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Legal Issues of Pre-employment Background Checks

(in context of Industry 5.0)

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ABBREVIATIONS OF LEGISLATION

Anti-Discrimination Act	Act no. 365/2004 Statutes on Equal Treatment in Certain Areas and on Protection against Discrimination, as amended
Civil Code	Act no. 40/1964 Statutes of the Civil Code, as amended
Civil Litigation Code	Act no. 160/2015 Statutes on Civil Litigation Code, as amended
Criminal Code	Act no. 300/2005 Statutes of the Criminal Code, as amended
Criminal Register Act	Act no. 330/2007 Statutes on Criminal Register, as amended
Employment Services Act	Act no. 5/2004 Statutes on Employment Services, as amended
Enforcement Code	Act no. 233/1995 Statutes on Bailiffs and Enforcement Activities (Enforcement Code), as amended
GDPR	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)
Labor Code	Act no. 311/2001 Statutes of the Labor Code, as amended
Occupational Health and Safety Act	Act no. 124/2006 Statutes on Occupational Health and Safety, as amended
Public Health Protection Act	Act no. 355/2007 Statutes on Protection, support, and development of public health, as amended

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INTRODUCTION

Pre-employment background check is an additional method used at the final stage of filling a vacancy. Personnel specialists use this method to verify the accuracy, completeness and truthfulness of information that the natural person applying for a job has so far provided about themselves or, conversely, has not provided, but such information is important to the employer in view of the work to be performed. According to various available internet surveys, many respondents admit that they are deliberately misleading in their résumés, either by embellishing and enhancing their abilities and skills compared to an objective state of reality, or by deliberately withholding some information so as not to be disqualified from the selection process.

Pre-employment background check is not generally prohibited by law. And as long as certain limits are respected, there is no reason to prohibit such action by the employer. The execution of pre-employment background check requires a balance be struck between the employer's right to choose a reliable employee and the employee's right to privacy. Not all employers take into account the need to maintain the existence of this balance and research on this topic is lacking in the Slovak legal environment, too. The aim of the monograph is therefore to offer stakeholders recommendations on how to legally carry out employee background checks and to illustrate on selected examples which procedures are still defensible and which are no longer so. The authors synthesize the focus of the pre-employment background checks content in the legal context, predicting the focus of the content of these checks in the era of Industry 5.0. Given that several traditional occupations are expected to disappear, it will not be important to check the job seeker's previous history and previous experience, but rather their medical fitness to work in a digitized environment, and therefore we expect employers' increased interest in mental capacity of jobseekers. Maintaining the image a company has constructed as an important element of the company's competitiveness and viability will, in turn, require employing reliable, honest, and ethically behaving employees, which will translate into a demand for checking their criminal history and digital footprint. The above-mentioned pre-employment background check types and methods are the subject matter of the analysis of Chapter three, preceded by Chapter two describing the national (Slovak) regulation and the basic Union legal framework, which must be respected in this process. The last chapter addresses the issue of the employer's liability in the event of a breach of any of the obligations under the pre-employment background check.

The compliance of the employer's conduct is assessed within the relevant national and European legislation. The starting point of the analyzes is acknowledging

a specific position of a job seeker as a weaker party to the emerging employment relationship. With the use of qualitative scientific methods such as analytical-descriptive method, comparison, critical analysis, induction, deduction, and synthesis of the acquired knowledge, the authors draw attention to the approach of labor law and personal data protection legislation to the issue of pre-employment background check. The presented results are based on the analysis of the existing documents, as well as on internal documentation of business entities from the authors' own application practice, who face this problem especially in large multinational corporations.

The publication is intended primarily for employees in human resources departments and employee relations departments and employee representatives who deal with pre-contractual relations on a daily basis. It is also dedicated to lawyers or attorneys who provide legal advice in the field of implementation of individual and collective employment relationships. The publication can also be used by employees with a deeper interest in mastering the basic legislation and its application in the field of legal and social relations arising from the exercise of the right of natural persons to work.

Košice, 10 December 2021

Authors

1 RECRUITMENT AND SELECTION IN INDUSTRY 4.0 AND CHANGES EXPECTED IN INDUSTRY 5.0

The continuation of the Fourth Industrial Revolution and the expected onset of the fifth industrial revolution[1] in the global market economy immediately impacts the labor market and labor relations. The relatively long-lasting significant predominance of job offers over the number of available job seekers is confronted with the gradual demand of employees for a drastic increase in their remuneration in order to improve their own working and employment conditions. Such situation on the labor market causes a high rate of labor turnover, which in some industries and service areas reaches 30% (e.g., in the banking sector, IT sector, etc.). The described state of affairs is further influenced by the phenomena accompanying the Fourth Industrial Revolution. Characteristic of the Fourth Industrial Revolution, also known as the second age of machines or Industry 4.0, is the idea of complete digitization of the labor market. Interconnection of the virtual world with the physical world increases work efficiency but, at the same time, endangers a number of job positions in which a person is replaced by the machine and many professions will disappear,[2] or at least their nature will be altered.[3] This is a not very bright prospect for the future, as presented by several professional authorities.[4]

Due to its very nature, it is pointless to argue how the phenomenon of digitization will affect regulation of industrial relations and human resources management. The advent of new technologies, including their further development, will have a major impact on the work environment itself. Automated work equipment in the form of production lines and related production machines will be multipurpose, reconfigurable and transformable, enabling them to make significant progress in their autonomous management. Through the Internet of Things (IoT),

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1 Industry 6.0 and 7.0 are already being discussed. ČERVENÝ, K. *Průmyslová revoluce 4.0, 5.0, 6.0 nebo 7.0?* (*Industrial Revolution 4.0, 5.0, 6.0 or 7.0?*) [online]. [2021-11-15]. Available at: <https://www.technickytydenik.cz/rubriky/ekonomikabyznys/prumyslova-revoluce-4-0-5-0-6-0-nebo-7-0_35493.html>.

2 BRYNJOLFSSON, E. – MCAFEE, A. *Druhý věk strojů: práce, pokrok a prosperita v éře špičkových technologií.* (*The second age of machines: work, progress and prosperity in the era of high technology*). Brno : Jan Melvil, 2015, pp. 33-34.

3 DÚBRAVSKÁ, M. et al. Internationalization of Entrepreneurship – Motivating Factors: Case Study of the Slovak Republic. In *Acta Polytechnica Hungarica*, 2015, Vol. 12, No. 5, p. 125.

4 BOSTROM, N. *Superinteligence: až budou stroje chytřejší než lidé.* (Superintelligence: when machines are smarter than humans). Praha : Prostor, 2017, p. 69.

these production machines will become wirelessly interconnected, creating new possibilities for interaction between systems and, at the same time, new possibilities for their control, monitoring and provision of advanced services in relation to physical production of end products. In combination with other technologies such as digital enterprise, intelligent robots, huge amounts of data, machine learning or elements of artificial intelligence, the production process will gain the ability to self-manage and self-organize. Thus, it will become a system with decentralized management and autonomous decision-making (smart factory), which is referred to as a *cyber-physical system*.[5] At the same time, the use of sensors will increase, enabling collection of large volumes of data, their processing and use to generate new knowledge, not only in industry. Intelligent solutions will take the form of ever-increasing automation, thus savings in labor costs.

In this respect, digitization, as part of Industry 4.0,[6] which was originally intended to bring industrial production back to the European Union in order to compete with dumping labor prices in non-European countries and thus create new jobs for European workers, has become essentially a (counterproductive) element of significant job losses still left in the Member States of the European Union in industrial sectors. Although these negative effects on national (local) but also the global labor market can only be estimated, published studies provide some guidance. However, their conclusions are not uniform, they are literally contradictory in some respects, and it is incorrect that their estimates focus on selected occupations only and not the job description of current employees. Due to the lack of a unified catalog of job positions, formal designation of job positions differs in individual countries, but also in specific companies, or jobs have the same designation, but a different job description, which of course makes them difficult to compare.

Digitization will, therefore, have fundamentally different consequences for individual jobs, which must be taken into account when considering relevant changes in labor legislation or when proposing changes in human resource management processes at the enterprise level. Taking into account the findings of a frequently cited study that looks at the effects of digitization on the labor market

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[5] MEYER, H. The Digital Revolution: How Should Governments Respond? In DOLPHIN, T. (ed.): *Technology, Globalisation and the Future of Work in Europe: Essays on Employment in a Digitised Economy*. London : Institute for Public Policy Research, 2015, pp. 96-97.

[6] The main technologies of the new revolution are: cyber-physical systems, communication network, internet of things, communication interface, Big data and Cloud computing; artificial intelligence, robotics, sensors, digital enterprise, virtual reality, sensor networks; virtual factory, digital factory. For more details see: BOWLES, J. The Computerisation of European Jobs – Who Will Win and Who Will Lose from the Impact of New Technology onto Old Areas of Employment? [online]. [2021-11-15]. Available at: <http://www.bruegel.org/nc/blog/detail/article/1394-the-computerisation-of-european-jobs/>.

in the United States (hereinafter the "USA") by Frey and Osborn, up to half of US jobs will be replaced in the next 10 to 20 years by machines or intelligent robots exactly due to introduction of new technologies. Similar, if not greater, effects will be felt by the spread of digitalisation in European countries, where digitalisation threatens up to 54% of all jobs.[7]

The most endangered jobs due to the more significant promotion of digitization and automation in the production and work process are the places with the lowest to medium education level, such as secretarial, technical-administrative, machine setting (CNC), fitting, sales. It is interesting to look at the so-called substitution potential, which, based on the above-mentioned study by Frey and Osborn, was applied to market conditions of the Federal Republic of Germany (hereinafter "Germany"), where Dengler and Matthes question the possibilities of applying the results from the USA to Germany.[8] The substitution potential would be expected to decrease with increasing levels of job requirements. However, the conclusions of the study by Dengler and Matthes suggest that, just like ancillary work for which high educational requirements are not necessary, professional executive activities which require at least two years of a professional training, too, have the same substitution potential, up to 45%. This means that up to 45% of ancillary and professional production activities can be substituted with machine labor.[9] It follows from both studies that undeniably the greatest substitution potential lies in the field of manufacturing and manufacturing professions, up to 70%. Substitutable to almost up to 65% are the manufacturing technical professions, in all other professions the risk of substitutability by intelligent robots is lower than 50%. The lowest substitution risk is in cultural and social services.

We can also look up studies in professional literature that show the potential of digitization in the area of growing job opportunities. The results of published research by Wolter on the effects of the transition to Industry 4.0 suggest that, from a market economy perspective, there is no need to worry about dramatic effects and impacts of digitization on employment. According to Wolter, the demand for higher-skilled people will increase at the expense of people with lower and secondary

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7 FREY, C. B. – OSBORNE, M. A. *The Future of Employment: How Susceptible are Jobs to Computerization?* Oxford : University of Oxford, 2013, pp. 24-27.

8 The German context is presented primarily as an opportunity to gain a basic orientation (theoretical and empirical) from the Fourth Industrial Revolution. We also take into account the fact that the Fourth Industrial Revolution dates back to the 1990s, when the Federal Government of Germany first introduced its concept of strengthening digitization and automation in industrial enterprises as an effort to return industrial production to the European Union (especially the Federal Republic of Germany).

9 DENGLER, K. – MATTHES, B. Folgen der Digitalisierung fuer die Arbeitswelt. Substituierbarkeitspotenziale von Berufen in Deutschland. In *IAB – Forschungsbericht*, 2015, No. 11, pp. 14-16.

education, which will be reflected in Germany in the loss of 490,000 jobs and the creation of 430,000 new jobs by 2030. In total, about 60,000 jobs can be expected to be lost.[10] However, the growth of new job opportunities itself is directly linked to the changes made in industrial enterprises with a clear vision of increasing the productivity of the production process (including labor productivity) and a faster start of the final production process of the end product. According to a McKinsey study, as many as 91% of German companies expect productivity growth of about 20%, but only 6 out of 10 German companies are ready for the Fourth Industrial Revolution and the digitalisation of their production and working environment. The McKinsey study also shows that 40-50% of all industrial parks (production plants) will have to be rebuilt to accommodate new technological processes that come with new technological equipment.[11] To illustrate the different approach of companies from different national economies, German companies will use only 14% of their annual cash turnover to adjust their technological, production, and organizational processes to digitization compared to US companies, where the investments in question represent almost twice the German volume.

However, it will not be just digitalisation that will change the structure of the labor market and jobs. The economic trends of recent decades, as well as potential changes related to industry 4.0 and industry 5.0 in the form of globalization, tertiarization of the economy, or externalization of services, have been notoriously well known. Robert Reich[12] refers to the current system of economic relations as supercapitalism[13], typical for which, he says, are companies competing for customers and investors. At the same time, customers want the highest quality and cheapest product, while investors demand the highest possible profits. As a result, companies reduce their costs through innovation, shareholders' profits regularly increase at the expense of employees' wages,[14] human rights are sold out[15] (companies move production capacity to countries like China, with lower labor costs

[10] WOLTER, M. I. et al. Industrie 4.0 und die Folgen fuer Arbeitsmarkt und Wirtschaft, Szenario-Rechnungen im Rahmen der BIBB-IAB-Qulifikations und Berufsfeldprojektionen. In *IAB – Forschungsbericht*, 2015, No. 8, p. 38.

[11] McKINSEY & COMPANY. *Industry 4.0 – How to Navigate Digitization of the Manufacturing Sector*. [online]. [2021-11-15]. Available at: <https://www.mckinsey.de/files/mck_industry_40_report.pdf>.

[12] Rober B. Reich is a professor and former US Secretary of Labor in Bill Clinton's cabinet.

[13] REICH, R. B. *Supercapitalism. The Transformation of Business, Democracy and Every Day Life.* New York : Vintage 2008, 288 p.

[14] The theory of the growth of social inequality due to disproportionately faster growth of wealth (inheritance income, capital ownership, etc.) in comparison with income from wages (labor) is extensively documented by the French economist Thomas Piketty in his publication. PIKETTY, T. *Capital in the Twenty-First Century*. London : Belknap Press, 2014, 696 p.

[15] BLAINPAIN, R. *The world of work in the XXIst century. Challenges and opportunities. The explosion of the social contract*, In *International Labour Law and Globalisation.* Textbook 6800.12V.620. Tilburg : Tilburg university, 2012, p. 19.

and lower levels of social and human rights), companies run politics, democracy declines.[16]

An interesting phenomenon in this context is the so-called glocalization.[17] The world economy is becoming increasingly global and local at the same time. Globalization is reflected, among other things, in an increase in the volume of foreign investment (cross-investment), increased influence of multinational corporations, growth in labor productivity, or liberalization of world trade. On the other hand, localization is related to the adaptation of global products to the specificities of local markets.[18] Due to aging population, increased average life expectancy, as well as income growth, there is an ever-increasing demand for the so-called personal services, such as social services (care for the elderly and disabled), healthcare, education, services related to sports activities, restaurant and hospitality services, hairdressing services, etc. At the same time, such services create jobs that are local, tied to a particular place, and unlike a car factory, cannot be relocated and transferred to a country with lower costs.[19] Personal services are also specific in that they are largely financed from public budgets and labor productivity growth is very slow or even impossible here.[20]

A significant phenomenon of the Industry 4.0 economy is also a change in the structure of companies. We expect the same trend within Industry 5.0. Further outsourcing leads to fragmentation of the original hierarchical pyramid structure of companies and to the emergence of the so-called networking or a network structure based on small teams of employees working on different projects, while the individual teams partially overlap in their composition and, at the same time, the number and composition of the teams change depending on new projects.[21] Currently, companies focus only on *their* "core business" and outsource secondary and service activities. According to prof. Blanpain, for labor relations this means that they will be less collective, freer, less controllable and controlled, while collective agreements will only be of a purely framework nature, or will disappear altogether.[22]

The issue of the impact of international trade liberalization (removal of trade barriers in the form of tariffs, quantitative restrictions, and administrative barriers) on the labor market deserves special attention, especially in the context of

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16 *Ibid.,* p. 19.

17 *Ibid.,* p. 18.

18 For example, some food stuff sold in different countries under the same name differ slightly in their composition in order to meet the different taste preferences of customers in different markets.

19 BLAINPAIN, R. *The world of work in the XXIst century. Challenges and opportunities. The explosion of the social contract*, In *International Labour Law and Globalisation.* Textbook 6800.12V.620. Tilburg university 2012, pp. 12, 21-22.

20 *Ibid.,* p. 21.

21 *Ibid.,* p. 16.

22 *Ibid.,* p. 16.

the ongoing negotiations between the European Union and the US on the Transatlantic Free Trade Area (TTIP). According to an OECD study, trade liberalization in the organisation's member countries has not led to rising unemployment or falling wages, on the contrary, the composition of workers has changed towards a low share of low-skilled and manual workers and an increase in white-collar workers and employment in services.[23] The study further states that some categories of employees are more vulnerable to "forces of globalization" than other.[24] Of course, these are mainly low-income groups and unskilled employees, or employees with a lack of work experience. According to the authors, the consequences of globalization can be addressed through government measures aimed at supporting massive job creation, ensuring the availability of education to and retraining of employees, adequate financial support in unemployment and active and effective assistance in finding a new suitable job.[25] The OECD conclusions on the effects of globalization on the labor market cannot be seen as universal and automatically applicable. The effects of trade liberalization will always vary depending on the country, stage of the economic cycle, sector of the economy, type of staff, their qualifications, experience, accompanying governmental measures, etc. Akira Kurihara points out that the liberalization of services has led to the replacement of traditional jobs by non-standard forms of employment, such as reduced hours or part-time work, citing the privatization of the Dutch state postal operator, which has led to a dramatic reduction in staff, as well as a significant decrease in the share of full-time employees.[26]

Taking into account the conclusions of the above studies and the trends described, two basic realizations can be objectively made. At present, it is not possible to predict with a greater degree of certainty what the real effects of digitization and the Fourth Industrial Revolution will be on the local (national) and global labor market. However, assuming the trend of introducing modern technologies into production practice is to continue and assuming the conclusions from the studies that companies will try their utmost to outsource employment-dependent activities are correct, it can be stated with certainty that a certain volume of jobs will be lost without a corresponding substitution.[27] However, in our view, it is a mistake to expect Industry 5.0 to be about labor without people. Although, of course, it can only be our deliberations and predictions. The coronavirus pan-

[23] LOVE, P. – LATTIMORE, R. *International Trade. Free, Fair and Open?* OECD Insights. Paris : OECD 2009, p. 105.

[24] *Ibid.*, p. 105.

[25] *Ibid.*, p. 105.

[26] KURIHARA, A. *FTA impact on postal services*. UNI Global Union, Nyon 2013. Non-public study for internal needs.

[27] In the example shown, the percentage of companies considering outsourcing these activities ranged from 30-50%.

demic has revealed many weaknesses, including one of Industry 4.0. Workflow automation and robotisation as a highlight of Industry 4.0 came to a halt when the corona virus pandemic hindered operations around the world. And it was not the machines that fell ill. Why didn't they continue working? This fact emphasized the importance of the human being in the performance of work and prompted a reassessment of the negative belief that machines would completely replace human labor in the future.

Industry 4.0 has brought digitization, automation, and an observation of how these processes enter human life. It is our belief that Industry 5.0 is the future, but a future which is not about how machines will devastate and eliminate human labor, but about realizing that human capabilities are irreplaceable and technology will not work without humans, rather than the other way round. It will be about achieving mutual interaction between people and machines. The division of labor has changed into human and digital.[28] What requires understanding is that Industry 5.0 will not hinder people from engaging in employment, provided they acquire skills for newly emergent jobs. So what will the recruitment and selection of employees in Industry 5.0 be about? We believe that the primary task of HR management will be to map emerging professions and forecast the needs and skills of employees to fill these new vacancies. Human activity can be divided into analytical, cognitive, and manual non-routine tasks and manually constantly recurring, i.e., routine tasks. It is the manual, routine work that is replaceable by digital technologies and machines equipped with artificial intelligence.[29] Examples are bookkeeping, sorting goods, ordering goods, etc. Digitization will have a different effect on activities that require fine motor skills, creative or social thinking, because modern technologies have barriers to these skills. Thus, recruitment and selection of staff in the future should generally focus on verifying skills that cannot be automated (critical thinking, creativity, social intelligence, bargaining capability, etc.), which are activities in which people have an advantage over computers.

Industry 4.0 benefits in particular from the fact that we are currently in a time of constant technological progress and the introduction of innovations that are advancing rapidly in the field of digital technologies. What needs to be realized is the difference in the perception of technology, or innovation as such, and its transcendence into human life across generations. Currently, several generations of employees coexist in the labor market. There is no exact agreement among experts in defining the time span of individual generations, but there are no significant differences. It

[28] LEVY, F. – MURNANE, R. J. *The New Division of Labor: How Computers Are Creating the Next Job Market*. Princeton University Press, 2004, p. 41.

