CNS 34/2021

Opinion in relation to the query made by the data protection representative of a city council on compliance with the regulations for the prevention of occupational risks in the case of telework.

A query is being submitted to the Catalan Data Protection Authority by the data protection representative of a town hall regarding compliance with the regulations for the prevention of occupational risks in the case of telework.

In the consultation it is stated that article 1 of Royal Decree Law 29/2020, of September 29, on urgent measures regarding telework in Public Administrations and human resources in the National Health System to deal with the health crisis caused by COVID-19, modifies the revised text of the EBEP, in the sense that it introduces a new art. 47 bis which establishes in its third section that: "The personnel who provide their services via telework will have the same duties and rights, individual and collective, contained in this Statute than the rest of the personnel who provide their services in person, including the occupational risk prevention regulations that are applicable(...)".

It is also noted that the Occupational Risk Prevention Service visits workplaces (public offices) to check that the workplaces comply with the conditions of occupational risks established by the regulations, but in the case of telework the doubt about how to verify compliance with the regulations. To this end, the DPD states that different alternatives are being considered, which it describes as follows:

> **"To be able to carry this out, the telework applicant would be asked to provide a check list with the conditions of his workplace in the telework application (height of the table, height of the seat from the floor, type of shoulder strap, shoulder strap width, free space for the legs, etc.), as well as a photograph (according to the attached example), in which only the work tools (chair, table) need to appear in the image , screen, keyboard, etc.), removing any element with personal data or privacy of the worker.**
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> **In the event that the person does not comply with the requirements to be able to telework in compliance with the risk prevention regulations, he would be required to amend it, or, in the worst case, when this was not possible, he would be denied the sole· request for teleworking in a motivated way, because it would be about complying with the regulations on occupational risks, to avoid any subsequent claims for occupational disease due to musculoskeletal problems.**
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> **Perhaps another, more neutral option would be to provide a checklist of minimum requirements and for the worker to sign it as he fulfills it."**

In this context, the DPD, faced with the conflict that it understands would involve reconciling the obligations derived from compliance with the Occupational Risks regulations with data protection, as w

also with the privacy of the working people requests that the Authority issue an opinion in this regard.

Having analyzed the query that is not accompanied by other documentation, in accordance with the report of the Legal Counsel, I issue the following opinion:

I

(...)

II

The consultation raises the conciliation of the right to data protection and the privacy of public workers in the fulfillment by the City Council of the obligations derived from the regulations on the prevention of occupational risks, specifically with regard to the verification of conditions required for the workplace in the specific context of the provision of services by workers in the telecommuting mode.

The Royal Decree-Law 29/2020, of September 29, on urgent measures regarding teleworking in Public Administrations and human resources in the National Health System to deal with the health crisis caused by COVID-19, modifies in its article1 the revised text of the EBEP, in the sense that it introduces a new art. 47 bis which establishes:

"1. Telework is considered to be that modality of providing remote services in which the content of the competence of the job can be developed, as long as the needs of the service allow it, outside the dependencies of the Administration, through the use of information technologies and communication

2. The provision of the service via telework must be expressly authorized and will be compatible with the face-to-face modality. In any case, it will be voluntary and reversible except in duly justified exceptional cases. It will be carried out in accordance with the rules that are dictated in the development of this Statute, which will be subject to collective bargaining in the corresponding area and will include objective criteria for access to this modality of service provision.

Teleworking must contribute to a better organization of work through the identification of objectives and the evaluation of their fulfillment.

3. The personnel who provide their services through telework will have the same duties and rights, individual and collective, contained in this Statute than the rest of the personnel who provide their services in person, including the regulations for the prevention of occupational risks that are applicable , except those that are inherent in the provision of the service in person.

4. The Administration will provide and maintain the people who work in this modality, the technological means necessary for their activity.

5. The labor personnel in the service of the Public Administrations will be governed, in the matter of telework, by the provisions of this Statute and by its development rules."

With this modification of the EBEP, workers, in the teleworking modality, are recognized with the same duties and obligations as the rest of the staff who provide their services in person, including the regulations for the protection of occupational risks that are applicable.

In the case raised in the consultation, we want to verify that the conditions of the workplace (height of the table, height of the seat on the floor, type of shoulder pad, width of shoulder pad, free space for the legs, etc.) of the worker that requests to provide its services in telework modality are in line with the regulations on occupational risks and for this purpose the possibility is considered to require the worker that, together with a "checklist" of the requirements of the workplace, the worker contributes a photograph of your workplace at your

III

In accordance with the provisions of articles 2.1 and 4.1 of Regulation (EU) 2016/679 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of this data and which repeals Directive 95/46/CE (General Data Protection Regulation), hereinafter RGPD, the data protection regulations apply to the treatments that take place in term on any information "about an identified or identifiable natural person (the "data subject"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person".

Therefore, the information referred to in the query, that is to say the information about the working conditions including the photos of the same taken at the residence of the municipal employees is information about an identified natural person and therefore subject to the principles and guarantees of the RGPD data protection regulations and Organic Law 3/2018, of December 5, Protection of personal data and guarantee of digital rights (LOPD

The RGPD establishes that personal data must be treated lawfully, loyally and transparently in relation to the interested party (principle of lawfulness (article 5.1.a) RGPD).

