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## PROCESSING OF PERSONAL DATA CONCERNING HEALTH IN LABOUR LAW RELATIONSHIPS

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**Abstract:** *This article focuses on an issue of protecting a special category of personal data defined in the Article 9 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 95/46/EC and in the Slovak Legal order in the Section 16 of the Act. No. 18/2018 Coll. on the Protection of Personal Data and on Changes and Amendments to Certain Acts. The article deals with basic legal terms and situation as processing of special categories of personal data (or sensitive data), general prohibition of processing of special personal data and exemption of prohibition of processing of special personal data, regarding to focus on possibilities and obligations of employers in labour law relationships.*

**Keywords:** *GDPR, personal data, labour law, mental health, health*

### 1. Introduction

Implementation of European legal regulation of personal data protection was until May 25, 2018 content of Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter as the “Directive 95/46/EC”) and in Slovak Legal order by the Act No. 122/2013 Coll. on the Protection of Personal Data and on Changing and Amending of other acts, as amended (hereinafter referred to as the “Previous Act on the Protection of Personal Data”).

After May 25, 2018, a new legal regulation of personal data protection was implemented into the legislation of the Slovak Republic by new Act No. 18/2018 Coll. on the Protection of Personal Data and on Changes and Amendments to Certain Other Acts. (hereinafter referred to as the “New Act on PPD”). However, the base of this “false” implementation, Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regards to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (hereinafter referred to as the “Regulation GDPR”) is legally binding all citizens and legal entities in territory of all of the Member States especially without a need for its specific implementation (transposition) into the national (Slovak) law, the Slovak Republic implemented the Regulation GDPR into the Slovak legislation by the New Act on PDD.

The adoption of the Regulation GDPR at the European Union level and New Act on PDD at the level of the Slovak legal order aims to ensure high level of protection of individuals (*persona natura*) against an unauthorized interference with personal data that may lead to breach of their rights and freedoms.

### 2. Data concerning health – special category of personal data or sensitive data

In the Chapter II named as *Principles*, and in the Article 9 - Processing of special categories of personal data, paragraph 1 of the Regulation GDPR (similarly the provision of Section 16 Par. 1 of the New Act on PDD) is stated: “*Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.*”

In general (the Article 4 Par. 2 of the Regulation GDPR and similarly the provision of Section 5 point (e) of New Act on PDD), processing of personal data means: “*...any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.*”

The concept of “data concerning health” is defined in the Article 4 Par. 15 of the Regulation GDPR (similarly the provision of Section 5 point (d) of the New Act on PDD) as “*personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status*” and specified in detail in the Recital 35 of the Regulation GDPR: “*Personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the*

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*data subject. This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council [1] to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test.“*

As the personal health data, we can consider not only the information mentioned above, but also an information about fact that a person wears glasses or use contact lenses, also data about a person's IQ or intellectual and emotional capacity, mental illness or status, stress resistance, information about drinking habits, drug abuse, smoking, data about allergies, data on health conditions to be used in an emergency, membership of an individual in a patient support group (e. g. cancer support group, Alcoholics Anonymous or other self-help and support groups with a health-related objective; and the mere mentioning of the fact that somebody is ill in an employment context are all data concerning the health of individual data subjects. [2]

As reader can see, the Recital 35 of the Regulation GDPR sets basic characteristic of data concerning health and the Article 9 Par. 1 of the Regulation GDPR (similarly the provision of Section 16 Par. 1 of the New Act on PDD) sets a prohibition of processing of data concerning health, but this prohibition is not absolute. Why cannot be prohibition of processing of data concerning health absolute?

### **3. Legal base of processing of data concerning health as an employer**

The processing of data concerning health is common processing activity of dozens of controllers in member states of the European union (natural or legal person, public authority, agency or other body which alone or jointly with the other determines the purposes and means of the processing of personal data) as health care professional (medical professions in common), psychologists, lawyers and of course employers.

