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EMPLOYEE'S OBLIGATION TO SUBMIT TO PREVENTIVE TESTS FOR SOBRIETY

Abstract

The article presents an analysis of employees' obligation to be sober in the context of legal possibilities of running preventive sobriety tests on employees. It thoroughly discusses the Supreme Court judgment policy on employees' obligation to be sober in the workplace and legal consequences of their failure to fulfil this duty. The article also conducts a critical analysis of the opinion that an employer can carry out preventive checks only based on an employee's consent expressed on his/her own initiative. The author proves that a contrary thesis is right and that, in case of some jobs, such as drivers or persons working at height, an employer is obliged to do preventive tests for employees' sobriety and employees are obliged to take such tests. At the same time, employees' consent to process data concerning the state of their sobriety is not required.

Słowa kluczowe: obowiązek trzeźwości w pracy, prewencyjne kontrole trzeźwości pracowników, obowiązek dbałości o stan bezpieczeństwa i higieny pracy, prawo do bezpiecznych i higienicznych warunków pracy

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Introduction – on employees' obligation to be sober in the workplace

Employees' obligation to be sober in the workplace is one of the fundamental labourers' duties. According to the stance that has been dominating the Supreme Court case law for years, failing in employees' duty to be sober constitutes serious failure to fulfil their fundamental obligation, which gives grounds for termination of an employment contract with the use of the so-called disciplinary mode, i.e. without notice referred to in Art. 52 § 1(1) of the Labour Code (Dz.U. 2018, item 917 consolidated text, as amended, hereinafter referred to as: the Labour Code, LC). Failure to fulfil the obligation to be sober should be treated as a serious breach of law regardless of whether an employee's

arrival in the workplace has or has not harmed an employer's particular measurable interest or caused damage to an employer's property (judgment of the Supreme Court of 18 November 2003, I PK 5/03, LEX no. 599521). Being under the influence of alcohol even once may constitute a serious failure to fulfil employees' duties (judgments of the Supreme Court: of 14 January 1976, I PR 158/75, OSNC 1976, no. 9, item 205; of 10 October 2000, I PKN 76/00, OSNP 2002, no. 10, item 237), and consumption of alcohol in the workplace cannot be tolerated even if superiors have accepted it (judgment of the Supreme Court of 23 July 1987, I PRN 36/87, OSNC 1989, no. 2, item 32).

A drunken employee may cause a series of serious, often irreversible damage to the property of an employer or third parties, or lead to the involved person's or other people's loss of health, and in extreme circumstances result in the involved person's or other people's death (e.g. in a traffic accident). A drunken person's appearance in the workplace alone may be classified as interference in the order of the labour process. Consumption of alcohol in the workplace, which is prohibited in accordance with Art. 14 § 1(2) of the Act of 26 October 1982 on upbringing in sobriety and the prevention of alcoholism (Dz.U. 2018, item 2137 consolidated text, as amended, hereinafter referred to as: USPA), should be classified similarly.

The legislator laid down a series of sanctions against an employee who does not fulfil the obligation to be sober in the workplace, including penalties for the violation of order or the commission of a misdemeanour and even criminal liability.

An employee who appears in the workplace being drunk or consumes alcohol at work may be held disciplinary liable and punished with an admonition, a reprimand or a fine. The legislator lists appearance in the workplace when being drunk and the consumption of alcohol at work among order-related infringements of law laid down in Art. 108 § 2 LC.

In accordance with Art. 21 of the Act of 30 October 2002 on social insurance against accidents in the workplace and occupational diseases (Dz.U. 2019, item 1205 consolidated text, as amended), the insurance policy holder shall be deprived of insurance benefits if an accident [in the workplace and one treated as an accident in the workplace – comment by the author] is caused by him/her exclusively by a proved infringement of the provisions concerning the protection of life and health committed intentionally or as a result of flagrant negligence. Moreover, a person insured against accidents who, being drunk or under the influence of narcotic drugs or psychotropic substances, considerably contributed to the occurrence of an accident shall not be entitled to benefits. Only in case of an employee's death as a result of an accident, regardless of the extent to which the deceased contributed to the accident because of being drunk, the family is always entitled to accident benefits (judgment of the Supreme Court of 8 June 2011, I UK 418/10, LEX no. 950428).

