

# LEGAL BASIS FOR DATA PROCESSING RELATED TO THE EMPLOYEES' ADDICTIONS BY EMPLOYERS IN POLAND

## PRÁVNÝ ZÁKLAD SPRACOVANIA OSOBNÝCH ÚDAJOV TÝKAJÚCICH SA ZÁVISLOSTÍ ZAMESTNANCOV ZAMESTNÁVATEĽMI V POĽSKU

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### ABSTRACT

*The aim of this article is the analysis of possible legal basics for processing of personal data on employees' addictions in Polish labour law. The Author analyses the concept of "addiction" in social, medical and legal aspects. She qualifies the data on addictions as the sensitive data. It is connected with strict regime of processing them in labour relations. In most situations in Polish law the processing of personal data on addiction of employees is done in indirect way. The most common legal basis of processing of personal data on addictions in serious cases is legal obligation of employer connected with ensuring health and life of people in the workplace. It is also possible to process the data on addictions on the basis of some other legal basics analyzed by Author.*

### ABSTRAKT

*Cieľom tohto článku je analýza možného právneho základu spracúvania osobných údajov o závislosti zamestnancov v poľskom pracovnom práve. Autor analyzuje pojem „závislosť“ z hľadiska sociálneho, zdravotného a právneho aspektu. Údaje o závislostiach kvalifikuje ako citlivé údaje. Sú spojené s prísnyim režimom ich spracovania v pracovnoprávných vzťahoch. Vo väčšine situácií v poľskom práve sa spracovanie osobných údajov o závislosti zamestnancov realizuje nepriamo. Najčastejším právnym základom spracúvania osobných údajov o závislostiach v závažných prípadoch je zákonná povinnosť zamestnávateľa spojená so zabezpečovaním zdravia a života osôb na pracovisku. Údaje o závislostiach je možné spracovať aj na základe niektorých ďalších právnych základov analyzovaných autorom.*

### 1. INTRODUCTION

There is no doubt that employees' addictions may evoke a series of adverse implications, be it in the mutual relations between the employees and, most of all, in contact with the employers. Addictions may have a considerable impact on maintaining safety and hygiene at workplace, in that they might pose a threat to the safety of others and affect the organisation and effectiveness of the service provided to the employer. Sometimes it is the case that having limited legal remedies to use in order to obtain knowledge in this respect, the employer learns about these habits only later, when a specific, usually long-lasting, problem arises.

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The most frequent harmful addictions at workplace include alcohol, abusive substances, psychoactive substances, smoking cigarettes<sup>2</sup>, behavioural addiction<sup>3</sup> (increasingly frequent of lately), addictions to electronic means of communication<sup>4</sup> or workaholism<sup>5</sup>. The scale of this phenomenon together with its social consequences would require empirical research, which might become the subject matter of my other research project. In this text I am going to focus on selected legal aspects of the very concept of addiction at workplace, and on the possibility of the employers to obtain data on the employees' addictions according to the Polish law. Another question arises on this occasion: whether existing Polish regulations are adequate to reflect the employers' needs and the occupational safety requirements at workplace.

The main issue is personal data processing by employers in this respect. What is interesting, the EU legislator has not made it clear whether the data on addictions is sensitive data - a special category of personal data (Article 4 point 15 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)<sup>6</sup>, which entails a stricter legal regime as regards data protection. The opinions of specialists in this respect are not unanimous. The above definitely affects the employers' possibility to obtain relevant knowledge in this respect, to reflect the practical needs, especially related to threats at workplace.

This issue requires balancing two opposing interest groups within employment relationships. On the one hand, it is related to the protection of privacy and personal data of people affected by addictions, while on the other hand it has to do with workplace safety, including the employer's liability in this respect<sup>7</sup> and the employer's economic interest related to relevant management of the working time, place of work and manner of working.

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<sup>2</sup> See also: GŁADOCH, M., Prawa i obowiązki pracodawcy w związku z używaniem środków odurzających lub substancji psychotropowych przez pracowników [Employer's rights and obligations related to the use of abusive or psychoactive substances by employees], *Praca i Zabezpieczenie Społeczne* 2007, no. 7-8, pp. 15-20; identifier YADDA: bwmeta1.element.ekon-element-000132986798.

<sup>3</sup> See more: ALAVI S. S. - FERDOSI M. - JANNATIFARD F. - ESLAMI M. - ALAGHEMANDAN H. - SETARE M., Behavioral Addiction versus Substance Addiction: Correspondence of Psychiatric and Psychological Views, *International Journal of Preventive Medicine*, vol. 3, no. 4, April 2012; PMID: 22624087; PMCID: PMC3354400.

