To process or not to process? How to handle information concerning an employee's COVID-19 immunity

The Hungarian data protection authority ("NAIH") recently issued a new communiqué[1] that addresses an issue that has been of concern to employers for at least the past six months: the processing of personal data regarding the COVID-19 immunity of employees (who are subject to the Hungarian Labour Code).

The NAIH's position on the matter is once again more moderate than what employers had in mind.

In addition to noting that the employer's obligation to ensure its employees work in a heathy and safe workplace forms the basis on which such data may be processed, the communiqué also states that a lawful need for an employer to access and process immunity data can only exist (i) *"for employment law, health and safety, occupational health and work organisation purposes"*[2], (ii) on the basis of a relevant risk assessment, and (iii) with respect to specific jobs and employees exposed to higher risks. Additionally, the processing will only be lawful if an analysis and a balancing test carried out by the employer show that it is proportionate with, and necessary and adequate for, the purpose that the employer wants to attain.

There is nothing new in the fact that information pertaining to an employee's immunity, whether acquired through recovery from COVID-19 or by vaccination, qualifies as sensitive (health) data, and therefore its processing is subject to stricter rules. We believe that in the overwhelming majority of cases, employers will be able to cite a legitimate interest in the processing of such data [Article 6(1)(f) GDPR] and, potentially, the existence of one or more of the conditions listed in Article 9(2) GDPR as the legal basis for the processing, which in turn will necessitate the performance of a balancing test, including the determination of storage period(s).

If, in light of the above, the processing meets the applicable regulations, another important requirement that will have to be met is that not only the employer's stated purpose (i.e. compliance with the applicable statutory requirements) should be attainable with the help of the immunity data, but the necessary (safety) measures will also have to be introduced on the basis of such data; therefore, collection of data for future potential use is not permitted.

If an employer meets the above requirements and decides to process immunity-related data, employees in the relevant jobs will still only be required to display the related application on their phone or show their immunity card, and the employer will only be permitted to record the fact that particular employees have confirmed their immunity and for how long such immunity lasts. Practically, this means that employers can record the relevant employee's name, immunity status, period of immunity, and that they have certified their immunity.

It should be noted that the NAIH believes that these rules are only applicable in the pandemic situation that existed on the date when the communiqué was published, and therefore any pro-

[1] NAIH-3903-1/2021

[2] NAIH-3903-1/2021, page 2

cessing operations that are introduced on the basis of these rules will have to be regularly revised and adjusted to the situation as it evolves.

It is important to remember that at the end of the day, employers are liable not only for the lawful completion of a risk assessment but also for the lawfulness of their data processing operations as a whole, including compliance with data processing principles and the requirement to provide adequate information to data subjects. Consequently, it is advisable to carry out a proper assessment of all relevant factors before the decision to process immunity-related data is made.

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