CNS 18/2020

Opinion in relation to the consultation of a public company on the occupational risk prevention measure consisting in taking the temperature of the entity's own and external workers due to Covid19

A letter from the data protection officer of a public company (hereafter, the entity) is presented to the Catalan Data Protection Authority, in which it raises whether the occupational risk prevention measure consists of taking the temperature to the entity's own and external workers due to Covid19 would result in legitimate data processing. It also raises whether, for this purpose, it is required that the competent authorities in matters of public health have previously foreseen the need to adopt a measure of this nature.

Having analyzed the request and seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

The entity states in its consultation that, given the current health emergency situation and the deconfinement phase launched by the competent authorities, the entity's occupational risk prevention service, together with the occupational health and hygiene service , have proceeded to define the action guidelines for the incorporation and stay in the workplace, both short and medium term, of their staff.

Among these actions, he points out, the systematization of body temperature checks prior to entering the work center is specifically established in order to effectively contribute to preventing the spread of Covid19.

It maintains that the occupational risk prevention service and the occupational health and hygiene service consider it advisable to implement the aforementioned measure in accordance, mainly, with the recommendations approved through Agreement GOV/57/2020, of 12 d 'April, by which the action strategy is approved, in the face of the new measures to restrict work activity applicable from April 14, in order to contain the pandemic generated by Covid19.

The DPD poses to this Authority, in summary, the following questions:

a) If, in order to consider that the treatment consisting of the temperature control of the internal staff of the entity could be protected in article 9.2.b) or in article 9.2.h) of the Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (RGPD), the competent health authorities must have previously issued implementation guidelines that determine their necessity and suitability.

b) If the aforementioned precepts of the RGPD could protect this treatment in relation to the external staff of the entity and if, in this case, it is also necessary to issue prior implementation guidelines by the authorities sanitary

c) If it can be considered that any of the bodies or persons designated in article 5 of Law 18/2009, of October 22, on public health, while the state of alarm lasts, are considered competent health authority for the purposes of issuing the aforementioned guidelines on the measure in question.

III

The establishment of body temperature controls prior to entering the work center referred to in the query constitutes processing of personal data, specifically, data relating to health (Article 4.15) RGPD), which remains subject to the personal data protection legislation.

The RGPD establishes that all processing of personal data must be lawful, fair and transparent (Article 5.1.a)).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based. Specifically, section c) provides that the treatment will be lawful if "it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment".

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in this article 6.1.c) must be established by the Law of the European Union or by the law of the Member States that applies to the person responsible for the treatment.

The reference to the legitimate basis established in accordance with the internal law of the Member States referred to in this article requires that the rule of development, when dealing with the protection of personal data of a fundamental right, has the status of law (Article 53 CE), as recognized in Article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD).

In addition, it must be borne in mind that, when the treatment affects special categories of data, as is the case with data relating to health, it is also necessary to count on one of the exceptions established in article 9.2 of the RGPD, in order to be able to consider this data processing lawful.

Article 9 of the RGPD provides that:

"1. The processing of personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to the health or data relating to the sexual life or sexual orientation of a natural person.

2. Section 1 will not apply when one of the following circumstances occurs:

(...)

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 healthcare professional and without prejudice to the conditions and guarantees contemplated in section 3; (…)"

At the same time, the seventeenth additional provision of the LOPDGDD states that:

"1. The treatments of health-related data and genetic data that are regulated in the following laws and their provisions are covered by letters g), h), i) and j) of article 9.2 of Regulation (EU) 2016/679 development:

(...)
b) Law 31/1995, of November 8, on the Prevention of Occupational Risks. (...)"

Law 31/1995, of November 8, on the prevention of occupational risks (LPRL) establishes that "workers have the right to effective protection in matters of safety and health at work", recognition that, in turn, entails " the existence of a correlative duty of the employer to protect workers against labor risks" (article 14.1).