<sup>4</sup> See e.g. POSPISZYL, I., Patologie społeczne [Social pathologies], Warsaw 2008, ISBN: 978-83-01-15327-4p. 186 et seq.; DURKEE, T. - KAESS, M. - CARLI, V. - PARZER, P. - WASSERMAN, C. - FLODERUS, B. - APTER, A. - BALAZS, J. - BARZILAY, S. - BOBES, J. - BRUNNER, R. - CORCORAN, P. - COSMAN, D. - COTTER, P. - DESPALINS, R. - GRABER, N. - GUILLEMIN, F. - HARING, C. - KAHN, J.P. - MANDELLI, L. - MARUSIC, D. - MESZAROS, G. - MUSA, G.J. - POSTUVAN, V. - RESCH, F. - SAIZ, P.A. - SISASK, M. - VARNIK, A. - SARCHIAPONE, M. - HOVEN, C.W. - WASSERMAN, D., Prevalence of pathological internet use among adolescents in Europe: demographic and social factors, *Addiction*, Society for the study of addiction, Vol.107, Issue12, December 2012, pp. 2210-2222, <https://doi.org/10.1111/j.1360-0443.2012.03946.x>; KURNIASANTI, K.S. - ASSANDI, P. - ISMAIL, R.I. - NASRUN, M.W.S. - WIGUNA, T., Internet addiction: a new addiction?, *Medical Journal of Indonesia*, 2012; vol. 3, no. pp. 290-294, <https://doi.org/10.13181/mji.v28i1.2752>; VAN ROOIJ, A.J. - SCHOENMAKERS, T.M. - VERMULST, A.A. - VAN DEN EIJNDEN, R.J. - VAN DE MHEEN, D., Online video game addiction: identification of addicted adolescent gamers, *Addiction*, January 2011; vol. 106(1), pp. 205-212, doi: 10.1111/j.1360-0443.2010.03104.x.

<sup>5</sup> See: JANKOWICZ, S., Pasja pracy czy uzależnienie? Pracoholizm jako jedno z zagrożeń współczesnego świata [Passion for work or addiction? Workaholism as one of contemporary threats]. In: *Rozważania na temat kondycji polskiego społeczeństwa*, PYTKA, A. - MACIĄG, K. (eds.), Lublin 2018: Wydawnictwo Naukowe TYGIEL, ISBN 978-83-65932-11-2, pp. 91-100.

<sup>6</sup> Official Journal of the European Union, L 2016 119/1, hereinafter referred to as GDPR.

<sup>7</sup> See: article 207 § 1-2 of the Polish Labour Code.

## 2. THE NOTION OF AN ADDICTION

The starting point for the analysis should be the key concept in these considerations - the notion of an addiction. In particular, from the medical point of view, what is interesting is the distinction between a habit, an addiction and dependence. (In Polish: *nawyk/przyzwyczajenie* - ‘habit’; *nałóg* - ‘addiction’ and *uzależnienie* - ‘dependence’). In medicine, especially in psychology, we use the notions of: habit<sup>8</sup>/custom, addiction and dependence.

An addiction is commonly defined in the dictionary as: “ 1. «a habit detrimental to health», 2. «a settled or regular tendency»”<sup>9</sup>. The connotation is unequivocally negative and stigmatising.

In practice the distinction between an addiction and a dependence is not clear-cut, though - the latter is treated as a permanent brain disease<sup>10</sup>. When speaking of “dependence” and “addiction”, some people refer to such terms as “chemical addiction” (which is a brain disease) and “substance abuse” (which is not a brain disease)<sup>11</sup>. In the event of a dependence we are dealing with a medical condition. By way of an example, in specialist literature on the subject, with regard to alcohol dependence, certain specific and well-defined symptoms are mentioned. It is said that “final diagnosis of a dependence requires the identification of at least three features or symptoms coexisting over a certain period of time within the past year. These would be:

- 1) Strong desire or feeling the pressure to drink (“alcohol withdrawal”).
- 2) Impaired ability to control drinking-related behaviour.
- 3) Physiological symptoms of withdrawal when drinking alcohol is limited or discontinued.
- 4) Changed (often increased) tolerance to alcohol.
- 5) Increasing neglect of alternative sources of pleasure or interest because of alcohol.
- 6) Persistent drinking even when faced with obvious evidence of detrimental effects of alcohol”<sup>12</sup>.

In 1957 the World Health Organisation (WHO) made an attempt to distinguish between the definition of an addiction and a habit<sup>13</sup>. It was accepted that in both cases we are faced with an established behavioural pattern and a form of mental dependence<sup>14</sup>. An addiction is defined by the following four features:

- tolerance, i.e. the need to increase the dose or specific stimulation,
- harmful aspect of the behaviour in question, both in personal and social dimension (in the event of a habit there was no mention of social harm),
- coercion rather than desire, which is typical of a habit,
- physical dependence and withdrawal symptoms in the event of an addiction<sup>15</sup>.

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<sup>8</sup> More on custom in philosophical categories – see: HARASIMOWICZ, M., *Filozoficzne aspekty przyzwyczajenia* [Philosophical aspects of habits], *Analecta Cracoviensia* 2013, no. 45, pp. 39-62, <http://dx.doi.org/10.15633/acr.995>.

<sup>9</sup> <https://sjp.pwn.pl/sjp/nalog;2486437.html>, access on: 06/02/2021.

<sup>10</sup> ERICSON, C.K., *Nauka o uzależnieniach. Od neurobiologii do skutecznych metod leczenia* [The Science of Addiction: From Neurobiology to Treatment], ed. 1, reprint 4, Warsaw 2018, ISBN 978-83-235-2719-0 (pdf online), pp. 28-29, <https://doi.org/10.31338/uw.9788323527190>.

