

Opinion in relation to the query made by a local entity about temperature control at the entrances to its work centers during the COVID-19 pandemic

A letter from a local entity is submitted to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on the checking of body temperature in the control of access to the work centers of the entity to its own staff, to the staff of external companies and to the users of the entity's services.

The inquiry is accompanied by the following documentation:

- Plenary Agreement approving the "Protocol through which criteria and organizational, prevention and protection measures are established for the resumption of the activities of (...) with a general character in the de-escalation process of confinement caused by COVID-19".
- Resolution in which, in development of the aforementioned Protocol, the system of access control to corporate buildings and the measurement of the body temperature of the people who access them is established.
- Report of the Data Protection Delegate in relation to the Protocol and the Resolution mentioned.
- Resolution in which the access control system to corporate buildings and the measurement of body temperature are updated to adapt it to data protection regulations.

Having analyzed the request and the documentation that accompanies it, and having seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

The entity states in its consultation that, with the aim of guaranteeing the safety and health of workers in the current pandemic situation, it has issued resolutions at every moment to deal with the health crisis in the organizational field and labor, among them, the "Protocol through which criteria and organizational, prevention and protection measures are established for the resumption of the activities of (...) with a general character in the process of de-escalation of the confinement caused for COVID-19" (hereafter, the Protocol).

This Protocol, a copy of which is attached, establishes - within the heading relating to prevention and protection measures prior to the start of face-to-face activity - that it is necessary:

"Establish preventive measures related to the use of common areas to avoid the risk of contagion by coming into contact with contaminated surfaces and objects or by direct contact between people. The measures to be taken include:

(...)

For the protection of the health and safety at work of the working people in the respective centers, enabling systems to measure the body temperature in the different accesses to corporate buildings. In case of exceeding the established temperature limit, 37.3 °C, access will not be allowed and in the case of an employee, he or she will notify the Occupational Risks Prevention Office.

In order to guarantee the control of the body temperature of all the people who access the work centers of (...), thus guaranteeing the safety and health of the people who work face-to-face, it will be necessary, whenever possible, to establish a only access to the buildings.”

In the consultation it is pointed out that, in furtherance of what was established in said Protocol, the entity issued a resolution establishing and defining the access control system to corporate buildings and the adoption of the measure consisting of checking the body temperature of the people who access it, a resolution that was revised and updated following the observations made in this regard by the entity's Data Protection Officer (a copy of both versions is attached).

It is also pointed out that, precisely in response to the report of its Data Protection Delegate, the preventive and protective measure consists in the control of the body temperature of the people who access the entity's buildings, in the terms described in the resolution accompanying this consultation (second version), has only been implemented in relation to the entity's own staff.

Having said that, it is agreed in the consultation that both the entity and the social representation of the entity, and specifically the occupational risk prevention services and the Health and Safety Committee, in order to make effective the purpose of guaranteeing the safety and health of the entity's workers, they want to extend this measure (temperature control) to the staff of external companies and to people using the entity's services. For this reason, this Authority is requested to make a statement in this regard.

It should be noted that the problem raised in the present consultation is a question on which this Authority has already pronounced previously, specifically, in opinion CNS 18/2020, which is available on the website <https://apdc.cat.encat.cat/ca/inici>, to which we refer.

However, it is considered convenient, for the purposes that are of interest, to recall, immediately, the main considerations.

III

As stated in FJ III of the aforementioned opinion CNS 18/2020, the establishment of body temperature controls prior to entry to work centers constitutes processing of personal data, specifically, data relating to health (Article 4.15) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (RGPD)), which remains subject to data protection legislation personal

In order to consider the treatment of these data deserving of special protection as legitimate, it is necessary to count, on the one hand, with the concurrence of one of the legal bases established in article 6.1 of the RGPD, such as the case of the relative to which "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c)), and, on the other hand, with the concurrence of one of the exceptions established in article 9.2 of the RGPD.

In this sense, and with regard to the treatment of health data of the entity's own employees (FJ III), reference must be made to the enabling assumption of article 9.2.h) of the RGPD relating to "the treatment it is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's work 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.", which must be put in relation to the provisions of Law 31 / 1995, of November 8, on occupational risk prevention (LPRL).

Examining the provisions of the LPRL, specifically its articles 14, 22 and 31, it can be said that the treatment by the occupational risk prevention service of the health data of the employees of the entity, 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 to the entity the obligation to guarantee the safety and health of the workers in its service in aspects related to work.

All 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); limitation of the purpose (Article 5.1.b) RGPD); data minimization (Article 5.1.c) RGPD); accuracy (Article 5.1.d) RGPD); and, data confidentiality (article 5.1 RGPD).

Accordingly, checking the body temperature of the entity's employees who access its buildings and facilities to perform their duties would be in line with data protection regulations.

IV

With regard to the treatment of health data of the staff of external companies, it must be taken into account that this treatment could not be considered legitimate in the provisions of articles 6.1.c) and 9.2.h) of the RGPD mentioned above.