[29] HUGHES, M. C. et al. A Lifestyle-based Weight Management Program Delivered to Employees: Examination of Health and Economic Outcomes. In *Journal of Occupational and Environmental Medicine*, 2007, Vol. 49, No. 11, p. 1215.

can be stated that those born between 1946 and 1964 are roughly the Baby Boomers generation. Generation X includes members born between 1965 and 1979, Generation Y members born between 1980 and 1994, and Generation Z those born between 1995 and 2009.[30] According to their respective years of birth, the current labor market is dominated by employees of Generation X and Generation Y. Represented to a lesser degree are the Baby Boomers, who are gradually leaving the labor market for retirement and entering it are the members of Generation Z.[31] Each generation is somewhat different from the previous one, and these differences are due to the nature of the period in which the generation was born and raised. In professional life, it will be Generation Z who will not be able to imagine their personal but also their working life without technology, and conversely, Baby Boomers will be the generation most concerned about the use of technology. Generation Z is the most technically proficient, because it has been using technologies from an early age, as a result of which it can integrate them without any problems into all areas of its life. An employer who wants to fill vacancies in the era of Industry 4.0 or 5.0 should thus be aware of the specific needs of Generation X and Y, but especially Generation Z, and adapt their recruitment strategies accordingly.[32]

The employer fills the vacancies according to its operational and economic possibilities, it chooses both the conditions and the method. It is at the employer's discretion to decide if, when, and how to fill the vacancies, and this will not change in the future. The professional literature in the field of human resources management distinguishes three stages of filling a vacancy.[33] The first stage is to recruit potential employees. It is the process during which a sufficient number of competent and motivated candidates are attracted and declare their interest to work for a given organization and their interest in filling a vacancy in a particular organization, at the necessary time and at a reasonable cost.[34] Attracting candida-

[30] McCRINDLE, M. *The ABC of XYZ: understanding the global generations*. Sydney: UNSW Press. 2014, p. 248.

[31] BENNETT, J. – PITT, M. – PRICE, S. Understanding the impact of generational issues in the workplace. In *Facilities*, 2018, Vol. 30, No. 7-8, pp. 278-288. [online] [2021-11-08]. DOI: 10.1108/02632771211220086.

[32] See also: BENCSIK, A. A. – HORVÁTH-CSIKÓS, G. – JUHÁSZ, T. Y and Z generations at workplaces. In *Journal of Competitiveness*. 2016, Vol. 8, No. 3, pp. 90-106, [online]. [2021-11-08]. Available at: <https://doi.org/10.7441/joc.2016.03.06>.

[33] KRAVČÁKOVÁ, G. *Manažment ľudských zdrojov*. (*Human resources management.*) 1. vyd. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2014, p. 63; VAVERČÁKOVÁ, M. – HROMKOVÁ, M. *Riadenie ľudských zdrojov. ((Human resources management.*) Trnava : Fakulta zdravotníctva a sociálnej práce Trnavskej univerzity v Trnave, 2018, p. 27.; NĚMEC, O. – BUCMAN, P. – ŠIKÝŘ, M. *Řízení lidských zdrojů*. (*Human resources management.*) Praha : Vysoká škola finanční a správní, o.p.s., 2014, p. 80.

[34] KRAVČÁKOVÁ, G. *Manažment ľudských zdrojov*. (*Human resources management.*) Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2014, p. 63.

tes is followed by the selection of potential employees. The main task of the selection is to assess the prerequisites and requirements for candidates with regard to the position to be filled and, finally, to decide on the most appropriate candidate. Like any selection process, this process is based on information, certain criteria, and its inherent specificities. The very theory of human resources management recognizes strict compliance with applicable laws as one of the basic principles of candidate selection. The *selection criteria and methods chosen should not violate any of the human rights and adversely affect human dignity, whether in the preparatory, implementation, or evaluation stage of filling a vacancy*.[35] The recruitment process is then completed by filling the vacancy.

While the stages of filling a vacancy are of a permanent nature, they do not change over time or even in relation to the generations of employees described above, the ways and methods by which the goals are met in the individual stages are subject to trends. The most significant in the 21st century is the digitization of employee recruitment and selection, which permeates every single stage described above. While it was enough to publish an advertisement in the press as part of the recruitment of potential employees from among the Baby Boomers and Generation X, and an online ad when targeting Generation Y, this is unlikely to attract prospective employees from Generation Z. Generation Z was born into the world of technology and online recruitment, i.e., publishing advertising through online web portals means to them what advertising in print or on the radio meant for Generation X. One of the characteristics of Generation Z mentioned by McCrindle is that members of this generation communicate through colors and pictures rather than through words and phrases. Members of this generation prefer a video on a particular topic rather than reading an article.[36] Therefore, it is not surprising that the emerging trend is publishing ads with videos and images that simultaneously present employer branding.[37]

Generation Z not only understands technology, but the free movement of workers and searching for a job within the European Union is a matter of course for them. It is, therefore, of strategic importance for the search for future employees to be successful to create a job profile that will stand a chance and attract candidates in the European context. Resolving what factors would attract members of Generation Z enough to apply for the advertised job position by professional public is still a few years away. The following work preferences are discussed: salary, employee benefits, pleasant working atmosphere, work-life balance, job security

[35] KOCIANOVÁ, R. *Personální činnosti a metody personální práce. (Personnel activities and methods of personnel work.)* Praha : Grada Publishing a.s. 2010, p. 114.

[36] McCRINDLE, M. *The ABC of XYZ: understanding the global generations*. Sydney : UNSW Press. 2014, p. 88.

[37] DÖMEOVÁ, L. *Generace Z na pracovišti: "mladí zaměstnanci a zaměstnavatelé"*. (*Generation Z in the workplace: "young employees and employers"*.) Praha : Česká zemědělská univerzita. 2018, p. 54.

and career growth prospect. Randstad's latest global survey of 2021 shows that money is not the most important factor that makes an employer attractive.[38]

The most significant trend in the selection of employees at the second stage of filling vacancies is currently automation of this process. JIM, MYA, WATSON, VERA are virtual chatbots with artificial intelligence used to select potential employees.[39] The main advantage of involving artificial intelligence in this process is the speed of hiring suitable employees.[40] Artificial intelligence takes over the routine and recurring aspects of HR work, but it can do more. Depending on the model, the artificial intelligence software will screen the received résumés, select the most suitable candidates, help with the candidates profiling, schedule and arrange a personal job interview, or communicate with selected candidates, verify their abilities or answer their questions concerning normal operation of the employer. In most of these cases, artificial intelligence is based on machine learning. The machine learns autonomously, using the learning method provided, for example from the cases with defined correct answers/responses and trains the assignment of further such attributes. In the systems searching for potential employees, such a training set consists of the characteristics of all previous candidates (age, education, skills, previous jobs ...), which are then paired with a description of a successful candidate, or with other indicator, such as a desired performance of the employee. Training sets can be given, pre-recorded, or procured by artificial intelligence autonomously, for example by screening relevant digital content from social networks. This results in predictions. If characteristics of a new candidate match as closely as possible the characteristics of the candidate who was chosen for the job, it is very likely that their employment application will be evaluated positively. The choice to involve artificial intelligence in the selection of employees is currently influenced mainly by the economic possibilities of the employer,[41] but the trend of online interviews is

[38] RANDSTAD. *Employer brand research 2021 global report*. Randstad – 2021 [online] [2021-11-08]. Available at: <https://www.randstad.com/workforce-insights/employer-branding/research-reports/>.

[39] This is a practice that is already known to Slovak personnel specialists, and employees had the opportunity to try job interviews with, for example, the IBM Watson Assistant at ŠKODA AUTO.

[40] See also: DOBROVIČ, Ľ. Umelá inteligencia ako výzva pre pracovné právo a trh – možnosti, riziká a perspektívy. (Artificial intelligence as a challenge for labor law and the market – opportunities, risks and perspectives). In *Právo, obchod, ekonomika (9): zborník príspevkov z medzinárodného vedeckého sympózia*. (*Law, Business, Economics (9): Proceedings of an International Scientific Symposium*.) 1. vyd. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2019, pp. 382-392., DOLOBÁČ, M. Legislatívne výzvy priemyselnej revolúcie 4.0. (Legislative Challenges of the Industrial Revolution 4.0.) In *Práca 4.0, digitálna spoločnosť a pracovné právo*. (*Work 4.0, digital society and labor law*). Bratislava : Friedrich Ebert Stiftung, 2018, pp. 19-25.

[41] MURA, L. – KLJUČNIKOV, A. – TVARONAVIČIENE, M. – ANDRONICEANU, A. Development Trends in Human Resource Management in Small and Medium Enterprises in the Visegrad Group. In *Acta Polytechnica Hungarica*, 2017, Vol. 14, No. 7, pp. 105-122.

becoming more and more popular and can be expected to become domesticated even when the pandemic passes. Chatbots equipped with artificial intelligence have the potential to arrange and conduct an online interview on their own, without the presence of a personnel expert. It will not be an unnatural or exceptional situation for members of Generation Z, as intense use of online means of communication is typical of this generation, which is sometimes even overused.

Finally, what manifestations of Industry 4.0 and Industry 5.0 could we expect in the last stage of filling a vacancy? As we mentioned above, the process of filling a vacancy is completed by hiring an employee. The content of work of personnel specialists in this stage is divided into activities concerning the successful, and activities concerning the unsuccessful candidates. In relation to the successful candidate(s), the recruitment process begins with their notification about their having successfully passed the selection process. In a more narrow sense, personnel practice also understands recruitment as legal and administrative procedures related to the initial stage of the *employment* of a newcomer employee, joining in from the outside environment.[42] This is followed by drafting of an employment contract and, upon its signing, the employee's registration with the relevant public offices/authorities. These processes are already partially digitized, although in the conditions of the Slovak Republic, it is still inadmissible to enter into an employment contract by electronic means.[43] The blockchain technology is gaining in popularity, used not only in connection with cryptocurrencies, but blockchain is also talked about today in connection with recruiting.[44] This technology could be used to store and preserve employees' personal records, i.e., to keep a digital personal file. The advantage of blockchain is the ability to keep these records up to date, with each change being validated by strict protocol criteria and the approval of each network user. In addition, the technology ensures full control of the employee over their personal data. Time will tell whether such use of blockchain will become widespread, but the predictions in this regard are convincing.

In relation to unsuccessful candidates, the staff specialists have to deal with the question of the possible need to keep the collected documentation or to dispose of it, especially if it contains unnecessary personal data.[45] Personal data must

[42] KOUBEK, J. *Řízení lidských zdroju. Základy moderní personalistiky*. (*Human resource management. Basics of modern human resources.*) Praha : Management Press, 2015, p. 39.

[43] ŽUĽOVÁ, J. Pracovná zmluva uzatváraná na diaľku. (Distance employment contract.) In *Zamestnanec v digitálnom prostredí*. (Employee in a digital environment.) Košice : UPJŠ v Košiciach, 2021, pp. 89-96.

[44] ONIK, M. M. – MIRAZ, M. H. – KIM, C. S. A recruitment and human resource management technique using Blockchain technology for Industry 4.0. In *Proceedings of the Smart Cities Symposium (SCS-2018)*, Manama, Bahrain, 2018, pp. 11-16. DOI 10.1049/cp.2018.1371.

[45] ŽUĽOVÁ, J. *Výber zamestnancov: právne úskalia obsadzovania pracovných miest*. (*Staff selection: legal pitfalls of filling posts.*) Bratislava : Wolters Kluwer, 2021. 120 p.

be kept in a form which permits identification of the data subject for the longest time necessary for the purpose for which the personal data is processed; personal data collected in the process of obtaining potential employees from résumés, cover letters, affidavits are necessary for the employer only until it selects the most suitable candidate. The reason for which the personal data of other candidates were collected ceases to be relevant at the moment the selection of a suitable employee is made and the employment contract is entered into. For the employer, this means the end of the processing authorization and its obligation to immediately destroy such personal data or return it to the data subject. There are two exceptions to the obligation to destroy the personal data of unsuccessful candidates. The employer shall not dispose of personal data of unsuccessful candidates if *i)* such data is processed for the purpose of registration in its own database of potential employees and *ii)* in connection with the need to prove non-discriminatory procedure and compliance with the principle of equal treatment under § 13 of Act no. 311/2001 Statutes of the Labor Code, as amended (hereinafter referred to as the Labor Code) in the process of filling the vacancy.[46] Digitization is also typical for these processes.[47] Whereas a few years ago recruiters created databases of potential employees using Excel, today there are several applications on the market that create and update these databases in their stead.

To summarize this chapter, it can be stated that recruitment and selection of employees in the era of Industry 4.0 and 5.0 will be accompanied by the use of technology and influenced by the degree to which innovation is promoted among employers, and this will also influence the methods by which the goals of these processes are achieved. Without digitization, we would not even be talking about adopting a hiring practice in the form of pre-employment background check.

[46] To this: VALENTOVÁ, T. – HORECKÝ, J. – ŠVEC, M. *GDPR v pracovnoprávnej praxi. Ako byť v súlade s nariadením o ochrane osobných údajov*. (*GDPR in labor law practice. How to comply with the Data Protection Regulation.*) Bratislava: Wolters Kluwer. 2020, pp. 99-100.

[47] MASAROVÁ, T. – GULLEROVÁ, M. Digitization in recruitment. In *Economic and Social Development 62nd International Scientific Conference on Economic and Social Development Development: book of proceedings*. Varazdin : Varazdin development and entrepreneurship agency, 2020, pp. 128-151.

2 PRE-EMPLOYMENT BACKGROUND CHECKS

Pre-employment background check is a hiring practice or an additional method used by HR professionals when filling a vacancy. The aim of this activity is to verify more closely the accuracy, completeness, and veracity of the information that a natural person applying for a job has provided about themselves up to that point. In a broader sense, it is an overall examination of the job seeker's past and integrity, usually on the basis of publicly available information (typically from the Internet). According to various available internet surveys, many respondents admit that they provide false information in their résumés and embellish their abilities in interviews. In order to select the most suitable candidate, the personnel specialists examine the person of the potential employee themselves or through third parties, studying their work experience, verifying the education achieved and characteristics, in order to determine whether there are any disqualification factors that would hinder the prospect's employment.

In the Slovak application practice, we have seen a growing interest over the last year in carrying out background checks of job seekers. We believe that this is related to two facts. The first is globalization of the Slovak working environment, with foreign companies adapting their corporate culture thereto. An example is American companies, for which pre-employment background check is a common, and in some respects even mandatory, procedure. An American employer who fails to perform a thorough background check on a prospective employee may be vulnerable to negligent hiring or employment discrimination charges. The second fact, in our opinion, is the general availability of information, which facilitates carrying out the background checks and makes them more accessible. Big data and technological development make it easier and more efficient to collect data on employees, on the basis of which the employer obtains a better system of control over their performance and behavior. This data is actually collected and evaluated regularly.[48] Based on this data, the employer can assess which candidate is a suitable investment with a potential for appreciation and which is "only" a potential risk.

It must be said that for the Slovak environment, employee screening is not a completely new and unknown personnel practice. Basically, "only" the background check methods are being upgraded. The background check method with

[48] LACKO, I. – MEYER, H. On Technology Innovations, Digitalisation and Social Security in the 21st Century. In *Communication Today*, 2016, Vol. 7, No. 2, pp. 110-111.

a long-term existential tradition is to check the content of job reports[49] and verify the references provided.

Job report means all documents related to evaluation of the employee's work – quality and quantity of the work tasks performed, evaluation of the employee's work engagement, attendance; employee qualifications – achieved education, obtained certificates and certificates of professional competence, participation in trainings; employee skills – evaluation of practical, organizational, managerial, analytical, communication skills, the ability to participate in teamwork with other co-employees; and other facts related to the performance of work – this is information about the overall relationship of the employee to work and co-workers, e.g., personality traits that are directly related to work: conscientiousness, self-confidence, flexibility, emotional stability, and resistance to stress, creativity, reliability, consistency, loyalty, honesty, initiative, enthusiasm, ability to understand the context, causes and consequences of action, professionalism, discipline at work, etc.[50] According to the provisions of § 75 para. 1 of the Labor Code, it follows that a job report should contain only such data that is legally relevant in relation to the work performed by the employee and corresponding to the facts. The employer should prepare a job report as objectively as possible and avoid subjective attitudes. In the job report, the employer does not comment on private matters of the employee evaluated (family, personal life of the employee), or on whether it recommends the employee to another employer for hiring. At the same time, the job report must not express recommendation of former employee on their suitability for their future work in a certain range of work activities.[51] Data permitted in the report is information about the function indicating the job (job classification) in which the employee performed work for the employer under the employment contract.[52] The possibility of an agreement between the employer and the employee on further content of the job report beyond the scope of § 75 para. 1 of the Labor Code is not excluded. However, it should always be borne in mind that the range of information provided in the report consists mainly of personal data and its processing should then principally correspond to minimizations, i.e., the job report should contain only such personal data as is strictly necessary for the stated purpose of the report.

Due to its content, the job report is a suitable source for background check, but only in case of those candidates who already have some work experience. Pursuant

[49] The employer's obligation to issue a job report to the employee has existed in the legal order of the Slovak Republic since 1989.

[50] OLEXOVÁ, C. Pracovné posudky a referencie v praxi. (Work reviews and references in practice.) In *Práca, mzdy a odmeňovanie* (*Work, wages and remuneration*). Vol. 2013, No. 4. p. 32-37.

[51] Decision of the Supreme Court of the Czech Republic of 17 May 2005, case ref. 21 Cdo 2152/2004.

[52] Decision of the Supreme Court of the Czech Republic of 15 November 2005, case ref. 21 Cdo 241/2005.

to § 41 para. 5 of the Labor Code, the employer may request a job report only from a natural person who has already been employed. An employer's request to submit a job report can never be addressed to the candidate's former employer. Another question arises here, namely whether the employer could ask the candidate to submit a job report from all former employers or only from the latest one. According to the grammatical interpretation of § 41 para. 1 of the Labor Code, which uses the singular... *submission of a job report* ..., the employer should request a job report from the candidate's last job,[53] but if the candidate has job reports from other employers and these reports are related to the work to be performed in the new job, we see no reason why the candidate could not present them to the employer.

Therefore, if an employer asks a natural person applying for a job to submit an job report and the latter submits it, we consider that the employer is entitled to verify the accuracy of the information provided in the job report with the former employer without the natural person's consent. Should the range of information enquired be broader and beyond the scope of the job report, such information cannot be provided by the former employer without the employee's consent.[54]

2.1 Legal background of pre-employment background check

The legitimacy of candidate screening is defended by the fact that the employer has the right not to accept a candidate the employer knows or should know is likely to commit acts which may give rise to legal liability on the part of the employer to third parties. These checks should thus have a preventive effect and companies declare them a part of personnel risk management. In the American scholarly literature, the legitimacy of background checks is justified in the context of the negligent hiring theory. The negligent hiring liability is one of the most serious negative consequences employers are likely to face when they do not carry out a background check or carry it out inadequately. In order for a claim based on negligent hiring to be successful, it must first be established that the employer had a duty to the injured third party, and there is some relationship between the injurious act and the employment situation.[55] The legal structure of the employer's liability for the employee's actions towards third parties has also been created in the Slovak legal

[53] TOMAN. J. *Individuálne pracovné právo. Všeobecné ustanovenia a pracovná zmluva*. (*Individual labor law. General provisions and employment contract.*) Bratislava : Friedrich Ebert Stiftung, 2014, p. 148.

[54] BĚLINA, M. – DRÁPAL, L. a kol. Zákoník práce. Komentář. 2. vyd. (Labor Code. Commentary. 2nd ed.) Praha : C. H. Beck, 2015, p. 1235.

[55] LEVASHINA, J. – CAMPION, M. A. Expected practices in background checking: Review of the human resource management literature. In *Employee Responsibilities and Rights Journal*, 2009, Vol. 21, No. 3, pp. 231-249. Doi: 10.1007/s10672-009-9111-9.

environment. Pursuant to § 420 para. 2 of Act no. 40/1964 Statutes of the Civil Code as amended (hereinafter referred to as the Civil Code), *damage is caused by a legal entity or a natural person when resulting from activities of those used by the former for such activity. Such persons are not liable themselves for the damage thus caused under this Act; their liability under labor law is not affected*. The employer is liable to third parties under the conditions specified in § 420 par. 2 of the Civil Code on behalf of the employee, and thus the employee's conduct in violation of the law (within the limits of labor liability, i.e., if it is not a so-called excess) leads to civil liability of the employer to a third party. Such liability does not switch over into a civil liability of the former employee towards a third party even after employment has been terminated.[56] It is, therefore, in the legitimate interest of the employer to carry out a background check of candidates and thus take precautions for protecting its position.

