Ref.: CNS 64/2018

Opinion on the query made by a municipal company, on the possibility of providing occupational risk prevention delegates with a list of workers included in the group of workers potentially exposed to asbestos.

A municipal company formulates a query about the possibility of providing the company's occupational risk prevention delegates with the list of workers included in the group of workers potentially exposed to asbestos.

Specifically, it is stated that the Occupational Risk Prevention unit has informed them that within the Occupational Safety and Health Committee, the prevention delegates have requested the list of workers included in the group of workers potentially exposed to asbestos, as stated in notice 148/2018 that accompanies the consultation.

By means of this notice, the company addresses all staff in certain departments, areas or functions, and informs them that in connection with the recent detection of material containing asbestos (MCA) on several trains of the service, it is called to all active staff who have worked or are working in the indicated departments, in order to carry out a specific medical examination for possible exposure to asbestos. All staff already included in the specific health surveillance program for possible exposure to MCA since 2002 are also included in the call.

The consultant points out that he has compiled a list with the history of workers who have worked in the affected areas or functions. To this list it is indicated that another list has been added with the workers who are currently on leave from the company (retirements, leaves of absence, voluntary leaves, deaths...), some of them also included in the program of health surveillance for potential exposure to asbestos.

From here, the organization considers the following questions:

First.- If article 36 of Law 31/1995, on the prevention of occupational risks, of November 8, which attributes to the Prevention Delegates the task of monitoring and controlling compliance with the regulations on the prevention of occupational risks, and empowers them to receive information from the employer, would protect the transmission of the requested information.

Second.- If the data requested can be considered adequate and relevant in relation to the purpose for which they are required.

Third.- If the information related to the health data of the workers must be provided dissociated without referring to the specific subject, so that the principle of confidentiality is guaranteed.

Fourth.- If in the event that the list of workers must be provided, the express consent of the workers would be necessary.

Fifth.- If the information to be provided to the Prevention Delegates should include people who are currently no longer employees of the company.

Analyzed the query, which is accompanied by notice no. 148/18 issued by the entity and addressed to personnel potentially exposed to materials with asbestos content, and in accordance with the report of the Legal Counsel I issue the following opinion.

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(...)

II

The consultation raises the issue of sending to the occupational risk prevention delegates the data of the workers included in the group of workers potentially exposed to asbestos, and to whom Notice 148/2018 refers.

Article 5.1.a) of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data (hereinafter, RGPD), applicable since May 25, 2018 (article 99), establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party ("lawfulness, loyalty and transparency").

In order for this treatment (transmission of workers' personal information to occupational risk prevention delegates) to be lawful, one of the conditions provided for in Article 6 RGPD must be met and Article 9 RGPD must also be taken into account, in in the case of special categories of data.

Article 6.1 RGPD provides that it is necessary to have a legal basis that legitimizes the treatment, either the consent of the affected person, or any of the other circumstances provided for in the same precept, such as that "the treatment is necessary for the compliance with a legal obligation applicable to the controller" (letter c), and this is recognized in a legal basis in accordance with the provisions of sections 2 and 3 of the same article.

Section 3 of this precept provides: "The basis of the treatment indicated in section 1, letters c) and e), must be established by:

a) the Law of the Union, or

b) the law of the Member States that applies to the person responsible for the treatment.

The purpose of the treatment must be determined in said legal basis or, in relation to the treatment referred to in section 1, letter e), it will be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of conferred public powers to the person in charge of the treatment."

The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Constitution Spanish, that the development rule, as it is a fundamental right, has the status of law.

In this regard, the recent Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereafter LOPDGDD) provides in article 8.1 that:

> **1. The processing of personal data can only be considered based on the fulfillment of a legal obligation required of the person in charge, in the terms provided for in article 6.1.c) of Regulation (EU) 2016/679, when so provided by a law of the European Union or a rule with the rank of law, which may determine the general conditions of the treatment and the types of data subject to it as well as the assignments that proceed as a consequence of the fulfillment of the legal obligation. Said rule may also impose special conditions on treatment, such as the adoption of additional security measures or others established in Chapter IV of Regulation (EU) 2016/679. (...)"**

In accordance with the above, and assuming that the consent of the data holders (affected workers) is not available, it will be necessary to see if Law 31/1995, on the prevention of occupational risks, of November 8, (hereafter LPRL), would protect the transmission of workers' personal information to prevention delegates in the terms set out in the co

III

Article 36.1. of the LPRL attributes to the prevention delegates - workers' representatives with specific functions in the field of occupational risk prevention -, among other powers, the exercise of the task of monitoring and controlling compliance with the regulations on the prevention of occupational risks (section d).

