

Some information about the data management and the employment during the period of COVID-19

As it can be known, the COVID-19 (aka. SARS-coronavirus) spread through the whole world quickly as it can. Therefore it is indispensable to draw everybody attention to some important questions in relation with his/her personal data management and the conditions of their working during the epidemic period. This article discusses the most relevant issues only.

The article divides into two parts. The first part will discuss those provisions which are related to the employee's/clients personal data managements and the second part of the article will gives some information about the conditions of the employee's working.¹

In relation with this topic the Hungarian National Authority for Data Protection and Freedom of Information (hereinafter: NAIH or the Authority) has identified some requirement which shall be taken account during the personal data processing by the controllers. Therefore this article tries to sum up in short the Authority information documents.

The article will takes into consideration also other authorities opinions and information documents which can be useful for the parties to understand easily and follow the suggested measures. As a result of this the virus can be easier defeated by us. That is why it is very important to follow every single regulation precisely and advice of the authorities. This document makes easier to understand the relevant measures of the authorities in connection with the virus.

¹ The content of the article is derived from the following sources: Information on processing data related to the coronavirus epidemic - NAIH /https://www.naih.hu/files/NAIH_2020_2586_EN.pdf/, /<https://www.nnk.gov.hu/index.php/lakossagi-tajekoztatok/koronavirus/567-eljarasrend-a-2020-evben-azonositott-uj-koronavirussal-kapcsolatban-2020-03-16/> and /<https://www.nnk.gov.hu/index.php/lakossagi-tajekoztatok/koronavirus/553-tappenz-informacios-osszefoglalo-a-covid-19-virus-fertozessel-kapcsolatban/>/. The sources are available in Hungarian and English only.

I. Personal Data Management

In this section of this article will describe in short those conditions which are indispensable to process the personal data relating to the employee's in the employment and the health care. The article discusses the main points only.

In the past few days, the **Hungarian National Authority for Data Protection and Freedom of Information (hereinafter: NAIH)** published its information brochure on its website. The aim of this information brochure is that to create the right data management in connection with the employees personal, health and specific data.² Some concepts can be found in the GDPR while others are described by the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (hereinafter: **Info Act**).

I.1. According to this short information, the controller who is the employer, the therapist (company doctor) are responsible for the personal data management. During the personal data management, the employer must perform his/her data management according to the GDPR Article 5. This means that the basic principles of the GDPR shall be kept by the controller.³

I.1.1. Pursuant to the GDPR Article 5 (1) points a)-f), the main principles are the following: *a) lawfulness, fairness, transparency b) purpose limitation c) data minimisation d) accuracy e) storage limitation and f) integrity and confidentiality.* The

² GDPR Article 4 point 1 „*personal data*“ means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

GDPR Article 4 point 15 „*data concerning health*“ means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status;

Info Act Sec. 3 point 3 „*sensitive data*“ shall mean data included in the special categories of personal data, such as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, furthermore, genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation;

³ GDPR Article 4 point 7 „*controller*“ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;

Article 5 (2) ensures that the above-mentioned principles shall be kept by the controller and the processor.⁴ This section of the GDPR says that *the controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 („accountability“)*.

I.1.2. The data management process shall be complied with the Article 5 (2).

It is very important that during the planning of data management, it is necessary to take account the GDPR Article 5 (2) in connection with the collection of the data concerning health which are also belonged to the personal sensitive data.

I.1.3. It is very important expectation that the personal data processing is justified only if and to the extent that the purpose of the data processing can not be achieved by devices that do not require data management. It shall be examined in every case that there could be any other effective solution which is not harmful to the privacy of the data subject. For instance: recordings of the basic hygienic measures, the cleaning of the work tools or offices, providing of the detergents and require of their use, etc. There are some more example which are belonged to the aforementioned instances. There are also important requirements for example that the application of the glass wall or regulating the timetable, etc.

I.1.4. If the aforementioned tools (means) would be insufficient and the personal data management is still necessary, the personal data management can be determined by the controller, if it complied with the principles and the aim of the data management. In every case, the accountability and the transparency shall be taken account by the controller.

⁴ GDPR Article 4 point 8 „processor“ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;

I.1.5. Pursuant to the GDPR Article 13 (and the Info Act Sec. 16 in the case of data processing for the purposes of law enforcement, national security and defense) drawing up a privacy policy document is mandatory for all data processing purposes. In that document the controller must details the legal base of the data processing, the retention period of the data processing, the purpose of the data processing affecting the data subject. The policy must be written in a manner that is clearly understood for the affected persons. The private policy document shall be complied with the GDPR Article 6 (1) point f).