The state of being drunk justifies the assumption of intentionality of causing damage in the form of oblique intention, which also concerns damage to entrusted assets in a situation when the damage is composed of the sum of damage caused by various events not always connected with the guilt of a perpetrator (perpetrators); full liability is limited to those consequences of a perpetrator's action or omission that the action

or omission caused and not the whole damage (judgment of the Supreme Court of 22 April 1980, IV PR 86/80, LEX no.14523).

Moreover, pursuant to Art. 70 § 2 of the Misdemeanour Code (Dz.U. 2019, item 821 consolidated text, as amended), a misdemeanour against security of persons and property is committed by a person who fails to fulfil the obligation to be sober and having consumed alcohol, a narcotic drug or another substance affecting a person in a similar way and being in such a state undertakes occupational activities.

On the other hand, in accordance with Art. 178a and 179 of the Criminal Code (Dz.U. 2018, item 1600 consolidated text, as amended), the offence against the security of transportation includes driving a motor vehicle in the state of insobriety as well as allowing, against a special duty, a motor vehicle or another vehicle to be operated by a person in the state posing direct danger to security in land, water and air traffic or letting a person under the influence of alcohol or a narcotic drug or not possessing required qualifications to drive a vehicle on a public road, and in a residential or traffic area. Such a person shall be subject to a fine, a penalty of limitation of liberty or deprivation of liberty for up to two years.

Employer's duty to ensure safe and hygienic conditions of work

The protective function is the main and most important function of labour law. The right to life and health is an inalienable right, which means that an employee cannot efficiently entrust his right to dispose of his life and health to his employer. Ulpian's principle *volenti non fit iniuria*¹ is limited in labour law by the constitutional right to life and the criminal law ban on intentional self-exposure to direct danger of losing one's life or suffering serious damage to health.

The right to protection of human life and health is the right superior to the right to protect dignity or privacy. The protection of life and health should be treated as a supreme and special interest compared with other interests (Żołyński 2019). The right to protect life and health belongs to the first generation rights, which are basic and fundamental ones (Nowak 1993). Every human being shall possess them regardless of statutory law and human activities (Piechowiak 1999, p. 13).

An employee's physical and mental life and health constitute one of his personal interests that are subject to legal protection based on the Civil Law Code (Dz.U. 2019, item 1145 consolidated text) as well as the Labour Code (Szewczyk 2007, p. 433f¹). Inter alia, the right to safe and hygienic working conditions originates from the right to protect life and health (Wyka 2003, p. 67f). The need to ensure safe and hygienic conditions of work is among the requirements determining employees' existence. This is the way in which it was formulated inter alia in the International Covenant on Economic, Social

¹ The principle should be understood as one meaning that if someone willingly places himself in a position where harm may result, he is not able to bring a claim in tort (e.g. Kuryłowicz 2002, p. 125).

and Cultural Rights or the European Social Charter of 1961, which emphasise employees' rights to adequate working conditions, including occupational health and safety. The issue of occupational health and safety is also subject to regulations of the International Labour Organisation and the European Union law (Góral 2017, p. 1122–1124).

It should be stated that the interpretation precluding employers from carrying out preventive sobriety checks would lead to the infringement of the fundamental human right to protect life and health originating from the very essence of humanity. It would also be in conflict with the assumption of a rational legislator as a “correct and efficient legislator” (Żołyński 2019) and Art. 66 § 1 of the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. 1997, No. 78, item 483 as amended, hereinafter referred to as: the Constitution).

In accordance with the above-mentioned provision, everyone shall have the right to safe and hygienic conditions of work. The methods of implementing this right and the obligations of employees shall be specified by statute.