The initial legislative framework for background check in the context of the Slovak law is Art. 2 of the second sentence of the Labor Code. According to the cited article, *the employer has the right to freely select employees in the required number and structure and determine the conditions and manner of exercising this right, unless this law, special regulation, or an international agreement by which the Slovak Republic is bound, provides otherwise*. It is a legislative expression of the employer's right to freely choose a contractual partner as an immanent content part of the principle of contractual freedom.[57] It is also an aspect of the constitutional freedom of doing business to choose a team with which the entity wants to ensure the performance of its tasks.[58]

Unlike the theory of human resource management, Slovak labor law does not distinguish between the various stages of filling a vacancy.[59] Nor does it specify any manners in which the vacancy could be filled. Relationships arising before entering

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[56] TOMAN, J. *Individuálne pracovné právo IV. Zodpovednosť za škodu a bezdôvodné obohatenie.* (*Individual labor law IV. Liability for damage and unjust enrichment.*) Bratislava : Friedrich Ebert Stiftung, 2019, p. 13.

[57] Also: DOLOBÁČ, M. *Hranice zmluvnej slobody v pracovnom práve*. (*Limits to contractual freedom in labor law)*. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2017, p. 111. Too: BARANCOVÁ, H. Ústavnoprávne základy princípu zmluvnosti v individuálnom pracovnom práve. (Constitutional foundations of the principle of contract in individual labor law.) In GALVAS, M. (ed.). *Smluvní princip a jeho projevy v individuálním pracovním právu. Sborník příspěvků ze sympozia*. (*Contractual principle and its manifestations in individual labor law. Proceedings of the symposium.*) Brno, 1994. Brno : Masarykova univerzita, 1994, p. 13.

[58] Finding of the Constitutional Court of the Czech Republic of 8. 4. 1999, case ref. III. ÚS 547/98, 30/1999, also finding of the Constitutional Court of the Czech Republic of 30.04.2009, case ref. II.ÚS 1609/08.

[59] A certain indication of differentiation between the individual stages of filling a vacancy can be found in the Employment Services Act, which specifically regulates the content of advertisements in recruitment of potential employees and in another provision regulates the area of so-called prohibited information in the selection of potential employees.

into an employment contract are referred to by the labor law theory as pre-contractual relations. *Pre-contractual relations are relations that arise between the parties to a future employment contract before it is entered into*,[60] i.e., these are relations that arise only between the employer and the potential employee. This does not include relations between the two participants to employment, which arise after the employment contract has been entered into, notwithstanding these relations arising before the employment. Slovak legislation distinguishes between basing and establishing the employment relationship. Employment is based on signing an employment contract, but it is only established on the day specified in the employment contract as the day of commencement of work. In most cases, the date on which the employment is based is the same as the date on which it is established, or the date of the former immediately precedes the latter date. However, it is permissible that any period of time passes between the date on which employment is based and the date on which it is established, as both parties deem best given their circumstances.

In older literature, one can also find a time perspective for establishment of pre-contractual employment relations. This criterion narrows the pre-contractual relations to the period from the submission of a qualified proposal for conclusion of an employment contract to the moment it is entered into, or until negotiations on working conditions, even if failing to result in an employment contract, are over.[61] In the human resources management theory, pre-contractual relations in this sense correspond only to the third stage of filling a vacancy, i.e., recruitment. Pre-employment background checks would thus be excluded from the framework of pre-contractual employment relations.

No one doubts that from the moment of having been based, to the establishment of employment relationship, these legal relations are employment relations and are subject to employment law regulation, but the same cannot be said of relations predating establishment of employment. The inconsistency of professional literature dominates mainly the question of which legal regulation to proceed under in deriving liability within the framework of pre-contractual relations. There is a difference in the assessment of the entity's liability under labor law and its liability under the civil law regime (see Chapter 4 for more details).

The provision of § 1 para. 5 of the Labor Code stipulates very precisely when employment relationships are first based and established. The earliest possible moment of the existence of an employment relation is the conclusion of an employment contract (which corresponds to the establishment of the employment

[60] MESTITZ, F. Predzmluvné vzťahy v pracovnom práve. I. časť. (Pre-contractual relations in labor law. Part I.) In *Socialistické súdnictvo (Socialist judiciary)*, 1971, No. 9, p. 95.

[61] PÍCHOVÁ, I. *K některým aktuálním problémům vzniku pracovního poměru v teorii a praxi*. (*On some current problems of employment in theory and practice.*) Brno : Masarykova univerzita Brno, 1998, p. 95.

relation) or (Slovak-specific) agreement on work performed outside employment.[62] Stating the above, we could conclude the discourse on the legal nature of pre-employment background checks and refer the participants thereto to civil law. However, we do not consider this to be correct and the very existence of the provision of § 41 of the Labor Code proves the opposite when it regulates the issue of pre-contractual employment relations within the framework of the basic code of labor law. Slovak professional public does not doubt that pre-contractual relations are relations regulated by labor law and are, therefore, labor law relations, even if the Labor Code does not describe them as such.[63] Equally frequently appears the assertion of labor law authorities that pre-contractual relations are an exception to the rule that employment relations arise at the earliest on the day the employment contract or agreement on work performed outside employment is entered into (§ 1 para. 5 of the Labor Code).[64] In the theoretical division of labor relations into *basic* relations (employment and legal relations established by agreements on work performed outside employment), i.e., the *analogous* relations (government employment and service relations) and *derived* relations, Slovak professional literature classifies pre-contractual relations to belong to the class of those that are derived.[65] We, therefore, believe that the legal relations arising in connection with carrying out the pre-employment background check are employment-related in nature, and it is necessary to assess them in accordance with the regime of the applicable labor law regulations.

2.2 Legal limits on pre-employment background check

The practice of pre-employment background check is not generally prohibited by law. And as long as certain rules are respected, there is no reason to prohibit such conduct. Legal standards impose restrictions on what information the employer may consider and take into account when screening candidates. These are basically the limits on pre-employment background check and result from international, Union, and national law. In certain cases, legal norms also dictate how the employer may obtain and verify the information (for a more specific background check, see Chapter 3).

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[62] Decision of the Supreme Court of the Slovak Republic of 30 March 2011, case ref. 3 M Cdo 14/2010.

[63] BĚLINA, M. et al. *Pracovní právo*. 6. dopl. a přeprac. vyd. (*Labor law*. 6. supplemented and reworked. ed.) Praha : C. H. Beck, 2010, p. 69.

[64] BARANCOVÁ, H. et al. *Slovenské pracovné právo*. (*Slovak labor law*.). Bratislava : Sprint 2, 2019, p. 287.

[65] Compare: GALVAS, M. – GREGOROVÁ, Z. – HRABCOVÁ, D. – KOMENDOVÁ, J. – STRÁNSKÝ, J. *Pracovní právo*. 1. vyd. (*Labor law*. 1st ed.) Brno : Masarykova univerzita, 2012, p. 88.

2.2.1 National regulation

As with any legal relations, the content of legal relations is the rights and obligations of entities participating therein, relating to the subject of these relations. We will not find the rights and obligations of the parties to legal relations in carrying out the background check in any one provision, not even in any legal regulation. This is already indicated by the diction of Art. 2 of the Labor Code, which implies that the limits on the employer's freedom to fill a vacancy will follow primarily from the Labor Code, but also from other legislation and international treaties binding upon the Slovak Republic.

The starting point, even if only a framework one, is Art. 11 of the Labor Code, according to *which the employer may collect only personal data related to the employee's qualifications and professional experience and data that may be relevant to the work that the employee is to perform, performs or has performed.* There can be no doubt that the personal scope of this article also covers a natural person applying for a job who cannot yet be called an employee.

Particularly relevant for carrying out the background check are paragraphs 5 and 6 of § 41 of the Labor Code. The general rule is the possibility (permission) to request from the candidate only such information that is related to the work to be performed (provision of § 41 para. 5 of the Labor Code). This is a broad wording allowing for a relatively extensive interpretation. The information related to the work to be performed is not only information that is directly related to entering into the employment relationship, but also all other information that will become relevant to the employer only after employment is established. The risk of this extensive interpretation at the expense of the employee's privacy is to be mitigated by Art. § 41 para. 6 of the Labor Code, which establishes the so-called prohibited information that may not be required of a natural person. If the employer is not allowed to request certain information, it may not search for, obtain and verify it on its own or through third parties. This information includes information on pregnancy, family relationships, integrity (with some exceptions, see Chapter 3.2.), political affiliation, trade union affiliation and religious affiliation. Although the grammatical wording of Art. § 41 para. 6 of the Labor Code suggests that it should be an exhaustive enumeration,[66] we are convinced that the opposite is true. The enumeration of the so-called prohibited information is exemplary, and Art. § 41 para. 6 of the Labor Code must be interpreted in the context of the follow-up provisions of Act no. 5/2004 Statutes on Employment Services (hereinafter

[66] Often a position about the exhaustiveness of enumeration listed in § 41 par. 6 of the Labor Code can also be found in the literature: NEVICKÁ, D. Pracovný pohovor – manuál pre zamestnávateľov. (Job interview – a manual for employers.) In *Personálny a mzdový poradca podnikateľa* (Personnel and payroll consultant of the entrepreneur). 2021, No. 1 [online].[2021-11-08].

referred to as the Employment Services Act) and Act no. 365/2004 Statutes on Equal Treatment in Certain Areas and on Protection against Discrimination (hereinafter referred to as the Anti-Discrimination Act). Pursuant to § 62 para. 3 of the Employment Services Act, other information that the employer may not require when selecting an employee includes *information concerning nationality, racial or ethnic origin, political attitudes, trade union membership, religion, sexual orientation, information contrary to good morals, and personal data not necessary for the performance of the employer's obligations laid down in a special legal regulation*. The provision of § 41 para. 6 of the Labor Code and § 62 para. 3 of the Employment Services Act overlap only in the information concerning political, trade union and religious affiliation and do not contradict each other. It can, therefore, be concluded that there is no duplication of legislation on the same issue, but a single issue divided into two pieces of legislation is not the most appropriate solution either.

Although it may seem that the scope of information about a potential employee, which must not be the subject of enquiry and subsequent verification, is indeed broad, it should be noted that this is not an absolute ban in all cases. If this follows from the nature of the work in the position to be filled, the employer may, under provisions of the Labor Code or under a special legal regulation, also find out information about a potential employee that would otherwise be inadmissible. The Labor Code itself assigns integrity to such information (see Chapter 3). Prov. of § 7 of Act No. 552/2003 Statutes on performance of work in public interest and prov. of § 30 of Act No. 400/2009 Statutes on civil service provide for a ban on filling of public service jobs by relatives and thus allow the employer to learn of family circumstances within the framework of pre-contractual relations.[67] The Act no. 365/2004 Statutes on Equal Treatment in Certain Areas and on Protection against Discrimination (Anti-Discrimination Act) admits a possibility to ascertain the religion of natural persons applying for employment in registered churches, religious societies, and other legal entities whose activities are based on religion or belief.[68] On the other hand, information on sexual orientation, racial and ethnic origin, trade union membership and political affiliation always follows the absolute ban regime. We believe that direct questions about pregnancy do too.

[67] To this: ŽUĽOVÁ, J. Legal issues associated with nepotism in the workplaces in the Slovak Republic. In *European Scientific Journal*. Special edition Vol. 1, 2015, pp. 10-17.

[68] Prov. § 8 para. 2 of the Anti-Discrimination Act: *In the case of registered churches, religious societies, and other legal entities whose activities are based on religion or belief, there is no discrimination on grounds of religion or belief in terms of employment in these organizations or the pursuit of activities for these organizations and, depending on the nature of these activities or in the context in which they are carried out, the religion or belief of the person constitutes a basic legitimate and justified requirement of the profession*.

In relation to pregnancy, this prohibition is broken only when the employment relation already exists.[69]

2.2.2 Basic Union legal framework

The basic EU legal framework that must be respected in the pre-employment background check process is the anti-discrimination directives and the general regulation on personal data protection.

A) Prohibition of discrimination

For a list of anti-discrimination directives that apply in the European legal area, see the Handbook on European Anti-discrimination Law.[70] In the field of non-discrimination, European Union law contains various legal acts that promote equality in several areas of life. Protection under the European Union's anti-discrimination directives varies, but always includes access to employment. In the context of access to employment, protection is provided against discrimination based on sex, sexual orientation, age, disability, religion or belief, race and ethnic origin. This is a fixed list of protected grounds, i.e., characteristics of an individual that should not be considered relevant to the differential treatment or enjoyment of a particular benefit. The Slovak legislation contains an open list of protected grounds, which is in line with the European Union's anti-discrimination directives, but goes beyond them. Article 1 of the Labor Code provides that *natural persons have the right to work and to free choice of employment in accordance with the principle of equal treatment established in the field of employment relations by the Anti-Discrimination Act. They shall enjoy these rights without any restrictions or discrimination on the grounds of sex, marital or family status, sexual orientation, race, color, language, age, adverse health condition or disability, genetic characteristics, creed, religion, political or other opinion, trade union activity, national or social origin, nationality or ethnic group, property, gender or other status*. When comparing the so-called protected characteristics, i.e., the reasons why unequal treatment must not take place, Art. 1 of the Labor Code also lists other reasons which must not constitute a discriminatory restriction of natural persons' access to employment.

Thus, under anti-discrimination regulation, the employer must not screen job seekers on the basis of any of the above protected characteristics. None of these characteristics may be an input parameter for the background check, and

[69] More on that: DOLOBÁČ, M. – ŽUĽOVÁ, J. et al. *111 otázok a odpovedí o zdraví zamestnanca*. (*111 questions and answers about employee health.*) Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2020, p. 154.

[70] *Handbook on European non-discrimination law*. Luxembourg: Publications Office of the European Union, 2018 edition, p. 99.

likewise, if any of these protected characteristics are identified during the background check, the employer must not take them into account when assessing the suitability of the job seeker. For example, in accordance with anti-discrimination legislation, the employer must not find out and check whether the job seeker is childless, married or cohabiting, or has other family responsibilities. It is inadmissible to examine property ownership of the job seeker, for example, whether they own a car that they could use for business trips (more on property circumstances, Chapter 3.5). Health and fitness for work cannot be checked by seeking information on inappropriate lifestyle (alcohol, drugs, smoking, overeating) or, conversely, by checking whether the job seeker is active and does sports and eats healthy (more health checks Chapter 3.1).

Discrimination on grounds of sex is relatively clear in that it concerns discrimination based on the fact that a person is either female or male. Likewise, age discrimination either means unduly favoring younger people or, conversely, unduly favoring older people. However, it may not be clear what is meant by the open category *of other* status. European Court of Human Rights recognized that the following characteristics are protected grounds under other status: fatherhood; marital status; membership of an organization; military rank; parenthood of a child born out of wedlock; place of residence; health or any medical condition; former KGB officer status; retirees employed in certain categories of the public sector; details pending trial.[71] Thus, if the employer were to aim for not wanting any trade unionist in the workplace and would check whether candidates are members of trade unions, it would act in violation of anti-discrimination legislation, and ultimately also with Art. 41 para. 6 of the Labor Code as we stated in chapter 2.2.1.[72]

It is the employer's duty to avoid carrying out employee screenings that violate the principle of equal treatment or in some way demonstrate its stereotypical expectations and prejudices. Examination of a certain protected characteristic, which will then be taken into account when filling a vacancy, can lead to direct and indirect discrimination against the candidate. However, it should also be noted that the principle of equal treatment is not absolute. Differential treatment justified by the genuine occupational requirement is allowed. Member States may provide that a difference in treatment based on a characteristic related to [the protected ground] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the

[71] *Ibid*., p. 225.

[72] More by: OLŠOVSKÁ, A. et al. *Kolektívne pracovné právo s praktickými príkladmi*. (*Collective labor law with practical examples.*) Bratislava : Friedrich Ebert Stiftung, 2017, p. 39.

requirement is proportionate.[73] This means that, under certain circumstances and conditions, questions concerning the health status of the jobseeker, their criminal background or other anti-social activities may also be examined (see Chapter 3).

B) Protection of privacy and personal data

All natural persons applying for a job have the same right to protection of privacy and personal life. Gathering, collection, and verification of information about the person applying for a job is very closely linked to personal data protection. The employer's right to choose an employee correlates with the employee's right to personal data protection, and the role of legal regulation in this area is to reconcile the two rights.

With effect from 25 May 2018, a uniform regime for the protection of personal data in the form of Regulation of the European Parliament and of the Council of the European Union no. 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, repealing Directive no. 95/46/EC (hereinafter referred to as the General Data Protection Regulation or the Regulation only) is applied. Following the general regulation on data protection, a new law on personal data protection was adopted in the conditions of the Slovak Republic (Act no. 18/2018 Statutes). The content of the Personal Data Protection Act in most provisions fully reciprocates the legal regulation resulting from the Regulation. However, we do not evaluate this situation as a duplication of legislation. Article 2 para. 2 (a) of the Data Protection Regulation defines its scope in a negative manner, so that it does not apply to the processing of personal data in the course of an activity which does not fall within the scope of Union law. This means that, according to the current state of the division of competences between the European Union and the Member States, the Data Protection Regulation should fully cover three types of competences: (i) exclusive competences,[74] (ii) joint competences[75] and (iii) support, coordination and complementary activities.[76] Residual powers, i.e., powers of the Member States which have not been transferred to the European Union by the founding

[73] *Handbook on European non-discrimination law*. Luxembourg : Publications Office of the European Union, 2018 edition, p. 99.

[74] These include the customs union, the establishment of the competition rules necessary for the functioning of the internal market, monetary policy for Member States whose currency is the euro, the protection of marine biological resources under the common fisheries policy and the common commercial policy.

[75] The joint competences of the European Union and the Member States apply e.g., in the following areas: internal market; social policy; economic, social and territorial cohesion; environment; consumer protection; transport, trans-European networks, etc.

[76] For example, supporting, coordinating and complementary activities in the protection and improvement of human health, industry, tourism, culture, education, etc.

Treaties, are not covered by the Regulation. By literally transposing the articles and provisions of the Regulation into national law, the scope of the Regulation has *thus* been extended to activities which do not fall within the competence of the European Union, of course not within the scope of all Member State's remaining competences, but only within the scope defined by the Personal Data Protection Act as its material and territorial application. It is difficult to say whether the issue of pre-contractual employment relations clearly falls within the competence of the European Union or is a residual competence of the Slovak Republic. Rather, we are of the opinion that this is an area on the border of the internal market and social policy, i.e., common competences. When analyzing the legislation in the following text, we will thus refer to the Data Protection Regulation, which, as it is a regulation, is directly applicable.

When processing personal data, the employer acts as the controller and the natural person applying for employment as the data subject. The definition of personal data is regulated in Art. 4 point 1 of the General Data Protection Regulation and is applicable to all legislation that uses the term personal data. This is any information relating to an identified or identifiable natural person. A person is identifiable when additional information, making it possible for the person to be identified, can be obtained without undue effort. In addition to identifying the individual, the data must relate to, and have an impact on, the individual. In terms of content, personal data is any kind of information about a person concerning their private, family, work, and public life. The carrier (format) of personal data is not decisive for the application of the rules of data protection (paper, electronic, graphic, numerical, photographic, video-audio, audio form). The information does not have to be true or proven in order to be marked as personal data. It is irrelevant whether the employer processes the personal data of potential employees manually or with the help of modern technology. The scope of the Data Protection Regulation covers both automated and non-automated processing of personal data. The assessment of whether the information obtained is personal data must always be made within the specific context of the processing. Considering that the essence of pre-contractual relations is to gather and verify enough information to fill the vacancy with the most suitable candidate, it is difficult to find an example of information that would not be personal data.

The employer is unable to exempt itself from the scope of the data protection regulation and it is its duty to ensure compliance with this legal regulation in carrying out the pre-employment background check. The primary task of each controller is to determine the purpose of personal data processing, unless the purpose of the processing follows directly from the law. Any purpose is not acceptable. The purpose must be legitimate, explicit, stated in advance and specifically designed

to make it clear to the data subject why the employer is processing their personal data. The general purpose of processing personal data in the pre-employment background check is to verify the suitability of the candidate for the vacancy to be occupied and to prevent potential damage that could arise for the employer by the employee's actions towards third parties.