In compliance with this duty of protection, the LPRL provides that "the employer must guarantee the safety and health of the workers in his service in all aspects related to work. To this effect, within the framework of his responsibilities, the employer will carry out the prevention of occupational risks by means of the integration of preventive activity in the company and the adoption of whatever measures are necessary to protect the safety and health of the workers , with the specialties that are included in the following articles in the field of occupational risk prevention plan, risk assessment, information, consultation and participation and training of workers, action in cases of emergency and serious and imminent risk, monitoring of health, and through the establishment of an organization and the necessary means in the terms established in chapter IV of this law" (article 14.2).

In accordance with article 22 of the LPRL, relating to health surveillance:

"1. The employer will guarantee the workers in his service the periodic monitoring of their health status based on the risks inherent in the work.
This surveillance can only be carried out when the worker gives his consent.
This voluntary nature will only be exempted, after a report from the workers' representatives, in cases where the completion of the examinations is essential to evaluate the effects of the working conditions on the health of the workers or to verify whether the state of health of the worker can constitute a danger for him, for other workers or for other persons related to the company or when this is established in a legal provision in relation to the protection of specific risks and activities of special danger.

In any case, you must choose to carry out those examinations or tests that cause the least discomfort to the worker and that are proportional to the risk.
2. The surveillance and health control measures of the workers will be carried out

> **always respecting the right to privacy and the dignity of the person of the worker and the confidentiality of all information related to his state of health. (…).”**

These precepts enable the company to adopt the appropriate health surveillance measures regarding its workers if the worker's state of health may pose a danger to himself, to the other workers or to the people who are relate to the company.

Applied to the case at hand, this entails recognizing that the company can adopt the measures it considers appropriate to protect and preserve the health of its workers in the face of the current health emergency situation due to Covid19.

In the current context, in which the health authorities have not established the obligation of this control measure, in accordance with the LPRL, the decision to implement a prevention measure such as the control of the temperature of the workers prior to their access to the work center, corresponds to the company's occupational risk prevention service, prior to assessment of the risk factors that may affect workers.

Article 31 of the LPRL provides that prevention services correspond to "preventive activities in order to guarantee the adequate protection of the security and health of workers, advising and assisting the employer, the workers and their representatives and specialized representative bodies" (section 2).

In this sense, it establishes that prevention services must be able to provide the company with the advice and support it requires based on the types of risk that exist and in relation to (article 31.3):

> **"(...)**
> **b) The evaluation of risk factors that may affect the safety and health of workers in the terms provided for in article 16 of this Law. c) The planning of preventive activity and the determination of priorities in the adoption of preventive measures and the monitoring of their effectiveness. (…) f) Monitoring the health of workers in relation to the risks arising from work.”**

In the present case and based on the information available, the occupational risk prevention service and the occupational health and hygiene service of the entity consider it appropriate to implement the aforementioned temperature control measure in order to guarantee the safety and health of the people working at the entity's service, specifically, with the aim of effectively contributing to preventing the spread of Covid19.

Beyond the doubts that may exist about the degree of effectiveness of a measure such as the one proposed (it should be remembered that there may be people infected by Covid19 who are asymptomatic, that fever is not always one of the first symptoms in symptomatic people, and that the abnormally high temperature can also be due to other reasons), it cannot be ruled out that this measure can contribute to the control of certain cases of the disease and, therefore, that it can be considered as an instrument that could contribute to the fulfillment of the the obligation of the company to guarantee the safety and health of the workers in its service in aspects related to work, so it could find protection in the provisions of articles 6.1.c) and 9.2.h) of the RGPD in relation to the examined provisions of the LPRL.

In view of this legal authorization, the implementation of the measure by the entity, always in accordance with the criteria adopted by its occupational risk prevention service, once the risks to the health of its staff have been assessed their incorporation into the workplace as a result of Covid19, would not require that it has previously been established as mandatory by the health authorities.

This, without prejudice to compliance with the rest of the principles established in the data protection regulations, in particular, the principles of:

- Transparency in relation to those affected (Article 5.1.a) RGPD): mandatory information on said measure should be given to workers under the terms of Article 13 of the RGPD.

- Limitation of the purpose (Article 5.1.b) RGPD): it should be guaranteed that the data collected (temperature) will only be treated with the specific purpose of detecting possible people infected by Covid19 and controlling and/or preventing their access to the center work, as well as possible contact with other people in this work center.

