

Employment & Labour - Austria

Data protection for employers - rights and obligations

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Requirements for registration

According to the Data Protection Act, three issues must be examined before any form of personal data is processed:

- the legitimacy of the processing;
- the obligation to obtain authorisation from the Data Protection Agency; and
- the obligation to notify the agency of the processing.

As a general rule, the agency must be notified of any such processing, unless an exception applies. Such exceptions include:

- the transfer of personal data for personnel administration purposes to the social insurance carrier or the local tax office; and
- the transfer of customer data to customers or corporate management for logistical purposes.

Such applications usually correspond to standard applications that are laid down in ordinances by the Federal Chancellery. Once the notification has been filed, the processing may be carried out. The situation changes where sensitive data is processed; such processing requires prior approval from the agency, which usually takes up to three months.

The agency requires precise information on the nature of the data and its intended use. As a general rule, companies can collect employees' personal data; however, this right does not extend to employees of affiliated companies. There is no statutory privilege for corporate groups that would justify the transfer of data within the corporate group. However, the agency has repeatedly acknowledged the need for data transfers within groups of companies, depending on the purpose of the data transfer.

A prerequisite for the lawful processing of non-sensitive personal data is that the processing does not infringe the employee's legitimate interest in the confidentiality of the data. This condition is met if:

- the law explicitly provides for an authorisation or duty to carry out such processing; and
- the employee in question has expressly agreed to the processing or has a vital interest therein.

Therefore, obtaining consent from each employee is a possible solution to ensure compliance. However, such declarations of consent must be entirely free and unrestricted, and can be withdrawn by the employee at any time and without cause. Consequently, it is often more advisable to take into account the employee's legitimate interest by showing that the employer's interest in processing the data outweighs the employee's interest in its confidentiality.

The provisions on data security and confidentiality (Sections 14 *et seq* of the act) provide that the controller-employer must ensure data security. Specifically, the employer must ensure that data is protected against accidental or intentional destruction or loss and is not accessible to unauthorised persons.

Measures include:

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- regulating access to the data controller's premises;
- regulating access to data and specific programs; and
- maintaining logs and documentation to ensure the traceability of the processing.

Sensitive data

According to Section 4 of the Data Protection Act, 'sensitive data' is defined as data relating to natural persons and their racial or ethnic origin, political opinions, trade union affiliations, religious or philosophical beliefs, health or sexuality. Thus, medical information qualifies as 'sensitive data' within the meaning of the act.

In principle, the processing of sensitive data is subject to the framework above. However, the 'outweighing interest' test does not apply with respect to sensitive data. Consequently, in most cases in which sensitive data is (or may be) processed, the express consent of the employee will be required.

Background checks

There are no express statutory restrictions on employers carrying out background checks. Criminal record checks are not uncommon: employers request that candidates either present a certificate of good standing during their job interview or submit it with their résumé. Credit checks are also permissible if the employer has a legitimate interest in establishing a prospective employee's sound financial status (eg, in the banking industry).

However, the labour courts have repeatedly held that job interview questions concerning pregnancy, financial status and criminal convictions (if spent and deleted from the record) are impermissible. If an interviewee replies to such questions with an inaccurate statement, he or she cannot face legal consequences for the misstatement.

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