NEW LEGISLATION ON PERSONAL DATA PROCESSING BY EMPLOYERS

On 25 May 2018 the requirements 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 (the "General Data Protection Regulation", "GDPR") come into force. It provides for severe financial penalties for breaches of data protection provisions which could be as much as EUR 20 million or 4% of an enterprise's total worldwide turnover. To adjust Polish law to the requirements of the General Data Protection Regulation, the Ministry of Digitalization has prepared drafts of a number of regulations, including amendments to the Labour Code.

It seems that the intention of the Ministry of Digitalization was to ensure some liberalization of the current Polish legislation on the processing of the data of employees and candidates. For years these have been widely criticised as among the most restrictive in the world. Certain proposed amendments, however, have the opposite effect, introducing material limitations that are more restrictive than the current provisions and the requirements of the General Data Protection Regulation. These limitations are inconsistent with current market practice and do not accommodate the reasonable requirements of employers applying corporate compliance policies with regard to verification of personnel.

Key issues

- Status of the new regulations
- Requirement to demand basic data
- Employee's consent required to process e-mail addresses or telephone numbers
- No liberalization of provisions with regard to demanding and processing data on a clean criminal record
- Ground for processing data
- Closed list of grounds for processing personal data for employment-related purposes
- Consent of the employee
- How should employers prepare for the new legislation?

STATUS OF THE NEW REGULATIONS

The planned amendments to the Labour Code are to be enacted as part of asset of comprehensive amendments that include the draft of the new Act on Personal Data Protection and the draft Act – Provisions Introducing the Act on Personal Data Protection. Those drafts are currently only at an early stage in the legislative process and are now being consulted with the public. We believe the Sejm is unlikely to adopt the new legislation before the first quarter of 2018.

REQUIREMENT TO DEMAND BASIC DATA

The provision regulating the terms on which an employer may request personal data from employees or candidates is to be amended. After the amendment employers will be under the obligation to request the relevant data from persons applying for employment instead of having just the right to

request this. The scope itself of this data will not alter significantly when compared to the way things are currently. The main difference is the addition to the list of an e-mail address or telephone number.

Requiring an employer to demand data instead of conferring a right to demand such data is incomprehensible. Although most employers request this data in practice, it is easy to imagine a situation where it will not be essential for an employer to be in possession of all the relevant data. However, the proposed amendment does not provide for any sanctions for failing to comply with the regulation.

EMPLOYEE'S CONSENT REQUIRED TO PROCESS E-MAIL ADDRESSES OR TELEPHONE NUMBERS

Processing data on any private correspondence, e-mail address and telephone number after employment has been taken up is to be possible only after the employee's consent has been obtained. However, a refusal to consent to any processing of this data could cause considerable practical problems for the employer, especially in the case of employees who do not have a company telephone and e-mail address. For example, if consent to process this data is refused, in practice the employer will be unable to contact the employee to recall him from holiday or give him instructions to come to work during overtime hours (e.g. to remedy a breakdown). Therefore, the requirement that an employee consent to the processing of such contact data is unreasonable.

NO LIBERALIZATION OF PROVISIONS WITH REGARD TO DEMANDING AND PROCESSING DATA ON A CLEAN CRIMINAL RECORD

The new provisions currently being drafted for the entire financial sector and providers of services to financial sector provide for a relatively broad liberalization of the current regulations with regard to demanding candidates and employees for information on their criminal records. We discuss this issue in detail in a separate briefing.

However, the planned amendments to the Labour Code do not provide for such liberalization with regard to a huge number of other employers, so it will only be admissible to demand such data in exceptional circumstances, e.g. in relation to management board members (and only concerning specific offences). An employer that is, for example, a manufacturer will be unable to demand such data from not only rank-and-file employees but also from, for example, a candidate for the position of finance director who will not be a member of the management board. While it is possible to consider whether the fact that an employee has been convicted of a specific offence could remain solely the private business of that employee, the employer should have the opportunity to find out that an employee or a candidate for such position has been convicted of theft or accounting offences and whether there is any prohibition on practising his profession. It is also necessary to consider whether an employer – despite the presumption of innocence – should in certain cases be able to learn of any criminal proceedings pending against a candidate or employee.

Therefore all employers from outside the financial sector or who do not provide services for the financial sector that process such data after 25 May 2018 could be exposed to the multi-million-zloty sanctions provided for in the GDPR.

GROUND FOR PROCESSING DATA

Processing personal data without legitimate grounds to do so would be illegal and expose the employer to significant fines.