The scope of addressees of the right to safe and hygienic conditions of work is indicated by the term ‘everyone’, which means e.g. that the provision does not limit the scope of entitled persons only to the group of employees but covers all the people working.

The Constitutional Tribunal decided on 24 November 2015 (K 18/14, Dz.U. 2015, item 2023) that Art. 66 § 1, first sentence, of the Constitution expresses an element of the constitutional catalogue of economic, social and cultural freedoms and rights. The decision constitutes everyone's public right to safe and hygienic conditions of work. In Art. 66 § 1, second sentence, of the Constitution, the legislator stipulates that the methods of implementing this right and the obligations of employers shall be specified by statute. The importance of Art. 66 § 1 in its substantive aspect consists in the imposition of an obligation on a legislator to formulate provisions making it possible to implement the right to safe and hygienic conditions of work, including the creation of employers' adequate obligations. On the other hand, the formal aspect of Art. 66 § 1 of the Constitution consists in the establishment of an obligation to retain a statutory path in order to regulate those rights and obligations.

The Constitutional Tribunal stated in the above-mentioned judgement that ‘everyone’ is a direct addressee of the content of Art. 66 § 1 of the Constitution, i.e. every man and public authority, including the legislator. It also reminded that the cited provision imposes specific obligations on public authorities. In accordance with Art. 66 § 1, first sentence, of the Constitution, everyone has the right to safe and hygienic conditions of work, which is common in nature (Góral 2017, p. 1125). Thus, it is not limited only to persons being in an employment relationship, and it applies to persons who work based on other forms of employment relations, including self-employment (Wyka 2003, p. 106). Therefore, the term ‘employer’ should be interpreted not only within the meaning of Art. 3 LC but also as other entities employing persons based on an administrative relationship, and not an employee-related one.

The principle of the right to safe and hygienic conditions of work was also laid down in the regulations of the Labour Code as one of the so-called fundamental principles of

labour law. In accordance with Art. 15 LC, an employed shall be obliged to ensure safe and hygienic conditions of work for employees.

An employer shall be responsible for the state of safety and hygiene of work (Art. 207 § 1 LC). This means that fulfilling this obligation an employer is obliged to ensure real safety for employees. With no possibility of checking employees' sobriety, especially at their workstations where being under the influence of alcohol may pose danger to life and health of other employees (e.g. in mines), third parties (e.g. the work of drivers) or the energetic security of the state, an employer is not able to efficiently organise the process of work and properly fulfil their obligations towards other employees (e.g. to ensure safe and hygienic conditions of work for them) and third parties (e.g. to take care of safety in road traffic).

Therefore, an employer has not only the right but in many situations an obligation to prevent a drunken employee from working also because being under the influence of alcohol he/she is not at the employer's disposal. Being at an employer's disposal constitutes the essence of calculating a given period as working time, which is the time when an employee is at an employer's disposal in the workplace or another place assigned to do a job (Art. 128 LC). Working time is defined in Art. 2 § 1 Directive 2003/88/EC in a similar way. In accordance with its definition, working time means any period during which the worker is working, at an employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice.

The basic indication of being at an employer's disposal is an employee's readiness to work. An employee is ready to work when he/she comes to the workplace with an intention to work being in the (physical and intellectual) state making it possible to physically do a job and be at an employer's disposal at the time and in the place agreed upon. Being at an employer's disposal at the time agreed upon with an intention to carry out job activities and in the state making it possible to do that in the place assigned constitutes the state of being ready to work and thus results in calculation of working hours, i.e. working time. An employee's physical presence in the workplace does not mean his readiness to work. An employee may be physically present in the workplace and, at the same time, be unable to work due to his/her state (because of being drunk or having no documents necessary to do a job) or he/she is present in the workplace for other reasons than working, e.g. in order to submit a medical certificate.

An employee shall not retain the right to remuneration for the time when he/she is drunk and cannot work because this kind of absence from work is not excused. As a rule, remuneration is paid for the work done (Art. 80 LC).