The controller needs to address the stated purpose by choosing the correct legal basis according to Art. 6 of the Regulation. The Regulation simply sets out the following six legal bases: (i) the consent of the person concerned, (ii) processing for performance of the contract or implementation of pre-contractual measures; (iii) legal obligation; (iv) the protection of the vital interests of the data subject; (v) pursuit of the public interest; (vi) legitimate interest. We consider the legal bases mentioned in ii), iii) and vi) to be the most useful in carrying out the background check. It is not excluded that the processing may also take place with the consent of the natural person applying for the job. However, as with the processing of an employee's personal data, there can be doubts about the real freedom of consent. Fear of a natural person applying for a job from failure in the selection process deprives them of this will. If the data subject does not have real or free will or cannot refuse or revoke consent without fear of adverse consequences, consent shall be deemed not to have been given. Non-freedom of consent makes it non-existent, which means that the employer processes personal data without a legal basis. For this reason, the professional public recommends that the processing of personal data within the framework of employment relations, which are also relations under which background check is carried out, be limited to what is really necessary based on consent.[77]

In order to choose a suitable legal basis, it should also be noted that in practice there is often legal uncertainty as to which legal basis to choose for which processing operation. We believe that supervisory authorities in the field of personal data protection should not automatically resort to fines for incorrect choice of legal basis[78] if the situation is uncertain and allows for the cumulation of legal bases. Finally, also pursuant to Art. 6 para. 1 of the General Data Protection Regulation, processing is lawful if and only to the extent that at **least one of the conditions is**

[77] NULÍČEK, M. – DONÁT, J. – NONNEMANN, F. – LICHNOVSKÝ, B. – TOMÍŠEK, J. *GDPR Obecné nařízení o ochrane osobních údajů. Praktický komentář.* (*GDPR General Regulation on the protection of personal data. Practical commentary.*) Praha : Wolters Kluwer, 2017, pp. 231-239.

[78] Processing on appropriate legal grounds is expressed by the principle of legality. Pursuant to prov. of § 104 para. 2 (a) of the Personal Data Protection Act, non-compliance or violation of any of the basic principles of personal data processing, including the conditions of consent, may be fined by up to EUR 20,000,000, where the fine is imposed by the Office for Personal Data Protection of the Slovak Republic on the employer and if the latter is an enterprise, up to 4% of the global turnover in the preceding financial year, whichever is greater.

met, i.e., at least one of the legal bases for the processing listed in this provision. Cumulation of several legal bases is therefore possible, but on the other hand, it cannot lead to overuse of consent and requiring consent just to be certain about every processing operation.[79]

In addition to determining the purpose and choice of legal basis, another fundamental principle of processing, which the controller must respect, should prevent unauthorized interference with the private and personal life of the data subject. The principle of minimizing personal data is linked to that stated purpose.[80] Personal data must be proportionate, relevant, and limited to what is necessary for the purposes for which it is processed. The list and scope of personal data that can be processed in the background check must be interpreted in terms of the information analyzed above, which the employer may and may not require from the employee (§ 41 para. 5 and 6 of the Labor Code) and the principles of equal treatment. The general rule for the scope of personal data that can be processed about natural persons applying for a job is, therefore, given in connection with the work performed at the position to be occupied.

2.2.3 Soft law

The secondary legal framework of the above-mentioned national and Union law complements the area of soft law significantly influenced by the employer's internal company environment. Recently, various forms of soft law sources have become increasingly important, such as codes of conduct, declarations, guidelines or agreements, which also correspond to the mechanism applied to the open innovations in the form of an open method of coordination. These have no basis in applicable law and compliance with them is not legally enforceable. The literature lists five *tracks in which international* social issues are currently addressed:[81] *(i)* the legal track, formed mainly by the conventions of the International Labor Organization (ILO), *(ii)* voluntary or non-binding track that includes the ILO or OECD Guidelines for Multinational Enterprises, *(iii)* a promotional track, represented by the ILO Declaration on Fundamental Principles and Rights

[79] Compare: VOJTKO, J. Automatizované rozhodovanie a profilovanie v pracovnoprávnych vzťahoch podľa Všeobecného nariadenia o ochrane údajov. (Automated decision-making and profiling in labor relations according to the General Data Protection Regulation.) In *Časopis pro právní vědu a praxi*. (*Journal of Legal Science and Practice.*) 2017, No. 2, pp. 255-274.

[80] Compare: MORÁVEK, J. *Ochrana osobních údajů podle obecného nařízení o ochraně osobních údajů (nejen) se zaměřením na pracovněprávní vztahy*. (*Protection of personal data according to the general regulation on personal data protection (not only) with a focus on labor relations.*) Praha : Wolters Kluwer ČR, 2019. p. 89.

[81] BLAINPAIN, R. – COLUCCI, M. The Globalization of Labour Standards. The Soft Law Track. In *Bulletin of Comparative Labour Relations*, nr. 52. Oxford : Kluwer Law International, 2004, p. 384.

at Work, *(iv)* a business track made up of codes of conduct by multinational corporations, and finally *(v)* economic track, based on the fact that the EU and the WTO to some extent subject the inclusion of (especially developing) countries in more favorable customs regimes on these countries‘ compliance with the core ILO conventions (core labor standards).

The practical significance of soft law sources is greater than it might seem at first glance. We know from the sociology of law that legal norms with which their recipients are not identified are often circumvented in practice. This is a phenomenon that is well known. Simply put, human creativity is infinite, and if practice is convinced that a law is not good, there is always a way around it. On the other hand, if a company commits to something voluntarily and after mature consideration, it is much more likely to comply with these commitments. This is precisely the case with soft law, in particular codes of conduct or obligations arising *from the UN Global Compact*. The same applies to transnational agreements such as TCA, IFA or EFA. In addition, Prof. Blanpain is convinced that once any first court rules that such agreements are legally binding, it will mean the end of them.

The application of soft law sources is enforceable, but subject to the use of specific methods. International trade unions using the so-called *leverage research* identify the weaknesses of multinational corporations and subsequently, through public campaigns, demonstrations, social networks, reaching customers, customers, subcontractors of the relevant employer, exerts pressure on it, which is relatively effective. *An example may be, e.g., signing of the so-called Bangladesh Accord*,[82] which has been gradually joined by virtually all relevant global textile retailers as a result of public and media pressure. The complaints process through the *OECD Guidelines for Multinational Enterprises has also proved effective in practice*.

In connection with pre-employment background checks, soft law will operate primarily in the form of in-house instructions on how to screen employee for what content in unregulated cases. Examples are anti-terrorist screening or screening of social media used by jobseekers (see below).

2.2.4 Group regulations

In the case of holding companies operating in several European or non-European countries, there is a tendency to carry out certain activities, including pre-employment background checks, in a comparable way. For this purpose, various group regulations are therefore being developed, which are in some ways transposed into the employer's national environment. The effectiveness and binding force

[82] Available at: <http://www.bangladeshaccord.org/>, [online]. [2021-11-08].

of the adopted intra-group act of management is ensured by a formal declaration of binding force for all companies in the group at the beginning of the internal document's adoption and a general obligation to incorporate binding standards into the local employer's own internal regulations. However, the nature of the transfer of these binding standards to the employer's internal local environment in individual countries is no longer examined. Nevertheless, given the nature of the group document in question, the possibility of deviating from its content is generally not allowed, as otherwise the purpose and the goal of the adopted documentation could be undermined.

As a rule, group regulations do not define the relationship of the potentially investigated employee or local employment law when they deal with background checks, they only define hierarchically superior position of the checks mandate over the management of local companies and with respect to the management of the group itself. As a rule, the local companies are organizationally and technically independent organizational units, which are subordinated (depending on the type of the group's business structure according to foreign law) directly to the group's organizational management or its business or operational processes.[83] Many of the foreign groups operating in the Slovak Republic (mostly of German origin) do not create special rules for carrying out their own group checks, but are members of the German Institute for Internal Audit[84] or the Institute of Internal Auditors[85], which have adopted their own rules of procedure in conducting internal investigations, e.g., in the form of an internationally recognized document titled "*International Standards for the Professional Practice of Internal Auditing, including Basic Principles, Definitions and Code of Conduct*".[86] Execution of a potential pre-employment background check takes place (especially to fill senior positions) without the involvement of employees of the local employer, or often without the local employer's authorized persons' being aware of it, i.e., without the awareness of those persons who are authorized to carry out legal or factual actions with respect to local employer's employees in individual employment relationships.

In this respect, however, there arises an initial problem of the legal grounds, as the form of transposition of a group regulation into the internal environment is more of a declaratory transposition of the group directive by a local company

[83] From the application practice point of view, these are mostly joint-stock companies, with the senior employees carrying out group checks being usually subordinate to the chairman of the joint-stock company's board of directors to enable conducting investigations of the concern's management and other members of its board.

[84] German Institute.

[85] Institute of Internal Auditors.

[86] International Standards.

decision, but its content is no longer transferred to the content of formal sources under local employment law. The group regulation enters a comparable legal position as intra-group regulations of the code-of-conduct type or other form regulating "ethical behavior" in the employer's environment, in which the incorporation into the content of the employer's internal acts of management, however, does not happen. The first question that arises is then as to the form in which this regulation should be contained in the employer's internal environment. If we start from the basic premise that internal regulations can establish or change only those rights and obligations (in fact, they only specify them) which the relevant legislation allows (it can also be a legislation of other than employment law nature, but contains piece of legislation which is related to the performance of work by the employees concerned) and, if it lies within its legal framework, the framework of the employee 's employment contract or collective agreement.[87] However, the group regulation is not an internal act of management adopted by a decision of the local employer, although it may to some extent become one through the way of its transposition into the internal environment by the employer's decision.[88] However, as no one examines the content of this internal regulation and the possibilities of including it in the internal environment of local employers, the level of its compliance with national legislation is not assessed either.

Thus, if we perceive the application of group regulations at local employers' as a tool to extend the employer's dispositional authority through internal regulations (which corresponds, for example, to the status of adopted codes of conduct), which can clearly represent a significant interference into employees' right to privacy, procedures under these internal regulations are strongly called to question at the moment when they demonstrably circumvent the local labor law regulation on the adoption of certain types of internal company regulations regulating the obligations of employees (their work discipline). In such case, therefore, the pre-employment background check at the employer's, executed practically under group regulations, may be questioned.

[87] ŠTEFKO, M. Prameny pracovního práva. (*Sources of labor law*.) In BĚLINA, M. et al. *Pracovní právo.* 4.vydání. (*Labor law. 4th edition*.) Praha : C. H. Beck, 2010. p. 61.

[88] Local employers usually arrange for its translation into the employees' mother tongue (state language) and then issue it as an internal governing act of the employer in its unaltered form.

3 TYPES AND METHODS OF PRE-EMPLOYMENT BACKGROUND CHECKS

It is logical, justified, and legitimate that every employer wants to hire a job seeker who meets minimum educational and professional standards, is medically fit to do their job and does not pose any unpredictable dangers for the employer and the colleagues, either morally or ethically. It is then reasonable to expect that such demands on job seekers will be collected and the truthfulness of the information provided will be verified in some way. From the legal point of view, it is important to define what the content of such a check can be and how this check can be carried out.

We have described the legal limits of the content of pre-employment background checks in Chapter two and they relate to the job seeker's right to privacy and the right not to be discriminated against in access to employment. However, as we have said, these rights are not absolute. The employer may obtain certain information from the job seeker's privacy (such as personal data) or process certain protected characteristics (such as disability, integrity) if required by law or is a reasonable requirement due to the nature of the job or position to be filled. The execution level of the background check is thus preceded by the creation of a job profile and the specification of conditions the worker on that job is expected to meet. Prerequisites and requirements for job performance are summarized. The terms prerequisites and requirements are not synonymous. Prerequisites are substantive law criteria for filling a vacancy, established by legislation. The objectification of prerequisites for job performance in the legal regulation does not provide the employer with the possibility of discretion or deviation when creating the job profile and specifying the requirements for the job holder. If the legal regulation stipulates medical fitness, a certain age, qualification, driving license, length of professional experience, etc., the employer is obliged to respect these prerequisites and it cannot tolerate not to meet them. Job performance requirements are conditions set by the employer for the vacancy to be filled. It follows from the imperative of legal certainty that these requirements should be defined in advance if the employer makes establishment of an employment relationship subject to such. They may follow from the employment contract, from the organizational rules, from the internal (organizational) regulations of the employer, from the work instructions of the

managers, or they may also be requirements that are generally known for performance of the given job.[89]

The requirements for job performance are at the employer's discretion, given the specific conditions at the workplace and the employer's ideas of and demands on the future employee. However, such discretion is not unbound. The performance requirements set by the employer must be significant, justified and objectively justifiable in the view of the nature of work activities at the vacancy to be filled.[90] They must not contain an element of bullying, contradict ethical practices or violate the principle of equal treatment. The employer should be able to justify why it considers the requirement for the performance of the job necessary.

The requirements may relate to both the physical and mental characteristics of the employee, or other factors that have a material effect on the performance of the job at the workplace. Examples of legitimate requirements set by the employer can be deduced from court decisions. The following requirements, relating to the type of work or the conditions under which the work is to be performed, have been recognized as such:

- specific expertise;
- specific qualification knowledge;
- manual skills;
- management and organizational skills (managerial skills);
- moral qualities and character traits (honesty, truthfulness);
- appropriate social behavior and cooperation with clients (also outside working hours);[91]
- wearing the prescribed work attire;
- dressing and overall appearance outside work.

It should also be noted that the employer is not legally obliged to employ only those natural persons applying for a job who meet the set requirements (as opposed to the mandatory prerequisites). The employer may, at its discretion, tolerate non-compliance with certain requirements or waive certain requirements it deems proper for job performance.

Pre-employment background checks should thus be based on knowledge of the prerequisites and requirements associated with the vacancy to be filled and

[89] Opinion of the Supreme Court of the Czech Republic of 24 March 1978, case ref. Cpjf 44/77 published in the Collection of Judicial Decisions and Opinions under no. 15, vol. 1978, p. 500. Or also the decision of the Supreme Court of the Slovak Republic of 23 October 2001, case ref. 1 Cdo 86/2000, R 97/2002.

[90] Decision of the Supreme Court of the Czech Republic of September 7, 2010, case ref. 21 Cdo 2894/2009.

[91] Decision of the Supreme Court of the Czech Republic of 25 October 2001, case ref. 21 Cdo 1628/2000.

not go beyond them in the specific hiring process. The professional literature cites "sensitivity" of the job position as another indication for conducting job seeker checks. "Characteristics of the job that result in greater “sensitivity” include the anticipated degree of contact that the employee will have with other people in performing their job duties. For instance, jobs dealing with customers or the public, vulnerable people (e.g., children, the ill, the disabled, the elderly), jobs involving personal care and medical treatment, relatively unsupervised work, operation of motor vehicles or dangerous equipment, jobs affording substantial access to employer’s property and the homes and personal possessions of others, and positions entailing responsibility for security or safety."[92] Based on the prerequisites, requirements and "sensitivity" of the vacancy to be filled, the employer then chooses the types and methods of checks.

Pre-employment background checks can be done in several ways. For example, through verification of data in the received résumés, in the form of a questionnaire, through an in-person discussion at a job interview, by contacting former employers on the basis of a submitted job report or the references provided (see also Chapter 2.2). Furthermore, by searching through official registers or by searching the social networks on which the job seeker is active. There may also be legal restrictions in this regard. For example, in the conditions of the Slovak Republic, the employer's only option is to obtain information on the job seeker's integrity given in the form of a certificate of good conduct, which, however, can only be applied for by the job seeker and not by the employer (see Chapter 3.2). Similarly, data on medical fitness take the form of medical reports, which are issued by a legally authorized entity (see Chapter 3.1) and are issued only at the request of the job seeker.

In the following sections of this chapter, we shall analyze several types and one method of pre-employment background checks, which we assume will be current and frequently used in the era of Industry 5.0.

3.1 Health checks

Verification of the future employee's health is important in the area of employment relations and aims to ensure that it has been demonstrated to the employer that the person will be able to perform the agreed type of work and the performance of work does not endanger the worker's life or health and ultimately the lives and health of others. It is thus in a legitimate interest of the employer to hire only an

[92] Further studies mentioned in the paper: LEVASHINA, J. – CAMPION, M. A. Expected practices in background checking: Review of the human resource management literature. In *Employee Responsibilities and Rights Journal*, 2009, 21 (3), p. 240.

employee who is capable of performing work from the health point of view. This includes examining issues such as medical fitness, mental fitness, pregnancy, or testing for the use of drugs and psychotropic substances.

Health (of anyone) is a sensitive personal piece of information belonging to the privacy domain. Examination of the job seeker's state of health for the purposes of employment relations is therefore regulated. Health data belong to a special category of personal data, the term sensitive data has also been adopted. Enumeration of data considered sensitive is not self-serving. This is data the processing of which, compared to "ordinary" personal data, may pose a higher risk to the data subject, endangering the rights and interests protected by law, thus disclosing the individual's privacy to a much more intense and, above all, unwanted degree. For this reason, a special, stricter legal regime applies to sensitive personal data, with exhaustive exceptions for processing of this data and increased requirements for its security and protection. Data concerning health are defined in Art. 4 point 15 GDPR as personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their health status. The range of personal data that may fall into the category of health-related personal data is broad. Article 35 of the GDPR recital explains that *personal data relating to health should include all data relating to the health status of the data subject which provide information on the data subject's past, current or future state of physical or mental health*. By way of example, *information on a natural person obtained at the time of registration for the purpose of providing actual or future health care services to that natural person shall be deemed as health-related data; a number, symbol or special information assigned to a natural person for the individual identification of that natural person for medical purposes; information obtained from tests or checks of parts of the body or bodily substances, including genetic data and biological samples; and any information, such as the disease, disability, disease risk, medical*[93] *history, clinical treatment, or physiological or biomedical condition of the data subject, regardless of the source of that information, whether from a physician or other healthcare professional, a hospital, a medical aids provider or from performance of an in vitro diagnostic test*.

According to the expert opinion of the European Data Protection Board (EDPB), health-related personal data are, in addition to all information generated

[93] The term disease risk refers to data concerning possible future state of health of the data subject. According to the EDPB, health-related personal data also include information on a person's obesity, high or low blood pressure, hereditary or genetic predisposition, excessive alcohol consumption, tobacco or drug use, or any other information that is scientifically proven or commonly perceived as a future disease risk. Further examples of "good practice" that can be classified as health-related personal data are available at: <https://ec.europa.eu/justice/article-29/documentation/other-document/files/2015/20150205_letter_art29wp_ec_health_data_after_plenary_annex_en.pdf.> [online]. [cit. 2021-11-18].

in a medical context, information about whether a person is wearing glasses or contact lenses; IQ, information on smoking and drinking habits; allergy data; information on membership in health support groups (alcoholics anonymous, weight watchers, cancer treatment support group, etc.); information on a person's obesity, high or low blood pressure, hereditary or genetic predisposition, excessive alcohol consumption, tobacco or drug use, or any other information that is scientifically proven or commonly perceived as a risk of disease in the future. According to the EDPB, personal data relating to health also includes the mere fact that someone is ill in the context of an employment relationship.[94] The EDPB advocates an extensive interpretation of the concept of health-related data.

It is also crucial how this information is handled in order to identify whether or not the information contains sensitive health-related personal data as defined by the GDPR. At first glance, this may be "raw" data from which it is difficult to derive any knowledge about a natural person's health. However, the intended, potential use must also be taken into account. If it is possible to derive information on the actual or probable state of health of a natural person, the information is sensitive health-related personal data.

In the context of pre-employment background checks, the employer processes data concerning the job seeker's health in the form of information/confirmation of their medical fitness to perform a certain work activity within the framework of medical examinations; on medical fitness for working with food (the so-called health card); on mental fitness, eventually information about the employee's disability, if, for example, a job is created for such an employee, but it is also information about the results of possible tests for the use of narcotic and psychotropic substances. The employer must take into account that sensitive personal data is processed under its own legal rules and the corresponding obligations of the controller. In general, a ban on the processing of health-related data applies, unless there are any of the exhaustive exceptions to this ban (Art. 9 para. 2 GDPR). The employer is entitled to process personal data relating to employee health under a relatively broad exception set out in Art. 9 para. 2 (b) GDPR: *processing 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 authorized 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*. The existence of an exception is the first condition for the lawful processing of

[94] Available at: <https://ec.europa.eu/justice/article-29/documentation/other-document/files/2015/20150205_letter_art29wp_ec_health_data_after_plenary_annex_en.pdf.> [online]. [cit. 2021 - 11- 19].

health-related data. The second condition requires a legal ground (title) for such processing. These are listed in Art. 6 para. 1 GDPR.[95] In terms of an effort to avoid administrative offenses in the area of personal data processing, the most secure legal grounds for the employer for the processing of personal data concerning employee health is the so-called legal license: processing is necessary for compliance with a legal obligation to which the controller is subject (6 par. 1 (c) GDPR). The employer is entitled to process personal data concerning the employee's health (without the need for the employee's consent), for example, on the basis of § 41 para. 2 of the Labor Code for the purpose of determining medical fitness for work by means of the initial medical examination (see below). The data on the employee's disability is processed by the employer for the purposes of fulfilling its obligations in relation to employees with disabilities pursuant to §§ 158 and 159 of the Labor Code and the relevant provisions of the Employment Services Act. Employers are advised to avoid practices where they do not have to process personal data relating to job seekers' health but want to process this data for reasons known to them. They then deal with this situation by seeking the consent of the job seeker, which must – when processing sensitive personal data – also be explicit. According to the current opinions of the EDPB working group, such consent, however, may not be valid at all, because given the specific position of the job seeker vis-à-vis the employer, there will always be doubts as to whether the employee has given their consent freely. The invalidity of the consent consequently means the illegality of personal data processing.

