CNS 21/2019

Opinion in relation to the query made by the data protection representative of a trade union regarding the communication of a lawyer's medical leave to the court.

A request is submitted to the Catalan Data Protection Authority for an opinion from the data protection representative of a trade union on the communication of a lawyer's medical leave to courts and tribunals.

The consultation document states that, in the cases in which a court or tribunal requests that a medical leave document be provided, the question arises whether, in application of the data protection regulations, they have to remove from the document those data that are considered excessive for the intended purpose or they must provide the termination notice with all the data it contains.

Analyzed the query, which is accompanied by the copy of the query made (...) in the same terms as the one made to this Authority, as well as the response that this body addressed to them, in accordance with the report of the Legal Advice I issue the following opinion:

I

(...)

II

The consulting union expresses the doubt that arises when they have to send to courts and tribunals the medical leave notices of a lawyer, either at the request of the court itself, or to justify the circumstance that makes it impossible for him to appear in a certain procedure judicial

In particular, it is asked whether, in these cases, the medical leave notices must be provided without removing any of the data they contain, the union must first "minimize" those data that are not essential for the purpose pursued or, well, if once the document has been provided, this responsibility falls on the Administration of Justice.

In order to focus the query, it must be taken into consideration that the authorization of the company or entity in which the lawyer provides services to transmit the personal information of that person is analysed, from the point of view of the data protection regulations and, to the extent that the company or entity may be included in the scope of action of this Authority.

The communication of this data made directly by the lawyer to the courts and tribunals is outside the scope of this opinion.

III

Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), defines personal data as any information about an identified or identifiable natural person "the interested party"; "an identifiable natural person shall be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, an online identifier or one or more elements specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of this person" (article 4.1 RGPD). And it defines treatment as "any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction" (article 4.2 RGPD).

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

Regarding the concept of health data, recital 35 of the RGPD specifies that "Among the personal data relating to health, it is necessary to include all that provide information on the state of physical or mental health of the interested party, whether past, present or future. It includes the information about the natural person collected on the occasion of their registration for the purpose of healthcare, or on the occasion of the provision of this assistance, in accordance with Directive 2011/24/EU of the European Parliament and the Council11; any number, symbol or data assigned to a natural person that uniquely identifies him for he

With regard to the processing of personal data, article 5.1 of the RGPD, includes the principle of legality according to which the processing of personal data must be lawful, loyal and transparent in relation to the interested party, and, because a treatment to be lawful must be based on one of the legal bases established in article 6.1 of the RGPD.

It should be noted, however, that Article 9.1 of the RGPD prohibits the processing of personal data revealing ethnic or racial origin, political opinions, religious or philosophical convictions or trade union membership, and the processing of data genetic, biometric data intended to uniquely identify a natural person, data relating to health or data relating to the sex life or sexual orientation of a natural person, although this prohibition will not be effective when any of the circumstances of section 2 of this article.

Thus, article 9.2 of the RGPD lists the circumstances that revoke the prohibition of processing special categories of data, among which, for the purposes we are concerned with, we can highlight the following:

"a) The interested party has given his explicit consent to the processing of these personal data for one or more of the specified purposes, unless the right of the Union or of the

member states establish that the interested party cannot lift the prohibition mentioned in section 1. b) The treatment is necessary to fulfill obligations and to exercise the specific rights of the person responsible for the treatment or of the interested party, in the field of law labor and safety and social protection, if 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. (...) f) The treatment is necessary to formulate, exercise or defend claims or when the courts act in the exercise of their judicial function. (...) h) The treatment is necessary for the purposes of preventive or occupational medicine, assessment of the worker's work capacity, medical diagnosis, provision of assistance or health or social 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 provided for in section 3 .

(...)"

In this regard, recital 51 of the RGPD specifies that:

Likewise, when the law of the Union or of the member states establishes it and adequate guarantees are given to protect personal data and other fundamental rights, it is necessary to authorize exceptions to the prohibition of processing special categories of personal data, if it is in the public interest ; in particular, the processing of personal data in the field of labor legislation, social protection legislation, including pensions, and for the purposes of security, supervision and health alert, prevention or control of communicable diseases and other serious threats to to health This exception is possible for purposes in the field of health, including public health and the management of health care services, especially in order to ensure the quality and cost-effectiveness of the procedures used to resolve claims for benefits and of services in the sickness insurance regime, or for archival purposes in the public interest, scientific and historical research purposes or statistical purposes. Also, exceptionally, it is necessary to authorize the processing of this personal data when it is necessary to formulate, exercise or defend claims, either for a judicial procedure or for an administrative or extrajudicial procedure."

The specific nature of health data is also recognized by section 4 of article 9 of the RGPD when it provides that Member States may "maintain or introduce additional conditions regarding the processing of genetic data, biometric data or data relating to health, including limitations".

