REFLECTIONS ON EMPLOYEES' DISCLOSURE OF THEIR HEALTH STATUS AT THE CROSSROADS BETWEEN LABOR LAW REGULATIONS AND THE PROVISIONS CONCERNING PRIVATE LIFE

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Abstract

In this article, the author analyzes aspects related to the legal provisions regarding the medical examinations to be performed by the employees, considering also that the health of a person is an element of the person's privacy.

Keywords: *medical examinations, personal data, private life, employee*

JEL Classification*:* [K 31, K 36]

1. Introduction

1. The legal framework concerning the medical examinations of employees

1.1. The medical examination undergone at the time of employment

Beside the general conditions regulated by the lawmaker upon the conclusion of the individual labor agreement, there are also certain specific conditions, among which we will mention the medical examination. Medical examinations are exclusively the expertise of the occupational medic, who is obligated to supervise and assess the health status of the employees from the moment that they have concluded their labor agreement until its end.

According to article 27 paragraph 1 of Law no. 53/2003 republished concerning the Labor Code, "a person can be employed only on the basis of a medical certificate that proves that said person is fit for performing the type of labor that they are employed for," which entails that the failure to heed said provisions will result in the nullity of the individual labor agreement. If the medical certificate is subsequently presented, the nullity shall be covered according to the subsequent fulfillment of the condition imposed by the lawmaker, since the important element here is the health status of the employee when the cause for the non-validity of the contract and the possibility of its being maintained in force was ascertained (Moțiu, 2012, p. 48).

In accordance with paragraph 5 of the same article, upon employment in the fields of healthcare, public food service, education and other domains

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established through normative acts, specific medical tests can also be requested. Law no. 319/2006 on health and security at the workplace[1] also obligates employers to employ only persons who, according to the medical exam and, by case, psychological aptitude tests, are suitable for the task that they are to perform, and to ensure periodic medical check-ups and, by case, periodic psychological check-ups after employment.

The medical examination is a specific validity condition for all individual labor agreements, being of general nature because all employees and employers must be subject to the rigors concerning the fulfillment of this specific validity condition of the individual labor agreement (Gidro, 2013, p. 47). If the employer proceeds to employ a person without the prior medical examination, that represents a contravention.[2] On the other hand, if the employee fails to undergo the mandatory periodic medical check-ups, they are committing a disciplinary violation, for which they shall be liable, beside a contravention (Gidro, 2013, p. 47).

Given the general finality, which consists in determining one's capability to work, in relation to a certain workplace or a certain profession or trade (Roşioru, 2017, p. 280), the medical exam carried out prior to employment must be performed for the following categories of people:

a) those who seek employment via an individual labor agreement for an indefinite or definite period of time;
b) employees who already have a job, but are changing their workplace or are posted in other workplaces or performing other activities;
c) employees who are changing their trade or profession.

The medical examination seeks to establish the following:

a) the compatibility / incompatibility between any possible medical conditions found during the examination and the future workplace;
b) the existence / non-existence of a medical condition that can jeopardize the health and safety of other workers from the same workplace;
c) the existence / non-existence of a medical condition that can jeopardize the safety of the work unit and / or the quality of the products or services offered;
d) the existence / non-existence of a risk in what concerns the health of the population that the work unit offers its services to.

[1] Law no. 319/2006, including amendments and additions, was published in the Official Gazette no. 646 of July 26, 2006.

[2] See article 260 paragraph 1 letter m) of the Labor Code, article 39 paragraph 1 letter J of Law no. 319/2006, and article 52 letter a of Government Decision no. 857/2011 on establishing and sanctioning contraventions concerning the norms of public healthcare.

The Labor Code forbids the request for pregnancy tests upon employment, in accordance with the community law and internal law regulations that enshrine the equal opportunities between men and women.[3]

If, upon the conclusion of the medical examination, the employee proves unfit, which shall be noted in the medical certificate, the labor agreement, on the one hand, shall not be concluded, and, on the other hand, if it has been concluded, it shall be terminated by the employer on their own initiative (Roş, 2017, p. 55).