In exercising these powers and in accordance with article 36.2 LPRL, the prevention delegates are authorized, among other things and for the purposes that interest us, to:

> **"b) To have access, with the limitations provided for in section 4 of article 22 of this Law, to the information and documentation relating to the working conditions that are necessary for the exercise of their functions and, in particular, to that provided for in articles 18 and 23 of this Law. When the information is subject to the indicated limitations, it can only be provided in a way that guarantees respect for confidentiality"**
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> **(...)**
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> **d) Receive from the employer the information obtained by him from the persons or bodies in charge of protection and prevention activities in the company, as well as from the competent bodies for the safety and health of workers, without prejudice to what Article 40 of this Law provides for collaboration with the Labor and Social Security Inspectorate."**

Article 22.1 of the LPRL obliges the employer to "guarantee the workers in their service the periodic surveillance of their state of health based on the risks inherent in the work," and states that "this surveillance can only be carried out if the worker gives his consent. The only exceptions to this voluntary nature, with the prior report of the workers' representatives, are the cases in which the recognition

is essential to assess the effects of the working conditions on the workers' health or to verify whether the worker's state of health may constitute a danger to himself, to the other workers or to other persons related to the company or when so established by a legal provision in relation to the protection of specific risks and particularly dangerous activities. "

Article 18 of the LPRL provides that: "1. In order to comply with the duty of protection established by this Law, the employer must adopt the appropriate measures so that the workers receive all the necessary information in relation to:

a) Risks for the safety and health of workers at work, both those that affect the company as a whole and each type of job or function. b) The protection and prevention measures and activities applicable to the risks indicated in the previous section. c) The measures adopted in accordance with the provisions of article 20 of this Law.

In companies that have workers' representatives, the information referred to in this section must be provided by the employer to the workers through the representatives; however, each worker must be informed directly of the specific risks that affect their job or role and of the protection and prevention measures applicable to the risks. "

Royal Decree 396/2006, of March 31, which establishes the minimum health and safety provisions applicable to work with a risk of exposure to asbestos, provides in article 3:

"1. This royal decree is applicable to operations and activities in which workers are exposed or are likely to be exposed to asbestos fibers or materials containing it, and especially in: (...) d) Maintenance and repair work of existing asbestos materials in equipment, units (such as boats, vehicles, trains), facilities, structures or buildings. e) Maintenance and repair work that involves the risk of asbestos fibers coming off due to the existence and proximity of asbestos materials. h) All those other activities or operations in which materials containing asbestos are handled, as long as there is a risk of asbestos fibers being released into the work environment.

2. Notwithstanding the foregoing, as long as it concerns sporadic exposures of the workers, that the intensity of said exposures is low and that the results of the evaluation provided for in article 5 clearly indicate that the limit value of exposure to the asbestos in the area of the work zone, articles 11, 16, 17 and 18 will not apply when working:

a) in short and discontinuous maintenance activities during which only non-friable materials are worked with, b) in the removal without deterioration of non-friable materials, c) in the encapsulation and sealing of materials in good condition that contain asbestos, provided that these operations do not involve the risk of the release of fibers, and d) in the monitoring and control of the air and in the taking of samples to detect the presence of asbestos in a given material."

Regarding the monitoring of workers' health, and in accordance with article 16.1 of Royal Decree 396/2006:

"1. The employer will guarantee adequate and specific monitoring of the workers' health in relation to the risks of exposure to asbestos, carried out by competent health personnel, as determined by the health authorities in the guidelines and protocols drawn up, in accordance with the provisions of the article 37.3 of Royal Decree 39/1997, of 17 January.

Said surveillance will be mandatory in the following cases:

a) Before the beginning of the jobs included in the scope of application of this royal decree in order to determine, from the medico-labor point of view, his specific aptitude for jobs with asbestos risk.

b) Periodically, all workers who are or have been exposed to asbestos in the company will undergo medical examinations with the periodicity determined by the guidelines and protocols referred to in section 1.

2. Every worker with a medical-labor history of exposure to asbestos will be separated from work with risk and sent to study at the corresponding specialized care center, for the purposes of possible diagnostic confirmation, and as long as the specific health surveillance shows any of the signs or symptoms determined in the guidelines and protocols referred to in section 1.