IV

The notice of medical leave has as its object the declaration of the worker's medical leave and initiates the procedure for the recognition of the right to the allowance for temporary incapacity regulated in the Royal Legislative Decree 8/2015, of October 30, by which s approves the revised text of the General Social Security Law (LGSS).

The processing of medical leave notices is regulated in article 7 of Royal Decree 625/2014, of July 18, which regulates certain aspects of the management and control of processes for temporary incapacity in the first three hundred and sixty- five days of its duration (RD 625/2014), which, in this regard, establishes:

> **"1. The doctor who issues the medical leave, confirmation and discharge papers will give the employee two copies of the same, one for the interested party and the other for the company.**
>
> **In the period of three days counted from the same day of the dispatch of the medical parts of leave and of confirmation of the leave, the worker will deliver to the company the copy intended for it. However, if the termination of the employment contract occurs during the period of medical leave, the worker will be obliged to present to the managing entity or the mutual company, as appropriate, within the same three-day period set for the company, the copies of the parts confirming the discharge.**
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> **Within 24 hours following its dispatch, the medical part of discharge destined for the company, will be delivered by the employee to the same or, in the cases indicated at the end of the contract, to the managing entity or mutual. (...)"**

The format of medical leave notices and the data they must contain are defined in Order ESS/ 1187/2015, of 15 June, which implements RD 625/2014. In accordance with this rule, the notice of medical leave that must be submitted to the company must include the worker's personal identification data (name and surname, ID, address, telephone numbers), the name of the company to which he belongs, the workplace, the date of leave, the causative contingency (common disease, work accident, non-work accident, professional disease), the national employment code of the worker, if the process qualifies as very short, short, medium or long as well as the estimated duration of the process and, if so, the clarification of whether the process is a relapse of a previous one, as well as the date of termination. If the contingency is professional, it will also include the date on which it occurred and its classification as mild, serious or very serious.

In accordance with the aforementioned regulations, the medical leave notice has a different format and content depending on whether it is addressed to the company or the worker himself, with the main difference being that the document addressed to the company does not include information about the specific diagnosis carried out by the doctor who issues it.

However, in accordance with the definition of personal data contained in the RGPD, the document addressed to the company contains, in addition to the worker's identification data, his health data. In this sense, both the codes assigned to the worker, as well as the contingency causing the leave (common illness, work accident, non-work accident, occupational disease), as well as the typology of the process (very short, short, medium or long) and the graduation of this (in case of professional contingency), even if this document does not include information about the specific diagnosis of the disease or the affect that has produced the accident, when this be the reason for the leave.

Focusing the consultation on these terms, it is necessary to analyze, under the protection of data protection regulations, the authorization of the union to send the notice of medical leave to the courts and trib

as a document justifying the worker's incapacity situation, or at their request, and, in their case, what personal data of the worker can be communicated.

v

In relation to the sending of the lawyer's medical leave notice as proof of non-appearance or to request the suspension of trial or other procedural acts, article 83 of the Law 36/2011, of October 10, regulating social jurisdiction (LRJS), provides for the possibility of suspension of conciliation and trial acts, in the following terms:

> **"1. Only at the request of both parties or for justified reasons, certified before the court clerk, may he suspend, for a single time, the acts of conciliation and judgment, signaling again within the ten days following the date of the suspension. Exceptionally and due to adequately proven transcendent circumstances, a second suspension may be agreed. (...)**
>
> **2. If the actor, cited in form, does not appear or allege just cause that motivates the suspension of the act of conciliation or the trial, the judicial clerk in the first case and the judge or tribunal in the second, they will hold him for desistido demand**
>
> **3. The unjustified non-appearance of the defendant will not prevent the celebration of the acts of conciliation and judgment, continuing without the need to declare his rebellion."**

On the other hand, article 553 of Organic Law 6/1985, on the judiciary, provides that the lack of a lawyer's appearance at court summonses without "justifiable cause" can constitute a disciplinary correction. Thus, this article establishes:

> **"Lawyers and prosecutors will also be subject to disciplinary corrections for their actions before courts and tribunals:**
>
> **1.º) When in their forensic action they lack orally, by writing or by work, the respect due to judges and courts, prosecutors, lawyers, lawyers of the Administration of Justice or any person who intervenes or is related to the process. 2.º) When called to order in the oral arguments they did not repeatedly obey the presiding act. 3.º) When they do not appear before the court without justified cause once summoned in form. 4.º) When they unjustifiably renounce the defense or representation they exercise in a process, within the seven days prior to the celebration of the judgment or hearings indicated."**

Both rules refer to "justified causes" or "justified reasons" that allow to base, in one case, the suspension of the trial or the conciliation record, and, in another case, the non-appearance of the lawyer before the courts to which has been cited, without specifying the justified reasons or the documentation that must be provided to substantiate them.