In the event that a possible positive case of infection by Covid19 is detected, the worker should be referred to the medical or mutual employment service to determine whether or not they are fit to continue working.

- Minimization of data (Article 51.c) RGPD): it would be necessary to guarantee that only the strictly necessary data will be collected to achieve the purpose of preserving the health of the workers, which, in this case, would involve capturing only the worker's body temperature, without a priori register it or keep it, except in positive cases if the prevention service considers it necessary.

- Accuracy of the data (Article 5.1.d) RGPD): it would be necessary to ensure that the equipment used to measure the temperature is approved, in order to record the temperature intervals that are considered relevant in a reliable way, and it would be necessary to check with regularly its correct operation. In addition, these equipments should be used by suitable and trained personnel for this purpose.

- Data confidentiality (Article 5.1.f) RGPD): it should be ensured that the data collected from workers is treated confidentially by all the people involved in its treatment, both at the time of collection and afterwards.

IV

The consultation also considers whether the provisions of articles 6.1.c) and 9.2.h) of the RGPD, mentioned above, could legitimize the treatment of health data that derives from this temperature control measure regarding the external staff of the entity.

As we have seen, the LPRL imposes on the company the obligation to adopt the appropriate measures in order to guarantee the safety and health of the workers in its service in the aspects related to the work they carry out (article 14 et seq.), without it being possible to deduce from these legal provisions that said obligation must also cover workers external to the company.

With respect to these people, it would be up to their companies to guarantee working conditions that are safe and do not entail risks for their safety and health in the development of the work they carry out, in attention to the considerations made by the corresponding prevention services of occupational risks.

Beyond this, the possibility of establishing a measure such as the one proposed with respect to said persons, that is to say, of being able to control their temperature before entering any work center of the entity, could only be taken carried out in the event that the competent authorities in matters of public health determine it.

As has been said, the RGPD requires that all treatment of health data has a legal basis that legitimizes it (article 6.1), as would be the case of that provided for in letter c), and, in addition, with the Concurrence of any of the authorizations that lift the prohibition to treat special categories of data (Article 9).

Article 9.2.i) of the RGPD provides that the prohibition to treat special categories of data will not apply when "the treatment is necessary for reasons of public interest in the field of public health, como la protección frente a serious cross-border threats to health, or to guarantee high levels of quality and safety of health care and medicines or health products, on the basis of the Law of the Union or of the Member States that establishes adequate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy."

This article enables the processing of personal data, including health data, by the competent authorities in the field of public health when the processing is necessary for reasons of public interest in the field of public health, such as, for example, when there is a risk or a serious threat to the health of the population, as long as it is done on the basis of a rule with the rank of law that establishes appropriate and specific measures to protect the rights and freedoms of the people affected.

In accordance with Organic Law 3/1986, of April 14, on special measures in the field of public health, "the health authorities of the different Public Administrations may, within the scope of their powers, adopt the measures provided for in the this Law when so required by health reasons of urgency or necessity" (article 1).

Specifically, the competent authorities in matters of public health can "adopt measures of recognition, treatment, hospitalization or control when they appreciate rational indications that allow us to assume the existence of danger to the health of the population due to the specific health situation of a person or group of people or because of the health conditions in which an activity is carried out" (article 2) and, in order to control communicable diseases, they can "adopt the appropriate measures for the control of the sick, of the people who are or have been in contact with the same and the immediate environment, as well as those considered necessary in the case of risk of a transmissible nature" (article 3).

These forecasts are set out in similar terms to Law 18/2009, of October 22, on public health (LSP), which aims to organize actions, benefits and services in the field of public health in the territorial area of Catalonia established by Law 15/1990, of July 9, on health regulations in Catalonia, to guarantee the monitoring of public health, the promotion of individual and collective health, the prevention of illness and health protection (article 1).