1.2. Other medical examinations provided for in the labor legislation

According to Government Decision no. 355 of 2007 on the supervision of workers' health[4], the medical work adaptation exam shall be performed if requested by the occupational medicine specialist during the first month of employment and will supplement the medical exam carried out upon employment, in the conditions that are specific to new workplaces. The goal of this medical exam is to aid the employee's body in adapting to the new work conditions and to trace certain medical causes behind the failure to adapt to the new workplace, for which the occupational medic shall recommend certain measures to remove said causes.

The periodic medical exam is mandatory for all employees and has the following goals:

a. confirming or denying, at fixed periods of time, the employee's fitness for the profession / position and workplace for which the labor agreement was concluded and for which the certificate of fitness was issued;
b. finding any disease that represents a contraindication for the activities and workplaces that entail exposure to occupational risk factors;
c. diagnosing occupational diseases;
d. diagnosing diseases related to the employee's profession;
e. finding diseases that are a risk for the life and health of the other workers at the same workplace;
f. finding diseases that are a risk for the work unit's safety, for the quality of the products or for the population with which the worker comes into contact due to the nature of their activity.[5]

The Labor Code regulates, in article 28 letter e), f) and g), the categories of employees who must undergo periodic medical exams, whose frequency is

[3] Art. 10 Law no. 202/2002 republished in the Official Gazette no. 326 of June 5, 2013.
[4] Published in the Official Gazette no. 332 of May 17, 2007.
[5] Art. 19 Government Decision 355/2007.

established by the occupational medic under the conditions set forth in art. 21 of Government Decision 355/2007.

In contrast with the hypothesis of failure to perform the medical examination upon employment, which leads to the nullity of the labor agreement, any unjustified refusal and any failure on the part of the employees to undergo the periodic medical exams scheduled by the employer is, as we have shown above, a contravention.[6]

In situations where the employee has interrupted their activity, for medical reasons, and this interruption lasted for a minimum of 90 days, as well as where the interruption was due to other reasons and lasted 6 months, they shall undergo a medical exam upon resuming their activity, as this exam will confirm whether they are fit to work in the profession / position that they had worked in prior to the interruption or in the new profession / position that they are to work in within said workplace; it will also establish certain measures in order to adapt to the workplace and to the activities that are specific to the profession or position, and, wherever this is applicable, reorientation towards a new job, which would ensure the health and capacity to work of the worker.

Regardless of the timing of the medical examination, it shall result in a medical document bearing the following conclusions, which vary from case to case: fit for work, conditionally fit (a situation where the occupational medic will give medical recommendations, as the employee's fitness for work is conditioned by them being carried out), temporarily unfit (having the right to leave due to temporary inability to work) and permanently unfit.[7]

Even if, many times, the examined employees are in good health, there are also people who suffer from different chronic conditions, most of them "invisible." In these situations, the employees need to notify the occupational medic, upon undergoing these medical exams, of the possible medical conditions that they have or that they have developed in the meantime after they were employed. Given that one's health status is a private information, is there a balance in place between the labor law regulations regarding the medical exams that the employees must undergo and their right to respect for their private life?

2. Considerations regarding the person's health status, an aspect related to their private life

Art. 74 of the Civil Code lists, at letter g), the following as prejudice against one's private life, among others that can violate this right: "the

[6] Art. 53 Government Decision no. 857/2011 concerning the establishment and sanctioning of contraventions against public health norms, published in the Official Gazette no. 621 of September 1, 2011.

[7] See art. 9-12 of Government Decision no. 355/2007.

broadcasting of materials containing images of persons who are in treatment at a medical assistance unit, as well as of personal data concerning their health status, issues related to diagnosis, prognosis, treatment, circumstances related to the disease and other various facts, including autopsy results, without the consent of the person in question or, in the cases where they are deceased, without the consent of the family or any other person entitled to do so."

