

## EXPERT Personal data protection

# A NEW DATA CULTURE?

### The pandemic raises questions about the right of employers to access their employees' personal data.

Processing personal data is a matter of vital interest in numerous areas of law, including labor law, which is governed by particularly strict principles. As a rule, employers may ask employees only about things expressly stated in the Labor Code. In case they want to obtain additional information, they must meet the requirements set by the EU's General Data Protection Regulation (GDPR) and the Polish Labor Code—which requires not only voluntary consent but even the employee's initiative in the processing of personal data. In addition, they have to comply with Poland's data protection authority—the president of the Personal Data Protection Office (PUODO)—whose opinions usually render the right of employees to the protection of their personal data almost absolute, often making it much more difficult, or even impossible, for employers to take legal actions that would be permissible under the GDPR.

The question of what types of employee personal data and for what reasons employers may process became pressing during the pandemic. The restrictive requirements for the processing of employees' personal data prevented employers from taking actions that actually could ensure the effective protection of their workforce. An example of how damaging this can be is the position of the UODO president on granting finan-

cial incentives to employees in return for vaccination. According to the president, employers have no grounds to process such personal data because when they offer some financial benefit to their employees in exchange for personal data, it is not a voluntary employee initiative. Currently, there are also no clear legal grounds for the possibility of processing information on the vaccination of employees.

#### CONFLICT

In this difficult situation for employers, among other groups, an interesting judgment was issued regarding employers' right to process information about foreign travel of their employees. In that case, the court weighed the employee's right to privacy against the collective interest of other employees in protecting their life and health.

The case concerned a claim for damages for unlawful termination of an employment contract due to the fault of the employee. The employer terminated the employment relationship of an employee on disciplinary grounds, alleging the employee's breach of basic employment obligations: compliance with principles of social coexistence, including loyalty to the employer and other employees. The employee in question had concealed the fact that he/she traveled abroad despite the employer's require-

ment to provide information on foreign travel in connection with the pandemic and produced a false statement regarding foreign travel. With this, the employee breached safety requirements set by the employer to protect the workforce. This amounted to a gross violation of the safety rules at the workplace imposed in connection with the spread of COVID-19. The employee disagreed with the employer's arguments and filed suit for wrongful termination.

#### VERDICT

The Olsztyn District Court held that the employer had the right to ask employees about their foreign travel in connection with measures aimed at protecting the life and health of employees by preventing the spread of the COVID-19 virus.

In its decision, the court found that because the employer was obliged to protect the life and health of employees by responding to occupational health and safety needs and adopting measures to improve the existing level of protection, the employer was not only entitled but indeed obliged to take actions ensuring real safety. Further, the court stressed that the employer was obliged to adopt measures to improve the existing level of protection of employees' life and health to meet current needs, and caring for the health of employees during the pandemic constituted such a current need. As a consequence, the court found that adaptation of measures could take the form of issuing an order to employees to inform the employer of foreign travel and that the employee's right to privacy did not outrank the protec-

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tion of the collective interest in the health of all employees at the workplace. For the court, the life and health of all employees took priority. The court also stated that safety is a valid justification for violating the privacy of employees. The employer infringed the privacy of employees precisely to ensure the safety of the persons for whose health and safety it was responsible.

#### ROOM FOR IMPROVEMENT

A weakness of this judgment is the insufficient attention paid by the court to the protection of the employee's personal data and his right to privacy, which were almost completely marginalized. The court relied primarily on weighing values and prioritizing safety in the workplace and thus the life and health of other employees. Regardless of the court's noble intentions, it should also take into account important legal regulations governing the processing of personal data.

While it is clear that there will be a trend in the case law toward giving priority to employees' safety rather than their privacy, the ineffectiveness of provisions of labor law that are more restrictive than the EU's General Data Protection Regulation must also be borne in mind. A way out of this stalemate could be a pro-EU interpretation of the Labor Code, but in practice, until the situation is directly regulated in proper legal acts or the Supreme Court of Poland adopts a resolution on this subject giving direction to the judgments of the lower courts, decisions in cases related to the processing of data related to COVID-19 will remain highly risky for employers and may have adverse consequences.