<sup>11</sup> *Ibidem*, p. 25.

<sup>12</sup> After: PUŻYŃSKI, S. - WCIÓRKA, J. (eds.), “Klasyfikacja zaburzeń psychicznych i zaburzeń zachowania w ICD-10. Opisy kliniczne i wskazówki diagnostyczne” [Classification of mental and behavioural disorders in ICD-10. Clinical descriptions and diagnostics tips], Uniwersyteckie Wydawnictwo Medyczne “Vesalius”, Instytut Psychiatrii i Neurologii, 2000, ISBN: 83-85688-25-0, downloaded: <https://www.parpa.pl/index.php/szkody-zdrowotne-i-uzaleznienie/uzaleznienie> (access on: 13/05/2021).

<sup>13</sup> POSPISZYL, I., *Patologie społeczne* [Social pathologies], Warsaw 2008, p. 124.

<sup>14</sup> *Ibidem*, p. 124.

<sup>15</sup> *Ibidem*, p. 124.

In 1968 the WHO expert Committee proposed to replace the previous two notions with a concept of “dependence”, which was initially used to refer to medicinal drugs, but was later on expanded to include more elements<sup>16</sup>.

The above notional issues in medical aspect also have a bearing upon the legal perspective, when we refer to processing the data related to the employees’ addictions. In this context, P. Barta aptly notes that “The notion of an addiction is in practice linked to dependence, so it is impossible to regard information that somebody smokes cigarettes or a pipe, or about the preferred brand of cigarettes or tobacco, as information about an addiction (understood as a state of dependence). Yet in some cases (although not always) information on the number of smoked cigarettes or smoking frequency may be regarded as the data that points to the existence of an addiction. The situation would be similar e.g. in the event of information of the preferred type of alcohol, when this information in itself does not point to an addiction, while the data related to the frequency of drinking may not be so unambiguous”<sup>17</sup>.

In legal regulations we do not find the definition of an addiction as such. Certain conditions are defined, which may, but don’t have to, be related to an addiction, such as the state of intoxication<sup>18</sup> or drug addiction<sup>19</sup>.

### **3. DATA RELATED TO ADDICTIONS AS SPECIAL CATEGORIES OF PERSONAL DATA (SENSITIVE DATA)**

If we assume that the data related to addictions is in fact sensitive data (which has not been unambiguously ascertained by the Polish or EU legislator), it should be included among other data concerning health. According to the definition included in Article 4 point 15 of the GDPR, “data concerning health” means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status. As per Recital 35 of the GDPR, *personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test.* Data concerning addictions should therefore be classified as data concerning a disease, disease risk or the physiological or biomedical state of the data subject.

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<sup>16</sup> Ibidem, p. 124.

<sup>17</sup> BARTA, P., Commentary to Article 27 of the Act on Personal Data Protection, argument 5. In: BARTA P. - LITWIŃSKI, P., *Ustawa o ochronie danych osobowych. Komentarz*, Warsaw 2016, *Legalis*.

<sup>18</sup> As per Article 115 § 16 of the Polish Criminal Code of 6th June 1997 (Journal of Laws from 2020, item 1444) “state of intoxication”, in the meaning of this Code, occurs when: 1) alcohol content in the blood is higher than 0.5 per mille or leads to the concentration exceeding this level, or 2) the alcohol content in 1 dm<sup>3</sup> of the exhaled air exceeds 0.25 mg or results in the concentration exceeding this level.

<sup>19</sup> As per Article 4 (11) of the Act on Counteracting Drug Addiction of 29th July 2005 (Journal of Laws from 2020, item 2050) “drug addiction” is permanent or periodic use of narcotic drugs or psychotropic substances or substitutes thereof for non-medical purposes, which may result in developing addiction or may have caused addiction thereto.

According to M. Sakowska-Baryła, the general and therefore open aspect of the notion of “data concerning health”, which enables the dynamic understanding of the concept, at the same time makes it possible for this term to include data related to addictions, in particular the nicotine addiction, drug addiction or being intoxicated. M. Sakowska-Baryła claims this data is included within the analysed notion if it provides information on physical or mental health<sup>20</sup>.

In the commentary edited by P. Litwiński it is said that "The very information on addictions (e.g. frequent smoking cigarettes, drinking alcohol or using psychoactive substances) does not constitute data concerning health. It may, however, at least in certain situation, be regarded as such, in the event of a completed course of treatment (e.g. a rehab, treatment in a closed psychiatric unit) or with regard to the fact that in specific types of diseases or conditions these factors affect health or the process of recovery (e.g. limitations related to the use of certain medications)"<sup>21</sup>.

Other believe, however, that the scope of data concerning health also includes information on addictions and dependences<sup>22</sup>.

It is good to point out that as per the previously mandatory Polish Act on Personal Data Protection of 29th August 1997<sup>23</sup> there was no actual doubt as regards classifying the data on addictions as sensitive data. According to the definition of personal data included in Art. 6 para. 2 of this Act, an identifiable person is a person whose identity can be specified directly or indirectly, in particular by reference to the ID number, or to one or a few factors defining the physical, physiological, mental, economic, cultural or social features of the person. As per the old legal act (Article 27), the data on bad habits was mentioned directly as a separate type of data, alongside data concerning health. As per Article 27 of the abovementioned act, it was forbidden to process the data concerning health, genetic code, addictions or sexual activity. It was another type of sensitive data, separate from data concerning health<sup>24</sup>.

