CNS 53/2021

Opinion in relation to the query made by the data protection representative of a city council on the control of the absence of labor and civil servants by an external company

A query is presented to the Catalan Data Protection Authority by the data protection representative of a town hall regarding the control of absenteeism of labor and civil servants, through a company contracted for that purpose.

In her letter, the data protection representative starts from the premise that "at the level of the workforce, the company, in this case, the City Council, can check absenteeism without the need for consent on the part of the worker, because the art 20.4 The Workers' Statute allows this monitoring of absenteeism, to which the worker cannot refuse and consent is not necessary. This is also indicated by the AEPD labor relations guide, which adds that detailed information should be given to the worker about these facts and purposes. In addition, based on the STS 2018, it is allowed that this control can be carried out by an external company that is not a collaborating entity of the Social Security. But nothing is indicated regarding civil servants, because it is not regulated in the EBEP". With respect to this question, he asks if article 20.4 of the ET would be applied by analogy to civil servants and therefore it would also be possible to carry out this control of absenteeism without the c

Secondly, it states that the company requests, from the beginning of the contract and, regardless of whether the worker is sick or absent or not, or may never become so, the data of all municipal workers (name and surname, telephone, email, position and service in which they work), justifying their demand in that this facilitates the subsequent monitoring and management of possible absenteeism, and in the fact that part of the task entrusted to In this regard, he raises the following doubt: "In the case of having the worker's consent, could their data be given to the company despite the fact that the worker was never absent?"

Finally, it raises the question of how the city council should proceed in the event that a worker, labor or civil servant, requests the deletion of his data since, as indicated, this fact would prevent the company from contacting him to carry out the control task of absenteeism In particular, it considers whether the data of this worker should be deleted and, finally, whether it would be different in the case that it was a civil servant than a worker.

Analyzed the consultation that accompanies the opinions of the Authority CNS 21/2012 and CNS 58/2014, of the STS 62/2018, as well as the treatment contract with the company in charge of absenteeism control , in accordance with the report of the Legal Counsel, I issue the following opinion:

I

(...)

II

In advance, it should be made clear that it is unknown what the concrete actions are to control the absence of public employees that the city council wants to implement with the hiring of an external company, given that the consultation does not specify what they are these tasks, nor is attached the contract of services or the package of administrative clauses of that one. However, according to the content of the attached data processor contract, it can be deduced that the contracted services are intended for the external company to carry out a medical examination of the workers to verify their sick leave status labor Once the review has been carried out, the company undertakes to communicate to the city council the data relating to whether the worker has agreed to the review and to the periodic reviews, whether it is considered a justified termination or not and the date of possible reinstatement work

Thus, the first clause of the processing contract states: "The City Council (...) authorizes (...) to process the aforementioned data on its own behalf under the services contracted and specified in the award contract".

With regard to the legal basis of the treatment, the second clause of the treatment commission contract specifies:

> **"The consent of public employees will not be necessary, given that the legal basis for the processing of data for this purpose is protected by art. 20.4 ET and for the employment contract and/or the privacy rules signed (art. 6.1.b) EU Regulation.)**
>
> **In any case, (...) will be obliged, prior to the processing of the data provided, to inform the public employee that their eligibility conditions are being verified on behalf of the 'City council through the person in charge of the treatment and that the data treatment is protected by art. 20.4 ET and the City Council's privacy policy, as this is a labor control.**
>
> **(...) can generate a database, which contains health data considered by Regulation (EU) 2016/679, article 9, special category of data. With respect to these data, (...) will be the one responsible for the treatment, as these will in no case be provided to the City Council, which will only know about the Fit/Unfit character of the worker, that is, the conclusion of the medical examination, without having access to any health data.**
>
> **(...) will communicate to the City Council (...) exclusively the following data:**
> - **Whether or not the worker accesses the verification of their leave situation**
> - **Whether or not the worker attends review appointments • Whether or not the worker's leave is considered justified • The date of possible reinstatement.**
>
> **These data are transferred with the sole and exclusive purpose that the City Council (...) can verify the psychophysical conditions for the reinstatement to the workplace of employees in a situation of layoff due to common contingencies, leaving their treatment to it is protected by the provisions of article 6.1.a of Regulation (EU) 2016/679, without the transfer including health data or any other personal data considered as a special category."**

III

From the perspective of data protection regulations, it is necessary to start from the basis that Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), in accordance with its articles 2 and 4.1 results from application to the treatments that are carried out on personal data understood as any information "about an identified or identifiable natural person ("the interested party"); 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". (Article 4.1 RGPD).