3.1.1 Medical fitness

In professional literature, medical fitness is defined as a *suitable or sufficient medical disposition of an individually determined natural person to perform individually determined work in a specific environment and under specifically determined working conditions, at the time of the assessment*.[96] In the subjective sense, it is a basic condition of an individual, always associated with the person of a particular employee, without whom the agreed work cannot be performed or without whom the agreed work cannot be assigned by the employer. In an objective sense, it is a prerequisite for the specific work to be performed, given the specificities of this work, stipulated by special legislation. Medical fitness functionally connects the state of health of a person with the nature of work and the conditions under which the employee is to perform the agreed type of work. *"In the context of assessing medical fitness, information on the state of health shall be treated in a manner*

[95] We reiterate that, in a simplified way, we deal with the following six legal grounds; contract performance; legal license; protection of life, health or property; public interest and legitimate interest.

[96] JANÁKOVÁ, A. *Abeceda bezpečnosti a ochrany zdraví při práci*. (*Alphabet of safety and health at work*). 5. vyd. (5th. ed.) Olomouc : ANAG, 2011, p. 389.

which is intended to lead to the conclusion as to whether the employee is medically fit or unfit to perform the agreed type of work. As part of the assessment of an employee's medical fitness, the information originally provided on the employee's state of health is supplemented by additional information related to the employee's working conditions (work operations, specificities of the working environment)."[97]

Given that the parties to employment do not have enough information or knowledge to assess the job seeker's medical fitness or to evaluate it directly in a legally relevant manner, the law entrusts another entity to carry out this assessment. Act no. 355/2007 Statutes on Protection, support, and development of public health as amended (hereinafter referred to as the Public Health Protection Act) entrusts occupational health service physicians with the assessment of medical fitness to work in work-related preventive medical examinations.

Prior to employment establishment, initial preventive medical examination (hereinafter referred to as the initial health check) is performed. Depending on the working conditions and the type of employment relationship, the initial health check is a right or obligation of the employer. The employer has a legal obligation to ensure and pay for the initial health check in the case of natural persons applying for work classified in Category 3 or 4 in terms of health risk or in the event that medical fitness for work is required by a special regulation.[98] The employer may also provide initial health checks in relation to work classified in the 1st or 2nd risk category (§ 30e para. 17 of the Public Health Protection Act). The requirement to undergo an initial health check while working in category 1 or 2 must be objectively justified by the nature of the work or work activity. The Public Health Protection Act, referring to Act no. 124/2006 Statutes on Occupational Health and Safety (hereinafter referred to as the Occupational Health and Safety Act) stipulates the obligation of a natural person applying for a job to undergo an initial health check (§ 30e para. 2 and para. 17) in line of the Public Health Protection Act. The job seeker's obligation applies regardless of whether the provision of the initial health check is a right or an obligation of the employer.

The process of assessing medical fitness for work follows a standard sequence of steps. It begins with the collection of information, continues with the examinations and ends with the issuance and submission of a medical report. The position of the employer in this process is clearly defined and may be called passive.

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[97] VALENTOVÁ, T. – HORECKÝ, J. – ŠVEC, M. *GDPR v pracovnoprávnej praxi. Ako byť v súlade s nariadením o ochrane osobných údajov*. (*GDPR in labor law practice. How to comply with the Data Protection Regulation.*) Bratislava : Wolters Kluwer. 2020, p. 126.

[98] Examples of legal regulations that require the job seeker's medical fitness as a prerequisite for work include Act no. 138/2019 Statutes on Pedagogical Employees and Professional Employees as amended, Act no. 578/2004 Statutes on health care providers, health care workers, professional organizations in health care, Act no. 514/2009 Statutes on transport on railways, as amended, etc.

Information on the job seeker's state of health, which is necessary for issuing a medical report, is collected by the assessing physician. It is absolutely unacceptable for this information to be collected by the employer. The employer does not have the right to become acquainted with the medical history and diagnostic data of the (future) employee, which form the content of the latter's medical documentation and are necessary for issuing a work report.

Medical fitness for work is determined in examinations and assessed on the basis of their results. The physician does not assess the overall health of the assessed person in terms of overall physical and mental well-being in the examination of medical fitness for work; on the contrary, the physician is limited to identifying diseases, illnesses, possible health contraindications or conditions that limit or exclude the ability of the assessed person to carry out particular work (i.e., it focuses on examining the state of health in relation to the work to be performed and the working environment). What examinations the assessed person shall undergo depends on the professional assessment of the medical examiner and the employer has no right to request that the job seeker undergo any specific examinations. A framework is set for medical examiners to be used for examinations of job seekers and staff. This is a professional guideline of the Slovak Health Department on the content of preventive health checks in relation to work published in the Bulletin of the Slovak Health Department on 2 November 2016, section 29-38, volume 64 (hereinafter the guideline on the content of preventive examinations). Mandatory (basic) and optional (supplementary) examinations are distinguished. Mandatory examinations form an integral part of every preventive health check in relation to work, and they are conducted to the extent specified for individual factors, groups of factors or work performed in accordance with Annexes no. 2 to 7 to the Guidelines on the Content of preventive examinations. Optional (supplementary) examinations are carried out in justified cases. They are individually indicated by the medical examiner and result from the identified and assessed health risks, the effects of work and work environment factors, the work performed, possible occupational damage to health or are necessary to rule out contraindications.

The result of the medical fitness assessment during the initial health check is a medical report. A medical report may contain three types of conclusions, namely whether: *i)* the natural person is fit to perform the work under assessment, ii) is fit to perform the work under assessment with a temporary constraint, or *iii)* is incapable of long-term performance of work under assessment.[99] The employer does not have a legal right to obtain specific data on the results of basic or optional

[99] Specimens of medical reports on medical fitness for work according to Annex no. 3c to Act no. 355/2007 Statutes on Protection of Public Health.

examinations, which constitute the content of the health check. Only the original medical report with the statutory conclusions is available to the employer.

The medical examiner shall submit the medical report on medical fitness for work to the employer (§ 30 f para. 1 of the Public Health Protection Act). In practice, if the medical examiner is a general practitioner, the medical report is usually handed over to the employer through the (future) employee, as a result of which there is a risk of unauthorized interference with the content of the report. In this respect, however, the employer draws the short straw, because the Slovak legislation does not allow it to request a review of the medical report from the issuing physician, even if the employer has reasonable doubts about its content and conclusions. The only one who can request a reassessment of medical fitness for work due to disagreement with the content and conclusions of the report is the job seeker.[100]

We consider the initial health check and the submission of a medical report to be a legally envisaged way of obtaining personal data on the job seeker's health. However, the Office for Personal Data Protection of the Czech Republic dissents. According to it, a certificate from a physician or medical facility (for example, from an initial or preventive health check) as to whether or not a person is able to perform their work is not health-related personal data. It argues that the said documentation does not reveal specific information about the state of health, but only states whether the natural person is qualified to perform work tasks.[101] *The stated opinion of the Czech Office for Personal Data Protection does not correspond with the concept of interpretation of the term health-related data, as promoted by the EDPB, and which we stated in the introduction to this chapter.*

We agree that it is difficult to deduce any specific state of health of a natural person from the issued "positive" reports (capable of performing the assessed work). However, it is necessary to reconsider the generalization of the statement of the Office for Personal Data Protection of the Czech Republic. For example, if the conclusion of the medical fitness assessment is capable of performing the assessed work with a temporary constraint, the physician shall also indicate work operations that the assessed person cannot perform. It cannot be ruled out that a combination of the conclusions of the medical report and the content of the examinations in relation to work will result in the conclusion about the person's state of health or health risk.

[100] More in: ŽUĽOVÁ, J. – MINČIČOVÁ, M. *Posudzovanie zdravotnej a psychickej spôsobilosti na prácu (v podmienkach Slovenskej republiky).* 1. vyd. (*Assessment of medical and mental fitness for work (in the conditions of the Slovak Republic*). 1st ed.) Praha : Nakladatelství Leges, 2021. 116 p.

[101] Processing of personal data of employees in relation to the notification obligation of the administrator pursuant to § 16 of the Personal Data Protection Act. [online]. [cit. 2021-11-21]. Available at: <https://www.uoou.cz/files/stanovisko_2012_6.pdf.> Czech professional literature also adopted this opinion: JANEČKOVÁ, E. – BARTÍK, V. *Ochrana osobních údajů v pracovním právu (Otázky a odpovědi).* (*Protection of personal data in labor law (Questions and answers.)*) Praha : Wolters Kluwer, 2016, p. 107.

Whether these conclusions are accurate or inaccurate, legitimate or illegitimate, or otherwise appropriate or not, the EDPB considers these conclusions to be health-related data. Moreover, as the EDPB states, in order for data to be classified as health-related, it is not always necessary to establish "ill health". Information derived from examinations is considered health-related whether or not the results are within a "healthy" limit. We are of the opinion that personal data concerning health can be both positive and negative information about the ability of a natural person to perform a certain work activity. It is also crucial how this information is further handled in order to identify whether or not the information contains sensitive health-related personal data as defined by the GDPR. However, the intended, potential use must also be taken into account. Where it is possible to derive information on the actual or probable state of health of a natural person, the information should be considered to constitute health-related personal data.

3.1.2 Mental fitness

The health potential of each natural person is made up of two complementary components. Medical fitness and mental fitness. Although both relate to health, their content cannot be fully merged. Very simply put, medical fitness to perform work is tied to a person's physical dispositions, while mental fitness to their mental aptitude and mental level. Medical fitness and mental fitness as prerequisites for work are not identical in the Labor Code, when in Art. § 41 para. 2, it requires the employer to enter into an employment contract with a person who is medically and mentally fit if such skills are required for the performance of work by a special legal regulation.

Mental fitness for work is assessed in a psychological examination. The result of a psychological examination, which assesses the mental aptitude to perform work, is a psychological assessment or proof of mental fitness.[102] In the conditions of the Slovak Republic, persons required to be psychologically tested are those to fill the position of a judge[103], a prosecutor[104] and a bailiff.[105] The purpose of the psychological assessment of job seekers, for example those who seek to perform the function of a judge, is to verify the personal prerequisites, while the

[102] Pursuant to § 88 of Act no. 8/2009 Statutes on Road Traffic as amended.

[103] Act no. 385/2000 Statutes on Judges and Adjuncts as amended; Decree of the Justice Department no. 160/2017 Statutes, which lays down the details of the selection procedure for the position of a judge.

[104] Act no. 154/2001 Statutes on Prosecutors and Apprentice Prosecutors.

[105] Act no. 233/1995 Statutes on Bailiffs and Enforced Collection Activities (Collection Rules) as amended; Decree of the Slovak Justice Department no. 327/2013 Statutes, which lays down the details of the selection procedure for the position of a bailiff.

requirements for the personal prerequisites of such jobseeker are set by the Slovak Justice Department in cooperation with courts and psychologists.[106] An obligatory psychological examination of employees of the railway, tram and trolleybus tracks determines whether the assessed person has cognitive, psychomotor, behavioral and personal abilities enabling them to perform the work safely.[107] Psychological examination of an employee of the Center for Children and Families established pursuant to Act no. 305/2005 Statutes on Social legal protection of children and on social guardianship as amended, i.e., a person that comes into personal contact with children or job seekers interested in such employment, is focused on intellectual prerequisites, personal characteristics of the job seeker, risk factors and personality traits, psychopathological risks, family history with the focus on risky relationships and important events in the family, sources of coping with stressful situations and the ability of self-reflection.[108]

Mandatory or optional psychological examinations are also part of the initial health check. According to Annex no. 7 of the Professional Guidelines of the Slovak Health Department on the content of preventive health checks, a psychological examination, in some cases only indicative, is an obligatory part of the initial health check for the work of an inspection technician of reserved technical pressure equipment; Class I to V boiler operation; repair of Class I to V boilers and pipelines for the distribution of hazardous fluids with a maximum allowable pressure over 1 MPa; for the operation of a mobile jib crane and a jib tower crane; operation of a mobile work platform on a motor-driven chassis, which is intended to be operated on roads and with a lift height of more than 1.5 m; work of inspection technician of reserved technical gas equipment; motor vehicle operators; work at a height of 1.5 m or greater above the ground using special climbing and speleological techniques; scaffolding assembly and disassembly; operation of selected construction machinery and equipment, selected agricultural machinery and equipment and selected forestry machinery; operation of a hand-held chain saw during logging and a hand-held chain saw during other activities, etc. In these cases, however, psychological examinations focus on assessing medical fitness, and the result of such an assessment is then a comprehensive medical report with

[106] Prov. of § 10 para. 1 and 2 of the Decree of the Slovak Justice Department no. 160/2017 Statutes, which lays down the details of the selection procedure for the position of a judge. Examples of such personality prerequisites include facts such as wit, understanding, acumen, creativity, self-knowledge, emotional stability, and the like.

[107] Prov. of § 11 para. 3 of the Decree of the Slovak Department of Transport, Postal Services and Telecommunications no. 245/2010 Statutes on Professional competence, medical fitness, and psychological fitness of persons in the operation of the railway and transport on the railway.

[108] Prov. of § 22 of the Decree of the Slovak Department of Labor, Social Affairs and Family no. 103/2018 Statutes, which implements some provisions of Act no. 305/2005 Statutes on the social legal protection of children and on social guardianship as amended.

the conclusions as described in Chapter 3.1.1, not a separate psychological assessment.

If the prerequisite of mental fitness for work is required by law, the employer is obliged to ensure a psychological examination is available to the job seeker and the job seeker is obliged by law to submit to such examination. While reimbursement of the medical fitness assessment costs is always the responsibility of the employer, the costs of the psychological examination is in some cases borne by the job seeker. For example, pursuant to § 88 of Act no. 8/2009 Statutes on Road traffic as amended, the costs associated with the assessment of mental fitness to drive a motor vehicle shall be borne by the assessed person. If it is necessary for the performance of a job or profession, the costs associated with the assessment of mental fitness in this case may or may not be covered by the employer of the assessed person, too.

Examination of mental fitness, if such prerequisite for performance of work is stipulated by legal regulation, is not contradictory for practice. Employers are much more interested in the possibility of subjecting such job seekers to psychological examinations for jobs for which the prerequisite of mental fitness does not follow from the legal regulation. At the same time, we anticipate an increase in demand for psychological testing of job seekers, because digitization, automation, and robotics also have a significant impact on mental health,[109] and employers will be particularly interested in the adaptive abilities of employees to these situations.

Psychological testing of job seekers at their own expense, i.e., if the mental fitness prerequisite does not follow from the law, may be legal, but provided that the following procedure is observed. As we stated in the introduction to the present Chapter 3, setting certain performance requirements it is in line with the freedom to choose a future employee. Such requirement may also be mental aptitude or a certain numerical, verbal, mechanical ability, speed of perception, spatial vision, etc. In the first step, the employer must select those types of work or work activities in relation to which the requirement of mental fitness will be objectified. The employer may obtain information on the job seeker's mental fitness if such information is really necessary and relates to a specific type of work and work performed within its context. A comprehensive psychological examination ordered indiscriminately to all job seekers, i.e., without taking into account the

[109] DIVÉKYOVÁ, K. Vplyv nových technológií na duševné zdravie zamestnanca. (The impact of new technologies on the mental health of employees.) In *Societas et iurisprudentia*. 2019, Vol. 7, No. 4, pp. 147-164 [online]. [cit. 2021-11-21]. Available at: <http://sei.iuridica.truni.sk/medzinarodny-vedecky-casopis/archiv/cislo-2019-04/vplyv-novych-technologii-na-dusevne-zdravie-zamestnanca/>. See also: DOLOBÁČ, M. Technostres a ochrana duševného zdravia zamestnanca. (Technostress and protection of the employee's mental health). In *Pracovné právo v digitálnej dobe*. (*Labor law in the digital age*.) Praha : Nakladatelství Leges, 2017, pp. 55-64.

types of work and the specific tasks to be performed at the vacancy to be filled, is disproportionate and unjustified. As an example of work and work activities in the framework of which we could imagine the requirement to assess mental fitness are those types of work for which, after assessing working conditions and working environment, a psychological burden factor will be indicated and for this reason will be included in the second risk category. For example, executive and managerial positions, employees working with children, the sick, etc.

In the second step, the employer must ensure the legality of the manner in which the mental fitness information has been obtained. The employer may make a mistake if it chooses an inappropriate way of obtaining or assessing the job seeker's mental fitness. We have in mind, in particular, situations where the employer arranges "psychological examinations" on its own through various psychological tests it has purchased and their evaluation is subsequently carried out by a personnel specialist in charge of selecting future employees. It is necessary to realize that psychological tests are a way of obtaining information about job seekers, which in legal terms means:

- the trait to be revealed by a psychological test must be relevant to the vacancy to be filled;
- test questions must not enquire about the so-called prohibited information (which information is that is described in Chapter 2.2);
- this method of obtaining information is subject to the principles of personal data processing.

Information obtained from psychological tests is health-related personal data and is, therefore, sensitive personal data, the processing of which is generally prohibited, unless there is an exception to this prohibition. In a situation where personal data obtained from psychological tests are processed, the use of three out of ten exceptions may be considered:

1. *the data subject has given explicit consent to the processing of that personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject (Art. 9 para. 2 (a) GDPR);*
2. *processing 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 authorized 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 (Art. 9 para. 2 (b) GDPR);*
3. *processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis,*

the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3 (Art. 9 para. 2 (h) GDPR).

If the employer processes the results of mental fitness assessment, and this is prescribed by a special regulation as a prerequisite, we hold that the exception under Article 1 shall apply to the personal data processing in this case, 9 para. 2 (b), but also Art. 9 para. 2 (h) GDPR. In our opinion, the situation of processing personal data obtained from self-help psychological testing is a bit more complicated. Processing may be necessary for the purposes of assessing working ability under Art. 9 para. 2 (h) GDPR (the employer objectively sets the mental fitness requirement for the vacancy to be filled), but at the same time, the guarantees and conditions under Art. 9 para. 3 of the Regulation. I.e., personal data may in this case be processed only *by an expert, or under the auspices of an expert subject to professional secrecy under Union or Member State law or according to rules laid down by the competent national authorities, or if the data is processed by another person, which is also subject to the obligation of professional secrecy under Union law or the law of a Member State or the rules laid down by the competent national authorities*. The condition for processing health-related data for the purposes of assessing the candidate's work (health and mental) fitness is the legal origin of the duty of confidentiality or professional secrecy for the person who will carry out such processing.[110] Under the conditions of the Slovak legal system, health care workers have such confidentiality obligation (pursuant to § 80 of Act no. 578/2004 Statutes on Health Care Providers, Health Care Workers, Professional Organizations in Health Care as amended). If psychological testing of natural persons applying for a job is carried out by a personnel specialist, we hold that the condition of Art. 9 para. 3 GDPR is not met because the personnel specialist is not subject to a professional duty of confidentiality. In carrying out self-help psychological testing of job seekers, only the express consent of the data subject is considered an applicable exception (Art. 9 para. 2 (a) GDPR) or exception under the scope of Art. 9 of the Regulation on the basis of the fact that the psychological test used will not provide information about the tested person's state of health, which strikes us as a broad concept of health-related personal data promoted by EDPB difficult to fulfill (more details in introduction to Chapter 3). The EDPB's opinion also states that a job seeker's consent to psychological testing may not be valid at all if the employer fails to prove that it has been freely given. Obviously, the option to refuse psychological testing under pre-employment background

[110] BERTHOTY, J. et al. *Všeobecné nariadenie o ochrane osobných údajov*. (*General Regulation on the protection of personal data.)* Praha : C. H. Beck, 2018, p. 261.

checks will not be a completely free choice, as there will always be concerns about not being hired.

Therefore, if an employer opts for psychological testing of potential employees, it should hire an appropriate expert/health professional bound by a professional duty of confidentiality. It will then be entitled to process health-related personal data under an exception pursuant to Art. 9 para. 2 (h) GDPR. Subsequently, the exception from the processing of sensitive personal data is coupled with an appropriate legal basis pursuant to Art. 6 GDPR. Given the doubts about the freedom of job seekers' consent, we consider the most appropriate legal basis for processing of personal data obtained on the basis of psychological tests to be the legitimate interest of the employer 6 para. 1 (f) of the GDPR. This may be, for example, the employer's need to obtain objective information about the natural person applying for the job. In using these legal grounds, however, the employer must not forget to draw up a proportionality test in which it demonstrates that its interests, pursued by the processing operation, outweigh the interests of data subjects.

