the health of the employee, therefore the employer is entitled to „work“ with this kind of personal data in statutory terms. In case of some processing operations, it is not clear whether such processing is classified as processing of sensitive data about the health concerns of the employee or not. Disputative is the issue of processing information about the impact of mental health on work performance gained as a result of medical examination. In line with the concept of WP29, promoting a broad approach to concept of health-related personal data. Not only employers should consider specific data about the health of the employee, but also the data concerning the health condition can be deduced from the existing data.

The basis for processing sensitive personal data according to regulation and the Personal Data Protection Act is to lay down the general prohibition of processing. Whoever has to or wants to process sensitive personal data must justify processing of such data based on exemptions that allow processing of such data (Article 9 (2) of the Regulation, resp. § 16 (2) of the Personal Data Protection Act). Consequently, processing of data is conducted on one of the legal bases in Article 6 of the Regulation, resp. § 13 of the Personal Data Protection Act. In order to process information about the mental and physical health, the employer should refer to exemption in Article 9 (2) (b) of the Regulation, resp. § 16 (2) (b) of the Personal Data Protection Act, as well as the consent of the person concerned (see above) legal license and legitimate interest.

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References

1. Barancová, H. 2016. *Nové technológie v pracovnom práve a ochrana zamestnanca (možnosti a riziká)*. Praha: Leges, 208
2. Cvik, E. - D., Pelikanová, R., Malý, M. Selected Issues from the Dark Side of the General Data Protection Regulation. *Review of Economic Perspectives* 18 (4), 2018, 387 – 407
3. Goddard, M. 2017. The EU General Data Protection Regulation (GDPR): European regulation that has a global impact. *International Journal of Market Research* 59 (6), 703 - 705
4. Hsu, J. 2018. What you need to know about Europe's data privacy rules new GDPR regulations on personal data will affect even individual coders. *IEEE Spectrum* 55 (5), 21
5. Janečková, E., Bartík, V. 2016. *Ochrana osobních údajů v pracovním právu (Otázky a odpovědi)*. Praha: Wolters Kluwer, 192
6. Kho, ND. 2018. GDPR for content design, development, and deployment. *Econtent* 41 (3), 20 – 24
7. Krajnakova, E., Vojtovic, S. 2017. Struggles of older workers at the labour market. *Economics & Sociology* 10 (1), 319 – 333
8. Kubeš, V., Rančák, J. 2018. Sustainability of organization performance via management techniques. *Entrepreneurship and Sustainability Issues*, 5 (4), 1031 – 1042

9. Lindqvist, J. 2018. New challenges to personal data processing agreements: is the GDPR fit to deal with contract, accountability and liability in a world of the Internet of Things? *International Journal of Law and Information Technology*, 26 (1), 45 – 63
10. Mura, L., Daňová, M., Vavrek, R., Dúbravská, M. 2017. Economic freedom – classification of its level and impact on the economic security. *AD ALTA-Journal of Interdisciplinary Research*, 7 (2), 154 – 157
11. Mura, L., Ključnikov, A., Tvaronavičiene, M., Androniceanu, A. 2017. Development Trends in Human Resource Management in Small and Medium Enterprises in the Visegrad Group. *Acta Polytechnica Hungarica*, 14 (7), 105 – 122
12. Nulíček, M. a kol. 2017. *GDPR/Obecné nařízení o ochraně osobních údajů*. Praha: Wolters Kluwer, 525
13. Olšovská, A., Švec, M. 2017. Use of Psychological Examinations of Employees and Job Applicants in Personnel Management. *Issues of Human Resource Management*, 23 – 41
14. Orlova, L., Gagarinskaya, G., Gorbunova, Y., Kalmykova, O. 2018. Start-ups in the field of social and economic development of the region: a cognitive model. *Entrepreneurship and Sustainability Issues*, 5 (4), 795 - 811
15. Slávik, M. *Pracovná zdravotná služba versus HR? New Visions in HR 2014*. Available on: <https://www.informslovakia.sk/en/system/files/speech/slavik.pdf>.
16. Švec, M., Valentová, T., 2016. *Ochrana osobných údajov v pracovnoprávných vzťahoch*. Bratislava: Wolters Kluwer, 176
17. Žul'ová, J. a kol. 2018. *Spracúvanie osobných údajov zamestnanca podľa GDPR*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 146
18. Žul'ová, J., Valentová, T., Švec, M. 2018. *Nové pravidlá ochrany osobných údajov: podľa nového zákona o ochrane osobných údajov a nariadenia GDPR*. Bratislava: Wolters Kluwer, 168
19. Žul'ová, J., Švec, M. 2018. *GDPR a ochrana záujmov zamestnanca*. Bratislava: Friedrich Ebert Stiftung, zastúpenie v Slovenskej republike, 132
20. Wilson, S. 2018. A framework for security technology cohesion in the era of the GDPR. *Computer Fraud & Security* 12 (1), 8 – 11

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