According to article 4.15) of the RGPD, data relating to health are "personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their condition of health;". Recital 35 of the RGPD specifies that "personal data relating to health must include all data relating to the state of health of the interested party that provide information on their past, present or future state of physical or mental health. It includes the information on the natural person collected on the occasion of his registration for healthcare purposes, or on the occasion of the provision of such assistance, in accordance with Directive 2011/24/EU of the European Parliament and of the Council (1); any number, symbol or data assigned to a natural person that uniquely identifies him for health purposes; the information obtained from tests or examinations of a part of the body or a body substance, including that from genetic data and biological samples, and any information related, for example, to an illness, a disability, the risk of suffering from diseases , the medical history, the clinical treatment or the physiological or biomedical state of the interested party, regardless of its source, for example a doctor or other healthcare professional, a hospital, a medical device, or an in vitro diagnostic test."

Article 4.2) of the RGPD considers treatment "any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, query, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction".

In accordance with these definitions, there is no doubt that the processing of the data of municipal workers for the control of absences, either directly by the City Council, or through a company contracted for that purpose, is subject to personal data processing to the RGPD and the LOPDGDD. In addition, the control of absenteeism by the City Council, in the event that this is as a result of indisposition, illness or accident of the working person, may involve the processing of health data of those workers , even if the processed data only refers to the cause of the incapacity situation or to whether or not the worker is fit to join the workplace.

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (Article 5.1.a)) and, in this sense, establishes a system of legitimizing the processing of data which is based on the need for one of the legal bases established in its article 6.1 to apply. Specifically, with regard to the treatments carried out by public administrations, paragraphs c) and e) of article 6.1 of the RGPD are particularly relevant, which respectively state that the treatment will be lawful if "it is necessary for the fulfillment of an obligation law applicable to the person responsible for the treatment", and "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". In the case we are dealing with, it is also necessary to take into account the legal basis provided for in letter b) of article 6.1 RGPD when "the treatment is necessary for the execution of a contract in which the interested party is a party or for the applicati

As can be seen from article 6.3 of the RGPD and expressly included in article 8 Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on the legal bases of article 6.1.c) i) of the RGPD when this is established by a rule with the rank of law.

As has been explained, the data subject to the treatment for the control of absenteeism can be health data of the workers. 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:

"(...) a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in the section 1 cannot be raised by the interested party;

b) the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union of the Member States or a collective agreement in accordance with the Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party; (...) h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's labor capacity, medical diagnosis, provision of assistance or treatment of a sanitary or social type, or management of assistance systems and services health and social, 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; (...)

3. The personal data referred to in section 1 may be processed for the purposes mentioned in section 2, letter h), when its treatment is carried out by a professional subject to the obligation of professional secrecy, or under his responsibility, in agreement with the Law of the Union or of the Member States or with the rules established by the or

competent national authorities, or by any other person also subject to the obligation of secrecy in accordance with the Law of the Union or of the Member States or the rules established by the competent national bodies."

It is therefore necessary to analyze whether there is a legitimate basis for the treatment that is the subject of the inquiry.

IV

The control of labor absenteeism is a manifestation of the powers of management and control of labor activity that are recognized by the employer with respect to workers, whether in the field of labor law regulated by Royal Legislative Decree 2/2015 , of October 23, which approves the revised text of the Workers' Statute Law (ET), either in the field of civil servants, in accordance with the provisions established in Royal Legislative Decree 5 /2015, of October 30, which approves the revised text of the Law on the Basic Statute of the Public Employee (EBEP) and

In the execution of the powers of direction and control of the labor activity, the employer has information about situations of staff absence given his obligation, under labor or administrative regulations, to communicate to the company the absences from the workplace and the reason for the absence. This, on the understanding that the medical data of which the company must be informed is limited to the situation of incapacity or indisposition without the worker being obliged to inform, for this purpose, about the specific illness he suffers from.