However, considering that in practice an addiction is associated with dependence, and considering the fluid, vague distinction between dependence and addiction, I believe the data concerning addictions should be classified as data concerning health, which would make it special categories of personal data (sensitive data) within the meaning of Article 9 para.1 of the GDPR. Anyway, it will be impossible for the employer to notice the difference between an addiction and dependence in practice. To this end one would need to have specialist medical knowledge.

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<sup>20</sup> SAKOWSKA-BARYŁA, M., Commentary to Article 4 (15) of the GDPR, argument 4. In: SAKOWSKA-BARYŁA, M., (ed.) *Ogólne rozporządzenie o ochronie danych osobowych. Komentarz*, Legalis 2018.

<sup>21</sup> LITWIŃSKI, P. - BARTA, P. - KAWECKI, M., Commentary to Article 4 of the GDPR, argument XV.4. In: LITWIŃSKI, P., (ed.), *Rozporządzenie UE w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i swobodnym przepływem takich danych. Komentarz*, Legalis 2018, ed. 1.

<sup>22</sup> FAJGIELSKI, P., Commentary to Article 4 of the GDPR, argument 43. In: FAJGIELSKI, P., Commentary to Regulation no. 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), In: FAJGIELSKI, P., *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz [General Data Protection Regulation. Act on Personal Data Protection. Commentary]*, LEX/el. 2018 and KUBA, M., Commentary to Article 4 point 15 of the GDPR, argument 4. In: BIELAK-JOMAA, E. - LUBASZ, D. (eds.), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz [GDPR. General Data Protection Regulation. Commentary]*, LEX/el. 2018.

<sup>23</sup> Consolidated text: Journal of Laws from 2016, item 922.

<sup>24</sup> See also KUBA, M., Dopuszczalność pozyskiwania przez pracodawcę informacji o nałogach pracownika – uwagi de lege lata i de lege ferenda. In: WYKA, T. – NERKA, A. (eds.), *Ochrona danych osobowych podmiotów objętych prawem pracy i prawem ubezpieczeń społecznych. Stan obecny i perspektywy zmian*, Warsaw 2012, p. 111, ISBN 978-83-264-1685-9 and the quoted publications by E. Kulesza and T. Wyka .

#### 4. OBTAINING INFORMATION ON THE EMPLOYEES' ADDICTIONS BY EMPLOYERS

As per the GDPR, there is a ban on processing sensitive data. There are, however, certain exceptions to this rule, as indicated in Article 9 para. 2 of the GDPR. In the following part I will attempt to analyse the legal basis rooted in the Polish law, which can be drawn upon if the employer wishes to obtain the said data. This is going to be a general analysis, because the very act of processing personal data concerning the most frequent addictions at workplace, such as alcoholism, drug addiction or smoking, would require a separate publication for each of these addictions.

In specialist literature on the subject you will find the following legal bases for processing the data concerning the employees' addictions:

- a demand for providing specific data, issued by the employer to the employee,
- voluntary provision of data by the employee, as part of the so called information autonomy<sup>25</sup>.

In the former case, there must be a relevant legal basis in this respect. In the latter case, one needs to consider the content of the mandatory Article 22<sup>1b</sup> § 1 of the Polish Labour Code, which says that the consent of an applicant or employee may constitute a legal basis for the processing of personal data mentioned in Article 9 para. 1 of Regulation 2016/679 only when this data is provided on the applicant's or employee's initiative. If such a consent is not granted or is withdrawn, this may not become the basis for unfavourable treatment of the applicant or employee, nor can it produce any adverse consequences for them. In particular, it cannot be the reason for a refusal to hire such a person, for dissolving an employment agreement or for terminating it by the employer without a notice period.

The above leads to the conclusion that processing data concerning addictions requires extra caution. As K. Syska and I. Małobęcka-Chwast point out rightly, the legal basis for processing sensitive data (special categories of data, mentioned in Article 9 para.1 of the GDPR) should be the ground indicated both in Article 9 para. 2 of the GDPR and in Article 6 para. 1 of the GDPR<sup>26</sup>.

As per Article 9 of the GDPR, it is forbidden to process special categories of data. Exceptions to this rule are defined in paragraph 2 of this Article, which should be read jointly with a relevant legal basis from Article 6 para.1 of the GDPR.

Below I am going to analyse potential legal bases for processing data related to employees' addictions, which may be applied in line with the mandatory Polish and EU regulations.

#### 5. LEGAL BASIS FOR PROCESSING DATA RELATED TO EMPLOYEES' ADDICTIONS

##### 5.1. Employee's consent

The first legal basis for processing personal data related to employees' addictions is the employee's consent (Article 9 para. 2(a) and Article 6 para. 1(a) of the GDPR). According to the Polish law, an complication is included in Article 22<sup>1b</sup> of the Labour Code, which requires the employee's initiative as regards expressing consent in this respect. This is reflected in the rigorous standpoint of the Personal Data Protection Office<sup>27</sup> as regards the possibility to perform breathalyser tests to check the employees for alcohol. According to the standpoint expressed by the Personal Data Protection Office, "in the current legislative framework, employers cannot perform

<sup>25</sup> Ibidem, p. 112 along with the literature cited there.