According to article 6.1 of the RGPD, the treatment is lawful if it meets at least one of the following conditions:

"a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures;

c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;

d) the treatment is necessary to protect the vital interests of the interested party or another natural person;

e) the treatment 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 responsible for the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child"

It must be taken into consideration that the telework modality configured by the EBEP is voluntary for the worker. However, the fact that it is voluntary does not imply that the processing of the worker's personal data that is necessary as a result of this employment relationship can be based on the workers' consent. Thus, as the Article 29 Working Group (GT29) highlighted in Opinion 2/2017 on the processing of data at work: "Workers are almost never in a position to give, deny or revoke consent freely, given the dependence that results from the employer/employee relationship.

Given the imbalance of power, workers can only give their free consent in exceptional circumstances, when the acceptance or rejection of an offer has no consequences."

In the case we are dealing with, the consent of the worker could not constitute the legitimate basis for the processing of information relating to working conditions, including the photographs that are required of him, first of all because of the imbalance situation in which the worker finds himself with respect of the City Council as the public administration in which it provides services and, secondly, because the denial of that consent would lead to negative consequences for the worker, since the telework request would most likely be denied, if it is not established an alternative procedure for checking this requirement.

In the area of the prevention of occupational risks referred to in the query, the legitimate basis for the processing of the personal data of public employees could be found in letter c) of article 6.1 of the RGPD, the processing is necessary for the fulfillment of legal obligations applicable to the data controller.

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in sections c) and i) must be established by European Union Law 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).

Law 31/1995, of November 8, on the prevention of occupational risks (LPRL) aims, in accordance with the provisions of its article 2.1: "(...) to promote the safety and health of workers through the application of measures and the development of the necessary activities for the prevention of work-related risks.(...).”

The LPRL is based on the right of workers to effective protection in terms of health and safety at work with a correlative duty of the employer to protect workers against occupational risks (article 14).

Regarding the duties of employers, article 14.2 establishes:

> **"2. In compliance with the duty of protection, the employer must guarantee the safety and health of the workers at 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 constitution of an organization and the necessary means in the terms established in chapter IV of this law.**
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> **The employer will develop a permanent action to monitor the preventive activity in order to continuously improve the activities of identification, evaluation and control of the risks that could not be avoided and the existing protection levels and will have the necessary for the adaptation of the prevention measures indicated in the previous paragraph to the modifications that may occur in the circumstances that affect the performance of the work."**

In accordance with the provisions of article 16, the essential instruments for the management and application of the occupational risk prevention plan that the employer must carry out are the evaluation of the risks and the periodic controls when necessary and the preventive activity planning. Thus, paragraph 2 of this article 16 establishes:

> **2. The essential instruments for the management and application of the risk prevention plan, which may be carried out in phases in a programmed manner, are the evaluation of occupational risks and the planning of the preventive activity referred to in the following paragraphs:**
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> **a) The employer must carry out an initial assessment of the risks to the safety and health of the workers, taking into account, with a general character, the nature of the activity, the characteristics of the existing jobs and the workers who must perform them . The same evaluation must be done on the occasion of the choice of work equipment, chemical substances or preparations and the conditioning of the workplaces. The initial evaluation will take into account those other actions that must be developed in accordance with the provisions of the**

regulation on protection of specific risks and activities of special danger. The evaluation will be updated when the working conditions change and, in any case, it will be submitted to consideration and revised, if necessary, on the occasion of the health damage that has occurred.

When the result of the evaluation makes it necessary, the employer will carry out periodic checks of the working conditions and the activity of the workers in the provision of their services, to detect potentially dangerous situations.

But in addition, employers must prepare and keep at the disposal of the labor authorities the documentation justifying the fulfillment of their obligations, thus article 23 establishes:

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."

It must be taken into consideration, although this issue is not raised in the consultation, that the evaluation and control of working conditions could require the processing of workers' health data related to the special needs of the latter associated with their own personal characteristics, including those with a recognized physical, mental or sensory disability.

The RGPD prohibits in its article 9.1 the processing of special categories of data, as is the case of data relating to health, except if, in addition to a legal basis provided for in article 6.1, there is also one of the exceptions established in article 9.2 of the RGPD, including the one provided for in letter h) "the treatment is necessary for the purposes of preventive or labor medicine, evaluation of the worker's work capacity, medical diagnosis, provision of assistance or treatment of a health or social type, 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";

In this regard, 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. (...)"

Articles 15 and 25 of the LPRL regulate the employer's obligation to adapt the workplace to the specific circumstances of workers with special needs, including disabilities (this obligation is also included in article 4.2 of the 'ET, and in article 59 of the EBEP).

Therefore, the analyzed provisions of the LPRL could be a legitimate basis for the processing of workers' data, including health data, when these are necessary for the fulfillment of the obligations of the employer or public administrations in matters of security and health at work in relation to articles 6.1.c) and 9.2.h) of the RGPD.