The prohibition on the processing of a specific category of personal data is broken down by an enumerative list of legal bases (processing conditions of a specific category of personal data) that allow processing of a special category of personal data. In this article, we focus only on relevant legal bases concerning health-allowing processing of special category of data concerning health.

Employers, which process data concerning health, often (wrongly) request an explicit consent from their employees. Problem of the consent as a legal base is that all subjects have right to withdraw his/her consent at any time. In this case, without consent, any employer could not further process personal data.

The Regulation GDPR in the Article 9 Par. 2, point (b) (similarly the provision of Section 16 Par. 2, point b) of the New Act on PDD) sets exemption from the Article 9 Par. 1 (similarly the provision of Section 16 Par. 1 of the New Act on PDD). The prohibition of processing data concerning health shall not “*apply if processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law.*” The employer has not obligation to acquire the employee’s consent if these data concerning health are necessary for the purpose mentioned above.

On this legal base, a special category of personal data can be processed without explicit consent, if such processing is permitted by a specific regulation (the Union law or the law of the Slovak Republic) or a collective agreement. Regulation or collective agreement must provide, under the law, adequate safeguards to protect the fundamental rights and interests of the person concerned. The processing of a special category of personal data for these purposes may e. g. take place for the purposes of providing personal data to employers with the health insurance, social insurance, retirement savings, the granting of state social benefits (such as benefits in material need), social protection of children social welfare, social service provision, and so on. [3] The obligation mentioned above in the Slovak legal order results from legal Acts as Act No. 580/2004 Coll. on health insurance, Act No. 461/2003 Coll. on social security, Act No. 462/2003 Coll. on the replacement of income in case of temporary incapacity for work, and Act No. 43/2004 Coll. on old-age pension insurance etc.

The employer is obliged to process data concerning health not only based on the above-defined specific legislation, but also based on Act No. 311/2001 Labour Code as ammended (hereinafter referred to as the “Labour Code”). Thus, the employer is empowered to process the data concerning the health of the employee (without a need of the employee consent), e. g., based on the provision of Section 41 Par. 2 of the Labour Code for the purposes of determining medical fitness for work within the initial medical examination, on the basis of provision of Section 98 Par. 3 of the Labour Code for a preventive medical examination for the purpose of performing work at night or for the purpose of assessing the effects of the performance of work in the framework of extraordinary medical examinations pursuant to the provision of Section 55 Par. 2 point (a) and (e) and the provision of Section 63 Par. 1 point (c) of the Labor Code.

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On the other hand, an entity performing medical opinion on health ability or mental health ability or other opinion within preventive occupational medicine for purpose of medical expert opinion has a separate legal base for the processing of a special category of data concerning health. The Regulation GDPR in the Article 9 Par. 2, point (h) (similarly the provision of Section 16 Par. 2, point (h) of the New Act on PDD) sets exemption from the Article 9 Par. 1 (similarly the provision of Section 16 Par. 1 of the New Act on PDD). The prohibition of processing data concerning health shall not apply if “*processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services.*” The processing such as this one must be subject to the simultaneous application of the guarantees and conditions referred in the Article 9 Par. 3 of the Regulation GDPR. Data concerning health “*...may be processed for the purposes referred to in point (h) of paragraph 2 when those data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy under Union or Member State law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under Union or Member State law or rules established by national competent bodies.*”

#### **4. Conclusion**

The Processing of a specific category of personal data – data concerning health is generally prohibited in the Article 9 Par. 1 of the Regulation GDPR. The Regulation GDPR in the Article 9 Par. 2, point (b) (similarly the provision of Section 16 Par. 2, point (b) of the New Act on PDD) sets exemption for every employer from the Article 9 Par. 1 (similarly the provision of Section 16 Par. 1 of the New Act on PDD)., who wants to process the employee’s data concerning health. The employer must consider whether the personal data of employee do not fall under the category of a special personal data concerning health and whether the legal base required for such processing exists.

The article was elaborated within solution of grant project APVV-16-0002 Mental Health in the Workplace and Employee Health Assessment.

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