<sup>26</sup> SYSKA, K. - MAŁOBĘCKA-CHWAST, I., Podwójne podstawy prawne przetwarzania danych wrażliwych [Double legal basis for processing sensitive data], *ABI*, October - December 2019, p. 56 et seq.

<sup>27</sup> Standpoint of the Personal Data Protection Office of 27 June 2019, *Nowelizacja Kodeksu pracy nie dała pracodawcom uprawnień do badań alkomatem*, <https://uodo.gov.pl/pl/138/1076> (access on: 30/05/2021).

a breathalyser test on their own, including random controls. The Personal Data Protection Office holds an opinion that knowing whether somebody is intoxicated is tantamount to information concerning health. (...) According to the Personal Data Protection Office, breathalyser tests for employees cannot be treated i.a. as:

- a form of monitoring employees, as mentioned in Article 22<sup>3</sup> § 4 of the Labour Code,
- an action necessary to make sure all the employees have safe or hygienic working environment,
- an action justified because of the employer's legitimate interest."

The above was corroborated by the standpoint of the Minister of Family, Labour and Social Policy issued on 16th September 2019<sup>28</sup>. It is also worth mentioning the rigorous opinion of the Supreme Court expressed in the judgment passed on 4th December 2018 (I PK 194/17, OSNP 2019/6/73), when the Court stated that "It is primarily in the employer's best interest to ascertain that an employee is fit to work or in a condition that excludes him from working because of alcohol consumption. (...). It is in the employer's interest to summon an authorised body appointed to protect public policy, so that this body might test the employee at workplace in order to check whether they are intoxicated."

As regards employee's consent to processing their data concerning addictions, the subject needs to be tackled with extra caution also for a number of other reasons. As per Recital 43 of the GDPR, in order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller. The imbalance between the parties to an employment relationship as well as the disproportionality of collecting employee's consent were also mentioned in the judgments passed by the Supreme Administrative Court of Poland in line with the previously mandatory law with regard to processing biometric data<sup>29</sup>.

In my opinion, it would be possible to defend the employee's consent with regard to processing data concerning addictions for example in the situation when the employer funds rehab programmes or provides assistance in treating addictions. In such situations we can deal with the financing of some kind of social benefits and services by the employer<sup>30</sup>.

Additionally, in the event of advanced addictions, bordering on dependence, revealing this data may be in the employee's best interest. By offering this information, the employee could avoid a termination of employment without a notice period, in the mode defined in Article 52 § 1 point 1 of the Labour Code. As per the case-law of the Supreme Court, appearing at work while intoxicated does not constitute sufficient basis for declaring a serious breach of the employee's basic duties (Article 52 § 1 point 1 of the Labour Code)<sup>31</sup> if the employee suffers from chronic alcohol-induced psychotic disorder.

## 5.2. Employer's legal obligation

Another legal basis for processing the data concerning employees' addictions could be the employer's legal obligation, i.e. Article 6 para. 1(c) and Article 9 para. 2(b) of the GDPR in

<sup>28</sup> <https://uodo.gov.pl/pl/138/1188>, Personal Data Protection Office, *Obecny stan prawny nie pozwala pracodawcy zbadać pracownika alkomatem* (access on: 30/05/2021).

<sup>29</sup> See e.g. judgment passed by the Supreme Administrative Court of Poland on 6th September 2011, I OSK 1476/10, OSP 2013 no. 10, item 104; judgment passed by Supreme Administrative Court of Poland on 1st December 2009, I OSK 249/09, ONSA and WSA 2011 no. 2, item 39.

<sup>30</sup> More: MEJDRAŁA, M., *Spółeczny charakter świadczeń w polskim prawie pracy* [Social character of benefits in Polish labour law], Warsaw 2020, ISBN 978-83-8187-703-9, passim.

<sup>31</sup> Judgment passed by the Supreme Court on 10th October 2000, I PKN 76/00, OSNP 2002, no. 10, item 237.

connection with appropriate Polish labour law and social insurance regulations. As per the Article 9 para. 2(b) of the GDPR, such data processing is possible when it is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject.

Data concerning the applicant's or employee's addictions is not mentioned in Article 22<sup>1</sup> § 1-3 of the Labour Code. That's why the legal basis for the processing of such data might be sought for in Article 22<sup>1</sup> § 4 of the Labour Code, according to which the employer shall demand the provision of other data than this defined in Article 22<sup>1</sup> § 1 and 3 when it is necessary for the purposes of exercising a right or carrying out an obligation as defined in the law.

