Another look at sobriety testing of employees

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In industries with a heightened responsibility for the safety of the public, employers have implemented preventive sobriety testing for employees entering the workplace, thus mitigating the risk of incidents involving employees who are intoxicated or under the influence of alcohol. The permissibility of such testing has become the focus of increased interest of employers since June 2019, when the Personal Data Protection Office issued the position that employers cannot conduct such testing.

We believe that the position taken by the Polish Personal Data Protection Office (UODO) is in principle incorrect. This is because there are situations where an employer is not only entitled but indeed obligated to conduct precautionary sobriety testing of employees. However, when conducting such tests, the employer must pay attention to issues involving protection of employees' personal data.

Entities authorised to conduct sobriety testing of employees

The law does not expressly provide for a right of employers to conduct preventive sobriety testing of employees. Nor does it expressly forbid such tests.

Under Art. 17(1) of the Sobriety Act, the director of a workplace or person authorised by the director is required to refuse admittance to work of an employee for whom there is a justified suspicion that the employee has appeared at work under the influence of alcohol or has consumed alcohol during working time. And under Art. 17(3), at the request of the director of the workplace or authorised person, or at the request of the employee, a test of the employee's sobriety shall be conducted by an authority appointed to protect public order (a blood sample is taken by a professional from the health service).

Art. 17 (1) and (3) of the Sobriety Act thus imposes on both the employer and the authority appointed to protect public order an obligation to take specific action under the indicated circumstances. In the case of the employer, this is an obligation to remove the employee from work, and in the case of the authority the duty to test the person if requested by an authorised person. But in no respect do the regulations exclude the right, or even the obligation, of the employer to take further-reaching actions in order to ensure safe working conditions, including preventive sobriety testing.

Nor does it appear that the legislature had the intention of introducing such a ban. According to the justification for the amendment to the Sobriety Act (in force from 1 July 2011) instating the current wording of Art. 17(3), the change only "introduced the possibility for an authority appointed to protect public order to test an employee's sobriety at the request of the director of the workplace."

The Supreme Court of Poland did hold in its judgment of 4 December 2018 (case no. I PK 194/17) that "from 1 July 2011 sobriety tests of an employee may no longer be conducted by a security official employed by the employer (or other person authorised by the employer), but this can be done only by a competent authority appointed to protect public order." It may be concluded from this that an employee's sobriety may be tested only by a public authority. However, in light of the reasoning presented in the justification for this judgment, the holding should be interpreted to mean that only a sobriety test conducted by a competent authority has full evidentiary capacity. This does not mean that an employer cannot conduct such a test on its own, but it must assume the risk that the evidentiary value of the result may be questioned. Therefore, if the test by the employer shows that the employee has been drinking, the employer should summon the competent authority to conduct a formal test.

Information on sobriety as personal data

The regulations do not specify whether information about an employee's sobriety or intoxication constitutes his or her personal data, or if so, whether it is treated as ordinary data or falls into a special category. In our view, such information does constitute personal data under Art. 4(1) of the EU's General Data Protection Regulation, which provides that personal data means "any information relating to an identified or identifiable natural person…."

In this respect, we also share the view of the president of UODO (https://uodo.gov.pl/pl/138/1076) that information on one's state of sobriety (or being intoxicated or under the influence of alcohol) constitutes personal data concerning the person's health. As recital 35 of the preamble to the GDPR states, "Personal data concerning health should 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, among other things, any information on "the physiological or biomedical state of the data subject" from sources such "a medical device." A person's "physiological state" is a broad concept, as physiology refers to functions and mechanisms within a living organism, and that includes functions and mechanisms related to consumption of alcohol.

Legal basis for processing personal data concerning sobriety

Data concerning health fall within a special category of personal data. In general, processing of such data is prohibited (Art. 9(1) GDPR), unless one of the conditions provided for in Art. 9(2) is fulfilled.

