

Sensitive data (Art. 9) and Criminal record extracts

Processing operations revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, as well as the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

In the event that the employer is required to process special categories of data (e.g. data concerning health or trade union membership), additional requirements and limitations are needed.

The processing must not only be based on one of the grounds for lawfulness in Article 6 but must also comply with the conditions laid down in Article 9 of the GDPR.

Thus, the processing of sensitive data is in principle prohibited under Article 9(1) GDPR, unless one of

the conditions laid down in Article 9(2) GDPR is met. For example:

- The data subject has given his or her explicit consent to the processing of this type of data for one or more specific purposes;
- The processing is necessary for the performance of the obligations and the exercise of the controller's own rights in the field of labour law, social security or social protection to the extent that such processing is authorised by a legal text or a collective agreement; or
- The treatment is necessary for the purposes of preventive or occupational medicine, the assessment of the worker's capacity to work, medical diagnoses, health or social care, on the basis of European or Luxembourg law. Employers must verify, on a case-by-case basis, whether one of the cases provided for by the GDPR allows them to process the sensitive data of their employees.



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Example

An employee falls ill and gives a certificate of incapacity for work to their employer. Those data relate to the employee's state of health and therefore constitute sensitive data. Their treatment is therefore in principle prohibited.

However, the employer benefits from an exception to process them because the processing is necessary for the purposes of the performance of the obligations and the exercise of the controller's own rights in the field of labour law, social security or social protection to the extent that such processing is authorised by a legal text or a collective agreement (Article 9(2)(b) GDPR). The processing can therefore be carried out on the basis of this exception, in conjunction with Article 6(1)(c) GDPR (compliance with a legal obligation, namely Article L. 121-6 of the Labour Code).

Luxembourg law restricts the right of employers to consult the judicial data of their employees.

In the context of recruitment, a request for a criminal record may only relate to:

- Bulletin No 3 containing information on convictions for criminal and correctional offences;
- Bulletin No 4, provided that the possession of a valid driving licence is an indispensable condition for the exercise of the employee's professional activity and is required in the employment contract; and/or
- Bulletin No 5, if the professional or voluntary activities for which the employer aims to recruit a person involve regular contact with minors, provided that the data subject has given his or her consent.

The request to provide a bulletin No. 3 or No. 4 must be submitted in writing and must be specifically

motivated in relation to the specific needs of the post. The request must also be included in the job offer.

During the employment relationship, the employer may only request the issue of Bulletin No 3 for the purpose of personnel management and if a specific legal provision so provides. However, if, in the course of an employment relationship, the employee is required to perform a new function with the employer that necessitates a new fit and proper check in relation to the specific needs of the post, then the employer may request it again.

It should be noted that an employer who requests the issue of a criminal record of a natural or legal person in breach of the conditions referred to above is punishable by a prison sentence of 8 days to 1 year and a fine of EUR 251 to EUR 5 000.

Storage period

The employer may not keep the bulletins No 3 or No 4 of its newly recruited employees for more than one month from the conclusion of the employment contract. The bulletin must be deleted immediately if the data subject is not hired.

During the employment relationship, Bulletin No 3 may not be kept for more than two months from the date of issue, unless statutory provisions provide for a longer period. On expiry of the abovementioned storage periods, neither the extract nor the data entered therein may be kept in any form whatsoever.

Failure to comply with storage periods is punishable by a fine of EUR 251 to EUR 3 000.