I.2. Pursuant to the Authority information document the data management relating to the employment (employment, the legal relationship of public employees, public servants, government employees and public service employees, etc.) is also an important and relevant field in the view of the data processing. Therefore here are some measures which are suggested to be followed by the employers. These measures are set up by the Authority in its information document.

I.2.1. Under these measures, the following steps expected from the employer include:

- the development of **the so-called pandemic/business continuity action plan** (hereinafter: action plan): the plan should contain to preventive steps to be taken to reduce threats, measures to be taken upon the eventual appearance of the infection, preliminary consideration of the data protection risks of the measures applied, issues of responsibility within the organisation and building efficient and adequate channels of communication facilitating the provision of information to the data subjects);

- as part of the action plan, in terms of the preliminary measures reducing threats, **a detailed information document has to be drafted and made available to the employees** (e.g. source of the infection, period of incubation, mode of spreading, symptoms, prevention) and also who to turn to in the event of any alleged contact with the coronavirus or upon the onset of other conditions specified in the information material;
- if it necessary, **conduct of business and business/service trips and events may eventually have to be reorganised** and the possibility of eventually working from outside the workplace must be ensured;
- attention needs to be called with emphasis to the fact that in the event of any alleged contact with the coronavirus and upon the onset of other conditions specified in the information material **individuals should report this to the designated person** and visit the company doctor or another physician immediately **in order to protect their own and their colleagues health.** (Source of the above-mentioned measures is the Authority's information document - /https://www.naih.hu/files/NAIH_2020_2586_EN.pdf/)

I.2.2. The **possible exposure** can be reported by the employee to the employer. **If the employer deems that the suspicion of exposure can be established from the data provided by the employee,** the employer may record the date of the report and the personal data of the employee, the fact of whether or not the venue and date of the employee's foreign travel, even also for a private purpose, coincides with the countries (territories) and periods listed in the employer's information document, the data concerning the fact of having contact with a person arriving from the areas (territories) indicated in the employee's information document and based on information made available to the

employer, the measures taken by the employer (e.g. ensuring the possibility of visiting the company doctor, permission for a voluntary quarantine at home). **Pursuant to the Authority's information documents, the NAIH suggests that the employees should have complete questionnaires which are based on a preliminary risk assessment carried out by the employer in advance,** the employer makes a conclusion that the application of this method is necessary and it proportionately restricts the right of employees to privacy. Next to the above-mentioned facts, **the NAIH also expressly underlines that the questionnaires may not include data concerning the medical history of the data subject and the employer may not require employees to enclose health documentation.**

I.2.3. Taking into account the facts mentioned above, it can be determined that pursuant to the GDPR Article 6 (1) point f); or Article 6 point e), **the legal basis for the processing of data referred to above can be a legitimate interest to the employer.** The aforementioned provisions also can be a legitimate legal basis to those controllers who are processing the personal data in the public sector. These controllers are the following employers: organisations performing public tasks or exercising public powers. In the view of performing their basic duties, the above-mentioned data concerning to the provisions mentioned to above are necessary to these public organisations.

I.2.4. The employer may has to apply the GDPR Article 9 (2) point b) in connection with the health data because the provisions of the labor law require the employer to ensure healthy and safe conditions of work for the employees and those persons who may get into contact with them.

I.2.5. Having regard to the Authority's information document, the NAIH deems disproportionate the requirement of screening tests with any diagnostic device (e.g. thermometer) or the introduction of mandatory measurement of body temperature generally involving all employees called for by measure of the employer. In a view of the above-mentioned facts that the collection and evaluation of information related to the symptoms of coronavirus and drawing conclusions from them is the task of health care professionals and authorities.

I.2.6. Pursuant to the GDPR Article 9 (2) point h) and (3) the employer can act significant measures in compliance with the provisions of the legal basis of GDPR Article 6 (1) point f) and e). **These measures shall be based on the report of the employee, the risk assessment or any individual case upon consideration of all circumstances. Therefore the employer demand test to be carried out by the health care professionals or under their professional responsibility only.**

I.3. It is very important in connection with the occupational health care providers that the data processing **shall be complied with** the provisions of the Act XLVII of 1997 on the Processing and Protection of Health and Related Personal Data (hereinafter: Health Data Act). **This Act contains special provisions to the health care providers as well as company doctors** - as independent data controllers - therefore they have to comply with data protection requirements conducting their actions.