We believe that personal data about sobriety obtained by an employer as a result of conducting sobriety tests may be processed primarily on the basis of:

- Art. 9(2)(b) GDPR in connection with Art. 15 and 207 of the Labour Code (i.e., processing of the data is necessary for the purposes of carrying out the employer's obligations to ensure safe and hygienic working conditions, including protection of employees' life and health)
- Art. 9(2)(h) GDPR in connection with Art. 15 and 207 of the Labour Code (i.e. processing of the data

is necessary to assess the employee's ability to perform work).

The existence of such "necessity" is an essential condition for basing the processing of data concerning sobriety or intoxication on these grounds. This means that the situation of office workers should be viewed differently than staff performing, for example, work directly connected with rail or road transport, or handling substances hazardous to the life or health of other people or the environment. The employer may also be subject to industry regulations imposing further obligations on the employer, and these should also be considered when determining whether there are grounds for obtaining information about employees' sobriety or intoxication.

For the processing to be lawful, it is also necessary to comply with the principles set forth in Art. 5 GDPR (and to be able to demonstrate this), in particular the principles of purpose limitation; lawfulness, fairness and transparency; and accuracy. This means, among other things, that the rules for conducting preventive sobriety testing should be set forth in the employer's internal rules and made available to employees.

Art. 88 GDPR allows the member states to provide for more specific rules to ensure the protection of rights and freedoms in respect of the processing of personal data in an employment context, including discharge of obligations laid down by law as well as health and safety at work. We believe that under Polish law, such specific rules include Art. 22^{1}, 22^{1a} and 22^{1b} of the Labour Code. Art. 22^{1a} and 22^{1b} involve processing of employees' (and candidates') personal data on the basis of their consent. Given the risk of challenging employee consent as a valid basis for processing personal data, we believe that consent cannot be (safely) adopted as the basis for processing information on an employee's sobriety or intoxication (and for this reason we do not discuss that basis in more detail here). However, under Art. 22^{1} §4 of the Labour Code, the employer may demand that the employee provide data other than that indicated in Art. 22^{1} §§ 1 and 3, when necessary to exercise rights or discharge obligations arising out of Art. 22^{1} §§ 1 and 3.

Employer's obligations laid down by law

The Labour Code imposes on employers an obligation to provide employees safe and hygienic working conditions (Art. 15), and the employer is required to protect employees' life and health by providing safe and hygienic working conditions applying relevant scientific and technological advancements (Art. 207 §2). The employer is also responsible for the conditions of health and safety at the workplace (Art. 207 §1).

Under §39(1)–(2) of the general regulations on occupational health and safety, the employer is required to ensure employment health and safety in particular by combatting threats connected with the work performed by employees, proper organisation of work, application of necessary preventive measures, and informing and training employees. This obligation should be carried out among other things by combatting threats, conducting assessments of risks associated with dangers that cannot be excluded, and eliminating threats at the source.

Employer's entitlements and burden of proof

If an employee reports to work under the influence of alcohol or has consumed alcohol at work, the employer may terminate the employee's contract, including with immediate effect due to the employee's fault, in connection with the employee's serious violation of his fundamental duties (under the procedure of Art. 52 §1(1) of the Labour Code). This is because according to the established line of decisions from the Supreme Court, maintaining sobriety during work and at the workplace is one of the employee's fundamental duties. The court has held that the employee bears this duty not only when he is performing work at the employer's location, but also when the employee is present at any other location during the time designated for performing work. There can be no margin of tolerance for the employee's use of alcohol during the time set aside for performing work, even if consumption of alcohol is practised or condoned by the employee's superiors. The employee's presence at the workplace in a state of intoxication excludes both the possibility of performing work but also remaining in readiness to perform work.

It should be pointed out, however, that in the event of termination of employment because the employee has worked under the influence of alcohol, and also when the employee is charged with a disciplinary fine or damages are sought against the employee for causing a loss related to such behaviour, the employer bears the burden of proof.

Proving that the employee was under the influence of alcohol is also relevant for the obligation to establish the employee's right to benefits under insurance covering on-the-job accidents. This is because proof of the insured's violation of health and safety regulations, caused by the insured intentionally or through gross negligence, deprives the insured of the right to accident-insurance benefits (Art. 21 of the Act on Social Insurance for Work Accidents and Occupational Diseases).

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