Legal possibilities of carrying out a professional check of employees' sobriety

In accordance with Art. 17 §§ 1 and 2 USPA, the head of an employing institution or a person authorised by them shall be obliged to refuse to let an employee work if there

is a reasonable suspicion that he/she has come to work after the consumption of alcohol or consumed alcohol at working time. The entitlements of the head of an employing institution also serve an organ that is superior to that institution to supervise that workplace. An employee should be informed about the circumstances constituting grounds for a decision.²

In accordance with Art. 17 § 3 USPA, at the request of the head of an employing institution or a person authorised by them as well as at the request of the employee suspected of coming to work after the consumption of alcohol or consuming alcohol at working time, an authorised body appointed to protect public order shall check an employee's sobriety. Qualified healthcare personnel can perform a blood test.

A check of an employee's sobriety should be carried out in accordance with the provisions of the Regulation of the Minister of Health and the Minister of Internal Affairs and Administration of 28 December 2018 concerning tests for alcohol content in blood (Dz.U. 2018, item 2472).

An employer has grounds to undertake the above-mentioned steps if there is a reasonable suspicion that an employee has come to work after the consumption of alcohol³ or consumed alcohol at working time. The suspicion should result from objective indications such as staggering or smell of alcohol. Ordering an employee to go to a police station in order to check sobriety if the circumstances justify it does not impair human dignity. The impairment of human dignity and personality rights may take place if there were no objective circumstances justifying such suspicions (judgment of the Supreme Court of 15 October 1999, I PKN 309/99, OSNAPiUS 2001, no. 5, item 147).

It should be highlighted that an employer is obliged to prevent an employee from working if there is a suspicion that he/she has come to work in the state after the consumption of alcohol or consumed alcohol at working time. However, he is not obliged to request that authorised bodies carry out a test for alcohol content to check sobriety.

It seems that the intention to terminate an employment contract without notice is a circumstance that will in particular motivate an employer to demand such a test. A positive result will constitute convincing evidence of an employee's drunkenness in case he/she sues the employer for unfair dismissal.

² Until 1 July 2011, the examination of the state of sobriety could be carried out at the request of an employee suspected of coming to work after the consumption of alcohol or consuming alcohol in the workplace. An employer was obliged to ensure such a sobriety check to the employee.

³ The state after the consumption of alcohol occurs when the alcohol content account for or results in:

- a) alcohol concentration in blood from 0.2‰ to 0.5‰, or
- b) the presence of 0.1 mg to 0.25 mg of alcohol in 1 dm³ of air breathed out.

The state of drunkenness occurs when the alcohol content accounts for or results in:

- a) alcohol concentration in blood above 0.5‰, or
- b) the presence of more than 0.25 mg of alcohol in 1 dm³ of air breathed out (see Art. 46 §§ 2 and 3 Act on upbringing in sobriety).

In the judgement of 4 December 2018 (I PK 194/17, LEX no. 2586273), the Supreme Court stated that an employer may terminate an employment contract without notice due to an employee's drunkenness only based on the result of a test for alcohol content carried out by a body authorised to protect public order and not a person authorised by an employer (Art. 52 § 1(1) LC in conjunction with Art. 17 § 3 USPA). The thesis concerns a situation in which an employer terminates an employment contract without notice because of serious infringement of one of employees' obligations, i.e. the obligation to be sober in the workplace.

The Supreme Court emphasised that, in the factual state discussed, carrying out a sobriety test (with an employee's consent) with the use of a sobriety tester available in the workplace does not exempt an employer from calling a body authorised to protect public order to formally carry out such a test. Carrying out such a test by an employer with the use of a sobriety tester (if an employee gives consent to that) is important because it confirms the employer's suspicion of the employee's state (of drunkenness) and should make the employer (the head of the institution or a person authorised by him) promptly call a body authorised to protect public order to carry out a formal sobriety test if an employee questions the result of the test carried out by the employer (as in the case heard by the court). A test carried out by a police officer or a municipal police officer constitutes fully reliable evidence.

