LEGAL UPDATE

Measures implemented by employers due to pandemic and data protection

ČECHOVÁ & PARTNERS

Measures implemented to protect the health of employees and personal data protection

In order to prevent the spread of COVID-19, employers have implemented various kinds of measures. Those include employee temperature checks, temperature checks of individuals entering an employer's premises, questionnaires for employees who are present at work on their travel history and occurrence of COVID-19 in their families, as well as the signing of declarations about not showing any symptoms of the disease. When applying such measures, employers shall take into consideration not only their duty to provide a safe and healthy working environment for employees[1], but also to respect employees' privacy given that their personal data is collected. This is also reiterated in the issued statement of the Office for Personal Data Protection.

The Office stated that the information on body temperature is personal data, more specifically, health data, which falls into special categories of personal data (also called *sensitive data*). Other data, such as information that a person has returned from abroad or is self-quarantined (not quarantined based on medical instructions), may be also considered personal data, but not health data. This conclusion has been confirmed by other supervisory authorities as well.

How to process personal data collected when applying measures against COVID-19? As has been reiterated by supervisory authorities, including the Office for Personal Data Protection, it is crucial to comply with the principles relating to the processing of personal data, i.e. transparency, data minimisation, storage limitation, security – integrity and confidentiality, accountability and above all, the lawfulness of processing.

Measures implemented by employers based on orders from the authorities

The competent authorities are allowed to impose targeted measures on employers to prevent the spread of coronavirus, which has created the emergency situation that was declared due to the danger to public health on 12 March 2020. Such measures may be imposed in the form of measures, orders or resolutions of the public health authorities, in particular the Public Health Authority of the Slovak Republic and central government authorities (the Slovak Government, the Ministry of Interior, district offices, municipalities in the position of local public authorities).

[1] Act No. 124/2006 Coll. on Occupational Health and Safety and on amendment and supplement to selected laws, as amended

If an employer implements measures that are imposed on him or arise from the obligations imposed by the competent authorities and in relation to those tasks it collects, processes and retains employees' personal data or personal data of individuals entering its premises, including health data; and the employer does so pursuant to measures adopted by public health authorities, it is in a strong position, as the public health authorities' measures provide a clear legal basis. The consent of the employee is not required and the processing should be considered proportionate, legitimate and lawful as required by the GDPR.[2] The employer must still follow the data protection principles and not exceed the scope and authorisation given by measures adopted by the public health authorities.

Nevertheless, the measures issued by the Public Health Authority have not imposed any specific data processing-related tasks on employers yet.[3] The government has just announced that mandatory measurement of temperature will be performed in hospitals, shops and factories from 30 March 2020. A public health authority measure has yet to be issued.

Preventive measures implemented by an employer and personal data processing

No data protection related tasks have yet been imposed on employers in relation to the pandemic. Notwithstanding this, some employers have implemented pandemic-related procedures that require (additional) personal data from their employees or individuals entering their premises. Is such processing compliant with GDPR?

The European Data Protection Board[4] has in its latest statement on the processing of personal data in the context of the COVID-19 outbreak confirmed that GDPR does not hinder measures taken to protect public health or the health and lives of

[2] 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 (General Data Protection Regulation)

[3] Public Health Authority Measure No. OLP/2640/2020 from 18 March 2020 imposes obligations on natural persons that returned from abroad 13 March 2020 after 7 a.m. to notify their return to their health care practitioners. Health care practitioners shall declare/confirm these individuals are unfit to work due to COVID-19. There are other obligations imposed on employees in specific professions. Those individuals are not required to stay in the quarantine, as long as they do not show any symptoms of COVID-19 and should wear personal protective equipment.

[4] See in Slovak language version here, original is available here. It should be noted that some data protection authorities (Belgium, France, Netherlands, Italy) were quite restrictive in their statements from early March with regards to the systematic, large scale and long term application of body temperature measurements of employees or other individuals, and reiterated that any procedures should be in line with public health authorities measures or coordinated with occupational health services. The European Data Protection Board stated that the measures should be implemented in accordance with national law.

employees, nor does it preclude employers from processing personal data in the fight against the coronavirus pandemic, without the need to obtain the consent of the employees, as GDPR provides for other legal bases.[5] As mentioned above, it is necessary to follow the data protection principles under Article 5 of GDPR, in particular the lawfulness of processing, accountability, and comply with the legal requirements of Member States.