On the other hand, article 188 of Law 1/2000, of January 7, on Civil Procedure (LEC) lists the circumstances that allow a hearing that has already been scheduled to be suspended, including:

"5.º Due to death, illness or absolute impossibility or absence due to maternity or paternity of the lawyer of the party who requested the suspension, sufficiently justified, in the judgment of the Attorney of the Administration of Justice, provided that such facts had been produced when no longer it was possible to request a new notice in accordance with what is provided in article 183, provided that the right to effective judicial protection is guaranteed and r

Equally, they will be comparable to the previous cases and with the same requirements, other similar situations provided for in other social security systems and at the same time for which the leave is granted and the provision of the permits provided for in the Social Security legislation ."

In accordance with the aforementioned procedural regulations, there is an obligation to properly justify the lawyer's failure to appear in court proceedings. The incapacity of the lawyer, whether due to illness or accident, can be one of the causes of suspension of the proceedings which can be justified by means of a statement of medical leave, although nothing prevents that, in his case, the illness or other circumstance of health that prevents the lawyer from carrying out his duties is accredited with other supporting documents, such as a medical certificate, a hospital certificate regarding the assistance received, or a certificate from the entity in which he provides services as proof of this eventuality, etc.

But in addition, the circumstances that prevent the assistance of the lawyer may be due to permits that he has as a result of contingencies that may affect his relatives up to a certain degree of consanguinity or affinity. Thus, it is necessary to take into account, although it is not the specific assumption raised in the consultation, that the Workers' Statute (Royal Legislative Decree 2/2015, of October 25), establishes the possibility of obtaining a work permit when there is an "accident or serious illness, hospitalization or surgical intervention without hospitalization that requires home rest, of relatives up to the second degree of consanguinity or affinity" (art. 37.3 ET) and in the same sense the Basic Statute of public employee (Royal Legislative Decree 5/2015, of 30 October) grants public employees leave due to accidents or serious illness of family members. Consequently, not only the lawyer's illness can be a justifying reason for his non-attendance at the procedural acts, but also the illness, intervention or hospitalization of his relatives up to a certain degree of consanguinity or affinity.

In accordance with the aforementioned regulations, the sending of the notice of medical leave, or other documentation attesting to the lawyer's illness or incapacity to courts and tribunals by the company or entity in which he provides services, has as legal basis letter b) of article 9.1 of the RGPD, to the extent that it can be considered a necessary treatment "to fulfill obligations and to exercise the specific rights of the person in charge of the treatment or of the interested party, in the field of labor and social security and protection law, if 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

Also, section f) of article 9.1 of the RGPD establishes the exception to the prohibition of processing special categories of personal data when the processing is necessary to "formulate, exercise or defend claims or when the courts act in the exercise of his judicial function." The possibility of requesting an adjournment of judgment or any procedural act for justified reasons related to the impossibility of legal assistance, either for health reasons

own or of a family member, is directly related to the fundamental right to effective judicial protection recognized in article 24.1 of the Constitution, as has been collected by extensive jurisprudence, among others STS 1121/2002 of 27 November, which exhibits:

> **"As S 130/1986, of 29 Oct., of the 2nd Chamber of the Constitutional Court has pointed out, "art. 323.6º LEC entrusts the Court with the appreciation of the lawyer's illness as a justified reason for suspending the oral hearing. However, in light of the fundamental right recognized in art. 24 Spanish Constitution, that appreciation must always be done in the most favorable sense for the effectiveness of judicial protection". And the main interpreter of the Constitution continues to say that in cases where the lawyer's illness is proven as prescribed by the statute, and the hearing is not suspended, it constitutes a restrictive interpretation of the fundamental right and "has placed on the appellant in a defenseless situation by preventing him from formulating the corresponding allegations in the act of the hearing, which determined that the Chamber would issue a sentence with ignorance of the legal grounds of the appeal... all this without motivating or explaining the reasons why the cause of suspension of the hearing invoked by the appellant was not justified, as the simple rejection of the medical certificate, which attested to the illness of the defense attorney, was not sufficient, for this purpose, because it had been presented in common paper". This is the case in the case now prosecuted through the cassation appeal, in which the medical certificate was presented in common paper, but it even had a previous telephone call to the Secretary of the Court, certified by**

Thus, to the extent that the purpose of sending the medical leave notice is to justify the lawyer's absence and the request to set a new date for the hearing or procedural act, the first paragraph of letter f) of article 9.1 of the RGPD (treatment necessary to defend claims) would also constitute a legal basis for this treatment.

