

PERSONAL DATA PROTECTION IN THE CONTEXT OF COVID-19

1. General considerations

Employers must take into consideration the implications related to personal data protection any time they collect their employees' personal data (particularly the data concerning their health) in order to monitor and prevent the spread of Covid-19 within the company.

It should be recalled that, despite the state of emergency established in Romania and the global spread of Covid-19, employers' obligations with regard to personal data processing remain the same, as provided by General Data Protection Regulation no. 679/2016 ("GDPR").

2. Legality and basis of processing

Personal data processing in the context of monitoring and preventing the spread of Covid-19 within the company may have as basis the fulfillment of a legal obligation, but this justification entails a much too extensive interpretation of the legislation on occupational health and safety.

Thus, considering that the legislation does not expressly provide for employers' obligation to take measures in order to analyze and determine the existence or non-existence of a suspected disease, on a case-by-case basis, controllers may invoke the following reasons provided by Art. 9 GDPR for processing health personal data:

- (i) *"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 on the basis of Union or Member State law or pursuant to contract with a health professional [...]";*
- (ii) *"processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy".*

We have reservations about the press release published by the National Supervisory Authority for Personal Data Processing ("ANSPDCP") regarding the processing of health data of employees by

their employer, processing based on the data subject's consent¹. Considering the European recommendations and practices, the existing subordination relationship and the employee's fear about the potential unfavorable consequences for them if they do not give their consent (e.g., social exclusion, salary decrease, dismissal), we believe that the possibility of using this basis for processing the health data of employees is, thus, debatable.

Also, the bases in points (i) and (ii) above must be carefully analyzed and applied, on a case-by-case basis, depending on the industry in which the employer is active, on the recipients of information, as well as on the specific type of personal data which are processed.

3. Questionnaires and Temperature Testing

According to the practice of other supervisory authorities of the European Union² *“a company may not invoke any basis for processing the health data of its employees by means of a questionnaire, for example, so as to prevent the spread of Covid-19”*. Such a practice is justified by the fact that the processing of such types of data devolves upon the competent institutions, which means that a person who has the specific symptoms/would be suspected of having Covid-19 or of having visited the affected areas would anyway be bound to stay in quarantine and no longer come to the company's headquarters.

Furthermore, according to the same supervisory authorities mentioned above, companies are prohibited from implementing a medical testing system (temperature scanning, blood tests, etc.), not even in order to prevent the spread of Covid-19. Such a testing system is considered by the supervisory authorities as being intrusive and prejudicing every person's right to dignity.

As an alternative to the above, employers can undoubtedly take the following actions and measures in order to prevent the spread of Covid-19 within their company:

- (i) to encourage their employees to be transparent about interactions with persons known as or

¹The press release is available at the following address:

https://www.dataprotection.ro/?page=Pre lucrarea_dator_privind_starea_de_sanatate&lang=ro

²<https://www.cnil.fr/fr/coronavirus-covid-19-les-rappels-de-la-cnil-sur-la-collecte-de-donnees-personnelles>
<https://www.gdpd.it/web/guest/home/docweb/-/docweb-display/docweb/9282117>
<https://www.autoriteprotectiondonnees.be/covid-19-et-traitement-de-donn%C3%A9es-%C3%A0-caract%C3%A8re-personnel-sur-le-lieu-de-travail>

- suspected of being infected with Covid-19;
- (ii) to encourage their employees to be responsible and report the presence of any Covid-19 symptom;
 - (iii) to implement medical check points within the company (*e.g.*, at the working units – production halls, retail outlets) and to recommend their employees (*but not to compel them*) to pay a visit to the occupational physician;
 - (iv) to use, as much as possible, technological means of communication as an alternative to business meetings (teleconferences);
 - (v) to prohibit entirely the presence of visitors or meetings at their headquarters.

4. Disclosure of Personal Data (Internally and Externally)

Employers should limit, as much as possible, the disclosure of their employees' personal data, particularly their health data.

However, in certain suspected or even confirmed Covid-19 cases, it may be necessary to disclose who the employee is and which measures were implemented. The employer will do so when it is forced to comply with any reporting obligation under the Romanian legislation or, where applicable, when it has such employee's consent³. In such cases, the employer must limit reporting to what is necessary for the person for whom such data is intended.

But particular caution must be exercised internally. The identity of the person who tested positive for Covid-19 or who was confirmed as being positive must be disclosed only to a limited number of persons who need to know such information and strictly concerning such need directly (*e.g.*, such information may be sent to the working team of which such employee is a part).

5. Need for Data Protection Impact Assessments (DPIA)

Considering the context and purposes for personal data processing, the performance of a data protection impact assessment might be required, as provided by Art. 35 GDPR.

In case the processing activities conducted by data controllers in the context of Covid-19 can result

³ https://www.dataprotection.ro/?page=Pre lucrarea_datelor_privind_starea_de_sanatate&lang=ro



in a high risk to the rights and freedoms of data subjects, controllers must consider conducting a DPIA before commencing the processing activity.

*The legal basis of the above is represented by **Law 190/2018 on measures for implementing 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) and Regulation no. 679 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).***

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