

LEGAL ALERT

Polish Personal Data Protection Office takes stance on employee sobriety testing

Polish Personal Data Protection Office (UODO) published a communique concerning rules on employee sobriety testing conducted by employers. It is the opinion of UODO, that information on one's intoxication constitutes data concerning health. Consequently, processing of such data is, as a rule, prohibited pursuant to art. 9(1) of the GDPR. Moreover, in accordance with art. 211b § 1 of the Polish Labor Code, which became applicable as of 4 May 2019, employees' consent may serve as a legal basis of processing of data concerning health only if such data has been provided on employee's own initiative.

Sobriety testing could be therefore performed, if the employee would willingly and on his or her own initiative use a commonly available breathalyzer. Nevertheless, such control could not be performed pursuant to employers' request or command. However, the above is based exclusively on provisions of the Labor Code and the GDPR, which are not the only sources of law applicable to employee sobriety testing.

In its communique, the Personal Data Protection Office has also referred to art. 17 of the Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism, pursuant to which the sobriety testing may be demanded, when there is a reasonable suspicion that employee is under the influence of alcohol. Moreover, such test may only be demanded by the employer, person authorized by the employer or the suspected employee and performed by an authorized public authority (e.g. police).

Polish Supreme Court, in its judgment of 4 December 2018 (case ref. I PK 194/17), devoted substantial attention to the analysis of art. 17 of the Act on Upbringing in Sobriety and Counteracting Alcoholism and concluded the following: "*under the law currently in force, sobriety testing may only be performed by a public authority, tasked with protection of public order*". In the same judgment, the Supreme Court also determined, that conducting sobriety testing, even with permission of the employee, "*may be seen as circumvention of art. 17(3) of the Act on Upbringing in Sobriety and Counteracting Alcoholism*".

Therefore, regardless of the assessment of accuracy of UODO qualification of state of intoxication as data concerning health, one has to accept that without relevant legislative amendments to the Act on Upbringing in Sobriety and Counteracting Alcoholism, sobriety testing performed by the employer will not be permissible. In the light of the aforementioned jurisprudence of the Supreme Court, UODO stance on qualifying the state of intoxication as data concerning health is of no significant influence on the possibility of performing sobriety testing on employees by the employer.

Consequently, employers who perform sobriety testing without engaging relevant public authorities may face negative consequences from the National Labor Inspectorate, President of UODO as well as claims of their employees, associated with infringement of their personal interests.



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