IV

It is clear that in the teleworking modality, the impact that the measures to ensure compliance with the safety regulations at work can have on the privacy of working people is greater than in the face-to-face modality given that they may involve collecting aspects of the worker in a private context.

In this sense, GT29 in Opinion 2/2017, highlights that the boundaries between home and workplace are blurring more and more given the possibilities of working from home or during journeys: "Por ejemplo, cuando workers work remotely (from their home) or while traveling for professional reasons, activities carried out outside the physical work environment may be monitored, which may include monitoring the individual in a private context (...) ” and in this regard concludes that “Regardless of the legal basis of said treatment, before its initiation a proportionality test must be carried out in order to determine if the treatment is necessary to achieve a legitimate end, as well as the measures that must be adopted to guarantee that violations of the rights to private life and the secrecy of communications are limited to a minimum.
This can form part of a data protection impact assessment (EIPD).

In the case raised in the consultation, we want to verify that the conditions of the workplace (height of the table, height of the seat on the floor, type of shoulder pad, width of shoulder pad, free space for the legs, etc.) comply with the regulations on occupational risks and for this purpose the possibility of requiring the worker to provide a photograph of the workplace at home, together with a "checklist" of the requirements of the working conditions, i

It seems obvious that providing a photograph of the workplace in the public worker's home, even if it only shows the image of the work tools (chair, table, screen, keyboard,

etc.), this is a measure that involves the disclosure of elements of the worker's personal or intimate sphere, to the extent that it forms part of the space where he develops his family life.

In this case, given that the measure could imply a possible restriction of a fundamental right, as this Authority has argued on previous occasions and in line with the recommendations of the GT29 mentioned, the Constitutional Court doctrine of the triple judgment of proportionality should be applied, suitability and necessity in the face of eventual limitations of fundamental rights, in particular the right to the protection of personal data (for all, STC 186/2000). According to this doctrine, the constitutionality of any measure restricting fundamental rights is determined by the strict observance of the principle of proportionality, based on an analysis of the following aspects:

a) First, if the measure is capable of achieving the proposed objective (judgment of suitability). In this regard, it cannot be denied that the image of the workplace captured in a photograph could provide evidence of compliance with the required working conditions, since, roughly speaking, it would make it possible to verify, for example, that the chair has a back and arms, that the table has a sufficient dimension to place the computer on it, the ratio between the height of the table and the chair, and even, if it was required that together with the elements to be photographed a measuring reference (metric tape next to the table and chair, which provides a clear reference of the dimensions to be controlled), would provide certainty of compliance wi

b) Secondly, if the measure is necessary (judgment of necessity). It must be taken into account that the employer, in this case the City Council, in accordance with the regulations governing teleworking and the regulations on occupational risks analyzed in the second and third grounds of this opinion must be able to verify that they meet the established requirements regarding working conditions and, therefore, the judgment of necessity must be favorable insofar as the proposed measure is necessary for compliance with the applicable regulatio

c) And finally, if the measure is weighted or balanced, due to the fact that its implementation derives more benefits or advantages for the general interest than damages for other legal assets or values in conflict (judgment of proportionality in strict sense). This requirement therefore requires an appropriate weighting between the legal assets and interests that may potentially collide, and the result of the weighting. In this case, requiring the worker to attach a photograph of his workplace is a much less intrusive measure for his privacy than other measures that the city council could adopt with the same purpose, such as making a home visit, through the prevention service, to verify the declared working conditions. In this case the council could take photographs of the workplace to record the visit and the result of the same. Obviously, this measure is much more intrusive than the proposed one in which the worker can prepare the space and remove those personal elements that may reveal aspects of their home that are not relevant for the intended purpose.

Although it cannot be ruled out that, in case of doubt or discrepancy, the council could make a home visit to verify the conditions, initially, the proposed measure is much more respectful of privacy.

Therefore, it seems that the result of the proportionality trial would lead us to conclude that the proposal made by the DPD of the City Council consists of the presentation together with the

telecommuting request for a checklist with the workplace conditions (height of the table, height of the seat from the floor, type of shoulder pad, width of shoulder pad, free space for the legs, etc.), as well as a photograph (according to the example attached in the query or incorporating elements of reference measurement), in which the work tools (chair, table, screen and keyboard) appear in the image, removing any element with personal data or privacy of the worker, would allow the achievement of the pursued purpose of verifying compliance with the requirements in relation to the working conditions that must be met by the workplaces in their provision through telework, and would be respectful of the principle of data RGPD according to which the data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

Conclusions

The presentation together with the request for telework of a checklist with the conditions of the workplace (height of the table, height of the seat from the floor, type of shoulder pad, width of shoulder pad, free space for the legs) as well such as a photograph in which only the work tools available to the worker (chair, table, screen, keyboard) appear in the image is authorized in article 6.1.c) of the RGPD so that the City Council can fulfill its obligation in relation to the conditions that the workplaces must meet in their provision through teleworking, and it would comply with the principle of data minimization (art. 5.1.c) RGPD).

Barcelona, July 12, 2021