3. Due to the long latency period of pathological manifestations due to asbestos, all workers with antecedents of exposure to asbestos who cease to work in the company in which the exposure occurred, whether due to retirement, change of company or any other cause, will continue to be subject to preventive medical control, through periodic examinations carried out, through the National Health System, in pneumology services that have adequate means of functional respiratory examination or other services related to asbestos pathology."

The employer must guarantee to the workers who are at his service a periodic monitoring of their health based on the risks inherent in the work (art. 22 LPRL). This obligation is specified in the case of workers potentially exposed to asbestos, in compliance with the specific measures to monitor the health of these workers provided for in Royal Decree 396/2006.

Beyond the medical checks that the company must guarantee to these workers, article 18 of the LPRL obliges the employer to inform the workers through their representatives, of the health risks inherent in the workplace and the health prevention and surveillance measures adopted, in this case, due to a potential exposure to asbestos and therefore, in the terms provided for in article 14 of Royal Decree 396/2006.

Taking this into account, and for the purposes of assessing whether or not the company is guaranteeing adequate and specific surveillance for all workers who may have been exposed to asbestos in their workplaces, prevention representatives should be able have the nominative list of workers that the company has included in this group. Th

it would allow the prevention delegates to check that there are all the people who in their opinion should be included to be potentially affected. For these purposes, the list should include both the people who currently occupy positions at risk of exposure and those who have previously occupied them. This check can only be done by having the names of all the workers affected, and therefore the transfer (treatment) of this data to the delegates would be respectful of the principle of data minimization (Article 5.1.c) RGPD), which requires that any data processing carried out is limited to the minimum data necessary to achieve the intended purpose of this processing.

To warn that the fact of being or having been exposed to asbestos, although it provides information about a potential risk to the health of that person, cannot in itself be considered information about past health status, present or future of this person. Another thing is that, as a result of a medical assessment or test carried out on a specific worker, there are elements that pose a risk of suffering from one of the diseases related to exposure to asbestos.

Article 4.15) RGPD defines data relating to health as: "personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their state of health;"

Recital 35 of the RGPD specifies that "Personal data relating to health must include all data relating to the state of health of the interested party that provide information on their past, present or future state of physical or mental health. It includes (...) the information obtained from tests or examinations of a part of the body or a body substance, including that from genetic data and biological samples, and any information related, for example, to a disease, a disability, the risk of suffering from diseases, the medical history, the clinical treatment or the physiological or biomedical state of the interested party, regardless of its source, for example a doctor or other health professional, a hospital, a medical device, or a diagnostic test in in vitro "

Although the RGPD includes information on the risk of suffering from diseases within the information that would be related to a person's health, this must be linked to an individualized assessment of that person.

The risk of developing an asbestos-related disease is related to: the concentration of airborne fibers, the duration of exposure, the frequency of exposure, the size of inhaled fibers, and the time elapsed from initial exposure, concomitant exposure to tobacco or other carcinogens and the individual characteristics of each person.

The inhalation of asbestos fibers can lead to various disorders and diseases, some benign, such as pleural plaques, and others serious or very serious, such as asbestosis or various types of cancer, not everyone who has been exposed Asbestos will end up suffering from a disease because of this fact. Whether or not a disease develops and the type of disease that appears will depend on several factors such as the intensity, frequency and duration of exposure, the type of asbestos and the characteristics of the fibers, the time elapsed since onset of exposure, concomitant exposure to tobacco or other ager

Thus, an individualized assessment carried out on the worker on all these elements (contained in an occupational clinical history), in which a risk of suffering from a

disease related to exposure to asbestos, it would be data related to your health, and would fall within the special categories of data regulated in article 9 RGPD.

All in all, it must be concluded that, from the data protection side, and in response to the first two questions raised, the transmission to the prevention delegates of the nominative list of active workers included as potentially exposed to asbestos, would be a lawful treatment in accordance with articles 6.1.c) RGPD and 36.1 a) and 36.2 b) of the LPRL, and respectful of the principle of data minimization (article 5.1.c) RGPD), which would not require the consent of the affected persons.