As stated in the opinion CNS 18/2020 (FJ IV), the LPRL imposes on the employer the obligation to adopt the appropriate measures in order to guarantee the safety and health of the workers in their 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 entity.

It should be borne in mind that article 22 of the LPRL allows mandatory examinations to be carried out on workers to verify if the worker's state of health may constitute a danger for himself, for other workers or for other people related to the company. But the possibility of making these acknowledgments with a mandatory nature covers only the workers of the own company, and not the workers of other companies.

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 accordance with the corresponding risk prevention services labor

V

With regard to the users of the entity's services, the Authority considers that the possibility of establishing a measure consisting in the control of their body temperature before

to enter any work center of the entity could only be carried out in the event that the competent authorities in matters of public health determine it on the basis of articles 6.1.c) and 9.2.i) of the RGPD in relation to public health legislation.

This is evident in FJ IV of CNS opinion 18/2020, which, given its interest in the case at hand, is transcribed below:

"(...)

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 examination, 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 by 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 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.

(...)

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)."

Point out, at this point, that the LSP referred to in the transcribed text has recently been modified by Decree Law 27/2020, of July 13, amending Law 18/2009, of October 22, of public health, and the adoption of urgent measures to deal with the risk of outbreaks of the COVID-19, in the following terms:

"Unique item. Modification of Law 18/2009, of 22 October, on public health.

first

A letter k) is added to article 55 with the following tenor:

k) In pandemic or epidemic situations declared by the competent authorities, the competent health authorities may adopt measures to limit activity, the movement of people and the provision of services in certain territorial areas provided for in annex 3, d in accordance with the provisions of article 55 bis.

second

An article 55 bis is added with the following tenor:

Procedure for the adoption of measures in a declared pandemic situation 1. The adoption of the measures referred to in letter k) of the previous article are aimed at guaranteeing contagion control and protecting people's health, conforming to the principle of proportionality.

For these purposes, the adoption of the indicated measures will require the issuance of a report issued by the director of the Public Health Agency, in the healthcare aspects proposed by the Catalan Health Service and in the epidemiological aspects and of public health, at the proposal of the Agency itself, which will aim to certify the current situation of risk of contagion, the control situation of the pandemic, the sufficiency of the measures, and will propose the measures to be adopted.

The reports will conform to the parameters established in the annexes of Decree Law 27/2020, of July 13, amending Law 18/2009, of October 22, on Public Health and adopting urgent measures to facing the risk of outbreaks of COVID-19.

2. Whenever possible, the resolution will formulate recommendations to be followed to avoid risks of contagion. In the event that mandatory measures are established, this obligation must be expressly stated, which will be based on the reports issued.

The resolution will expressly indicate the existence or not of the maintenance of essential services, among those indicated in Annex 2.

3. The resolution that establishes the measures will indicate their duration, which in principle must not exceed 15 days, unless the necessary establishment of a longer period is justified, without prejudice to the fact that an extension can be requested, justifying the maintenance of the conditions that justified its adoption.

In any case, periodic reports on the effects of the measures will be issued, as well as a final report, once these have been exhausted.

4. The establishment of the aforementioned measures must be carried out always taking into account the least impact on people's rights, and whenever possible, they must be territorially adjusted to the minimum area necessary for their effectiveness

5. The resolution by which the specific measures are adopted may establish mechanisms for grading the measures based on the evolution of the indicators."

Annex 3 of this Decree Law 27/2020 defines the measures to be adopted within the framework of the COVID-19, which, with respect to workplaces, may include:

"Jobs and retail.

Regulation of the situation of the work spaces in terms of space and hygiene measures.

Opening control (capacity, prior appointment or other modalities) of work spaces.

Prioritization of schedule management to promote and guarantee family reconciliation."

It is also foreseen that the set of measures defined in this Annex "may be subject to updating through a Resolution of the Steering Committee of the Plan for Emergencies Associated with Emerging Communicable Diseases with Potential Risk, PROCICAT, and may be applicable to any other pandemic or epidemic declared within the framework of Law 18/2009, of October 22."

In view of these forecasts, it is clear that, as already stated in CNS Opinion 18/2020, it would be up to the competent authorities in matters of public health to adopt a temperature control measure such as the one proposes

Until the date of issuance of this opinion, it is not known that the competent authorities in matters of public health have established, in general, the obligation to adopt the measure of body temperature control prior to all people who access a center of work

In the area of Catalonia, the successive resolutions that have been adopted under the applicable health and civil protection legislation, and, specifically, Decree Law 27/2020, previously mentioned and, more recently, in protected by Royal Decree 926/2020, of October 25, by which a state of alarm is declared to contain the spread of infections caused by SARS-CoV-2 (which has been extended by Royal Decree 956/ 2020, from November 3, until 00:00 on May 9, 2021), contemplate several public health measures to deal with the health emergency situation caused by COVID-19.