However, the instances of prejudice that are permitted by law or by the international conventions and pacts concerning human rights that Romania is a part of are not considered to be violations of one's private life, according to art. 75 of the Civil Code.

The person's health status is included here, according to point 35 of Regulation (EU) 2016/679 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, in force starting May 25, 2018, of legal protection. Among the personal data benefitting from legal protection is also the person's health status: "35) Personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject.

This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test."

The issue of whether the right to the protection of personal data should be considered a new fundamental right or just a component of private life was raised, the conclusion being that the right to a private life and the right to the protection of personal data are not identical, even though the right to a private life represents the central value that justifies the protection of personal data, a view shared by the jurisprudence of the European Court of Human Rights, according to which personal data protection is fundamentally important in the exercise of one's right to private and family life, which is regulated in article 8 of the Convention (Ungureanu, O. & Munteanu, C., 2015, p. 104).

Recently, the European Court of Human Rights made a ruling in the case of Mockute v. Lithuania, where it was established that the Lithuanian state had

breached art. 8 and 9 of the European Convention of Human Rights and was forced to pay moral damages totaling 8,000 euros. The plaintiff claimed that her right to a private life, protected by art. 8 of the Convention, was violated by the state psychiatric hospital where she had been admitted for certain mental issues, as they had given both her family and journalists information about her private life (Bogdan, D. & Micu, I. A., 2018).

The European Court of Human Rights believed, that, first of all, it was sufficient for the disclosure of the information related to the plaintiff, made by the psychiatrist employed by the state hospital to the journalists and her mother, to have existed in order to rule in favor of the plaintiff.

They also noted that a disclosure of confidential personal and deeply sensitive information was made to journalists and the plaintiff's mother by the psychiatrist employed by the public hospital with no consent from the plaintiff, and that the transmission of this information represents, in the Court's view, a violation of the right to respect for one's private life (Bogdan, D. & Micu, I. A., 2018).

3. The analysis of the legal provisions on the matter in the light of the right to respect for one's private life

Article 6 of the Labor Code enshrines one of the principles of labor law, namely the principle of "employees' protection." The element of interest for this study is the protection given by the lawmaker to the personal data of employees[8], which means that the lawmaker implicitly guarantees the protection of employees' personal data concerning their health status and ensures confidentiality in regards to any possible medical conditions they may have.

For the employee, the employer's respect for confidentiality is capital, because, as stated, the purpose of confidentiality means the very protection of the former's dignity (Dimitriu, 2016, p. 381).

Any processing by the employer of the personal data related to the health status of their employees must be supported by a legitimate reason, namely the necessity to fulfill the legal obligations that fall within their responsibility, in accordance with the provisions that we have mentioned above.

We are perfectly aware of the fact that an employee who has various different medical conditions is, many times, understandably put in a delicate and uncomfortable position when they have to disclose information related to their health upon undergoing their medical examinations.

However, we believe that they have to submit to the legal provisions on the matter because, at least in what concerns the periodic medical check-ups, if they fail to undergo them, they shall be liable from a contraventional and disciplinary

[8] Art. 6 paragraph 2 of the Labor Code.

point of view. As such, we can assume that, if the employee understands that they have to comply with this obligation, they shall also understand the importance of informing the occupational medic of their health status.

However, the employee's disclosure of their health status is a complex and, at the same time, sensitive issue, and that is because there is a conflict, in this case of employees suffering from certain health problems as well, between the individual's right to a private life and the State's duty to protect public health and the common good (Aluaş, M. & Dulău, A., 2018).

There are situations such as when a person wishes to become a babysitter, where the lawmaker enshrines intrusion into one's private life not for the purposes of protecting the interests of the employer, but those of a vulnerable third party, where certain aspects of the person's private life are relevant (Dimitriu, 2016, p. 376).

