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Lawful data processing in employment relationship

In legal relationships aimed at establishing employment, employers obtain abundance of personal or sensitive data, if required, and "manage" them pursuant to legislation. Employees whose data are managed by employers are called "data subjects" under legislation.

Data processing at each phase of the employment

For the first time, data are managed when an employer decides to hire personnel. A job advertisement is published and a great number of resumes appear within seconds in its system. After a few days, more popular employers are no longer looking at the resumes as the high volumes of incoming data can no longer be processed by then. Thus, as early as during the recruitment procedure, a number of personal data appear in the "system", such as the age, education, language skill, economic interest and possible criminal record of the employee. In this phase, data processing can have two legitimate purposes: preparation for the decision of hiring personnel (main goal) and protection against occasional claim enforced in the future. Thereafter, data are managed in stages during the continuance of employment: aptitude test (resilience, communication skills, problem solving capacity), workplace check (geographical location, relations, sphere of interest), assessment, training; as well as the process of the termination of employment and even of the enforcement of employment claims imply data management.

All data-related procedures qualify as data processing

In examining the framework of data processing, the term needs to be defined at first as provided by legislation (Act CXII of 2011: Privacy Act). Data processing shall mean any operation or the totality of operations performed on the data, irrespective of the procedure applied; in particular, collecting, recording, registering, classifying, storing, modifying, using, querying, transferring, disclosing, synchronizing or connecting, blocking, deleting and destructing the data, as well as preventing their further use, taking photos, making audio or visual recordings, as well as registering physical characteristics suitable for personal identification (such as fingerprints or palm prints, DNA samples, iris scans). In short, the scope of data processing is extremely wide and includes practically all activities carried out in relation with data. In the context of data processing, one should be particularly careful with the so-called sensitive data. For the purposes of legislation, sensitive data include *inter alia* information regarding religious or philosophical beliefs, health, trade-union membership or sex life of the data subject.

These rules must be obeyed by employers

It should be said at the outset that the Labour Code (Mt.) does not contain many provisions in connection with data processing relating to work. Relevant rules must be searched not only in Act I of 2012 (Labour Code) but also in the Privacy Act. In the Labour Code, primarily the part titled as protection of personal rights needs to be examined; however, the entire body of the Privacy Act may contain relevant information. It is no insignificant matter to be familiar with the right rules as data processing related claims are usually asserted, similarly to other claims arising from employment, and, in fact, "flourish" after the termination of the employment.

This is how data can be requested from employees

Data can be managed also in employment as authorised by legislation (tax, social security laws) or after the prior or voluntary consent of the data subject. Here it must be pointed out that the voluntary consent of the employees acting as "data subject" is difficult to interpret due to the hierarchy predominant in employment. It also implies that both the authority responsible for data protection and the court may consider illegal and sanction data processing also with the consent of the employee. Therefore, even if relevant consent is given, employers are usually not allowed to process the data of the employees regarding her/his sexual habits, religious belief and political opinion as they are not related to employment in general. It is important that employees may be requested to make a statement to make or data to be provided which are without prejudice to their rights relating to personality (1), and is essential in terms of establishment, performance or termination of the employment relationship (2). The latter is the equivalent of data processing being subject to a purpose specified by labour law. If either condition is not met, no data can be processed in accordance with the law.

Data can be managed exceptionally in the absence of consent

Data processing can have various aims and be related to any lawful purpose whatsoever. In the context of the establishment of employment, the data contained in resumes are processed by employers for the purposes of establishing employment relationship and so it complies with the provisions of Subsection 10(1) of the Labour Code. Data can be processed under the Privacy Act as long as the relevant purpose subsists. After the post has been filled, however, such aim usually ceases to exist unless the applicant handed over her/his application file by giving her/his permission to use her/his application for future posts to be filled. It is obvious that the time allowed to do so is also limited. Other legal title may also ensure authorisation for the controller to process data. In case the employment relationship has not been established, the data of the individual applying for the job may also be processed if for example there is a reason to believe that the decision of the employer may be subject of a legal dispute in the future. Namely, the employee may also consider the decision of the employer e.g. discriminatory. If the employer has not obtained any data, it will not be able to protect its decision successfully. In addition, in actions brought against discrimination, reverse burden of proof applies pursuant to the provisions of Act CXXV of 2003 (Equal Treatment Act) namely that it is the employer who must submit exculpatory evidence. In such case, data may be processed even if the data subject has withdrawn her/his consent. Subsection 6(5) of the Privacy Act facilitates that in certain cases when the data subject has given her/his prior consent at the beginning, data processing can be continued for the purposes of fulfilling legal obligations or enforcing legal interests even in the absence of repeated consent or the withdrawal of consent given for additional purpose!

Neither data nor opinion may be communicated

The fundamental principle prevails also here that the employer under Subsection 10(2) of the Labour Code is required to notify the employee regarding her/his data being processed. Employers are only allowed to reveal any fact, data or opinion regarding employees to third parties in instances specified by legislation or with the consent of the employee. The strict nature of the prohibition is clearly reflected in the condition on the communication of the opinion. While in other countries (e.g., U.S.A.), an employer offering a job may legally turn to the former employer of an applicant to enquire about her/his work performance and aptitude, it is (legally) impossible in Hungary. In addition, the rules governing data transfer are applicable without exception when employers make data accessible by third parties. In particular, this includes data transfer to the owner of the employer, the parent

company, the subsidiary and in fact within the group of companies. In short, data can be transferred to them; however, legal constraints must be observed.

Data can be processed subject to conditions

For the purposes of fulfilling obligations arising from employment, employers are allowed to transfer the personal data of employees to the data processor, by designating the purpose of the data supply, as specified by legislation. Employees must be notified accordingly in advance. Thus, the provisions of the Privacy Act must be applied as amended to the extent that only the fulfilment of an obligation arising from employment relationship may constitute a legitimate objective. In practice, it can be either a company engaged in the calculation of remunerations or a law office. Special rules apply when non-resident (resident outside the EEA) data processors are employed. The conditions include the explicit consent of the data subject as well as adequate level of protection of the data. Should the data subject fail to give her/his explicit consent, the employer may again allude to the provisions of Subsection 6(5) of the Privacy Act. At this point, it must prove that data are being processed based on the consent given by the data subject, the processing of data serves the purpose of enforcement of the legitimate interest of the employer, as well as that the adequate level of protection of personal data will be provided.