In addition, the general regime of social security, specifically article 169 of Royal Legislative Decree 8/2015, of October 30, which approves the revised text of the General Social Security Law (LGSS) establishes that the situations that determine the temporary incapacity of workers are: those due to common or professional illness and accident whether or not at work, during the periods in which they receive health care from Social Security and are prevented from work with a maximum duration of three hundred and sixty-five extendable days and the periods of observation due to occupational illness with leave. And article 7 of Royal Decree 625/2014, of July 18, which regulates certain aspects of the management and control of the processes for temporary incapacity in the first three hundred and sixty-five days of its duration (RD 625 /2014), that medical notices of leave and discharge and of workers as a result of temporary work incapacity, be communicated to the company. Specifically, article

"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.

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 public health service or, as the case may be, the mutual, will send the medical parts of leave, confirmation and discharge to the National Institute of Social Security, via telematics, immediately, and, in any case, in the first business day following the date of dispatch.

2. The companies have the obligation to send to the National Institute of Social Security, immediately and, in any case, within a maximum period of three working days counted from the receipt of the part presented by the worker, through the electronic data transmission system (RED), the medical parts of leave, confirmation of leave and discharge presented by the workers, completed with the data corresponding to the company.

Failure to comply with the aforementioned obligation may constitute, in its case, an infraction of those typified in article 21.6 of the revised text of the Law on Infractions and Sanctions in the Social Order, approved by Royal Legislative Decree 5/2000, of 4 August

(...)"

This employee information (if the employee has been absent from his workplace and if the reason for this absence is a health reason) can be used by the company to monitor absenteeism, including, for example communication with the worker or the realization of statistics. These functions could be carried out directly by the employer or the public administration directly or through the contracting of these services to a company that would act as a processor on behalf of the employer.

Therefore, in the exercise of the powers of management and control of labor activity, employers or public administrations would have an authorization for the treatment of certain health data of workers in a situation of temporary work incapacity or absence due to indisposition in accordance with article 6.1.b) and article 9.2.b) of the RGPD, in relation to the aforementi

Now, in the consultation, it is specifically considered whether the workers' data can be used to carry out a medical check-up in order to verify their absence from work.

v

At this point, it is necessary to analyze the regime applicable to labor personnel, in the first place, and subsequently the regime applicable to official personnel, in order to determine what may be the legitimate basis of this treatment.

Letter a) of article 9.2 of the RGPD establishes that the consent of the interested party may constitute a legitimate basis for the processing of special categories of data in certain circumstances.

According to the RGPD, the consent of the interested party is: "any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the treatment of personal data that concern him;"(article 4.11 RGPD).

In order for consent to be a legitimate basis for the processing of personal data, it must consist of a free, specific, informed and unequivocal expression of will. The RGPD outlines in recitals 32, 42 and 43 what are the requirements that consent must meet in order for it to be considered valid. Thus Recital 42 of the RGPD establishes: "For the consent to be informed, the interested party must know at least the identity of the person responsible for the treatment and the purposes of the treatment for which the personal data is intended. Consent should not be considered freely given when the interested party does not enjoy true or free choice or cannot refuse or withdraw their consent without suffering any harm. Specifically, in the case of an imbalance between the interested party and the data controller, recital 43 states: "To guarantee that consent has been given freely, this should not constitute a valid legal basis for the treatment of personal data in a concrete case in which there is a clear imbalance between the interested party and the person responsible for the treatment, in particular when said person responsible is a public authority and it is therefore unlikely that consent has been given freely in all the circumstances of said particular situation. Consent is presumed not to have been freely given when it does not allow the separate authorization of the different personal data processing operations despite being adequate in the specific case, or when the fulfillment of a contract, including the provision of a service, is dependent of consent, even when this is not necessary for said compliance".