3.1.3 Pregnancy

In practice, the question often arises as to whether the employer can check with female job seekers whether they are pregnant. This can be done either by asking a direct question about the job seeker's pregnancy, or by ordering her to undergo a gynecological examination. The procedure is justified by the fact that the employer must not employ pregnant women in work that is physically inappropriate for them or harmful to their body. The lists of jobs and workplaces that are prohibited for pregnant women are established in the conditions of the Slovak Republic by Government Regulation no. 272/2004 Statutes establishing a list of jobs and workplaces that are prohibited to pregnant women, mothers until the end of the ninth month following the childbirth and breastfeeding women, list of jobs and workplaces associated with a specific risk for pregnant women, mothers until the end of the ninth month following the childbirth and for breastfeeding women and laying down certain obligations for employers in the employment of such women. The above Regulation of the Slovak Republic Government transposes into its provisions Council Directive 92/85/EEC of 19 October 1992 on Introduction of measures to encourage improvements in the occupational health and safety of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual Directive in the sense of Art. 16 para. 1 of Directive 89/391/EEC), which demonstratively sets out in its Annex no. 1 substances, effects, processes, and working conditions with a certain risk for pregnant women.

We believe that the legal possibility for an employer to ask a job seeker if she is pregnant does not exist. The argument that filling the vacancy with a pregnant

woman is prohibited by law and the employer should be informed of the job seeker's pregnancy so as not to infringe that prohibition will not stand either. This is because respecting the prohibition of employing pregnant women in harmful positions is ensured through examining their medical fitness. Assessment of medical fitness for work is performed on the basis of *ad 1)* assessment of health risk from exposure to the work and the working environment factors and *ad 2)* results of a preventive health check in relation to work. The risk assessment process is the determination of the probability of occupational hazards' and the working environment's adverse effects on the health of employees, and the risk assessment includes assessment of the risk, and this is arranged by the employer. At its workplace, the employer categorizes all jobs in terms of health risks and lists them in the risk assessment (§ 30a para. 3 of the Public Health Protection Act). The risk assessment is made available to the medical examiner, who shall use it to decide whether the job seeker's medical fitness will also include examination to determine the job seeker's possible pregnancy, as this involves working with a factor detrimental to pregnant women. It follows from the annexes no. 2 to 7 of the Professional guidelines of the Slovak Health Department on the Content of preventive health checks that the gynecological examination is usually a part of the examinations within the initial preventive health checks:

- where there is exposure to chemical factors, namely: chromium and cadmium as part of optional examinations;
- where there is exposure to physical factors, namely: hyperbaria, hypobaria as part of the mandatory or optional examination; cold as part of an optional examination.

In the above situations, the job seeker will be required to undergo an initial gynecological examination. In the case of optional examinations, the justification of the requirement to undergo a gynecological examination must be given by the medical examiner. The job seeker's medical fitness or incapacity to perform the work will then follow from the medical report without the employer learning the details of the medical condition that led to such conclusion.

It should also be recalled that a job position is generally not prohibited to a pregnant woman in its entirety, but in most cases it is only a certain detrimental factor or partial task that she is not allowed to perform. Rejecting a pregnant job seeker interested in such position would lead to discrimination on grounds of sex, as confirmed by the Court of Justice of the EU in the case of Mahlburg v Land Mecklenburg-Vorpommern.[111] The claimant, who was pregnant, was denied a permanent nurse 's post where a substantial part of the work was to be performed in the operating theaters. This step was justified by the fact that exposure to

[111] ECJ, Case C-207/98 Mahlburg v Land Mecklenburg-Vorpommern of 3 February 2000.

harmful substances in the operating theatre could harm the child. The European Court of Justice held that, given that the post was permanent, it was disproportionate to deny the applicant that post, as her inability to work in the operating theatre would only be temporary. Although working conditions constraints for pregnant women were permissible, it was necessary to specify what tasks might harm them and could not include a general ban on performing the work.

In conclusion, it can be stated that the initiative on the part of the employer to examine job seeker's pregnancy is an unacceptable practice under the pre-employment background check and employers should not look for any hidden ways to find out about the job seeker's pregnancy.

3.1.4 Drug checks, alcohol checks

Checking whether a job seeker is addicted to alcohol or taking drugs is a very tricky matter. The job seeker usually answers a direct question in the negative, and few admit to such bad habits voluntarily. The method of finding out these facts is then testing. In the conditions of the Slovak Republic, there is no explicit legal regulation that would regulate the employer's ability to test candidates for the presence of addictive substances (alcohol, drugs) and the job seeker's obligation to undergo such testing. If the employer proceeds with the testing on its own, the risk of undue interference with the job seeker's privacy is high. The employer must subject such an interference with the privacy of a natural person to a proportionality test and justify the objectives pursued by the test. If the outcome of substance testing is not relevant to the job performed or does not prevent the job seeker from performing the job properly, the employer's practice of requiring the job seeker to undergo testing will be contrary to the job seeker's right to privacy and the employer should refrain from its intent to test job seekers.

If the employer concludes that substance testing is highly relevant to the job and the vacancy to be occupied and proceeds with testing, it needs to have legal safeguards in place for carrying out such procedure. Information on the use of addictive substances (drugs, alcohol) is sensitive health-related personal data (see Chapter 3.1), and therefore the GDPR regime will apply. To be able to process the test results, the employer must specify an exception for the processing of sensitive personal data pursuant to Art. 9 para. 2 GDPR and subsequently choose the appropriate legal grounds according to Art. 6 para. 1 of the GDPR. Theoretically, testing job seekers for addictive substances could be justified by two exceptions. Pursuant to Art. 9 para. 2 (a) of the GDPR, under which *processing of sensitive personal data is permitted if the data subject has expressly consented to the processing of such personal data for one or more purposes specified.* Or according to Art. 9 para. 2 (b) of the GDPR, where the *processing of sensitive personal data*

is necessary for the purposes of fulfilling the obligations and exercising the special rights of the controller or data subject in the field of labor law and social security and social protection law, to the extent permitted by European Union or Member State law; the law of a Member State providing adequate guarantees for the protection of the fundamental rights and interests of the data subject. We recommend using primarily the second exception. If a job seeker refuses to give explicit consent, the employer may find itself in a bind, as job seekers who refuse to be tested should not automatically be considered drug or alcohol users and be excluded from the hiring process on that basis.[112] Under the second exception, *compliance with labor law obligations* would justify testing job seekers for addictive substances under the employer's general precautionary obligation in the field of occupational health and safety. As the legal grounds for a given processing operation, the employer could use the legitimate interest under Art. 6 para. 1 (f) of the regulation, subsequently justified by the proportionality test (also referred to as the balance test). Testing candidates for substance use would be justified by the proportionality test depending on the nature of the jobs, for which safety is a crucial requirement and an impairment of senses or judgment could have critical consequences. Other rights of data subjects – the tested jobseekers will be ensured by transparent information on which positions the testing is required, the use of certified laboratories for testing, the adoption of measures to protect the tested job seeker's privacy and the possibility for the job seeker to challenge positive test results.[113] If this procedure is followed, it will be legitimate for the employer to exclude from the hiring process a job seeker whose result on addictive substances has turned positive.

3.2 Criminal check

Employers believe that integrity checks will help them avoid hiring job seekers who tend to cheat, steal, and engage in workplace violence.[114]

Pursuant to § 41 para. 6 (c) of the Slovak Labor Code, the *employer must not request information on integrity from a natural person, except in the case of work for which integrity is required by a special regulation, or if the requirement of integrity is required by the nature of the work to be performed by the natural person*. An example of special regulations that require integrity from a job seeker is Act no. 55/2017

[112] ILO: *Management of alcohol- and drug-related issues in the workplace*. An ILO code of practice Geneva, International Labour Office, 1996, p. 56.

[113] *Ibid.*, p. 38.

[114] LEVASHINA, J. – CAMPION, M. A. Expected practices in background checking: Review of the human resource management literature. In *Employee Responsibilities and Rights Journal*, 2009, 21 (3), pp. 231-249. Doi: 10.1007/s10672-009-9111-9.

Statutes on Civil Service as amended, Act no. 552/2003 Statutes on Performance of work in the public interest, Act no. 73/1998 Statutes on Civil Service of Members of the Police Force, the Slovak Intelligence Service, the Prison and Judicial Guard Corps of the Slovak Republic and the Railway Police, Act no. 35/2019 Statutes on Internal Revenue Service as amended, Act no. 138/2019 Statutes on Pedagogical Employees and Professional Employees as amended, Act no. 473/2005 Statutes on Provision of services in the field of private security as amended (Private Security Act), etc.

As follows from the provisions of § 41 par. 6 (c) of the Labor Code, the requirement of a potential employee's proof of integrity may also be set by the employer itself, due to the nature of the work performed. The employer is then obliged to determine the nature of the criminal offenses, or the merits of such, and the degree of fault (intent, negligence), the commission of which would be incompatible with the performance of work at the job to be assigned. The general requirement of a "clean" criminal record is disproportionate. The refusal of a job seeker who has committed an offense unrelated to the work to be performed is a breach of their right of access to employment. The professional literature cited work in which money and securities are handled as the most common example of the legitimacy of an employer's integrity requirement.[115] However, as we have already said, the conviction of a job seeker in this case should be linked to a property crime, not to a conviction for any criminal offense.

In the conditions of the Slovak Republic, integrity is proved by a certificate of good conduct or by a full criminal record issued pursuant to Act no. 330/2007 Statutes on Criminal Register as amended (hereinafter referred to as the Criminal Register Act). Criminal registers are not publicly accessible databases and only the person concerned may request the certificate or the full record. While only unserved and unexpunged convictions are listed the certificate, the full criminal record states all data and information that is kept about the person in the Criminal Register. If the employer establishes integrity as a requirement for the vacancy to be filled, it cannot subject it to the full criminal record. This follows from prov. § 14 para. 3 on Criminal Register, according to which a full record of convictions is issued only for the purpose of proving integrity or reliability under a special law and only at the request of statutory authorized bodies or authorized persons specified in the Criminal Register Act. If the employer does not meet the requirements of § 14 para. 3 (e) of the Criminal Register Act[116], it does not have a legal opportunity to obtain information

[115] BARINKOVÁ, M. Bezúhonnosť zamestnanca. (Good character of employee,) In *Personálny a mzdový poradca podnikateľa*. (*Personnel and payroll consultant of the entrepreneur*). Vol. 21, No. 9-10 (2015), p. 42-54. See also: VALENTOVÁ, K. – PROCHÁZKA, J. – JANŠOVÁ, M. – ODROBINOVÁ, V. – BRŮHA, D. a kol. *Zákoník práce. Komentář*. (*Labor Code. Commentary.*) Praha : C. H. Beck, 2018, p. 71.

[116] E.g., courts, prosecutor's office, civil service, etc.

on expunged convictions of the job seeker. If, as part of the background check, a job seeker is asked whether they have been convicted in the past and whether they have an entry in the criminal record and they would have lied, but their conviction has been expunged, such lie has no legal significance. The job seeker is not obliged to inform the employer of their conviction of a criminal offense if they are treated by law as if they had not been convicted. This would defeat the purpose of expunging the conviction, namely, to eliminate the adverse consequences thereof, which persist after the sentence has been served and may make it difficult for the job seeker to succeed later in life, including in employment.[117]

Verification of the criminal past and collection of data on possible convictions of the job seeker is personal data processing. The data from the criminal register is not included by the GDPR among sensitive personal data, but the processing of personal data concerning pleading guilty of criminal offenses and misdemeanors is set aside to be addressed by a separate regulation in Art. 10.[118] Pursuant to Art. 10 of the GDPR, processing of personal data relating to having pleaded guilty to criminal offenses and misdemeanors is carried out only under the oversight of a public authority or where such processing is permitted by European Union law or by the law of a Member State providing adequate safeguards for the rights and freedoms of data subjects. Thus, if the employer processes the job seeker's criminal integrity, which is not only storage of the paper version of the certificate of good conduct, but also the processing of notes taken from this certificate, and this prerequisite for the job/function to be filled follows from a special regulation, the legal grounds for this processing operation is Art. 6 para. 1 (c) GDPR, i.e., legal license. If the job seeker's integrity is an objective requirement for the vacancy to be filled, this personal data is processed on the basis of the legal grounds pursuant to Art. 6 para. 1 (f) of the GDPR, i.e., based on the legitimate interest of the employer. It would be contrary to the GDPR and the Labor Code for the employer to process information on the job seeker's integrity on the basis of their consent arguing that it processes personal data provided voluntarily. Processing of personal data which cannot be processed (the integrity requirement is not necessary for the vacancy to be filled) will not "be made alright" by the consent of the data subject.

In connection with processing the job seeker's criminal integrity, most frequently processed in practice are certificates of good conduct. That is, whether the HR specialist should keep the originals/copies of the certificates of good conduct or whether it is sufficient for them to make a note of the job seeker's having proven,

[117] Decision of the Supreme Court of the Czech Republic of 21 May 2015, case ref. 21 Cdo 2005/2014.

[118] Prior to the adoption of the GDPR, the professional public was of the opinion that criminal history belonged in the category of sensitive personal data, while clean criminal record did not constitute sensitive personal data. More on the topic in: JANEČKOVÁ, E. – BARTÍK, V. *Ochrana osobních údajů v pracovním právu (Otázky a odpovědi).* 1. vyd. (*Protection of personal data in labor law (Questions and answers.*) 1st ed.) Praha : Wolters Kluwer, 2016, p. 101.

by providing the certificate, that they have met the prerequisite/requirement to perform the work. It should be noted that the certificate of good conduct is out of date on the day following the day on which it was submitted. There is no relevant reason for the certificate of good conduct to be retained by personnel specialists. A note on the fulfillment of integrity prerequisite/requirement and its proof submitted in the form of a certificate of good conduct is sufficient for the intended purpose.[119]

3.3 Anti-terrorist check

Technology and digitization are not the only factors that have a major impact on Generation Z. Global, but also Slovak Generation Z, has been affected by a number of terrorist attacks, especially the terrorist attack of September 11, 2001.

The world has changed since September 11, 2001. The illusion of inviolable security of the world superpower and its allies has collapsed, and it has become clear that terrorism is capable of posing a continuous global threat.[120] From this moment onward, security and its assurance in various areas of social and working life has become not only the social responsibility but also a necessity. For almost twenty years now, states have been taking various precautionary measures to protect against an enemy who is fighting in an unpredictable way, failing to respect international law and ignoring fundamental human values. The European Union Report on the Situation and Trends in Terrorism (TE-SAT) 2020, published on 23 June 2020, states that the terrorist threat remains high in the European Union. The data collected for 2019 show that:

- A total of 119 foiled, failed and completed terrorist attacks were reported by a total of 13 EU Member States;
- 1 004 individuals were arrested on suspicion of terrorism-related offenses in 19 EU Member States, with Belgium, France, Italy, Spain and the UK reporting the highest numbers;
- Ten people died because of terrorist attacks in the EU and 27 people were injured.[121]

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[119] See also: VALENTOVÁ, T. – HORECKÝ, J. – ŠVEC, M.. *GDPR v pracovnoprávnej praxi. Ako byť v súlade s nariadením o ochrane osobných údajov*. (*GDPR in labor law practice. How to comply with the Data Protection Regulation.*) Bratislava : Wolters Kluwer. 2020, p. 106.

[120] ZAUŠKOVÁ, A. et al. Problems of innovative thinking advocacy within the christina doctrine. In *European Journal of Science and Theology*. Vol. 10, No. 3, 2014, pp. 81-87.

[121] EUROPEAN UNION TERRORISM SITUATION AND TREND REPORT 2020. European Union Agency for Law Enforcement Cooperation 2020. [online] [2020-11-28]. Available at: <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020>.

These events have contributed to greater caution.[122] The state, or a transnational grouping such as the European Union, has mechanisms in place to adopt various restrictive measures to combat terrorism, which are then reflected in areas that are not primarily related to the fight against terror. The measures are taken from the position of public authorities and within the framework of state coercion, they may be enforced through sanctions for non-compliance. In order to protect the public interest, the security measures regularly aim to restrict freedom and interfere with fundamental human rights and freedoms. However, subordination of human rights to the interests of security is perceived with great sensitivity.[123] In many cases, the blame falls on failure to protect the borders and opinions are voiced that sacrificing human rights to fight terrorism does not correspond to the real struggle with this threat to freedom and security, but that it has rather became a tool for fulfilling egocentric (mostly political) interests of states.[124] It is then necessary to consider very carefully what role or position the private sector can have in this fight, how it can be helpful in this respect and whether in some cases it is no longer only extra work with the aim of pursuing other (own) goals.

In application practice, in the last few years (especially after the adoption of GDPR), we have come across a question[125] of whether the employer may check whether job seekers interested in working for it have been involved in a terrorist act or have sympathized in any way with demonstration of such violence in their private life or did so in their previous professional career.[126] The issue in question is becoming so serious that it may be the cause of the employer's restricted pur-

[122] IORGULESCU, M. CH. Generation Z and its perception of work. In *CrossCultural Management Journal*. No. 1, pp. 47-54. [online]. [2020-28-11]. Available at: <https://EconPapers.repec.org/RePEc:cmj:journl:y:2016:i:9:p:47-54>.

[123] ZAUŠKOVÁ, A. – BOBOVNICKÝ, A. – MADLEŇÁK, A. How can the state support the innovations to build sustainable competitive advantage of the country. In *Serbian journal of management*, 2013, Vol. 8, No. 2, pp. 255-267.

[124] Compare: KUPSA, J. Možnosti aktivních preventivních opatření k omezení hrozby terorismu. (*Possibilities of active preventive measures to reduce the threat of terrorism.*) In BLAHOŽ, J. *Lidská práva a právní politika boje proti terorismu*. (*Human rights and legal policy in the fight against terrorism*.) Praha : Vysoká škola aplikovaného práva, 2008. 460 pp.

[125] The issue in question is present especially for employers in industrial sectors (automotive industry, metallurgical industry) and logistics, i.e., for employers where the investors themselves come directly from the countries mentioned, or sales of their products and services to these countries account for a significant portion of their business.

[126] Increased demand for anti-terrorist screening of jobseekers is described as one of the main consequences of the 9/11 attacks on HRM. To this: KONDRASUK, Jack N. The Effects of 9/11 and Terrorism on Human Resource Management: Recovery, Reconsideration, and Renewal. In *Employee Responsibilities and Rights Journal*, 2004, Vol. 16, No. 1. [online] [2020-11-28]. Available at: <https://www.cstsonline.org/assets/media/documents/workplacepreparedness/KondrasukJN_Effects911HumanReso.pdf.>

suit of its business activity. Conducting anti-terrorist screening is often one of the basic conditions for an employer to be able to apply for commercial contracts with businesses incorporated in the United States of America or Israel. Quite often, however, we also encounter a situation where the requirement is included in the so-called due diligence or the rules of conduct of suppliers of a particular company, in addition to the obligation to implement rules related to anti-corruption measures and anti-bribery measures, including setting appropriate procedures to prevent the receipt of commissions and defining the principles of gifts or benefits, and the applicant for a commercial contract must declare that its internal processes and procedures are compliant with those requirements.[127] In an effort to satisfy such business partner, employers try to implement anti-terrorism screening in their internal processes, but often without a deeper examination of the impact on the rights of the persons concerned and without its deeper integration into the employer's internal environment. For example, in the conditions of the Slovak Republic, these could conflict with the competencies of employee representatives in implementation of the control mechanism or with the employer's ability to process such information about a potential employee at all.

Assessing the compatibility of anti-terrorist check with labor law legislation and legislation in the area of personal data protection a systematic legal analysis of the scope of information the employer may collect and further process about the candidate in the process of filling the vacancy.

Anti-terrorist checks most often consists of checking whether the jobseeker's name is on the list of globally maintained terrorists databases or also going through the job seeker's digital footprint, especially the one he leaves on social networks. In view of the above, it is indisputable that the anti-terrorist screening itself, as well as other processes constituting a part thereof, are processes in which personal data are processed. In accordance with Art. 4 point 2 of the GDPR, the search for information on candidates, collection, organization ... verification of this information is a processing operation that concerns personal data, and is, therefore, subject to the legal regime of the GDPR. The aim of anti-terrorist checks of jobseekers is to prevent terrorism and maintain security by employing only an individual who has not been identified as participating in any terrorist-related activities or who cannot be expected to act or express himself in this regard at all. The aim is, therefore, to prevent such persons from accessing strategic occupations such as working at airports, in public services (energy, information and communication systems, armaments industry, transport), etc. Persons who have been identified as being involved in terrorism or other serious crimes related thereto, as

[127] NOVÁČKOVÁ, D. et al. Financial crime in economic affairs: case study of the Slovak Republic. In *Juridical Tribune - Tribune Juridica*, 2020. Vol. 10, pp. 142-163.

well as persons who could, in theory, later, using the means of employers, assist in these activities, or disseminate information about them. The purpose of screening is, on the one hand, prevention and security of public order, but also protection of fundamental human rights and freedoms. Secondarily, however, anti-terrorist screening is also used to assess possible harm to the employer's interests, especially from employees in managerial positions and positions that come into contact with the employer's business partners, and any action by such an employee could theoretically not only damage the employer's repute, but also interfere with its internal or external communication, chances of winning new business contracts, etc.[128] The goal or purpose thus determined can be considered legitimate, but attention must be paid to the lawfulness of the means and manners by which it is achieved. Proportionality to the resulting consequences must also be considered. The right to personal data protection and the right to free access to employment are at stake.[129]

As we have said, each processing operation should be dealt with from an appropriately chosen legal basis. Art. 6 of the GDPR provides in simplified terms the following six legal bases: (i) consent of the data subject, (ii) processing is necessary for contract performance or for implementation of pre-contractual measures; (iii) compliance with a legal obligation; (iv) protection of vital interests of data subject; (v) pursuit of public interest; (vi) legitimate interest. Through the application of the exclusion method, it can be concluded that the most appropriate legal basis applicable to personal data processing in the framework of anti-terrorist screening appears to be the legitimate interest, even if the legal basis provided in Art. 6 par. 1 (c) of the GDPR "processing is necessary for compliance with a legal obligation to which the controller is subject," would be the most legally certain. First, however, let us deal with the exclusion of some of the legal bases mentioned above.