Since the communication made by the company to the courts and tribunals of the documentation certifying the absence of the lawyer is a lawful treatment, it is necessary to analyze under the principle of minimization (Article 5.c) RGPD), which of the personal data contained in that documentation "are adequate, relevant and limited to the purposes for which they ar

In the case we are dealing with, if the justification is made through the medical leave notice, it must be taken into account that of the worker's identification data collected in that document (name and surname, ID, address and telephone numbers), for the identification of the lawyer who is acting before a court or tribunal, it is sufficient to indicate his name, surname and ID, not his address and telephone numbers, which are irrelevant for this purpo

The notification of leave also incorporates, as explained, the following health data: the codes assigned to the worker, the contingency causing the leave (common illness, work accident, non-work accident, occupational disease), the type of process (very short, short, medium or long) and its graduation (in case of professional contingency). To the extent that the purpose of the presentation of the termination notice is to prove the existence of a justified cause that allows the postponement of the corresponding procedural acts, it can be considered that the information on the contingency, the type of process and the graduation they are not excessive data for the intended purpose insofar as they identify the reason for the termination and the type of process, not so the codes assigned to the worker that result, likewise irrelevant to determine the existence of a justified cause.

In any case, in accordance with the procedural regulations, the assessment of the sufficiency of the justification provided corresponds to the court receiving the documentation, which, in the last instance, in case of doubt or discrepancy, may request the contribution of the documentation it deems appropriate, a matter that is analyzed below.

VI

It may be the case, as has been highlighted in the consultation, that it is the same court or tribunal that requires the entity for which the lawyer provides services, the presentation of the medical leave notice, or any other documentation attesting to that person's illness or incapacity.

It must be taken into consideration that the RGPD is applicable to the processing of data carried out by the courts and tribunals of the social order as a result of the processing of the processes of which they are competent.

The Organic Law 6/1985, of July 1, of the Judiciary, incorporates a specific regulation regarding the processing of personal data that must be interpreted under the protection of the RGPD.

For purposes of processing personal data, the LOPJ differentiates whether the data is processed for jurisdictional or non-jurisdictional purposes. One of the consequences of the fact that the treatment has jurisdictional purposes or not, has to do with the control entity with powers in this regard. In this sense, article 55.3 of the RGPD establishes that the control authorities are not competent to control the processing operations carried out by the courts in the exercise of the judicial function.

In relation to the processing of data in the exercise of jurisdictional authority, article 236 quarter, establishes that:

> **"In accordance with the provisions of article 11.2 of Organic Law 15/1999, of December 13, the consent of the interested party will not be necessary for the Courts to proceed with the processing of the data in the exercise of jurisdictional power, already these are provided by the parties or collected at the request of the Court itself, without prejudice to what is provided in the procedural rules for the validity of the evidence.**

This rule therefore incorporates an authorization for the processing by Judges and Courts of those personal data that are necessary for the exercise of jurisdictional authority, whether provided by the parties or at the request of the same court, in the under letter e) of article 6.1 of the RGPD, according to which processing is lawful when it is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person in charge of the treatment.

In the case of special categories of data, as is the case of the health data contained in the medical leave notice, this treatment would be covered by the second part of section f) of article 9.1 according to which the prohibition of treatment of this category of data would not operate when the treatment is carried out by the courts "in the exercise of their judicial function."

In short, it can be understood that, when it is the same court or tribunal that requires the entity for which the lawyer provides services, the presentation of the statement of medical leave of that one, there is sufficient qualification in accordance with what is established the RGPD to send the required documentation to the court. It will be the judicial body that will determine whether certain data can be omitted or whether the entire document is claimed.

In any case, the LOPJ itself regulates what measures must be taken by the Judges and Courts, as well as in their case the lawyers of the Administration of Justice to guarantee the protection of the personal data contained in the documents that are incorporated in the judicial process:

> **"Article 236 quinquies.**
> **1. The Judges and Courts, and the Lawyers of the Administration of Justice in accordance with their procedural powers, may adopt the measures that are necessary for the deletion of personal data from the documents to which the parties can access during the processing of the process as long as they are not necessary to guarantee your right to effective judicial protection.**
>
> **In the same way they will proceed with respect to access by the parties to the personal data that could contain the judgments and other resolutions issued in the course of the process, without prejudice to the application in the other cases of what is established in article 235 bis.**
>
> **2. In any case, the provisions of the personal data protection legislation will apply to the processing that the parties carry out of the data that would have been disclosed to them in the course of the process.**
>
> **(...)**

Therefore, it will be up to the same Judge or Court to delete the personal data from the documents that the parties can access during the processing of the process, when they are not necessary to guarantee the right to effective judicial protection.

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

The sending to the Courts and Tribunals of the notice of medical leave of a lawyer by the company or entity in which he provides services, is considered lawful, in accordance with the data protection regulations.

The personal data contained therein must be the minimum necessary to achieve the purpose pursued, in the terms indicated in Legal Basis V of this opinion, unless it is required by the judicial body, in which case it should be to be what that body establishes.

Barcelona, May 14, 2019