The European Data Protection Council in Directives 5/2020 on consent in the sense of Regulation (EU) 2016/679, states that "(...)Also in the context of employment there is an imbalance of power. Given the dependence that results from the relationship between the employer and the employee, it is not likely that the interested party can deny his employer consent to data processing without experiencing real fear or risk that his refusal will have harmful effects. It seems unlikely that an employee could respond freely to a request for consent from his employer to, for example, activate camera surveillance systems in the workplace or to fill out evaluation forms, without feeling pressured to give his consent. Therefore, the CEPD considers it problematic that employers process the personal data of current or future employees on the basis of consent, since it is unlikely that this will be freely given. In the case of the majority of these data treatments at work, the legal basis cannot and must not be the consent of the workers [article 6, section 1, letter a)] due to the nature of the relationship between the employer and employee However, this does not mean that employers can never rely on consent as a legal basis for data processing. There may be situations in which the employer can demonstrate that consent has been given freely. Given the imbalance of power between an employer and the members of his staff, workers can only give their free consent in exceptional circumstances, when the fact that they give said consent or not does not have adverse consequences".

The workers' consent could not be understood as validly given in the context of an employment relationship if the refusal to give it would entail some kind of adverse or discriminatory consequence. Certainly in the field of labor personnel, to which the ET would apply, the refusal to allow the control of absenteeism by the worker can lead to negative consequences, as we will analyze below, due to the application of the Article 20.4 of the ET which expressly provides that in the event that the worker refuses to carry out the review

medical this fact "may determine the suspension of the economic rights that could exist in charge of the employer for said situations."

Consequently, it does not seem that the city council can base the processing of the data of the workforce on consent, since the imbalanced situation in which they find themselves with respect to their employer would not make it possible for consent to be free.

However, as established in the aforementioned article 20.4 of the ET:

> **"The employer will be able to verify the state of health of the employee that is alleged by him to justify his lack of attendance at work, by means of a medical examination. The refusal of the worker to these recognitions may determine the suspension of the economic rights that could exist in charge of the employer due to these situations.**

The jurisprudence of the Supreme Court, among others the STS 481/2018 and the most recent STS 629/2021 conclude that the medical check by an external company to verify the state of incapacity declared by the worker is valid. Thus STS 481/2018 makes the following considerations

> **"(...) As the judgment of instance well reasons, the power that that statutory precept attributes to the employer is nothing but a manifestation of the different powers of direction and control of the labor activity that corresponds to him as the owner of the same, in accordance with the general rules of art. 20 ET in whose scope it is framed, without the rule having other limitations than those that ordinarily arise from the requirements of good faith and respect for the rights of workers, essentially in this point, of all those related to the safeguarding of his privacy and the consideration due to his dignity, which is expressly referred to in the same context of the control of labor activity art. 20.3 ET .(…)**
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> **And what is at stake in the present case, is precisely to determine whether the provision in art. 63 of the Collective Agreement is a limitation in that it forces the company to entrust those functions to the Mutual, and prevents it from using the services of subcontracted medical personnel through a third company. (Foundation 4.2) (…) the art. 20.4 ET lacks any connotation that could be linked to the management of the temporary disability benefit from any of its different perspectives, whether it is purely related to the right of the worker to receive health care or that linked to the perception of the subsequent economic benefit , because it has the sole and exclusive purpose of verifying the justified nature of absences that the worker has justified due to their health status.**
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> **It is true that this verification of the health status of the worker can have not only eventual disciplinary consequences, but also economic consequences, as art. 20.4 ET admits that the employee's refusal to submit to said medical examinations could determine the suspension of economic rights by the employer.**
> **Provision that intersects and can affect the payment of social security improvements regulated by art. 63 of the Collective Bargaining Agreement that, temporarily, affects the benefits of**

But this indirect circumstance does not denature the true purpose and object of the business faculty that regulates art. 20.4 ET, which contains a different management than the temporary incapacity referred to in art. 63 of the Collective Agreement, to be framed within the strictly referred to the set of general powers of direction and control of labor activity that art. 20 ET attributes to the employer, among which it includes that control over the lack of attendance that the worker justifies due to his state of health." (Foundation 4.3)

(...)
On the other hand, as provided by art. 82. 1 , the performance of the collaborating mutuals LGSS of the Social Security is framed within the protective action of the system.

