



Employee Data Privacy – Spain

Employee Consent

Do I have to obtain employees' consent in order to collect their personal data?

The processing of any personal data may impose obligations to the individuals the data is related to, the data subjects. Some jurisdictions only recognize processing personal data as lawful if the data subject has provided express consent. Other jurisdictions require a legal obligation to process the data and may not require consent. The processing of HR personal data has raised questions and court decisions in a few countries, and interpretations may vary based on data privacy and labor law requirements.

The concept of employee consent has been increasingly criticized because there is doubt as to whether consent can be given freely in the subordinate employee/employer relationship. There are more prescriptive requirements for obtaining consent under the European General Data Protection Regulation, including the ability to withdraw consent at any time.



The legitimate interest of employers can sometimes be invoked as a legal ground for processing personal data, but only if the processing is strictly necessary for a legitimate purpose and the processing complies with the principles of proportionality and subsidiarity. A proportionality test should be

conducted in order to consider whether all data collected is truly necessary, and measures must be taken to keep personal data processing limited to the minimum necessary.



Sensitive Personal Data

Under the Spanish Data Protection and Digital Rights Act, employee consent is considered insufficient when the main purpose of processing sensitive personal information is to identify an employee's ideology, trade union membership, religion/beliefs, sexual orientation or racial/ethnic origin. Processing this sensitive personal information is permitted when necessary to comply with a legal obligation relating to employment laws.

The Law on Social Order Infringements and Sanctions (Art. 16.1.c) prohibits requests for personal data in recruitment procedures that represent discrimination in access to employment. The Spanish Data Protection Authority issued a statement stating that

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employers cannot process COVID-19 immunity information as part of the hiring process. In addition, if an applicant voluntarily includes this information in their CV, the employer cannot use the COVID-19 immunity information to make a hiring decision and is obligated to delete this information.

Employee Monitoring

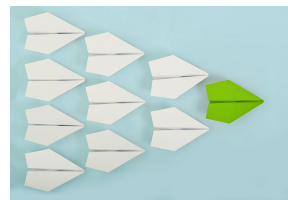
Clear communications should be provided to employees, informing them how their personal data is being processed. Where possible, such as in the event of monitoring technologies, employees should be given the option to prevent their data from being captured.

Where employees are expected to use online applications which process personal data, they should consider enabling employees to designate certain private spaces to which the employer may not gain access under any circumstances, such as a private mail or document folder.

Under the Spanish Data Protection and Digital Rights Act, employers are required to implement

policies relating to the use of digital devices in the workplace. These policies should be implemented in conjunction with worker's representatives (if applicable).

Video surveillance and GPS tracking is permitted under the Act as long as employees are clearly informed in advance of any surveillance/tracking. Video surveillance is not allowed in spaces intended for employee rest and recreation (i.e., changing rooms, bathrooms and cafeterias).



HR Best Practices:

As consent on its own might not be enough to justify lawful processing of employee

personal data, other processes should be documented and implemented. Consider legitimate requirements, such as those outlined in Poland's Labor Code. Commit to properly informing employees, documenting legal rationales for data collection and offering consent/correction/deletion where possible.

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