In this context, one could primarily refer to the employer's obligations under Article 15 and Article 207 of the Polish Labour Code and Article 17 of the Act on Education in Sobriety and Counteracting Alcoholism of 26th October 1982<sup>32</sup>. Based on above regulations it is sometimes argued in the current legislative framework that it is acceptable for the employer to perform a breathalyser test if there is a suspicion that an employee might be intoxicated<sup>33</sup>. As per Article 207 of the Labour Code, the employer is obliged to protect the employees' life and health by ensuring safe and hygienic workplace conditions, taking advantage of the modern science and technology. As per Article 15 of the Labour Code Employers are obliged to ensure healthy and safe working conditions for their employees. In particular, the employer shall:

- 1) organise work in a way that ensures safe and hygienic working conditions;
- 2) make sure that workplace safety rules are followed at workplace, demand that any faults in this respect are rectified and make sure these orders are followed;
- 3) respond to the needs related to workplace safety and hygiene, and adjust any measures taken in order to improve the existing protection of the employees' life and health, considering the changing workplace conditions;
- 4) ensure the development of a coherent policy aimed at preventing workplace accidents and occupational diseases, considering technological issues, work organisation, social relationships and the impact of work environment.

The above is correlated with employee duties in the field of occupational health and safety. According to the article of 207 point 7 of Polish Labour Code a basic duty of an employee is to observe the provisions and principles of health and safety at work. In particular, an employee must co-operate with the employer and superiors in the performance of duties concerning health and safety at work.

In the legal doctrine, in this context it is sometimes pointed out that the employer has a public obligation to be responsible for the safety of the employees at work (Article 207 of the Labour Code)<sup>34</sup>. „The right of an employer should be based on the protection of the highest human good what it is beyond his dignity his life and health”<sup>35</sup>.

According to the Article 17 of the Act on Education in Sobriety and Counteracting Alcoholism of 26th October 1982 the employer the head of the workplace or a person authorized by him is

<sup>32</sup> Journal of laws from 2019, item 2277.

<sup>33</sup> See: ŻOŁYŃSKI, J., Uprawnienie pracodawcy do kontroli trzeźwości pracowników, *Praca i Zabezpieczenie Społeczne* 2019, no. 7, p. 32 i n., ISSN 0032-6186, t. LX, DOI 10.33226/0032-6186.2019.7.5.

<sup>34</sup> ŻOŁYŃSKI, J., in: TOPOLSKA, K., Kontrole trzeźwości pracowników: po stanowisku UODO pora na nowelizację, *Dziennik Gazeta Prawna* of 11/07/2019.

<sup>35</sup> ŻOŁYŃSKI, J., Uprawnienie pracodawcy do kontroli trzeźwości pracowników, *Praca i Zabezpieczenie Społeczne* 2019, no. 7, p. 32.



obliged not to admit an employee to work if there is a justified suspicion that he appeared at work after using alcohol or consumed alcohol during work.

Additionally, as a basis from preventing an employee from working as a result of addiction which can be detrimental in the workplace may also be article 6 para. 1 lit. c and article. 9 para. 2 lit. h of the GDPR. The processing of data on addictions in some situations can be treated as part of the broadly understood assessment of the employee's ability to work<sup>36</sup>.

The said legal provisions may therefore justify a situation when an employee is not allowed to work when there are characteristic symptoms that may indirectly point to addiction, e.g. if the employee is intoxicated or under the influence of addictive substances. This person might pose a threat to the health or life of other employees and therefore should be prevented from performing work. Although in the case of smoking cigarettes or other behavioral addictions this does not exclude readiness to work, in the event of alcohol<sup>37</sup> and addictive substances this readiness is excluded because of the person's mental and physical condition. Since there are no specific procedures in the situations of suspicion of the employee's condition after using addictive substances, attempts are made to follow the same procedure as in the case of intoxication, referring to the general obligation of the employer to care for health and safety at work<sup>38</sup>.

The abovementioned situations may indirectly testify to the addictions of employees. Legal provisions related to accident insurance provide also an opportunity to process the data that could indirectly point to employee's addictions<sup>39</sup>. As per Article 21 para. 2 of the Act on Social Insurance Against Accidents at Work and Work-Related Diseases of 30th October 2002<sup>40</sup>, benefits from accident insurance shall not be payable to an insured party who contributed significantly to an accident while being intoxicated or under the influence of addictive or psychotropic substances. As per Article 21 para. 3 of the Act, if there is a reasonable presumption that the insured party was intoxicated, or under the influence of addictive or psychotropic substances, then the contribution payer shall refer the insured party to undergo a medical test necessary to ascertain the level of alcohol, addictive or psychotropic substances in the organism. The insured party is obliged to undergo the said medical test. A refusal to undergo the test or another behaviour that makes it impossible to conduct the relevant procedure shall result in the loss of the right to receive benefits, unless the insured party proves that there was a reason why it was impossible for them to undergo the procedure. The cost of the medical test shall be reimbursed to the referring party by the Social Security, and if the insured party has contributed significantly to the accident, they shall incur the cost of such a test themselves. Detailed arrangements in this respect are mentioned in the regulation issued by the Minister of Economy, Labour and Social Policy, concerning the accounting of the cost of tests needed to ascertain the level of alcohol, addictive or psychotropic substances in the organism, dated 10th April 2003<sup>41</sup>.

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<sup>36</sup> See: *ibidem*, p.36.