In our opinion, it is inadmissible for the processing of personal data in the framework of anti-terrorist screening to take place with the consent of the natural person applying for employment. As in the processing of the employee's personal data, there can be doubts about the real freedom of expression, as there is a clear imbalance between the employer and the job seeker.[130] Fear of a natural person applying for a job from failure in the selection process deprives them of this will. If the data subject does not have real or free will or cannot refuse or revoke consent without fear of adverse consequences, consent shall be deemed not to have

[128] HITKA, M. et al. Knowledge and Human Capital as Sustainable Competitive Advantage in Human Resource Management. In *Sustainability*, 2019, Vol. 11, No. 18, Article Number 4985.

[129] ZORIČÁKOVÁ, V. Agreement on withdrawal in labor relations and limits of labor law regulation. In *Central European Journal of Labor Law and Personnel Management*, 2019, Vol. 3, No. 2, pp. 18-30.

[130] In more detail: Guidelines for consent under the General Regulation on Personal Data Protection no. 2016/679 of 10 April 2018. [online] [2020-11-28]. Available at: <https://www.uoou.cz/assets/File.ashx?id_org=200144&id_dokumenty=31896>.

been given. Non-freedom of consent makes it non-existent, which means that the employer processes personal data without a legal basis.[131] It should also be borne in mind that if the processing were nevertheless carried out on the basis of the consent and the data subject refused to give the same, the employer would prevent itself from achieving the purpose pursued by such anti-terrorist screening.

The surest legal basis to apply to any processing operation is compliance with a legal obligation. In order to establish the legal basis in question for making a processing operation legal, the processing needs to satisfy the necessity of carrying out an obligation imposed by law, for which the controller is objectively held liable. The literature differs on whether this legal basis also covers the permitted possibility of processing, or only an explicit obligation to process.[132] If this legal basis subsumes only the legal obligation of processing, it is necessary to rely on another legal basis, either on the public interest (Art. 6 par. 1 (e) of the GDPR) or on the legitimate interest (Art. 6 par. 1 (f) of the GDPR). The basis for processing personal data to fulfill a legal obligation of the controller must be laid down in the law of the European Union or in the law of the Member State applicable to the controller. It must be said here that the European Union anti-terrorism legislation[133] does not have an explicit obligation on the employer to carry out such anti-terrorist screening. The Union anti-terrorist regulation implicitly infers the principle of prohibition of aiding, according to which it may be prohibited to receive, employ or pay salaries to suspected terrorists.[134] In order for an employer to do so, it is essential to subject job seekers and employees to anti-terrorist scree-

[131] NULÍČEK, M. – DONÁT, J. – NONNEMANN, F. – LICHNOVSKÝ, B. – TOMÍŠEK, J. *GDPR Obecné nařízení o ochrane osobních údajů. Praktický komentář.* (*GDPR General Regulation on the protection of personal data. Practical commentary.*) Praha : Wolters Kluwer, 2017, pp. 231-239.

[132] *Ibid*., p. 240.

[133] Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organizations, Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442 / 2011, Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010, Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them and Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) 'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402 / CFSP.

[134] The so-called prohibition of aid principle has been laid down in the EU anti-terrorism regulations. According to this principle, it may be prohibited to hire, employ or pay wages to suspected terrorists. Dr. Annette Demmel: ANTI-TERRORIST SCREENING OBLIGATIONS Employers on the Horns of a Dilemma. [online] [2020-11-28]. Available at: <https://www.squirepattonboggs.com/~/media/files/insights/publications/2015/01/anti-terror-2/antiterrorscreeningsalert.pdf.>.

ning. Applicability of the legal basis under Art. 6 par. 1 (c) of the GDPR is thus a matter of legal interpretation. If we lean towards the fact that this legal basis subsumes not only a legal obligation, but also the legal admissibility of personal data processing, the basis for such processing is laid down in the European Union law. However, we must draw attention to the fact that in this respect the Union law does not differentiate between individual categories of employees and does not take into account, e.g., the amount of the staff member's salary as a relevant element of any aid aimed at supporting or disseminating information about the terrorist movement. Thus, taking into account an employee whose income from the employer is objectively marginal, it is questionable whether an anti-terrorism screening can be carried out in the light of the interference with the rights of the data subject. It should be borne in mind that any processing of personal data, albeit on the legal basis of a legal obligation, must be necessary. If we conclude that the implementation of anti-terrorist screening can be applied to any job seeker without taking into account the nature of the work performed, the employee's inclusion in the employer's organizational structure and their real ability to support a terrorist movement in any way through their own salary or work, we find ourselves contradicting the GDPR, as the processing of personal data without taking these aspects into account will not be necessary.

On the contrary, if the interpretation of Art. 6 par. 1 (c) of the GDPR is restrictive, it is necessary to look for another legal basis for anti-terrorist screening. Particularly, consideration can be given to the public interest (according to Art. 6 par. 1 (e) of the GDPR), which, however, serves primarily for the processing of personal data by public authorities, or may also be used by private law entities if they are entrusted with the performance of a certain task of a public authority. Employers in the private sector may process personal data in the context of this processing operation under the legal basis pursuant to Art. 6 par. 1 (f) GDPR, i.e. "processing is necessary for the purposes of legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data." This is the most flexible legal basis but linked to other obligations of the employer. The controller may not process personal data under this legal basis if the interests and/or fundamental rights and freedoms of the data subjects whose personal data are to be processed outweigh the legitimate interest. It follows that, before processing personal data on that legal basis, it is necessary for the controller to assess the legitimate interest defined thereby, both in terms of its legitimacy and in terms of whether the interests of the data subject outweigh those interests. It happens in the so-called balance test and only its positive result, i.e., the conclusion that the legitimate interest pursued by the employer is indeed justified and does not outweigh the interests of the data subject, entitles the employer to use this legal

basis. As part of the assessment, the employer should always answer the question before processing personal data on this legal basis whether the data subject can reasonably expect, at the time and in the context of the collection of personal data, that its processing can take place for that purpose. At the same time, it is necessary to assess the legitimate interest of the controller always in the light of a specific purpose of processing with regard to the specific job position and the scope of personal data that the employer is to process. If the employer hires airport staff, it is in its legitimate interest to carry out anti-terrorist screening of job seekers, because there is a legitimate and factual reason for such processing in the nature of the work. If hiring concerns supermarket staff, achieving a positive balance test result will be very difficult, if not impossible. In our view, the argument used in the balance test that the income provided for the performance of work could be used to finance terrorist activities, and therefore should not be provided, cannot stand. The use of income from any employment for funding terrorism is too hypothetical and disproportionately restricts the right of access to employment and, in general, the right to work. The fight against funding terrorism is a crucial aspect of the fight against terrorism, but it is inappropriate to conclude that anti-terrorist screening by employers is permissible for the purpose of filling any vacancy.

A possibility that the legal eligibility or obligation to conduct anti-terrorist screening of a job seeker may be regulated also by national legislation needs to be accounted for as well. As we have already stated, pursuant to Art. 11 and § 41 par. 5 and 6 of the Labor Code and § 62 par. 3 of the Employment Services Act, the employer may request from a natural person applying for a job and subsequently collect only information about it that is related to the work to be performed.[135] The employer may not actively obtain information that the employer may not request from a natural person, either by itself or through third parties. If non-work-related information has also been provided by the job seeker, it may not be subject to screening or any other processing. Anti-terrorist screening of job seekers is thus not a prohibited practice in the conditions of the Slovak Republic either but must have a factual connection to the work that will be performed in the vacancy to be filled.

A legal option of checking whether the job seeker has not committed the crime of terrorism in the conditions of the Slovak Republic[136] is to request information from them on their integrity in form of criminal records (see Chapter 3.2 for

[135] OLŠOVSKÁ, A. et al. Okamžité *skončenie pracovného pomeru*. (*Termination of employment Termination of employment with immediate effect.*) Bratislava : Wolters Kluwer, 2020, 104 pp.

[136] According to the Slovak Criminal Code, the offenses of terrorism are the crime of establishing, conspiring and supporting a terrorist group, the crime of terror, the crime of terrorist attack, the crime of certain forms of participation in terrorism, the crime of terrorist funding, the crime of traveling for terrorism and crime-specific motive, i.e., with the intention to commit one of the terrorist offenses.

more details), if the requirement of integrity is required by the nature of the work to be performed by the natural person. The second theoretical option is to establish a "clean personality profile"[137] as a requirement for the performance of work in the vacancy to be filled in the employer's internal regulations. In accordance with Slovak legislation, it is possible for an employer to fill vacancies with candidates who meet the requirements set by the employer. Of course, the employer must bear the burden of proof and justify the inclusion of a certain trait, ability, personal characteristic in the requirements for the performance of work, i.e., it must be able to prove a causal link between the nature of work performed (agreed type of work, job position, conditions of filling the job position) and obtaining certain data. For certain types of work, it is thus possible to require special abilities or personality characteristics of the employee, e.g. verbal, mathematical, mechanical skills, performance, concentration, etc., but also eventual absence of contacts with defective persons, or absence of listing on the anti-terrorist list as a requirement for work performance, provided that this requirement is really needed and necessary and related to the specific the type of work and the activity carried out as a part of it. With respect to the above, however, we consider that the inclusion of anti-terrorism screening among the requirements for filling a position in that context should be more burdensome for the employer in relation to objectifying the need to verify this information with the employee, as there is a significant risk of infringing the rights of data subjects, in particular the right to privacy. Also as a result of this fact, we believe that such a requirement could be demanded by employers of no less than the managers working right under the executives or of employees whose nature of work might pose a possible risk to the legitimate interests of the employer, e.g., in relation to damage to its reputation, proceedings against business partners and to the establishment and acquisition of business relationships, etc. However, the inclusion of such a requirement when filling a vacancy would, in our opinion, be out of proportion for a traditional employee without contacts with the employer's business partners, in the absence of contact with representatives from other countries, etc.[138]

Given that it is possible for the employer to set requirements with respect to how the job to be assigned be performed, we believe a suitable legal basis for the processing of personal data in this case is not the employer's legal obligation, but its legitimate interest under Art. 6 par. 1 (f) of the GDPR. In a broader legal framework,

[137] This term usually conceals an investigation into the employee's various contacts with a problematic person; persons who are politically exposed, persons who are, e.g., investigated for various offenses, but also, e.g., listed on anti-terrorist lists, or checking possible manifestations of support expressed by a natural person with various terrorist groups, attacks, movements, etc.

[138] KUPEC, V. – KRETTER, A. Measurement of data attributes. In *Communication today*, 2013, Vol. 4, No. 1, pp. 106-116.

proponents of the theory that the legal basis under Art. 6 par. 1 (c) of the GDPR comprises not only a legal obligation, but also a legal eligibility, could argue by referring to Article 11 of the Basic Principles of the Labor Code, which lists the types of information and data that an employer can process about an employee (or a job seeker). These are personal data relating to the employee's qualifications and professional experience and data which may be relevant to the work which the employee is to perform, performs or has performed. The issue of information about the candidate subject to anti-terrorist screening could fall within the scope of information that may be relevant to the work that the employee is to perform. The assessment of whether such information is of such nature is at the sole discretion of the employer,[139] who must also be able to bear the burden of proof that it is entitled to collect and process such data under either of the legal bases of Art. 6 par. 1 of the GDPR. Regardless of the legal basis chosen by the employer, the need to process personal data will have to be demonstrated on a causal link between work performance and the specific data that the employer has processed on the employee under the anti-terrorism screening. The scope of this data will vary depending on the work performed, as the scope of relevant information that the employer needs to collect will also be given by the complexity (difficulty) of the type of work performed, the place where the work is performed, or by possible use of devices or tools for carrying out work, etc.

For the sake of completeness, we would like to emphasize that anti-discrimination legislation must also be taken into account when setting the conditions for the implementation of the anti-terrorist checks. It would be contrary to this legislation for an employer to act if only persons of a certain race or members of a minority were subject to check. For example, focus on radicalization has led to stigmatization of the Muslim community, but also of refugees and migrants in general. Doubling down on employer's preventive measures in the form of anti-terrorist screening aimed only at certain job seekers, deliberately selected from these groups, is based on prejudice and is not legally consistent with general anti-discrimination legislation.

Official lists of persons drawn up for this purpose may be considered a suitable source for anti-terrorist screening in order to detect unwanted terrorist behavior. Various measures are being taken at European Union level to combat terrorism, such as improving the exchange of information, strengthening controls at external borders, preventing online radicalization, improving firearms controls, digitizing judicial cooperation and criminalizing terrorist offenses and preventing terrorist funding. Joint efforts in the fight against terrorism, especially in the last two areas mentioned, have resulted in compilation of a terrorists list. This list of persons, groups, and entities involved in terrorist acts, subject to restrictive measures, was drafted by the European Union as early as December 2001 as its counter-terrorism

[139] KLJUČNIKOV, A. – MURA, L. – SKLENÁR, D. Information security management in SME´s: factors of success. In *Entrepreneurship and Sustainability Issues*, 2019, Vol. 6, Nr. 4, pp. 2081-2094.

response to the attacks of September 11, 2001. The list was made to implement the UN Security Council Resolution 1373 (2001) adopted pursuant to Chapter VII of the UN Charter. To this end, the Council adopted Common Position 2001/931/CFSP (17) and Regulation No. 2580/2001 (18). This list includes persons and groups operating both inside and outside the European Union. The list is periodically reviewed, not less frequently than every 6 months. The last revision of the list dates back to 5 February 2021, covering the next six months.[140]

What should be borne in mind is that personal data are processed by searching the list and further checking the candidate's information on the Internet, i.e., this activity must be further legally assessed under the GDPR. The fact that personal data are in the public domain is irrelevant. Before adoption of the GDPR, we had a legal basis in the Slovak Republic, according to which the controller could process personal data without the consent of the data subject if personal data that had already been published in accordance with the law were processed and the controller duly marked them as originating from public domain. Personal data published in accordance with the law could be deemed personal data published by the data subjects about themselves and personal data that is legitimately publicly available to anyone.[141] However, it was not clear whether the information published on social networks, i.e., on a publicly available domain, acquired a public character in making the content of the information available to anyone, or maintained its personal (private) character.[142] The adoption of the GDPR has removed the controversy. The processing of publicly available information is like processing any other information. The employer must choose an appropriate legal basis for the processing of publicly available information and inform the data subject of this processing operation within the meaning of Art. 13, or 14 of the GDPR. An appropriate legal basis for processing of personal data obtained by checking a potential employee's background against publicly available sources on the Internet is a legitimate interest under Art. 6 par. 1 (f) of the GDPR.

3.4 Credit checks

Checking the credibility and riskiness of business partners, customers, buyers or suppliers has become a common part of business. Information on economic

[140] Point 4 COUNCIL REGULATION (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

[141] MATEJKA, J. *Internet jako objekt práva: hledání rovnováhy autonomie a soukromí.* (*The Internet as an object of law: seeking a balance between autonomy and privacy*). Praha : CZ.NIC, 2013, p. 100.

[142] ŽUĽOVÁ, J. Používanie sociálnych sietí pri výbere zamestnancov (z pracovnoprávneho hľadiska). (Use of social networks in the selection of employees (from an employment point of view.)) In *Justičná revue: časopis pre právnu teóriu a prax.* (*Judicial Review: a journal for legal theory and practice*) 2016, Vol. 68, No. 6-7, pp. 729-736.

results[143], debts, forced collections and other risks is obtained from publicly available sources and checked. By analogy, employers have also become interested in the credibility of potential employees. They believe that credit checks will help them avoid recruiting job seekers who appear untrustworthy, unreliable or prone to stealing. Thus, carrying out credit checks is based on prejudices that candidates with high credit scores are better employees, while candidates guilty of financial indiscretions are more likely to engage in counterproductive work behavior. No decision, not to mention a decision to hire, should be based on prejudice. In addition, empirical studies also provide conflicting findings on the relationship between performance at work and credit checks.[144]

Despite this, many HR specialists resort to checking job seeker's financial standing. In the conditions of the Slovak Republic, it is a relatively common practice to ask the job seeker about enforcement of an injunction (forced collection) with respect to their wages and deductions therefrom. An affirmative finding often leads to the exclusion of the job seeker from the hiring process. At the same time, unreasonable assessment of a person's suitability according to whether they have been subject to forced collections is often discriminatory and leads to a violation of the equal treatment principle. In application practice, job seekers burdened with forced collection and mandatory deductions are often perceived as not quite ideal also because they bring an administrative burden to the future employer. If the employer hires a job seeker who is subject to forced collection by deductions from wages, it is the new employer who is obliged (by law) to implement subsequent deductions from wages until the amount due is repaid. The obligation to make deductions follows from Act no. 233/1995 Statutes on Bailiffs and Enforcement Activities (Enforcement Code) as amended (hereinafter referred to as the Enforcement Code), which considers the employer to be the payer of the wage, who must make deductions. This fact usually justifies the need to have knowledge of the job seeker's forced collections. What should be noted, however, is that time has not become "ripe" to process such information within hiring.

If the employer has a legal obligation to make deductions from wages, it must know such deductions exist, or it must be aware that there are some deductions to be made from the employee's wages. During the term of employment (if an obligation to make deductions from the employee's salary arises), the employer

[143] In the conditions of the Slovak Republic, for example, the Business Journal, the list of debtors published by the Social Security Agency, the list of debtors published by health insurance companies, the register of financial statements, the list of defaulters on value added tax, the list of tax defaulters, etc.

[144] BERNERTH et al. (2012) found a positive relationship between task performance and credit scores. Bryan and Palmer (2012) found no relationship between the various indicators of poor credit and performance ratings. LEVASHINA, J. – CAMPION, M. A. Expected practices in background checking: Review of the human resource management literature. In *Employee Responsibilities and Rights Journal*, 2009, 21 (3), p. 240.

shall learn about the ordered deductions from wages under a collection injunction. If the employee's income had been subject to deductions from wages before the employment was established, then the employer should learn about the obligation to make deductions from the employee – the job seeker directly, or from the certificate of employment issued by the former employer. § 84 of the Collection Rules imposes an obligation on the employer to actively ascertain whether deductions from the employee's wages are being made.[145] The entity hiring the employee (the new employer) is obliged to request from the job seeker a certificate issued by the entity with whom they last worked (previous employer), whether the enforcement of the injunction by deductions from wages has been ordered, by which court and on whose behalf. Each employer is obliged to issue such a certificate to an employee who has stopped working for it, and it is a mandatory part of the employment report (so-called certificate of employment history), which the employer must issue upon termination of employment according to § 75 of the Labor Code. The above is followed by § 41 para. 5 of the Labor Code, according to which the employer may request an employment report from a natural person who has already been employed, i.e., the employment report, issued by their last employer, which contains information on the deductions made from wages. If the new employer finds that enforcement of injunction has been ordered for deductions from the employee's wages, it shall notify the bailiff who issued the enforcement injunction without delay. The bailiff shall demonstrably serve the entity with whom the debtor has entered into employment an injunction for the commencement of forced collection and a forced collection injunction pursuant to § 67 and § 68 of the Collection Rules. The bailiff shall inform the employer of the course of collection to date, in particular the amount of deductions made so far, state the amount of the claim for the satisfaction of which deductions are to be made and what is its order, and instruct it to continue making deductions from the wages of the liable party as of the day the injunction is served upon it and shall warn it of all its obligations in carrying out the forced collections by means of deductions from wages. If the employer (as a payer) fails to make deductions or fails to ask the employee about its obligation to make deductions at all (whether out of ignorance or with the intention of avoiding administrative burdens), and thus fails to fulfill the obligation specified in § 84 para. 1 and 2 or in § 85 para. 2 of the Collection Rules, the creditor may claim at the general court of the payer that the court enforce payments to the creditor by the employer in the amounts to which the creditor would

[145] The provision of § 84 para. 1 of the Collection Rules reads: "An entity that hires an employee is obliged to request the employee submit a certificate issued by the person with whom the employee was last employed, whether a forced collection injunction commencement or forced collection injunction has been issued, by which bailiff and on whose behalf. Every employer is obliged to issue such a certificate to an employee who has ceased working for it."

have been entitled if the payer had fulfilled the said obligations. For failure to fulfil the obligations specified in § 84 and § 85 of the Collection Rules, the court may, at the request of the bailiff, impose a disciplinary fine on both the debtor and the payer of wages. Information on forced collections or deductions made from the employee's wages is therefore important for the employer to enable it to fulfill the legal obligation to make deductions from wages according to the Collection Rules.