It should be emphasised that the above-mentioned judgement of the Supreme Court did not challenge the possibility of applying a preventive sobriety test by an employer with the use of the employer's equipment but only the value of this type of test as evidence in a potential lawsuit. However, this does not exclude testing employees by an employer with the use of sobriety testers available in the workplace in order to prevent drunken employees from working.

At the same time, the thesis presented in the justification for the judgement that such tests can be carried out only with employees' consent raises doubts. It seems that in the situation in which the legislator imposed many obligations on the employer directly or indirectly connected with employees' sobriety, e.g. the obligation to prevent an employee from working in circumstances referred to in Art. 17 § 1 USPA, it cannot be assumed that preventive checks of employees' sobriety before letting them work may be carried out only with their consent.

Testing employees for sobriety in the light of the provisions on the protection of personal data

Undoubtedly, the implementation of an employer's right to monitor employees' sobriety may present threats of a breach of the right to privacy of the person checked and sometimes even of disregard for their dignity. The latter threat might occur e.g. if the same employee were always the only one or in most cases subject to preventive sobriety testing before starting work, in addition in the presence of other employees.

The situation is additionally complicated by the fact that some lawyers are of an opinion that an employer cannot at his discretion use a breathalyser to check employees' sobriety without their consent (expressed on their own initiative), and requesting an employee to undergo such tests might constitute the violation of an employee's personality rights. According to Kwoka (2019, D 1), alcohol content in blood is a piece of data that belong to a special category and an employer can process them if an employee gives consent to do that on his own initiative. In her opinion, the regulations that are in force do not provide an employer with legal opportunities to carry out sobriety tests on all or randomly chosen employees.

The Ministry of Family, Labour and Social Policy expressed a similar opinion stating that an employer should request that an employee be tested by a body authorised to test employees' sobriety when there is a reasonable suspicion that an employee is not sober. In other circumstances, obtaining personal data concerning an employee's state of sobriety is admissible only based on an employee's consent given on his own initiative. An employee's state of being drunk, as his/her 'physiological state', belongs to data concerning health, i.e. a special category of data.⁴

It seems, however, that the above-presented opinions are not fully substantiated in the light of the provisions in force. The European Union legislator indicates in Art. 4 (1) of the 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; OJ L 2016/119, p. 1, as amended, hereinafter referred to as: GDPR), that 'personal data' means any information relating to an 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 and social identity of that natural person.

On the other hand, 'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction (Art. 4(2) GDPR).

It should be noticed that, based on the above-cited definitions, it is doubtful whether we can speak about personal data processing in case of standard sobriety checks consisting in the use of breathalysers in the entrance hall to a bus/tram depot or another

⁴ Explanations of the Ministry of Family, labour and Social Policy concerning employees' sobriety checks: <https://sip.lex.pl/#/publication/470118004/ministerstwo-rodziny-pracy-i-polityki-spoleszcnej-wyjasnienia-mr-pi-ps-ws-badania-trzezwosci...> (access: 10 June 2019).

type of workplace facilities and no registration or recording of particular employees' test results that indicate sobriety.

As Żołyński rightly states:

Preliminary sobriety tests on employees are impersonal in nature. Thus, individual employees are not identified with the use of their first names and surnames, so personal data are not collected and processed (there are no personal data at all; there are 'technical' data). The necessity of making personal data available and then processing them will occur the moment the device indicates the state after the consumption of alcohol, and in accordance with Art. 13 § 3 Act on upbringing in sobriety, at the request of the head of an employing institution, such an examination will be carried out (tłum. G. Butrym, za: Żołyński 2019).

Preventive sobriety checks may indeed be organised in such a way that in case of a positive test result, the employee concerned cannot enter the workplace or come to his/her workstation. Then, if he/she believes that a breathalyser incorrectly indicated their state after the consumption of alcohol, they can contact their superior or another authorised staff and request that authorised bodies carry out sobriety tests on them. Therefore, in such a case the employer would process personal data concerning alcohol content in employees' blood with their consent expressed on their own initiative.