IV

With regard to the possibility of sending workers' health data to the prevention delegates, article 9 of the RGPD establishes a general prohibition of the processing of personal data of various categories, among others, data relating to health (section 1). Section 2 of the same article provides that this general prohibition will not apply when one of the following circumstances occurs:

> **"a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the purposes specified, except when the Law of Union or member states establish that the prohibition mentioned in section 1 cannot be lifted by the interested party;**
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> **b) the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union of the Member States or a collective agreement in accordance with the Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party;**
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> **(...)**
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> **h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's labor capacity, medical diagnosis, provision of health or social assistance or treatment, or management of health and social care systems and services, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a health professional and without prejudice to the conditions and guarantees contemplated in section 3;"**

For its part, article 9.2 of the LOPDGDD, provides:

> **"1. Pursuant to article 9.2.a) of Regulation (EU) 2016/679, in order to avoid discriminatory situations, the consent of the data subject alone will not be sufficient to lift the ban on the processing of data whose main purpose is to identify their ideology, trade union affiliation , religion, sexual orientation, beliefs or racial or ethnic origin. The provisions in the previous paragraph will not prevent the treatment**

under the remaining assumptions contemplated in article 9.2 of Regulation (EU) 2016/679, when applicable.

"2. Data processing contemplated in letters g), h) ei) of article 9.2 of Regulation (EU) 2016/679 based on Spanish law must be covered by a law-enforcement law, which may establish additional requirements relating to its security and confidentiality. In particular, said rule may cover the treatment of data in the field of health when this is required by the management of public and private healthcare and social systems and services, or the execution of an insurance contract of which the affected be part."

The seventeenth additional provision (section 1) of the LOPDGDD specifies that the treatments of health-related data and genetic data are covered by letters g), h), i) and j) of article 9.2 of the RGPD regulated in Law 31/1995, of November 8, on the Prevention of Occupational Risks, among others.

In accordance with article 36.2 of LPRL, prevention delegates, in the exercise of their task of monitoring and control over compliance with risk prevention regulations, must be able to have access, with the limitations provided for in the section 4 of article 22 of this Law, to the information and documentation relating to the working conditions that are necessary for the exercise of their functions and, in particular, to that provided for in articles 18 and 23 of this Law When the information is subject to the indicated limitations, it can only be provided in a way that guarantees respect for confidentiality (art. 36.2 b)).

According to article 22.4 of the LPRL, "The data relating to the monitoring of the health of workers cannot be used for discriminatory purposes or to the detriment of the worker. Access to medical information of a personal nature must be limited to medical personnel and the health authorities that carry out the monitoring of the health of workers, without it being possible to provide it to the employer or other people without express consent of the worker

However, the employer and the persons or bodies with responsibilities in matters of prevention must be informed of the conclusions that derive from the assessments carried out in relation to the worker's fitness to perform the job or to the need to introduce or improve protection and prevention measures, so that they can correctly perform their functions in preventive matters."

This precept prohibits the transmission of medical information obtained under the LPRL to any third party other than the medical staff and the health authorities in charge of monitoring the health of workers, exceptionally establishing the access by the people with responsibility for prevention to the conclusions derived from this monitoring and in relation to their ability to carry out the tasks inherent in their workplace.

In this sense, article 36.2. c) of the LPRL authorizes the prevention delegates to be informed about the damage caused to the workers' health once the employer has become aware of it, and these can be presented, even if it is outside the working day , at the scene to find out the circumstances.

In turn, article 39.2 c) of the LPRL empowers the Safety and Health Committee - the prevention delegates are part of it - to know and analyze the damage caused to the health or physical integrity of workers, to the purpose of assessing the causes and proposing the appropriate preventive measures.

According to these precepts, prevention delegates should be able to access information about workers who have suffered damage to their health as a result of the tasks carried out in the workplace, for the purposes of monitoring compliance by of the company's occupational risk prevention rules (article 36.1.a) LPRL), or within the Health and Safety Committee, in order to promote initiatives on methods and procedures for effective risk prevention , proposing to the company the improvement of conditions or the correction of existing deficiencies (article 39.1.b) LPRL).

Article 16.2 of Royal Decree 396/2006 provides that "2. All workers with a history of occupational medical exposure to asbestos will be separated from work at risk and sent to study at the corresponding specialized care center, for the purposes of possible diagnostic confirmation, and as long as any of the signs are evident in the specific health surveillance or symptoms determined in the guidelines and protocols referred to in section 1."

There may be cases in which it is sufficient to know the number of detected cases and the jobs held by the affected persons, so that the prevention representatives can assess whether the company has taken the appropriate measures. This could happen in the event that a specific problem affected all workers who occupy the same workplace. Probably the prevention delegates could make their assessment without needing to have the names of the affected people.