Specifically, article 55.1.j) of the LSP provides that:

"1. The health authority, through the competent bodies, can intervene in public and private activities to protect the health of the population and prevent disease. To this end, you can:

(...)
j) Adopt measures of medical recognition, treatment, hospitalization or control if there are rational indications of the existence of danger to the health of people due to a specific circumstance of a person or a group of people or the conditions in which an activity is carried out. Measures can also be adopted for the control of people who are or have been in contact with the sick or the carriers.
These measures must be adopted within the framework of Organic Law 3/1986, of April 14, on special measures in the field of public health, and State Law 29/1998, of July 13 , regulating administrative contentious jurisdiction, and the legal provisions that modify or repeal them.

2. The measures referred to in paragraph 1 must be adopted respecting the rights that the Constitution recognizes for citizens, especially the right to personal privacy, in accordance with what is established in the data protection regulations of personal nature and with the procedures that these regulations and the other applicable regulations have established, and having the mandatory authorizations."

For its part, Law 33/2011, of October 4, general public health (LGSP) establishes that "without prejudice to the measures provided for in Organic Law 3/1986, of April 14, on Special Measures in Matters of Public Health, with an exceptional character and when so required by reasons of extraordinary gravity or urgency, the General Administration of the State and those of the autonomous communities and cities of Ceuta and Melilla, within the scope of their respective competences, may adopt any number of measures are necessary to ensure compliance with the law" (article 54.1).

Therefore, it would be up to the competent public health authorities of the various public administrations to adopt the necessary measures provided for in these laws to, in the face of an international public health emergency due to the SARS-CoV-2 coronavirus (Covid19), protect the health of the population and prevent its contagion.

To determine which would be the competent public health authority, as indicated in the consultation, it will be necessary to take into account article 5.1 of the LSP, which determines the bodies that have the status of health authority, in the framework of the respective functions.

On the other hand, given the current state of alarm situation, it will also be necessary to bear in mind what is established in Royal Decree 463/2020, of March 14, by which the state of alarm is declared for the management of the health crisis situation caused by Covid19, and its successive extensions.

Article 4 of Royal Decree 463/2020 provides that:

"1. For the purposes of the state of alarm, the competent authority will be the Government.
2. For the exercise of the functions referred to in this royal decree, under the superior direction of the President of the Government, will be delegated competent authorities, in their respective areas of responsibility: (...) d) The Minister of Health. (…).”

And article 6 provides that "each Administration will retain the powers granted by current legislation in the ordinary management of its services to adopt the measures it deems necessary within the framework of the direct orders of the competent authority for the purposes of the state of alarm and without prejudice to the provisions of articles 4 and 5."

However, Royal Decree 514/2020, of May 8, which extends the state of alarm declared by Royal Decree 463/2020, cited, provides (article 4):

> **"In the process of de-escalation of the measures adopted as a consequence of the health emergency caused by the COVID-19, the Government will be able to jointly agree with each Autonomous Community the modification, extension or restriction of the units of action and the limitations regarding the freedom of the movement of people, of containment measures and of securing goods, services, transport and supplies, in order to better adapt them to the evolution of the health emergency in each autonomous community.**
>
> **In case of agreement, these measures will be applied by whoever holds the Presidency of the Autonomous Community, as ordinary representative of the State in the territory."**

In the event that the competent authority in matters of public health establishes the obligation to adopt a temperature control measure such as that mentioned in the consultation, the entity would remain legitimate to carry out the processing of the data of health resulting from its implementation, since this would be necessary for the fulfillment of an obligation imposed by the health authority in accordance with the legislation on public health (articles 6.1.c) and 9.2.i) RGPD).

In accordance with the considerations made so far in relation to the query raised, the following are made,

Conclusions

The treatment by the occupational risk prevention service of workers' health data following the establishment of a body temperature control prior to entering the workplace, would be lawful on the basis of articles 6.1.c) and 9.2.h) of the RGPD in relation to the provisions of the LPRL, which impose on the company the obligation to guarantee the safety and health of the workers in its service in aspects related to work.

The establishment of this measure regarding workers external to the entity should be carried out by the prevention service of the company to which they belong. Apart from this assumption, it could be considered lawful if adopted by the competent authorities in matters of public health on the basis of articles 6.1.c) and 9.2.i) of the RGPD in relation to the legislation in the matter of public health

Barcelona, May 21, 2020