The reasons for which the employee is asked to share information about their health status to the occupational medic are diverse. First of all, the individual labor agreement is an *intuitu personae* contract, and, as such, the personal characteristics of the employee reflect on this contract, as their health status in relation to their workplace is among said characteristics, given that the temporary inability to work or physical or psychological unfitness of the employee are legal grounds for suspension or termination of the labor agreement (Dimitriu, 2016, p. 380).

One other reason is to protect employees who have been diagnosed with various chronic diseases. According to article 8 paragraph 1 of G.D. no. 355/2007, the occupational medic is obligated to enact special supervision consisting in a prophylactic medical exam designed to ascertain the fitness for work of certain categories of employees, namely: minors between 15 and 18 years of age, persons over 60 years of age, disabled persons, pregnant women, people suffering from certain addictions, left-handed people, people with monocular sight, people registered with chronic diseases.

On the other hand, according to the law, the medical exams also aim to find diseases that are a risk to the life and health of the other workers at the same workplace as the employee in question.

The doctrine (Dimitriu, 2016, p. 379) has maintained that, if the professional life of the employee affects their private life, it is oftentimes true that this also works the other way around, meaning that a series of the employee's rights is acknowledged only insofar as they reveal certain aspects of their private life: their employer must be made aware of their health status, for example, upon undergoing the medical exam, as well as at any time temporary unfitness for work is invoked. In order to protect the employee disclosing information about their health status, art. 33 of Law no. 418/2004 concerning the specific professional status of the occupational medic provides

for the fact that the occupational medic must keep the professional secret promoted by the code of medical deontology.

As such, the results of the employees' medical exams shall be stated to the employers only in terms of fitness or unfitness, with the exception of the cases provided for in the law, namely when addressing work-related accidents and infectious or parasitic diseases that risk spreading to the entire group of workers. Art. 35 of the law also provides that the medical file of the employee cannot be accessed by other persons with the exception of medical authorities.

It is only when the employee's health status and the type of work that they perform are liable to endanger the safety of the other participants in the labor process that the employer shall also be informed of the situation, and, along with the competent authorities, in cases of particular risk, of the measures necessary to protect the other employees (art. 36 of the law).

Thus, this means that transmitting information regarding the health of a person (in our case, an employee) must be pared down to a certain type of necessary information for a certain requirement (Aluaş, M. & Dulău, A., 2018, p. 72).

The abovementioned legal dispositions guaranteeing the confidentiality of the data regarding the patient's health are also in accordance with the provisions of art. 21 and 22 of Law no. 46/2003 on the patient's rights[9], which states the following: "all information concerning the patient's health status, any results from medical examinations, diagnoses, prognoses, treatments, personal data are confidential even after the patient's death," and "confidential information can only be provided when the patient has given their explicit consent or when the law requires it expressly."

Even if the lawmaker explicitly provides for the fact that the occupational medic must keep the professional secret upheld by the code of medical deontology, we adhere to the opinion (Aluaş, M. & Dulău, A., 2018, p. 75) according to which, in order to enshrine the imperative of keeping the professional secret, the employers should add a confidentiality clause to do so in the contracts that they conclude, in the particular case that we have analyzed, with the occupational medics.

Conclusions

In what concerns the analyzed legal provisions, we believe that the lawmaker ensures a reasonable balance between the legal dispositions that impose the necessity of medical exams both upon employment, as well as periodically afterwards, while the employee is under their labor agreement, and the legal texts that guarantee respect for their private life.

[9] Law no. 46/2003 was published in the Official Gazette no. 51 of January 29, 2003.

As such, the employee's obligation to disclose their health status does not represent, in our opinion, an intrusion by the employer into the private life of the employee, as long as the disclosed information is obtained, used and processed in strict accordance with the legal norms on the matter and not for the purposes of discrimination or prejudice against the employee.

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