To warn that the fact that the names of workers who have been diagnosed with an illness related to exposure to asbestos are not provided does not imply that these people cannot end up being identified by other indirect means, such as relating the workplace with the person who occupies it. Even so, this measure would be more respectful of the principle of data minimization (Article 5.1.c) RGPD).

Having said that, it cannot be ruled out that access to the name of the specific workers affected may be necessary. If we take into account that, as it seems, the effect of exposure to asbestos is not only linked to the characteristics of a specific workplace, such as the intensity, frequency and duration of exposure, but other individual factors of the affected worker are also involved, the prevention delegates could have to assess the proposed measures (change of workplace), and check that these are suitable for the working capacity of the affected worker. In these cases, sending the names of the affected workers to the prevention delegates would be legally authorized, without the need to have the consent of these people.

Point out that article 9.3 RGPD provides that "The personal data referred to in section 1 may be treated for the purposes referred to in section 2, letter h), when its treatment is carried out by a professional subject to the obligation of professional secrecy , or under his responsibility, in accordance with the Law of the Union or of the Member States or with the rules established by the competent national bodies, or by any other person also subject to the obligation of secrecy in accordance with the Law of the

Union or Member States or the rules established by the competent national bodies.”

In this case, and in accordance with article 37.3 of the LPRL, the prevention delegates are subject to the obligation of professional secrecy provided for in article 65 ET, for company committees. Specifically, according to this precept, the prevention delegates must observe the duty of secrecy with respect to that information which, in the legitimate and objective interest of the company or the work center, has been expressly communicated to them in a confidential manner. (art. 65.3 ET). In any case, no type of document delivered by the company to the prevention delegates can be used outside the strict scope of the company and for purposes other than those that motivated its delivery. (art. 65.3 ET), and this duty of secrecy subsists even after their mandate expi

From all this it is concluded that articles 9.2 b) ih) RGPD, and articles 22.4 36.2 b) ic) and 39. 2. c) of the LPRL could enable the transfer to the prevention delegates of certain names and workplace occupied by workers affected by exposure to asbestos without the need to have the express consent of these people.

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Finally, and with regard to the possibility of sending information to the prevention delegates about workers who are included as potentially exposed to asbestos, but who, for whatever reason (retirement, voluntary leave, leave, etc.) do not form part of the workforce, it should be borne in mind that article 22.5 of the LPRL provides: "In the cases where the nature of the risks inherent in the work makes it necessary, the right of workers to periodic monitoring of their state of health it must be extended beyond the termination of the employment relationship, in the terms determined by regulation."

Article 16.3 of the Royal Decree establishes that "According to the latency period of the pathological manifestations of asbestos, todo trabajador con antecedents of exposure to asbestos that ceases in the employment relationship in the company in which the situation of exposure occurs , whether due to retirement, change of company or any other reason, will continue to be subject to preventive medical control, through periodic examinations carried out, through the National Health System, in pneumology services that have adequate means of functional respiratory examination or other services related to asbestos pathology.”

According to article 38 of Royal Decree 39/1997, of January 17, which approves the Prevention Services Regulation, it is up to the company's prevention services to collaborate with primary health care services and specialized health care for the diagnosis, treatment and rehabilitation of illnesses related to work and with the Health Administrations competent in the occupational health activity.

In this context, the notice 148/18 that accompanies the consultation informs that the prevention service will send a certified letter to the passive staff who have caused leave from the company and are included as potentially exposed to asbestos, in order that they can apply to enter the post-occupational monitoring program.

To the extent that the prevention delegates are assigned the functions of monitoring and controlling the regulations on the prevention of occupational risks (article 36.1 d) LPRL), it does not seem that there could be any inconvenience in the prevention delegates having 'information on the list of people to whom the company's prevention services must inform about their situation of potential exposure to asbestos, and who are not currently linked to the company.

Conclusions

The treatment or transfer to the prevention delegates of the list of people included as potentially exposed to asbestos, including people who are no longer linked to the company, would comply with data protection regulations, in accordance with articles 6.1.c) RGPD and 22.1 and 5, 36.1 a) 36. 2 b) of the LPRL, and would not require the consent of these persons.

The treatment or transfer to the prevention delegates of the name and workplace of the people affected by the exposure to asbestos, would conform to the data protection regulations, in accordance with articles 9.2. b) ih) RGPD, and 22.4 and 36.2 c) of the LPRL, and would not require the express consent of those affected.

Barcelona, January 29, 2019