<sup>37</sup> See: Article 17 of the Act on Education in Sobriety and Counteracting Alcoholism of 26th October 1982 (Journal of laws from 2019, item 2277).

<sup>38</sup> See: GŁADOCH, M., Prawa i obowiązki pracodawcy w związku z używaniem środków odurzających lub substancji psychotropowych przez pracowników, *Praca i Zabezpieczenie Społeczne* 2007, no. 8, p. 18-19.

<sup>39</sup> KUBA, M., Dopuszczalność pozyskiwania przez pracodawcę informacji o nałogach pracownika – uwagi de lege lata i de lege ferenda. In: *Ochrona danych osobowych podmiotów objętych prawem pracy i prawem ubezpieczeń społecznych. Stan obecny i perspektywy zmian*, WYKA, T. – NERKA, A. (eds.), Warsaw 2012, p. 125; GŁADOCH, M., Prawa i obowiązki pracodawcy w związku z używaniem środków odurzających lub substancji psychotropowych przez pracowników, *Praca i Zabezpieczenie Społeczne* 2007, no. 8, p. 18.

<sup>40</sup> Journal of Laws from 2019, item 1205.

<sup>41</sup> Journal of Laws from 2014, item 305.

An exception from the general rule is the opportunity to obtain data concerning addictions while recruiting specific groups of employees. This obligation is stipulated in Article 24 para. 3 point 2 and point 3 of the Act on the Protection of Classified Information of 5th August 2010<sup>42</sup>, which says that in the course of an extended security screening it is also determined whether there are any doubts as regards the information on mental illnesses or other mental distress which limits mental capacity and may adversely affect the ability of the person concerned to perform tasks which involve access to classified information, including addiction to alcohol, addictive or psychotropic substances. In para. 4 of this provision it is also said that in the event of doubts that cannot be removed, the interest in protecting classified information shall prevail over any other legitimate interest. It follows from Article 24 para. 8 of this Act that in order to conduct a security screening procedure, a written consent of the person concerned is needed. M. Kuba rightly expresses some doubts as to the actual voluntary aspect of this consent<sup>43</sup>. I believe we should rather speak of a legal obligation. This is corroborated by Article 26 para. 6 of the Act, which says that in order to make the findings as mentioned in Article 24 para. 3 point 2 and point 3 of the Act, the body conducting the extended security screening may oblige the person concerned to undergo specialist tests and share the results of these tests. A physician conducting the test shall receive the medical record of the person concerned as regards the doubts mentioned in Article 24 para. 3 point 2 and point 3 of the Act.

It should be added that the employee should also share the information concerning addictions with an occupational medicine practitioner during a medical interview. So even though the employer cannot process personal data concerning the results of the employees' medical tests, based on the fitness for work certificate issued by the physician, it might be inferred that there are no medical contraindications in this respect. If there are any doubts as to the health of the employee whose conduct may point to a harmful addiction or dependence, it is possible to refer this employee to a repeated medical test, even in the previous test results have not expired yet. This standpoint is corroborated both by the doctrine and case law<sup>44</sup>. Apart from the abovementioned provisions from the Act on the Protection of Classified Information, the employer does not have other grounds for processing the data concerning the applicants' addictions, which may be unsatisfied on the part of the legislator especially in the case of professions where some harmful addictions may endanger human health or life.

### 5.3 Other legal grounds for processing data related to addictions

In the event of force majeure, in extraordinary situations when employees' life or health may be at risk, grounds for processing data related to addictions may be found in Article 6 para. 1 (d) and Article 9 para. 2 (c) of the GDPR. As per the latter Article, personal data may be processed when such processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent. Such a situation may occur e.g. when it is necessary to call an ambulance after the employee has fainted as a result of heavy drinking .

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<sup>42</sup> Journal of Laws from 2019, item 742.

<sup>43</sup> KUBA, M., Dopuszczalność pozyskiwania przez pracodawcę informacji o nałogach pracownika – uwagi de lege lata i de lege ferenda. In: WYKA, T. – NERKA, A. (eds.), *Ochrona danych osobowych podmiotów objętych prawem pracy i prawem ubezpieczeń społecznych. Stan obecny i perspektywy zmian*, Warsaw 2012, p. 115.

<sup>44</sup> More on the subject: MĘDRALA, M., 2.5.12.3.5. Badania lekarskie pracowników [Medical assessment of employees]. In: GERSDORF, M. - RĄCZKA, K. (eds.), *System prawa pracy, t. 3, Indywidualne prawo pracy. Część szczegółowa*, Warsaw 2021, pp. 352-354, ISBN 978-83-8223-079-6.

The legal grounds mentioned in Article 6 para. 1 (f) (legitimate interest of the data controller) or in Article 9 para. 2 (e) of the GDPR are not excluded, either. The last of the abovementioned provisions stipulates the possibility to process personal data which is manifestly made public by the data subject. In the specialist literature it is indicated that this may refer e.g. to a public interview or press comments, especially formulated by people holding managerial positions or executives in the work establishment<sup>45</sup>.

As M. Kuba indicates, this is also related to the subject of information autonomy. By way of an example, she mentions public conduct of an employee which points to an addiction, e.g. using a smoking room or drinking alcohol at work<sup>46</sup>. Apart from health and safety issues, such situations may also have a negative impact on the employee's work efficiency.