However, it is not possible to agree with the practice that the verification of information on whether or not forced collection by means of deductions from wages has been imposed on the job seeker is a part of any of the hiring stages. In pre-contractual relations, employers can only check facts that are closely related to the establishment of a basic employment relationship, i.e., they can identify the circumstances decisive for entering into an employment contract and the establishment of an employment relationship. Wage deduction is not a real obstacle to any dependent work. In summary, therefore, the employer can find out whether the employee is subject to enforced collection or not for the purpose of fulfilling its legal obligation to make deductions from wages, but only after the employment relationship has started.

3.5 Social media screening

Verifying information about prospective employees from publicly available sources, typically from social networks, is currently cheap and affordable. User profiles on social networks provide sufficient personal and behavioral data that can play a role in selecting a future employee. Comments on events, published photos, posts, group memberships, spelling level of communication, lifestyle presentation have a more transparent meaning for the HR specialist than a résumé or a cover letter, as according to various available internet surveys, many respondents admit that they deceive in their résumés. Personnel specialists confirm that based on the internet (digital) trace, an individual may be invited to a job interview or even recruited, but also rejected or unnecessarily disadvantaged, although it may later turn out that the information provided had been distorted or even untrue.[146] Employers even feel entitled to monitoring social networks of job seekers in order to avoid mistakes in the selection of employees.[147]

Checking information about a job seeker on a social network is not *a priori* illegal, but it is a slippery slope that can easily become such. Obtaining relevant data on a potential employee is subject to the fact that it is the natural person who provides a certain amount of data about themselves. In this context, it needs to

[146] Compare: BÖHMOVÁ, L. – PAVLÍČEK, A. Personalistika a budoucnost sociálních sítí v ČR. (Human resources and the future of social networks in the Czech Republic.) In *Scientific Papers of the University of Pardubice. Series D, Faculty of Economics & Administration*, 2013. Vol. 20, No 27, p. 14-22.

[147] MITRAN, A. Using social networks for staff recruiting. In *Romanian Journal of Journalism & Communication (Revista Româna de Jurnalism si Comunicare)*. Vol. 5., No. 2/2010, pp. 59-69.

be pointed out that a certain "basic" data set will be provided knowingly when registering on the social network, but a significant part of the data about one's personality and the private world is provided as if "unconsciously". By leaving a digital footprint, and thus searching for topics of interest, automatically backing up photos on remote servers, "liking" posts, and so on. Through their own activity, prospective job seekers thus allow the employer to create a comprehensive profile about them within the pre-employment background check. From shared (or automatically backed up) photos, "likes", search words and other patterns of online behavior, the employer can get a sufficient idea of the user's health, their circle of friends, their religion, political beliefs, sexual orientation and more.

In order to ensure that the HR specialist does not obtain information that is unrelated to the work performed at vacancy to be filled, one should limit the sources of search for one's person. Creating a user profile on a social network is done primarily for the purpose of spending one's free time there, and therefore, the users legitimately expect that such activity will be separated from work life and its content will not permeate it.[148] For example, Facebook did not originally serve as a professional network, but as a connecting link among friends. The HR specialist should, therefore, limit their search for information on job seekers for screening purposes only to such social networks and such content that is related to public presentation of the job seeker's person, or a social network profile has been created directly for the purpose of presenting work skills. (LinkedIn).

Due to the fact that the verification of information about the job seeker results in the processing of personal data, this activity must be further legally treated according to the GDPR. As we have already mentioned in Chapter 3.3., the fact that personal data is publicly available shall make no difference. The processing of publicly available information is like processing any other information. The employer must choose the appropriate legal grounds for the processing of publicly available information and inform the data subject of this processing operation within the meaning of Art. 13, or 14 of the GDPR. Appropriate legal grounds for processing personal data obtained by checking a prospective employee's background against publicly available sources on the Internet is the legitimate interest under Art. 6 para. 1 (f) of the GDPR. Processing under the consent of job seekers is not recommended as their consent will not be free. Motivated by an interest to get a job, they would give their consent to the employer regardless of their free will.

Social media screening is primarily used to obtain and verify information about job seekers, subsequently this method is also used to screen the behavior of employees

[148] THOMAS, S. L. – ROTHSCHILD, P. C. – DONEGAN, C. Social Networking, Management Responsibilities, and Employee Rights: The Evolving Role of Social Networking in Employment Decisions. In *Employ Respons Rights Journal*, 2015. No. 27, pp. 307-323.

already hired. Less frequently, although this cannot be absolutely ruled out and this is usually done on some stimulus or suspicion, screening is used to verify the behavior of the unsuccessful job seeker. In this regard, the employer is primarily interested in negative statements damaging the company's name, describing internal selection procedures when filling a vacancy and other facts threatening its legitimate interest.

Any discussion of the assessment of the unsuccessful job seeker's conduct, which consists of sharing various content of the hiring process on social networks without the employer's consent or without its knowledge, must be assessed through the prism of the job seeker's[149] existing or non-existent obligation to refrain from such conduct. The main and implicitly enshrined principle of the regulation of private (and employment) relations is the principle *of neminem ledere* (not to harm anyone), which by its nature also shapes the behavior and actions of job seekers. In accordance with this principle, it is thus the job seeker's obligation to refrain from any conduct that could damage the employer's reputation or its position in a competitive economic market (e.g., theft or misuse of information). However, the conduct of a job seeker who shares internal content of the communication or even the employer's regulations on social networks may also be included in this category if the content of this communicated information is capable of causing it harm, e.g., in the form of a reduction in the value of its shares on the stock exchange, a deterioration of its reputation with its clients and subcontractors or the general public. However, appearing inadmissible is also such action, where the content of information shared on social networks consists of modified or fictional information, the aim of which is a clear attempt to harm the employer. Nor does such conduct justify whether the job seeker acted negligently in that way, i.e., they did not know or could not have known that the information shared did not contain objective facts. The amount of any damages will depend on the circumstances of the individual case, i.e., what specific information the job seeker shared on social networks,[150] the degree of its confidentiality in the employer's system and, of course, what potential threat or damage to the employer's interests have occurred.

[149] JÁNOŠOVÁ, D. Právne aspekty internetu. (Legal aspects of the Internet.) In *Možnosti a nebezpečenstvá komunikácie na internete.* (*Possibilities and dangers of communication on the Internet*.) Trnava : Fakulta masmediálnej komunikácie UCM v Trnave, 2014. pp. 75-97.

[150] HLADÍKOVÁ, V. K niektorým otázkam informačnej a vedomostnej spoločnosti. (On some issues of the information and knowledge society). In *QUAERE 2017: recenzovaný sborník příspěvků vědecké interdisciplinární mezinárodní vědecké konference doktorandů a odborných asistentů.* VII. (QUAERE 2017: peer-reviewed proceedings of the scientific interdisciplinary international scientific conference of doctoral students and assistant professors.) Hradec Králové : Magnanimitas, 2017. pp. 657-663 or HLADÍKOVÁ, V. – GÁLIKOVÁ TOLNAIOVÁ, S. Cyber aggressors, their motives, emotions and behavioural tendencies in the process of cyberbullying. In *AD ALTA : journal of interdisciplinary research : recenzovaný mezioborový vědecký časopis*. Vol. 9, 2019, No. 2, pp. 71-76.

4 LIABILITY OF THE EMPLOYER FOR ACTIONS WITHIN PRE-EMPLOYMENT BACKGROUND CHECKS AND SANCTIONS

Who does not behave as required by the standards must reckon with the fact that they will be responsible for such actions. Liability relations are sanction relations, i.e., liability is a type of sanction. If what was primarily intended had not happened, a sanction follows, i.e., harm (sanction) as a normative consequence of non-compliance with the disposition of the legal standard. The professional literature understands sanction as a secondary legal obligation arising from non-compliance with the primary legal obligation.[151] The stricter the sanction and the more likely it is to be imposed, the more likely it is that the addressee will carefully assess whether it is more advantageous for them to break the rule and risk the sanction, or not to break the rule and bear the costs of complying with it.[152] Failure to respect the legal obligation arising from labor law constitutes labor liability as a type of liability in labor law, non-compliance with the civil law obligation constitutes civil liability, etc. The precondition for liability under a particular regulation is then the existence of an appropriate relationship under that regulation.

A previous analysis of the legal framework, the types and methods of pre-employment background checks has shown that these relationships arise between two actors – the future employer and the job seeker, which are the main parties to the employment relationship. Logically, we should talk about the employment liability of these entities if they violate/fail to fulfill any of their primary obligations. However, the application problem in this direction is caused by § 1 para. 5 of the Labor Code. The cited provision stipulates very precisely when employment relationships are first established and arise. The earliest possible moment of establishment of an employment relationship is the conclusion of an employment contract or an agreement on work performed outside employment.[153] In order to derive labor liability within the framework of pre-employment background

[151] PROCHÁZKA, R. – KÁČER, M. *Teória práva*. 1. vydanie. (*Theory of law*. 1st edition) Bratislava : C. H. Beck, 2013, p. 164.

[152] *Ibid.,* p.165.

[153] Decision of the Supreme Court of the Slovak Republic of 30 March 2011, case ref. 3 M Cdo 14/2010.

checks, the basic substantive presumption of liability under the Labor Code is missing, i.e., existing employment relationship. Thus, we could end the discourse on employment liability under this personnel practice and refer the parties to these relations to the civil liability regulation. However, we do not consider this to be correct. We believe that it must be acknowledged that the entity of employment liability will not always be only the employee and the employer, but in the process of filling vacancies, it can also be a natural person of a job seeker and a prospective employer. The Labor Code itself also takes into account that labor liability can be derived within the framework of pre-contractual relations, when in the provision of § 41 para. 9 it sanctions the employer for breach of the obligation arising from the employment law relating to work in the position to be filled.

The liability relationship in this case arises from the fact that the primary obligation imposed by the Labor Code or other labor law regulations (e.g., the Employment Services Act) has been violated.

If the employer violates the obligations set out in paragraphs 5, 6 and 8 upon establishment of employment, the natural person has the right to adequate monetary compensation (provision of § 41 para. 9 of the Labor Code). Factually, the right to adequate monetary compensation is defined as arising for a natural person seeking employment if the employer:

- requests information that is unrelated to the work to be performed;
- asks for information on pregnancy, family relationships, integrity (with some exceptions) and political, trade union or religious affiliation;
- violates the principle of equal treatment in hiring.

The provision of § 41 para. 9 of the Labor Code has a broader application basis and its grammatical interpretation must be avoided. If the employer is not allowed to request certain information when filling the vacancy, then it must not actively search for, find out and verify this information on its own. Following the purpose of the standard, the right to adequate monetary compensation should be linked to the period before the employment was established, not to the moment of employment establishment. Adequate monetary compensation according to § 41 par. 9 of the Labor Code does not have the function of compensation for actual damage, but rather performs a vindicative function and its reasonable amount will be decided by court, unless the parties agree thereon. In the event of a dispute, it would be an employment dispute arising from an employment relationship, even if the employment contract has not yet been entered into. However, the unsuccessful job seeker would not be able to enforce commencement of an employment relationship in court.

In addition to the right to adequate monetary compensation according to § 41 para. 9 of the Labor Code, as a result of a breach of the employer's obligations

under the pre-employment background check, the job seeker could seek court-enforced compensation for breach of the equal treatment principle. The legal regulation of the civil trial, and thus the procedure on the basis of which the court acts in granting this protection, is regulated in the General Civil Code – Act no. 160/2015 Statutes on Civil Litigation Code as amended (hereinafter referred to as the Civil Litigation Code). Anti-discrimination disputes are disputes with the protection of the weaker party and the evidence is taken from the so-called reversed burden of proof. This institute is based on § 11 of the Anti-Discrimination Act, according to which proceedings in matters related to violation of the equal treatment principle are initiated at the request of a person who objects to their right having been affected by violation of the equal treatment principle (plaintiff). In their action, the plaintiff is obliged to identify the person whom they claim has violated the principle of equal treatment (defendant). The defendant is required to prove that it has not infringed the principle of equal treatment if the plaintiff informs the court of the facts from which it can reasonably be concluded that the principle of equal treatment has been infringed. It follows that the plaintiff has a substantially advantageous position.

A dispute over invasion of privacy and an action seeking to protect it is not ruled out either. Unlike anti-discrimination disputes, the concept of the burden of proof and the burden of allegation applies here. That means that the plaintiff must comply with the obligation to make an allegation, that is to say, to state all the facts truthfully and completely, as well as to identify the evidence and bear the burden of proof, that is to say, to adduce evidence in support of those allegations. The burden of proof in relation to the facts alleged supports the party which derives favorable legal consequences from the existence of those facts, i.e., it is the party which also claims the existence of those facts.

Despite the stated means of protection of the job seeker in the process of filling a vacancy, it can be stated that employers in the Slovak legal environment are not too concerned that they would have to face a claim for payment of adequate monetary compensation under Art. § 41 para. 9 of the Labor Code, an action for the protection of privacy, or the judicial enforcement of job seeker's claims as a result of a breach of the principle of equal treatment. Employers are not afraid to use any available information about the job seeker (even the kind that has nothing to do with the job to be performed) in the hiring process, as they can use this information in a covert and non-transparent manner. It is common practice that the unsuccessful job seeker is not informed at all about the results of the hiring process or is rejected by the standard sentence that the position has already been filled. The Labor Code does not impose an obligation on employers to justify to unsuccessful job seekers why they have not been offered employment. The case law of the Court of Justice of the European Union also confirms that EU law does not impose any

obligation on the employer to justify its decisions not to hire a job seeker or to provide the unsuccessful jobseeker with information on who was recruited and by what criteria, but on the other hand, impenetrable silence of the employer and refusal to disclose any information on the hiring process may indicate that the candidate was not rejected with entirely fair intent.[154] As a rule, the job seeker will not find out that they were unsuccessful, for example, thanks to information that the employer was not entitled to search for, because no reasonable employer will admit to having done so. Thus, actions are not filed by job seekers because they lack sufficient data and evidence from which it could be concluded that the employer acted illegally in the context of filling the vacancy. This is evidenced by the very modest (as to the number of relevant cases) decisions of Slovak courts.[155] Equally low in terms of success is the percentage of actions filed for the alleged breach of the principle of equal treatment in pre-contractual relations.[156]

The protection of the job seeker's endangered or infringed rights may also take a form other than by filing an action. The job seeker may initiate proceedings at the relevant Labor Inspectorate, which is, in the conditions of the Slovak Republic, an authority entrusted with checking compliance with labor law regulations, including ensuring liability for their violation. Labor inspection is conducted under the Act no. 125/2006 Statutes on Labor Inspection, as amended by the Act no. 82/2005 Statutes on Illegal work and illegal employment, as amended. Violation of the primary labor law obligation is in many cases sufficient to impose a sanction under the Labor Inspection Act (unless another measure is applied without penalty).

We also do not rule out initiating proceedings at the Office for Personal Data Protection of the Slovak Republic, which may carry out inspections of personal data processing on suspicion of a breach of personal data processing obligations

[154] Judgment of the ECJ of 19 April 2012 in the case of Galina Meister v Speech Design Carrier Systems GmbH no. C-415/10. See also the judgment of the ECJ of 21 July 2011 in the case of Patrick Kelly v National University of Ireland no. C-104/10.

[155] One of the few examples is the decision of the Revúca District Court of 28 March 2011, case ref. 6C/207/2010. There are also isolated trials dealing with cases of discrimination in employment offers, such as the decision of the District Court in Banská Bystrica of 20 November 2007, case ref. 8C/119/2006-107.

[156] For more details on claims in connection with violation of the principle of equal treatment, see: DOLOBÁČ, M. Nároky z diskriminačného konania v rozhodovacej činnosti súdov. (Claims from discriminatory proceedings in the decision-making activity of courts). In *Ochrana zamestnanca v rozhodovacej činnosti európskych a národných súdov*. (*Protection of employees in the decision-making activity of European and national courts.*) Kraków : Spolok Slovákov v Poľsku-Towarzystwo Słowaków w Polsce, 2014. See also ZOZUĽÁKOVÁ – M., MATEJČIKOVÁ, M., on the possibilities of seeking redress in cases of unequal treatment caused by discriminatory job offers. ZOZUĽÁKOVÁ, M. – MATEJČIKOVÁ, M. *Rovnaké príležitosti v pracovnej inzercii – mýtus alebo realita?* (*Equal opportunities in job advertising – myth or reality?*) Bratislava : Slovenské národné stredisko pre ľudské práva, 2011, pp. 20-23.

(§ 85 of the Personal Data Protection Act). Failure to comply with the rules laid down in the GDPR may result in the Authority imposing a fine of up to EUR 20 000 000 or, in the case of an enterprise, up to 4% of the total global annual turnover in the preceding financial year, whichever amount is greater. A maximum fine is not automatic. Circumstances in which the breach of duty occurred by the employer, as well as the degree of breach of the job seeker's privacy and the consequences that are causally related to this breach of the employer's duty, are accounted for.

Finally, in addition to imposing a financial sanction, the employer also runs the risk of imposing a criminal sanction by violating the employee's privacy in the area of handling their personal data. Act no. 300/2005 Statutes, § 374 of the Criminal Code, as amended (hereinafter the Criminal Code), regulates the factual nature of the criminal offense of unauthorized handling of personal data by a person who unlawfully provides, makes available or discloses personal data about others collected in connection with the exercise of public power, or by exercising the constitutional rights of a person, or personal data of another obtained in connection with the performance of their profession, employment or function, and thereby violates the obligation stipulated by a generally binding legal regulation. The criminal sanction includes a possible sentence of imprisonment of up to one year. Similarly, however, a natural person may also commit the crime of violating the confidentiality of oral and other expressions of personal nature under § 377 of the Criminal Code by violating the confidentiality of words or other personal expressions by unjustifiably recording them by a recording device and making such recording available to a third party or otherwise use it, thereby causing serious harm to another's rights. In this case, the custodial sentence can reach up to two years. However, the perpetrator of the crime may not only be the person of the employer represented by the manager or members of the statutory body, but the crimes may also be committed by senior employees of the employer or persons who have come into contact with the personal data of other employees or third parties.

CONCLUSION

The importance of choosing a suitable future employee becomes crucial for employers not only in terms of potential quality and quantity of job tasks the employee is to complete, but especially in terms of potential disputes or conflicts in the workplace that could adversely affect other employees' work ethic or increase ancillary personnel costs of the employer. The importance of the employer's choice is thus reflected not only in the form of hiring an employee who will benefit the employer in their performance of the tasks assigned, but also in the need to address situations with potential negative consequences for the employer. Indeed, if an employee is "problematic" in terms of their personal characteristics (although they may be an excellent employee in terms of professional experience), it is highly likely that any termination of employment with such an employee will be economically and humanly demanding. As a result, pre-employment background check also significantly gains in importance for the employer in its internal processes and its proper implementation can spare the employer many potential problems.

At the same time, however, present implementation of the indicated types and methods of future employee screening will create more pressure in the future to determine permissible intrusions into the privacy of natural persons, especially in the area of pre-contractual relations. Although the present publication includes and analyzes a certain range of the most frequently involved areas of employee screening, it can be stated with a high degree of certainty that the interest and ingenuity of employers in assessing other areas of private or professional life of employees will increase. Therefore, the presented legal interpretation cannot be perceived as doctrinal, but its possible modification will largely depend on the experience from the application practice. The area of pre-employment background check can be, without any doubts, placed in a situation of a legal premise application, consisting of stating that the legislation will always lag behind in its response to new approaches and situations brought about by the implementation of individual employment relationships at national and supranational level.

The advent of the Fourth and Fifth Industrial Revolutions, which necessarily include IoT, will also largely determine the requirements for staffing, including the conditions under which the employees are to perform their work. Given the current requirement for building smart workplaces and the preference for smart solutions in work tasks performance, it seems inevitable that the employer will assess (more thoroughly, with new approaches) whether or not a natural person is a suitable candidate for a given job position and whether they are able to develop

creatively and progressively even after they have been hired, similarly to the technologies that they will use in the performance of their work. As a result, the area of pre-contractual relations also seems to be gaining in importance in the field of labor law.

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