The competences of the mutuals in this matter are perfectly delimited in the provisions of number 2 of the same precept for professional contingencies, and number 4 for common ones.

They correspond to the recognition or denial of the right to the provision of temporary disability, as well as to its suspension, annulment and extinction in the legal terms, being strictly circumscribed to that area and without irradiating its effects on aspects strictly related to the employment relationship and unrelated to the performance consequences derived from the worker's state of health, either in terms of economic or medical and health care.
It is not the object of this appeal to pronounce on the possibility that the employer can entrust to the mutual the examinations carried out by medical personnel referred to in the art. 20.4 ET, either by unilateral decision or agreed in a collective agreement.

The litigious debate is limited to deciding whether the art. 63 of the Collective Bargaining Agreement imposes on the company that obligation to use the mutual medical services, and it is clear that the answer to that question must necessarily be negative in view of the wording of the conventional precept, which does not go beyond to reflect the powers that correspond to the mutual company in terms of management of temporary disability benefits in accordance with the provisions of the LGSS. (Foundation 4.4)"

This doctrine has been collected, among others, in the judgments of the National Court (social chamber) 20/2019, of February 13 and 4/2020, of January 20 (confirmed in cassation by STS 629/2021 of 15 June), which conclude that article 20.4 of the ET allows the employer to verify the state of health alleged by the workers to justify absences from work, and specifically, that this verification it can be carried out through examinations by medical personnel. These judgments state that article 20.4 of the ET does not prevent the company from outsourcing the control activity of work absenteeism and that the medical examinations that article 20.4 of the ET foresees as a control measure of absenteeism can be carried out by medical staff of a contractor company. In short, it is concluded that it is legal for the employer to commission a company to control and verify the state of health of workers who are in an IT situation, they can process the necessary data for this purpose .

This being so, the legal basis for the processing of the data necessary to do so seems clear. Specifically, the legal basis for this treatment would be article 6.1.b) of the RGPD "the treatment is

necessary for the execution of a contract in which the interested party is a party or for the application of pre-contractual measures at his request", as well as article 9.2.b) of the RGPD in relation to the management and control powers of the labor activity attributed by article 20.4 of the ET.

The additional provision 25 of Law 9/2017, of November 8, on Public Sector Contracts, establishes "For the case that the contract involves the contractor's access to personal data whose treatment the contracting entity is responsible for, that person will be considered to be in charge of the treatment." In accordance with this precept, and with regard to the data to which it has access that are the responsibility of the City Council, the company contracted by the City Council will be considered to be in charge of the processing of the workers' data necessary for to carry out the absenteeism control tasks entrusted by the city council.

This assignment must be formalized through a processing assignment contract that binds the person in charge with respect to the person in charge and establishes the object, duration, nature and purpose of the treatment, the type of personal data and categories of interested parties, and the obligations and rights of the person in charge and, in particular, the stipulations provided for in article 28.3 RGP

In addition to the principle of legality, in order for this treatment to comply with data protection regulations, it is necessary to comply with the rest of the principles of the RGPD, including the principle of transparency established in article 5.1.a) of the RGPD according to which the data must be treated transparently in relation to the interested party and the principle of minimization, contained in article 5.1.c), which establishes that the data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated.

In accordance with the principle of transparency, and without prejudice to the information that has already been provided to the worker at the beginning of the employment relationship in accordance with article 13 RGPD, it would be necessary to inform him of the legal basis that protects this treatment, from the fact that the treatment of your data will be carried out by the company following the instructions of the City Council on the basis of a treatment commission contract and the possible consequences of your refusal to submit to the review by medical personnel.

On the other hand, the application of the principle of minimization forces us to consider which of the worker's data are necessary to achieve the purpose of directing and controlling the work activity pursued by this treatment.