However, the processing of personal data concerning the content of alcohol in a particular natural person's blood takes place in a situation when the information is associated with a particular employee who the employer can identify. 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 and social identity of that natural person (Fajgielski 2018, p. 110).

In accordance with Art. 88 GDPR, Member States may, by laws or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by laws or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of the rights and benefits related to employment, and for the purpose of the termination of the employment relationship. Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place.

The provisions of Act amending some acts in connection with the implementation of 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), which entered into force on 4 May 2019, introduced some changes concerning the protection of personal data *inter alia* to the Labour Code.

Art. 22(1) to 22(1b) LC regulated the requirements for the processing of employees' and candidates' personal data in a more thorough way: discharging legal obligations imposed on a controller (Art. 22(1) LC) and consent (Art. 21(1a) and (1b) LC).

The consent given by the data subject who is a candidate or an employee may constitute grounds for the processing of personal data referred to in Art. 9 (1) GDPR⁵ by the employer only in case those personal data are provided on the candidate's or employee's own initiative.

The provision of Art. 22(1a) § 2 LC is applicable by analogy, which means that the lack of consent referred to in § 1 therein or its withdrawal cannot constitute grounds for unfavourable treatment of a candidate or employee and cannot result in any negative consequences for them, in particular it cannot be the reason for refusal to employ, termination of the employment contract or its dissolution by the employer without notice.

In the light of Recital 35 GDPR, data concerning the alcohol content in the air breathed out (if they really provide an opportunity to identify a person who has been tested) or in the blood should be recognised as data concerning health because such data include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. This includes information derived from the testing or examination of body part or bodily substance and any information on, for example, a disease, disability, disease risk, medical history of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an *in vitro* diagnostic test.

Literal interpretation of Art. 22 (1a) § 2 LC leading to a conclusion that the processing of data concerning an employee's sobriety by an employer without their consent expressed on their own initiative regardless of axiology and analysis of the system of interests that are to be protected by the provisions concerning the protection of personal data does not seem to be rational. Moreover, this type of interpretation is derived from an erroneous assumption that the requirements for the processing of employees' and candidates' data referred to in Art. 22(1) and 22(1a) have been completely regulated and that other requirements referred to in Art. 6 and 9 GDPR are not applicable to employment relationships.

In accordance with Recital 4 GDPR, the processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced

⁵ Special categories of personal data (formerly called sensitive data) referred to in Art. 9 GDPR are data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of 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.

against other fundamental rights, in accordance with the principle of proportionality. GDPR respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

The interpretation of the provisions concerning the protection of personal data cannot result in the violation of the right to life and health not only for employees alone but also for such persons as road traffic participants and contractors working in the same work place where a drunken worker was allowed to enter. The interpretation of the provisions resulting in a conclusion that an employer is deprived of legitimate means of preventive sobriety checks of employees, including in particular drivers, workers performing particularly dangerous tasks (e.g. work at heights) or doing jobs affecting other people's security, including energetic security, obviously and unambiguously denies the essence of the right to safe and hygienic conditions of work; it also violates the right to life and health of employees and potential third parties exposed to the negative consequences of work done under the influence of alcohol.

It also seems that the fact that the Polish legislator regulated two of the conditions for the lawfulness of the processing of personal data referred to in Art. 6(1) (a) and (c) and Art. 9(2) (a) GDPR (consent and discharging the legal obligation imposed on the controller) in more detail does not mean that the remaining requirements for lawfulness of the processing of personal data referred to in Art. 6 and 9(2) GDPR will not be applicable to employment relationships. It should only be assumed that in accordance with Art. 88 GDPR, the two above-mentioned requirements have been regulated in a more detailed way than in Art. 6 and 9 GDPR. In order to pursue the principle of lawfulness, a controller needs to base the processing of personal data only on the fulfilment of one requirement but it can also happen that more than one requirement may be met in a particular factual state (Lubasz, Sęczkowski 2016, p. 19f).