How should this be implemented in practice? In our view, Slovak law does allow employers to implement preventive measures in the workplace when applying the provisions of the Act on Occupational Health and Safety, in addition to any targeted measures of competent authorities. Nevertheless, before implementing any such measure, an employer must always take into account the factors relevant for its specific workplace, the existing safety and health risks specific to that particular workplace considering the number of employees, the concentration of employees and the level of risk in the workplace. Subsequently, the employer should evaluate whether the proposed measures are really necessary, i.e. to examine whether the objective of preventing the spread of COVID-19 may be achieved by different measures (such as home office, procurement of PPE etc.) or less intrusive measures (e.g. declarations of employees that they are symptoms-free and have no travel history, health self-checks or consultations with medical professionals). Such evaluation is not only important in relation to the laws on health and safety, but also in the data protection context, as this evaluation may form part of the balancing test and data protection impact assessment, in case the employer also balances and compares the public interest in collecting the employees' personal data against protection of their privacy. In the existing situation, it is advisable to perform the balancing test and data protection impact assessment, even when it is not strictly required by GDPR, in particular in workplaces with high numbers of employees, where it is planned to process personal data systematically and on a large scale. The evaluation should be documented in accordance with the accountability principle (Article 5 (2) of GDPR).

[5] The EDPB states that in the situation such as pandemic there are requirements met to process special category of personal data (health data). In particular, it refers to Article 9 (2) (i) GDPR, i.e. processing is necessary for reasons of public interest in the area of public health on the basis of Union of Member State law or Article 9 (2) c) GDPR, i.e. processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent. It is also possible to use Article 9 (2) g) GDPR, in cases when processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law. As far as legal bases under Article 6 GDPR are concerned, it is possible to use legal basis under Article 6 (1) c) when complying with a legal obligation, Article 6 (1) e) when performing a task carried out in public interest or under Article 6 (1) d) GDPR when protecting vital interests of the data subjects or another natural persons.

Measures that are to be implemented systematically shall be consulted with occupational health services or safety services (if used), as well as with employee representatives. Some measures could constitute the monitoring of employees in the workplace, which leads to the obligation of the employer to comply with the Labour Code[6]requirements, namely to consult the monitoring mechanisms with employee representatives and inform them how long they will last. In addition, the employer shall be transparent and respect an employee's right to information on data processing (Article 13 GDPR). It should inform them on the purposes of data processing, the measures implemented and the scope of data used, as well as on the data retention period and data recipients. Security of personal data, especially health data, must be ensured, therefore the number of individuals that have access to personal data must be limited to the necessary minimum and access must be verified to prevent any authorised access.

In conclusion, within all implemented measures that require personal data processing, only personal data that is strictly necessary can be collected and processed. It should be also considered whether or not such processing could be conducted with aggregated or anonymized data. Finally, personal data should be retained only as long as necessary (limited to the duration of the emergency situation).

Measures concerning a specific employee who shows symptoms of COVID-19

Some situations require an immediate (urgent) processing of personal data in order to protect the vital interests of data subjects and other natural persons. Such a situation may occur in the workplace during the pandemic. We are of the opinion that if an employee has health issues/complications related to COVID-19 at the workplace (e.g. shaking chills, fever), i.e. there is a risk to his/her life or health or to the health of others, the employer may provide personal data of the affected employee/individuals to public health authorities pursuant to Article 9 (2) (c) and Article 9 (2) (d) of GDPR in order to manage the situation and implement the necessary measures in the affected workplace.

Sharing personal data related to an employee's quarantine or COVID-19 diagnose in the workplace

Protection of personal data should be taken into consideration when sharing data on an employee's quarantine or COVID-19 diagnose in the workplace or with public

[6] Sec. 13 (4) of the Act No. 311/2001 Coll. Labour Code, as amended

health authorities. When the employer learns that an employee is unfit for work due to quarantine ordered because of COVID-19, it is our view that the employer may inform other employees about the situation; however, if possible, it should keep the identity of the employee confidential in order to avoid any potential discrimination of the employee. In order to protect the health of others and respect the privacy of the employee, we recommend that further steps are coordinated with the affected employee and the individuals that he/she has been in contact with are informed.

Sharing personal data with competent public authorities

No measure of the Public Health Authority requires employers to report any information on employees to the Authority (e.g. no reports on employees who have returned from abroad or to disclose any further information provided by employees in the questionnaires). Nevertheless, it is advisable that employers motivate their employees that they report their return from abroad to their health practitioner and comply with the measure of Public Health Authority issued on 18 March 2020. If the employer is aware that an employee returned from a business trip abroad after 13 March 2020, we believe that the employer may order the employee not to return to work. The health care provider shall make a report to the public health authority.

Other guidelines also imply that if any symptoms of COVID-19 are shown in the workplace, the employer may contact the public health authority, ideally via the occupational health service.