Presently, the Labour Code cross-refers to applicable data protection rules. This cross-reference may be interpreted as permitting employers to process also additional data (on the top of those specifically listed in the Labour Code) based on general principles of processing of personal data, in particular - to the extent the relevant employer has legitimate interest in doing so. While such interpretation wasn't fully established and the case law identified a number of specific exceptions, it was commonly used in practice to justify grounds for processing data actually processed by employers. Under draft new law, such cross-reference is expressly deleted and processing of data based on legitimate interest would not be possible.

CLOSED LIST OF GROUNDS FOR PROCESSING PERSONAL DATA FOR EMPLOYMENT-RELATED PURPOSES

The new wording of the Labour Code is to contain a closed list of grounds for processing the data of employees and candidates. Such processing is therefore to be admissible in the following circumstances:

- with respect to data the employer is required to demand on the basis of Art. 221 of the Labour Code (see above);
- with respect to data concerning the employment relationship and when the employee or candidates gives his/her consent to the processing;
- when the obligation to provide specific data results from separate provisions; or
- when the processing of data is essential for the fulfilment of an obligation imposed on the employer by law.

The list described above does not include any concept of legitimate interest justifying the processing of personal data. As a result this causes a number of problems for employers.

Firstly, the concept of legitimate interests is referred to the general list of grounds for processing data contained in the GDPR. According to the latest opinion of the EU Personal Data Working Group, legitimate interests should still be one of the fundamental grounds for processing data concerning employment, while relying on the consent of a candidate or employee should be applied in exceptional cases. Secondly, having a legitimate interest is currently the principal ground for processing data with regard to responsible recruitment and discovery of irregularities, e.g. with regard to a conflicts of interests, corruption and defrauding an employer. The inadmissibility of employers processing data based on those grounds seriously hinders, and, in

some cases, prevents, the implementation of compliance policy, background screening or monitoring.

For example, currently an employer who as a result of an internal investigation into potential irregularities involving the granting of non-market discounts to one customer learns of ties (e.g. ownership, family or social ties) between the employee granting the discounts and such customer may process such data on the grounds of legitimate interest. If the planned amendments are enacted, having the only way of legally processing the data will be to obtain the employee's voluntary consent, which will conflict with the purpose for which the data are being processed. In addition, it may be difficult in similar circumstances to claim consent was given voluntarily.

CONSENT OF THE EMPLOYEE

A good solution in the planned amendments to the Labour Code is confirmation that employers will be able to process personal data based on the consent of the candidate or employee. While this is currently practised often and is admissible under certain conditions, the administrative courts have frequently challenged (unjustifiably in our opinion) that possibility.

Nevertheless, the processing of data based on these grounds will be subject to special conditions. Under the draft, an employee will be able to give his consent in writing or in electronic form. The GDPR also introduces additional criteria for assessing the effectiveness of consent. For example:

- The request for consent must be presented in a comprehensible, easily available form, in clear, plain language and may not result from default settings, and the consent must be granted actively, and not in the form of a failure to object to a default setting.
- The person who gives his consent must be able to withdraw it at any time.

Most importantly, the consent must be given voluntarily and the employer will have to demonstrate that there will be no negative consequences resulting from a refusal to give consent. In particular, the lack of consent may not result in a refusal to employ a candidate or termination of an employment contract.

The planned amendments do not permit processing data on sex life, sexual orientation, addictions and health. An employer may process such data only if the requirement to provide them results from a specific provision or law or if to do so is necessary for the fulfilment of an obligation of the employer based on provisions of law.

However, we should be critical of how the draft limits the possibility of consent-based processing only to data that relate to the employment relationship. This is a very vague term and there is a risk of its being interpreted narrowly by the authorities and the courts.

HOW SHOULD EMPLOYERS PREPARE FOR THE NEW LEGISLATION?

The GDPR alters the philosophy of the approach to protection of personal data, forcing data controllers, including employers, to take a long look at what data they are processing, on what grounds and what internal procedures they should implement in order to process the data

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in accordance with the law. The GDPR will apply from 25 May 2018, regardless of whether domestic legislation has been enacted and what its ultimate form is.

The current draft of amendments to the Labour Code have not been prepared thoroughly and a number of modifications are needed. However, according to our sources, the Ministry of Digitalization wants the regulations ultimately adopted to be the result of a reasonable compromise between the need to protect an employee's privacy and the needs of employers. We will be participating actively in consultations concerning the amendments and hope that they have a positive impact on the substance of the new regulations.

The approval procedure for the new legislation is still in progress, but employers should already be preparing themselves for the implementation of the GDPR. This process could be time-consuming and require thorough planning. In certain organisations it may also require the implementation of changes to IT systems long before 25 May 2018.

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