I.3.1. It can be seen well that the legal obligations relating to data processing shall be complied with the GDPR Article 5 (1)-(2); Article 6 (1) point c); and the GDPR Article 9 (2) point i). Besides of the aforementioned laws, the Authority's information document refers one more provision of the Decree 18/1998. (VI.3.)

NM on epidemiological measures necessary to prevent infectious diseases and epidemics. The Section 25 of the Decree requires health care providers to report and keep records of infectious patients and persons under the suspicion of having an infectious disease. The case definitions in connection with the prior as stated to above are contained, inter alia in the Annex 1 to the Decree (which also includes the concept of the SARS-coronavirus aka. COVID-19). These safe measures are also provided by an another decree.⁵ The new procedural order in relation with the new coronavirus set up by the National Public Health Center on 2 March 2020.⁶

I.3.2. According to the NAIH, it follows from the general requirements of conduct applicable to employers and persons in an employment relationship aimed at performing work, thus the obligation to cooperate and the principles of bona fide action and fairness that the employer must be informed by the employees about every single health or other risk affecting the workplace, other employees or third persons in contact with them.

I.3.3. In connection with the third persons data processing outside any relating legal relationship in connection with the performance of work, it is advisable to follow the further measures:

- The employer should provide an effective and adequate channels of communication to facilitate the provision of information to the data subject in the process of implementing enhanced control of persons entering the organisation's area and the restrictions related to this as part of the action plan;

⁵ Decree 20/2009. (VI. 18.) EüM on the prevention of infections related to health care, the professional minimum conditions and the supervision of these activities

⁶ <https://www.nnk.gov.hu/index.php/lakossagi-tajekoztatok/koronavirus/567-eljarasrend-a-2020-evben-azonositott-uj-koronavirussal-kapcsolatban-2020-03-16>

- In terms of the advance measures to reduce risks as part of the action plan, the detailed information and notice about the coronavirus has to be drafted and made available to the third persons.

I.4. Finally the NAIH in its information document calls everybody attention to the fact that according to the Act C of 2012 on the Criminal Law, **the person who fails to subject himself to the epidemiological measures ordered by the competent organisation commits a crime.** Other authorities like as the police also entitle to process personal data. In term of their personal data management procedures, the Act XXXIV of 1994 on the Police Force and the Act XC of 2017 on Criminal Procedure shall be applied.

I.5. The data processing must be documented by the controller based on the GDPR Article 12 and 13. The subject data shall be informed about the data processing by the controller.

I.6. The opinion of the working party 29 is also worth to be taken into account by the controller during the data processing. The working party 29 in its opinion described the balancing test with its key factors that have to be considered during the personal data processing by the controller. These key factors are the following: a) assessing the controller's legitimate interest, b) impact on the data subjects, c) provisional balance and d) additional safeguards applied by the controller to prevent any undue impact on the data subjects.⁷

To summarize the aforementioned facts the parties shall inform each other mutually in this period. The basic principles of the GDPR are still applicable to the

⁷ https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf

The working party 29 69th footnote of opinion 6/2014 describes the following remark: Due to their importance, some specific issues related to safeguards will be further discussed under separate headings in Sections III.3.5 and III.3.6.

data controller and the data processor. The data shall be processed in safe and the safe data transmission shall be ensured by the controller.

II. Labor Law (Employment)

Due to the COVID-19 outbreak the following advices are recommended to the parties of the employment relationship.

II.1. On 11th March 2020 based on the Fundamental Law of Hungary Section 53 (1) the Hungarian Government declared the State of Emergency based on the Governmental Decree 40/2020 (III.11.) on the Declare of the State of Emergency. Because of this extraordinary human epidemic situation, the parties must pay attention to each other health and safety. Therefore advanced measures shall be done by the employer in connection with the employment relationship.

II.2. As it stands today, the epidemiological circuit has not ordered yet by the health authority but the Government closed the most public institutions, kindergartens and schools but the most of government and district offices are available for the clients with shorten opening hours. The measures in relation with the recent situation are changing continuously.

II.3. Therefore the employer must take measures in connection with the employment relationship to adjust himself to the situation of epidemic. If the conditions of the safe working are still exist the employee has to perform his/her work as usually.

II.4. Pursuant to the Act I of 2012 on the Labor Code (hereinafter: LCA or Labor Code) Section 51 (4) the employers must provide the conditions of the occupational safety and the occupational health for the job.