It must be taken into account that in order to achieve the purpose of management and labor control, the health data of the workers that the council must know must be limited to those that allow it to know whether or not they are fit to take up their position of work and, if applicable, the probable date of incorporation.

In this sense, STS 629/2021 of June 15 highlights the need to limit the worker's health data to which the company can access, when it establishes:

> **"The art. 20.4 ET allows the employer to verify the state of illness or accident of the worker that is alleged by him to justify his lack of attendance at work, through recognition by medical personnel. However, the worker's refusal to submit to these examinations only has the effect of suspending the rights**

economic that could exist at the expense of the employer. And, although article 20.4 ET does not expressly establish it, the precautions established by article 22.4 LPRL can be applied regarding medical examinations in the field of occupational risk prevention and, therefore, consider that the verification of the state of health will be carried out always respecting the right to privacy and the dignity of the person of the worker and, above all, that the information collected is subject to a high degree of confidentiality to prevent the data from being used for discriminatory purposes, reserving their knowledge to medical personnel and health authorities; so the employer and the competent bodies will only be informed of the conclusions in relation to the aptitude of the workers."

VI

The consultation raises the issue of whether the provisions of article 20.4 of the ET could be applied to civil servants and, therefore, whether it would be possible to control absenteeism without the workers' consent.

As explained in the basis III of this report, in order for the processing of workers' health data to be lawful, one of the legitimate bases provided for in article 6.1 of the RGPD must be given in addition of any of the exceptions for the treatment of special categories of data contained in article 9.2 of the RGPD.

Likewise, as has been explained with regard to the workforce, the consent of the workers can hardly constitute a legitimate basis given the imbalance between the parties. As established by the RGPD, consent could not be understood as validly given if the refusal to give it involved some type of adverse or discriminatory consequence for the worker. It is undeniable that the public administration has a capacity to control and direct the work activity of public employees and that any lack of consent on the part of the latter to control actions can lead to negative consequences for the worker.

Therefore, it does not seem that the city council can base the processing of the data of the civil servants for the treatment that is the subject of the consultation on the consent of the civil servants since the unbalanced situation in which it is found would not make it possible for the consent to be lifted consider free

On the other hand, the civil service regulations with the rank of law applicable to civil servants do not contain a specific provision equivalent to that established in article 20.4 of the ET that enables the public administration to process civil servants' data public to carry out medical examinations for the purpose of controlling absenteeism.

Likewise, it must be taken into account that article 1.3. a) of the ET excludes from its scope of application: "The service relationship of public officials, which will be governed by the corresponding legal and regulatory norms, as well as that of personnel in the service of Public Administrations and other entities, organizations and entities of the public sector, when, under a law, said relationship is regulated by administrative or statutory rules.".

The data processing necessary to carry out these reviews does not seem to be covered by the legislation applicable to civil servants. This treatment requires an authorization based on a rule with the rank of law or a collective agreement (or equivalent labor agreement in the field of public service) that establishes adequate guarantees of respect for the fundamental rights and interests of the public employees

In this regard, regarding the requirements for the treatment of workers' health data by the employer, the Constitutional Court ruling 202/1999, of November 8, 1999, is illustrative, in which it was analyzed whether a company could process the health data of the workers, specifically the medical diagnoses of the notices of absence, for the control of work absenteeism. The court concluded that there was no legal authorization for the treatment of the data relating to the diagnosis:

> **"(...)In this regard, it is interesting to remember that, in accordance with the provisions of art. 18.4 EC, the LORTAD enunciates, among other general principles of data protection, the congruence and rationality of its use, "by virtue of which there must be a clear connection between the personal information that is collected and processed electronically and the legitimate objective for which it is requested and, consequently, categorically prohibits the use of the data for purposes other than those that motivated its collection (paras. 1 and 2 of art. 4)" (STC 94/1998, legal basis 4 .o), as well as its accuracy and updating (art. 4.3). This regulation is substantially coincident with what is provided in the arts. 5 and 7 of the Convention of the Council of Europe of January 28, 1981, for the protection of persons with respect to the automated processing of personal data, ratified by Spain through the Instrument of January 27, 1984, and in the arts. 6 and ff. of Directive 95/46/CE, of October 24, 1995, on the protection of natural persons with regard to the processing of personal data and the free circulation of these data. Well, in this case we must affirm that the expressed computer treatment -with a view to its conservation- of the data referred to the health of the workers of which the company has knowledge breaks the alluded requirement of a clear connection between the personal information that is collected and the legitimate objective for which it was requested.**
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> **Consequently, we must conclude that the treatment and conservation of the medical diagnosis in the aforementioned database without mediating the express consent of the affected party does not comply with the guarantee that for the protection of fundamental rights contained in art. 53 CE"**