Finally, it should be noticed that in Art. 22(1) § 4 LC the Polish legislator laid down a possibility of requesting an employee to provide the employer with other personal data than those referred to in Art. 22(1) §§ 1 and 3 LC in case it is necessary in order to exercise the entitlement or fulfil a duty resulting from the law. The provision of Art. 51 § 1 of the Constitution lays down the requirement for a statutory form of limitation to the right to privacy and informative autonomy of an individual.

Informative autonomy means the right to decide to disclose personal information to others as well as the right to have control over this information if it is in other entities' possession (see the judgements of the Constitutional Tribunal: of 19 February 2002, U 3/01, OTK-ZU 2002, series A, no. 1, item 3; of 20 November 2002, K 41/02).

Conclusions

In the light of the above-presented considerations, it should be assumed that randomly or regularly carried out preventive checks of the sobriety of employees and other persons permitted to work based on civil law contracts shall be fully justified in the light of Art. 22(1) § 4 LC and Art. 9 § 2 (b) GDPR, i.e. in this case, discharging the requirement of necessity of processing data concerning employees' sobriety in order to carry out their duties and exercise the controller's or the data subject's special rights in the field of labour law, social insurance and social protection provided it is admissible in accordance with the law of the European Union or a Member State, or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject.

Such a special obligation of an employer as a controller of such data includes the obligation to ensure safe and hygienic conditions of work to all employees, which is referred to in Art. 15 LC, as well as the obligation to protect employees' health and life by ensuring safe and hygienic conditions of work referred to in Art. 207 § 2 LC.

Art. 207 § 1 LC indicates that an employer is responsible for the state of safety and hygiene in the workplace. This means that discharging this obligation, an employer cannot confine himself to complying with the binding legal rules (Wyka 2012, p. 393f) and is obliged to ensure real safety for the employees (Gersdorf, Rączka, Skoczyński 2005, p. 57).

The constitutional and statutory obligation to provide everyone with the right to safe and hygienic conditions of work primarily consists in the creation of the same conditions of work for employees and all the other people participating in the process of work, in which threats to their life and health will be eliminated or limited and the risk of accidents in the workplace or occupational diseases will be minimised.

An employer is obliged to use all available organisational and technical means in order to protect employees' health (Art. 207 §§ 1 and 2 LC), inter alia by complying with the Health and Safety rules and principles, responding to the needs in the area of safe and hygienic conditions of work and adjusting means applied to improve the existing level of protection of employees' life and health, taking into consideration the changing conditions of work.

The preventive activities that an employer can and, in case of some professions or types of business such as road transport or energy production, should apply include inter alia preventive sobriety checks of employees. Indeed, preventive activity is primarily the essence of the obligation to ensure safe and hygienic conditions of work, and sobriety tests on employees carried out in order to lower the risk of accidents in the workplace, catastrophes in road traffic or power outage should be classified as such.

Due to that, data on the state of employees' or contractors' sobriety may be retained and processed for the purpose of providing safe and hygienic conditions of work without the data subjects' consent (Żołyński 2019).

Identical conclusions can also be drawn concerning the possibility of preventive checking of the state of sobriety of contractors, and employees and contractors of

subcontractors or temporary workers because their potential state of insobriety may result in the threat to safety and hygiene of work as well as life and health of other employees, contractors and third parties in the same way. They are not subject to the provisions concerning the protection of personal data and the processing of special categories of personal data. The provisions of Art. 9 §§ 1 and 2 GDPR are fully applicable to them.

Finally, it is worth mentioning that at the level of an employing institution, detailed provisions concerning the obligation to be sober and the procedure of checking the state of sobriety should be enacted and laid down in a labour-related collective agreement or rules and regulations for working, which should constitute a source of labour law within the meaning of Art. 9 LC.

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