II.5. If there is no possibility to work with a safe conditions in a healthy circumstances, the employee shall refuse to carry out an instruction. So if the carrying out of the instruction would result in direct and grave risk to the health of others or the environment, the employee may refuse to implement of the particular duty. It is very important that, if there is no any obstacle to perform working and the employee even though refuse to implement the particular task of working given by the instruction of the employer, he/she has to count the possibility of the termination of his/her employment relationship or the legal consequences of the disobeying instructions.

II.6. The employer shall be entitled to temporarily reassign their employees to the other job or workplaces other than in the employment contract, or to another employer. [Labor Code Section 53 (1)]. This means that the employee has to perform his/her working at home (home office) according to the general rules of the employment relationship. During the employee job, the employee is entitled to get his/her base wage.

II.7. It can be occur such a situation, like this epidemic period when the employee is restricted to or unable to perform his/her working. Pursuant to the Labor Code Section 146 (1) in the event of the employer's failure to provide employment as contracted during the scheduled working time (downtime), the employee shall be entitled to his base wage, unless it is due to unavoidable external reasons. The Section 146 (2) of the LCA says the following: if the employee is exempted from work under the employer's consent, remuneration for such lost time shall be paid on the basis of their agreement. This means that if the employee can not be able to implement his/her job for reasons beyond his/her control, he/she is entitled to get his/her base wage. Pursuant to the LCA Sec. 146 (3) point a) the employee shall be entitled to absentee pay for the duration of leave.

III.8. If the epidemic circuit exists and there is no any other possibility to perform working, the employee is entitled to claim his/her allocation of vacation time. Pursuant to the LCA Sec. 122 (2) the employers shall allocate seven working days of the vacation time in a given year in not more than two parts, at the time requested by the employee, unless otherwise agreed.

III.9. Pursuant to the Act LXXXIII of 1997 on the Services of the Compulsory Health Insurance System (hereinafter: Health Insurance Act) Sec. 43 (1) sick-pay shall be due and payable to any person who becomes incapacitated for work during the life of the insurance relationship, if required to pay a health insurance cash contribution in the amount specified in the SPA (Act LXXX of 1997 on the Eligibility for Social Security Benefits and Private Pensions and the Funding for These Services - Social Security Pension Act). According to the Act LXXX of 1997 on the Eligibility for Social Security Benefits and Private Pensions and the Funding for These Services (hereinafter: SPA) Sec. 5 (1) point a) insured persons are persons engaged in employment under contract. Pursuant to the Health Insurance Act Sec. 44 point g) incapacity for work shall mean when a worker is prohibited from performing his/her job in the interest of public health and no other position is offered, or if isolated on public health grounds by order of the relevant authority, furthermore, if the worker is unable to commute to his/her workplace on account of an epidemiological or animal health emergency and no other employment or position is available on a temporary basis or otherwise. The Government Decree 102/1995 (VIII. 25.) on the Medical Evaluation and Control of the Incapacity and Capacity Sec. 1 (2) says the following: the evaluation and the control of incapacity shall be carried out in the cases listed by the Section 44 of the Health Insurance Act. The Decree Sec. 2 (1) point a) the person who entitled to evaluate and certify the incapacity is the family doctor (general

practitioner). The Decree Sec. 11 (2) also says that if the incapacity was due to official separation and restriction of occupation for public health reasons or it exist from epidemic circuit reasons, the Chief Medical Officer ordered the measures shall inform the doctor entitled to incapacity for work who record the insured person and certify his/her incapacity. The rate of the incapacity is discrepant.⁸ The incapacity is certified by the doctor with the code 7. The above-mentioned provisions means also that if the employee is infected by the virus at his/her work place it qualifies as an accidents at work and occupational disease and therefore sick leave shall not be available for the employee. In that way the employee is entitled to sick pay.

III.10. Finally, the parties shall cooperate with each other and shall exercise their rights and obligations in the manner consistent with the principle of good faith and fair dealing. Therefore the employee must inform the employer if he/she travels abroad, especially the are infected by the virus. The employer also shall inform the employee about the constant change of the epidemiological situation.

The whole content of the information document of the SAMKÓ LEGAL is made on the basis of the NAIH information document, the information document of National Public Health Center and the relevant laws and decrees.

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⁸ <https://www.nnk.gov.hu/index.php/lakossagi-tajekoztatok/140-koronavirus-tajekoztatok/553-tappenz-informacios-osszefoglalo-a-covid-19-virus-fertozessel-kapcsolatban>