Therefore, in the absence of a specific provision in the civil service regulations or in a collective agreement that expressly regulates the authorization for the aforementioned control and the consequences that may arise from the refusal, it cannot be applied by analogy the legal basis derived from article 20.4 ET in relation to article 9.2.b) RGPD.

VII

Regarding the second of the questions raised in the consultation regarding whether the company can access the information of all municipal workers, regardless of whether they have been absent or not, for the purpose of compiling statistics and for the subsequent monitoring and management of 'a possible absenteeism, the following considerations are made.

As has been explained, the city council can contract the services of a company for the control of the absence of labor personnel and, among the tasks that can be entrusted to it, it can include the production of statistics on the absence of workers and its causes. In fact, it should be borne in mind that there are certain obligations that fall on the employer closely linked to the production of statistics, such as those derived from the one established in article 64 of the ET, which provides that the employer has to give an account to the works committee of "statistics on the absenteeism rate and the causes, work accidents and occupational diseases and their consequences, accident rates, periodic or special studies of the labor environment and the mechanisms of prevention that are used") .

Therefore, if the task of the city council to the company includes the preparation of statistics on absenteeism, the company, in its capacity as data controller, must be able to access for the development of the functions that have been entrusted to him, to the information of the workers that is necessary to carry it out. To the extent that the assigned functions are related to absenteeism, you must be able to access the data of workers who have been absent from their workplace either due to illness or another circumstance and not with respect to all workers.

And if it is true that certain statistics may have to relate the workers who have had the absence with the rest of the workers, it does not seem necessary that in order to do this data on the rest of the workers must be available in such a way to identify them.

Consequently and in response to the second of the questions raised by the DPD in its consultation, if the absenteeism control functions contracted by the city council include the production of statistics on the absenteeism index, it may result justified and appropriate to the principle of minimization for the company to access the information of public workers whose absence from the workplace is documented and the reason for the absence that allow it to carry out the corresponding statistics, but not information that allows the rest of the staff to be identified.

In the same sense, for the monitoring and management of possible absenteeism, the company must not have access to the information of all municipal employees but only of the staff who have had an absence.

VIII

Finally, the DPD asks how to proceed in the event that a worker requests the deletion of his data and whether this fact would prevent the company from contacting him to carry out the task of monitoring absenteeism.

The right to deletion is directly related to the principle contained in article 5 of the RGPD limiting the retention period, according to which "the data will be maintained in a way that allows the identification of the interested parties for no more than necessary for the purposes of the treatment" (article 5.1.e) RGPD).

The right to deletion is regulated in article 17.1 of the RGPD. In accordance with the provisions of this article, the interested parties have the right to obtain from the data controller, "without undue delay", the deletion of their personal data when any of the following circumstances occur:

"a) personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

b) the interested party withdraws the consent on which the treatment is based in accordance with article 6, section 1, letter a), or article 9, section 2, letter a), and this is not based on another legal basis;

c) the interested party objects to the treatment in accordance with article 21, section 1, and other legitimate reasons for the treatment do not prevail, or the interested party objects to the treatment in accordance with article 21, section 2;

d) personal data have been treated unlawfully;

e) personal data must be deleted to comply with a legal obligation established in the Law of the Union or Member States that applies to the person responsible for the treatment;

Therefore, the interested party has the right to obtain the deletion of their data and the controller the obligation to delete them when any of the listed circumstances occur, among which for the purposes that concern us, once they stop be necessary or relevant for the purpose for which they were collected.