With regard specifically to prevention and hygiene measures in workplaces, these resolutions do not specifically state the adoption of the measure consisting in the control of the body temperature of all people who access a certain centre, for that, as we have seen, the legislation on the prevention of occupational risks could protect its adoption with respect to its own workers.

Thus, as an example, in the latest Resolution SLT/2983/2020, of November 21, which extends and modifies public health measures to contain the epidemic outbreak of the COVID pandemic -19 in the territory of Catalonia, it is established, on these measures, that:

"(...)

2. Without prejudice to the compliance with the occupational risk prevention regulations and the rest of the applicable labor regulations, the persons holding work centres, public and private, must adopt, in the work centres, among others, the following measures:

a) Adopt organizational measures in the working conditions, so as to guarantee the maintenance of the minimum interpersonal safety distance. And, when this is not possible, workers must be provided with protective equipment appropriate to the level of risk. b) Adopt cleaning and disinfection measures appropriate to the characteristics of the work centers and intensity of use, as well as guarantee the ventilation of the spaces and buildings, in accordance with the protocols established in each case by the health authorities and, in particular , of the common spaces of the work centers, restricting or phasing their use to avoid agglomerations, intensifying the cleaning of surfaces, establishing that the distance between people is allowed in the rest areas or establishing entry and exit zones differentiated, among others. c) Make available to workers water and soap, or hydroalcoholic gels or disinfectants with virucidal activity authorized, for hand cleaning. d) The use of the mask is mandatory in the work environment when the work space is for public use or open to the public, in accordance with Resolution SLT/1648/2020, of July 8, by the in which new measures are established in the use of masks to contain the epidemic outbreak of the COVID-19 pandemic, or when there are movements inside the work center. In the case of work spaces closed to the public, once the worker is at his workplace and doing tasks that do not involve mobility, its use is not mandatory, notwithstanding the specific recommendations that the services may adopt prevention of companies. e) Adopt measures to avoid the massive coincidence of people, both workers and customers or users, during the time slots in which the greatest influx is expected."

However, the adoption of a measure of this nature (temperature control) has been planned in certain areas of activity, in some cases as mandatory and in others as a recommendation, in accordance , as established in the same resolutions issued

by the health authority (such as in the aforementioned Resolution SLT/2983/2020, of November 21), with what is established in the sectoral plans approved by the Steering Committee of the PROCICAT Action Plan and related regulations.

These sectoral plans are available on the website of the Department of the Interior (https://interior.gencat.cat/ca/arees_dactuacio/proteccio_civil/cosells_autoproteccio_emergencia/emerging-communicable-diseases-with-high-risk-potential-/sectoral-plans/).

Thus, as an example, the adoption of said temperature control measure is expected to be mandatory in certain areas of the Administration of Justice (penitentiary centers and juvenile justice centers), in the area of care for children and adolescents (residential centers and also in relation to visits and permits for children and adolescents under the protection of the Generalitat de Catalunya with their parents or guardians) or in the residential area.

With regard to the commercial activity of Christmas fairs-markets, the possibility of adopting this temperature control measure has also been established if the organization foresees it or the city council determines it.

This measure was also foreseen as mandatory in the framework of children's and youth's leisure activities, or sports carried out with children under 18 years of age during the last summer.

In other sectors of activity, the temperature control measure is envisaged as a recommendation, such as, for example, within the framework of teaching activities, extracurricular activities, camps and school trips, or in the sports field as regards specifically to the use of sports facilities.

In the resolution adopted by the entity defining the access control system for corporate buildings (second version) that accompanies this consultation, there is (annex 4) a list of the buildings owned by the entity in which planned installation of body temperature measurement systems (...).

To the extent that the activity carried out in these buildings may correspond to some of the activity sectors for which a sectoral plan has been approved by PROCICAT and, in said plan, it has been established as a measure of prevention and protection of health the control of the body temperature of the people who access it, the entity would remain legitimate to carry out the treatment of the health data resulting from its implementation, in accordance with the legislation on public health (articles 6.1.c) and 9.2.i) RGPD).

Therefore, it will be necessary to carry out a prior analysis in attention to the activity carried out in each of the buildings of which it is the owner and in accordance with the measures foreseen at each moment by the public health authorities.

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

Conclusions

The local entity has authorization to check the temperature of its own workers, in accordance with the regulations for the prevention of occupational risks.

With regard to the workers of external companies or the users of the services, the entity could only carry out this control on the basis of articles 6.1.c) and 9.2.i) of the RGPD, in those cases where , in attention to the activity that takes place in these buildings, results

application of any of the sectoral plans approved by PROCICAT that provide for the adoption of this prevention and health protection measure. It is not known that the competent authorities in matters of public health have established, in general, the adoption of the measure of body temperature control before all people who access a work center.

Barcelona, December 17, 2020

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