

HR processing and legal bases

Any data processing must be based on one of the six criteria for lawfulness laid down in the GDPR: (i) the consent of the data subject, (ii) the performance of a contract to which the data subject is a party or of pre-contractual measures taken at the request of the data subject, (iii) compliance with a legal obligation, (iv) the safeguarding of the vital interests of the data subject or of another natural person, (v) the performance of a task carried out in the public interest or (vi) the legitimate interest pursued by the controller or a third party.

It is up to the employer to determine, before any processing of personal data and in the light of the specific context, which basis(es) of lawfulness is (are) the most appropriate and can justify the planned processing.

In general, the following four bases of lawfulness are most frequently invoked in the context of the processing of employee data:

1. The performance of the employment contract to which the data subject is a party or of pre-contractual measures taken at the request of the data subject: The employer and the employee are bound by a contractual relationship by virtue of the employment contract they conclude. The employer could therefore process personal data to fulfil its contractual obligations. It must be pointed out that, in order to be able to base the processing on that basis of lawfulness, the processing of the data in question must be objectively necessary for the performance of the contract. In other words, the mere fact that a clause in the contract provides for processing is not going to make it necessary.

Example

As part of the payment of salaries, the employer is required to process certain personal data (bank details, surname and first name, etc.). He will be able to base that processing on the 'performance of the contract', because it is necessary in the light of the objective pursued, namely the performance of his contractual obligation to pay the salary.



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2. Compliance with a legal obligation: labour or sector-specific legislation may impose legal obligations on the employer, who must use data processing in this context. In order for this provision to apply, the obligation must be imposed by law (in this case, it may be a law, but also, for example, a Grand-Ducal regulation, a collective agreement declared to be a general obligation or a European regulation) and not, for example, by a contractual clause. The employer must not have a choice as to whether or not to comply with the legal obligation. Unilateral voluntary commitments which involve the processing of data beyond what is required by law do not therefore fall within the scope of that provision.

The employer must be able to demonstrate that the processing and the data processed are necessary to comply with the legal obligation.

Exemple

In accordance with Article L. 211-29 of the Labour Code, the employer is required to enter in a special register or file the beginning, end, and duration of daily work as well as all extensions of normal working hours, hours worked on Sundays, public holidays or at night and the remuneration paid on any of these counts.

Exemple

In accordance with Article 426(5) of the Social Security Code, employers are required to provide monthly the periods of incapacity for work for their employees, including those for which they benefit from statutory or contractual retention of remuneration by the CCSS.



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3. The legitimate interest of the employer or a third party: This basis of lawfulness requires a balance between the interests of the employer and/or third party and the fundamental rights and freedoms of employees. The employer may only use this basis of lawfulness if the fundamental rights and freedoms of employees do not override the interests of the employer. They must therefore assess, in balancing their legitimate interest against the rights and interests of their staff, whether the processing carried out is necessary. The CNPD points out that, in order to be able to use the condition of lawfulness of the legitimate interest, three cumulative conditions must be met:

- i. the existence of a valid legitimate interest (e.g. the protection of the company's assets);
- ii. the need to process personal data for the purposes pursued by the legitimate interest invoked; and
- iii. the fact that the fundamental rights and interests of the data subjects must not prevail over the legitimate interests of the employer ('balancing exercise'). This third condition consists in verifying whether the processing is likely to adversely affect the fundamental rights and interests of the data

subjects and, if so, whether those fundamental rights and interests outweigh the interests of the employer and/or the third party.

iv. A detailed analysis of these three conditions should be carried out, so that it can be provided to the CNPD in the event of an inspection.

v. As part of its obligation of transparency, the employer must inform data subjects of the legitimate interests pursued and of their right to object to the processing carried out on grounds relating to their particular situation.

Example

An employer wants to set up an access control system to a room where the company's confidential data, including its customers' data, are stored in order to secure the data against unauthorised access. To this end, the employer installs a device which records the entry and exit of employees with appropriate authorisation to enter the room. Such targeted processing, which does not override the rights of employees, could be carried out on the basis of the legitimate interest of the employer.



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4. Consent: Data processing may be based on the consent of the data subject. Such consent must be freely given, specific, informed and unambiguous, and demonstrated by a statement or a clear affirmative action. The consent of the data subject will therefore very rarely constitute an appropriate basis for lawfulness in the context of the employment relationship. The relationship of subordination arising from the contract of employment between the employer and the employee creates, in principle, an imbalance of powers and the employee is therefore only very rarely in a position to refuse or withdraw their consent without fear of adverse consequences.

For consent to be valid, the acceptance or rejection of the request for consent must not have adverse consequences for the employee.

Furthermore, if the employee withdraws their consent, the employer is in principle obliged to erase the data, unless they are necessary for other processing for which the employee has not withdrawn their consent or which is not based on the employee's consent.