On the other hand, the same article 17 of the RGPD establishes exceptions to the right of deletion when the treatment is necessary for:

"a) to exercise the right to freedom of expression and information;

b) for the fulfillment of a legal obligation that requires the treatment of data imposed by the Law of the Union or of the Member States that applies to the person responsible for the treatment, or 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;

c) for reasons of public interest in the field of public health in accordance with article 9, section 2, letters h) ei), and section 3;

d) for archival purposes in the public interest, scientific or historical research purposes or statistical purposes, in accordance with article 89, paragraph 1, to the extent that the right indicated in paragraph 1 could make it impossible or seriously hinder the achievement of the objectives of said treatment, or

e) for the formulation, exercise or defense of claims."

Thus, for example, the RGPD excludes the right to deletion and consequently enables the retention of personal data in those cases in which the data must be retained for the fulfillment of a legal obligation applicable to the data controller.

On the other hand, in the case at hand, to the extent that the processing of absenteeism data has been entrusted to an external company as the processor, it is necessary to take into account what is foreseen, in relation to the person in charge of the treatment, article 33.3 of the LOPDGDD which prohibits the destruction of the data when there is a legal provision that requires their conservation in which case they must be returned to the person in charge of the treatment who must guarantee their conservation for as long as it lasts the obligation And paragraph 4 of the same article 33 which foresees the possibility that the person in charge of the treatment keeps the data properly blocked as long as responsibilities can be derived from their relationship with the person in charge of the treatment.

With regard to the identification and contact data of workers who have had an absence, it is clear that the data necessary for the execution of the employment relationship cannot be deleted while it is in force. During the validity of the employment relationship, the city council must keep the data of the workers necessary for the execution of the contract and compliance with the labor regulations that are applicable. These data must necessarily include the identification and contact data that would allow you to contact the worker who has been absent.

With regard to the data strictly linked to the absence (hourly control and its justifications), it would be necessary to comply with the legal retention periods for this information. Thus, for example, article 34.9 of the ET, in the modification introduced by Royal Decree Law 8/2019, establishes a period of conservation of time records for four years providing that they will remain available to working people, the their legal representatives and the Labor and Social Security Inspectorate. Despite this express provision is applicable only to labor personnel, by analogy it could also be applicable to the time control data of civil servants, as a reasonable period in which the information must be available for the aforementioned purposes.

This without prejudice to the fact that, in accordance with Article 32 of Organic Law 3/2018, of December 5, Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD), the data controller is obliged to block the data to delete

As established in section 2 of the aforementioned article 32, "The blocking of data consists in the identification and reservation of them, adopting technical and organizational measures, to prevent their treatment, including their visualization, except for the disposal of the data to the judges and courts, the Ministry of Finance or the competent Public Administrations, in particular the data protection authorities, for the demand of possible responsibilities derived from the treatment and only for the prescription period of the same. Expired that time the data must be destroyed.".

Therefore, the city council will have to take into account the legal terms for the conservation of information established by the regulations that are applicable to each of the treatments, and likewise, the prescription periods for the responsibilities derived from the treatment to block personal data before its final elimination.

Conclusions

From the point of view of data protection regulations, the carrying out of medical examinations to control the absence from work of workers subject to the scope of application of the ET, by the medical staff of a company contracted by the The council would have as its legal basis article 20.4 of the ET in relation to articles 6.1.b) and 9.2.b) of the RGPD. This legal basis would not be applicable, however, to civil servants.

For the purposes of statistics and the monitoring and management of absenteeism, it is not justified for the company to access information on all municipal employees but only on those who have been absent.

The city council must keep for the duration of the employment relationship the data of the workers necessary for the execution of the contract and compliance with the labor regulations that are applicable. Among these data must necessarily be the identification and contact data that would allow you to contact the worker in situations of absence. With regard to time control data, and their justifications, the 4-year period established by the current regulations must be taken into account, without prejudice to the duty to block the data that is deleted, in order to attend to eventual responsibilities.

Barcelona, December 23, 2021