The data about some employees' addictions in indirect way can be also collected by monitoring used on the basis of article of 22<sup>2</sup> and article of 22<sup>3</sup> of Polish Labour Code. The basis of collecting them is Article 6 para. 1 (f) (legitimate interest of the data controller) and Article 9 para. 2 (e,f, h) of the GDPR. In some situations connected with health and life it is also possible to treat them in the category of employer's obligation on the basis of Article 6 para. 1 (c) and Article 9 para. 2 (c) of the GDPR.

The mentioned kinds of employees' behaviour is not entirely verifiable, because the distinction between an addiction and dependence is rather fluid.

In some situations it is also possible to rely on the grounds following from Article 6 para. 1 (f) (legitimate interest of the data controller) and from Article 9 para. 2 (f) of the GDPR. Legitimate interests pursued by the data controller may also be manifested in the need to establish, investigate or settle claims, or as part of the administration of justice by courts.

In the current legislative framework, the employer is not obliged to create a smoking room, which used to raise considerable controversy in the past<sup>47</sup>. If a smoking room is created, though, the employer may have a legitimate interest in collecting the data related to the number of people interested in using such a room, although I share the opinion that this should be done for statistical purposes only, in order to collect quantitative data<sup>48</sup>. The collected data in this situations should be unanimous.

In extreme situations, and maybe in the future, it may also be possible to look for legal grounds for data processing in important public interest (Article 6 para. 1 (e) and Article 9 para. 2 (g) of the GDPR). The above may be increasingly significant in the context of growing global issues, especially when people with dangerous addictions may pose a risk to a broader community.

## 6. CONCLUSIONS

The analysis presented in this article leads to the conclusion that the definition of an addiction itself seems to be a problem. Sometimes the employer is unable to assess whether it is a one-off

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<sup>45</sup> NERKA, A., chapter XV. Przetwarzanie danych osobowych dotyczących zdrowia [Processing data concerning health]. In: *Ochrona danych osobowych w zatrudnieniu*, DÖRRE-KOLASA, D. (ed.), Warsaw 2020, ISBN: 978-83-8198-709-7, p. 265.

<sup>46</sup> KUBA, M., Dopuszczalność pozyskiwania przez pracodawcę informacji o nałogach pracownika – uwagi de lege lata i de lege ferenda. In: WYKA, T. – NERKA, A. (eds.), *Ochrona danych osobowych podmiotów objętych prawem pracy i prawem ubezpieczeń społecznych. Stan obecny i perspektywy zmian*, Warsaw 2012, p. 113 -114.

<sup>47</sup> More on this - see: LANKAMER-PRASOLEK, A. - FLORCZAK, I., Commentary to Article 233 of the Polish Labour Code, arguments 3.1-3.6. In: WALCZAK, K. (ed.), *Kodeks pracy. Komentarz., Legalis 2020*.

<sup>48</sup> See Article 9 para. 2(j) and Article 6 para. 1(f) of the GDPR. See also KUBA, M., Dopuszczalność pozyskiwania przez pracodawcę informacji o nałogach pracownika – uwagi de lege lata i de lege ferenda. In: WYKA, T. – NERKA, A. (eds.), *Ochrona danych osobowych podmiotów objętych prawem pracy i prawem ubezpieczeń społecznych. Stan obecny i perspektywy zmian*, Warsaw 2012, p. 114, 118.

situation, an addiction or a dependence. Acknowledging a state of intoxication or observing certain repeated instances of specific behaviour does not have to point to an addiction.

If we assume an addiction is an intermediate state between a habit and a dependence, the data concerning addictions should be classified as data concerning health. This means the processing of such data would involve a stricter regime.

The legislator provides limited opportunity for collecting the data related to the employees' addictions. The most frequent legal grounds for processing the data related to employees' addictions include: the employee's consent and the employer's obligation to ensure proper safety at workplace.

Polish legal provisions offer limited opportunity to collect data concerning the employee's health pursuant to the employee's consent. In most cases it might be difficult to argue that the employee provides the data concerning their addictions voluntarily, although this analysis has shown that such situations are in fact possible.

The public-law obligation to ensure proper safety at workplace, which also involves counteracting threats posed to life and health of other people by an employee with socially harmful addictions, in particular the most frequently observed alcoholism, drug addiction or smoking, makes it possible to rely on the employer's legal obligation in the sphere of health and safety as a legitimate ground for processing personal data related to the employees' addictions (Article 6 para. 1(c) of the GDPR and Article 9 para. 2(b) and (h) of the GDPR in connection with articles 15, 207, 211 pkt 7 of Polish Labour Code). The law should stipulate a broader opportunity for organising ad hoc preventive controls among employees, so as to check whether any of them are intoxicated, which might indirectly also point to an addiction. The data should be collected unanimously for organizational purposes. But in my opinion in some professions (i.e. drivers) the asking about employees' addictions should be the element of recruitment process.

## KEY WORDS

employer, employee, addiction, personal data, GDPR

## KEÚČOVÉ SLOVÁ

zamestnávateľ, zamestnanec, závislosť, osobné údaje, GDPR

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