

Summary: Conclusions and bottlenecks

Conclusions

A large amount of personal data is processed with regard to sick employees. The tightening up of the reintegration obligation and the extended obligation to continue payment of wages have in themselves led to an increase in the need for information on the part of employers. Further deregulation has meant that various tasks have shifted from the public to the private domain and more parties than ever before are now involved in coaching, reintegration or the continued payment of wages. This involvement has resulted in an increase in the need for personal data on sick employees as well as an increased incidence of data exchange.

This vast flow of information – often detailed information on the health of employees, sometimes without their knowledge – means that employees are not always fully aware of what is happening to their personal information. The enormous amounts of information and the frequently changing legislation make it difficult for the employers, the occupational health & safety executive, company physicians, the work reintegration agencies, the social security organisation (UWV) and insurance companies dealing with employee sick leave – to keep themselves properly informed about the rules and regulations they should be applying.

This study is an attempt by the Dutch Data Protection Authority (Dutch DPA) to clarify matters for all concerned. Rules of thumb based on current legislation and regulations have been formulated for the application of privacy regulations during the exchange of information on sick employees. The most important conclusions and the associated rules of thumb can be summarised under the following headings.

Transparency

Decisions, which may have serious implications for sick employees, are made based on the information that the various parties exchange. This can include decisions concerning the continued payment of wages, proposed reintegration activities or the assessment of an application for disability benefit. It is therefore essential that information of this kind is exchanged in a transparent manner. Personal data should be treated in a proper and careful manner.

A sick employee should be made aware of the information that is being processed about him, so that he can ensure that the information is handled in accordance with the law. An employee will become suspicious if he notices that information has been provided behind his back and he is unexpectedly confronted with the consequences.

The Dutch Personal Data Protection Act clearly states that the data controller has a duty to provide information. A sick employee does not only have the right to be informed about the type of data that is processed about him, but is also entitled to be told for which purpose this information was processed and the identity of the data controller. In its capacity as supervisor, the Dutch DPA is calling up all parties involved to give serious attention to the obligation of providing information.

It is particularly important to keep an employee properly informed about the exchange of information between the employer and the occupational safety & health services. Although the employer is responsible for inspection and reintegration of the sick employee, this task is often passed on (in part) to the occupational safety & health services. Employees often have no knowledge of the way in which the tasks relating to control and reintegration are divided between the employer and the occupational safety & health services. Both parties should provide the sick employee with more information on this subject than currently is the case.

Necessity requirements

All parties playing a part in the inspection, reintegration or continued payment of sick employees need information in order to be able to perform their tasks properly. Some parties like to be provided with as much information as possible to ensure that they can carry out their tasks to the best of their ability. However, the Dutch Personal Data Protection Act states that necessity requirements should apply, as is the case with other legislation.

The necessity requirements mean that only the information that is strictly necessary for the purpose of the data processing should be requested or provided. The parties receive only the information they need to perform their tasks, and the privacy of the sick employee is invaded as little as possible. In this way only data that is strictly necessary is processed. Collecting information that may eventually prove useful does not comply with these requirements. This means that the data controller has to make a careful consideration which information is necessary in each individual case. Many parties are calling for clear rules to specify which information can be collected and provided in which situations. Clear rules would prevent the various data controllers from coming to differing conclusions in similar situations. A uniform practice of processing contributes to proper and careful processing.

Sick employees often supply their employers with voluntary information about their illness. This can be part of the normal day-to-day practice within an organisation. If medical information has been provided voluntarily by an employee, his employer is not automatically entitled to record and process said information. In a case like this, the employer has to comply with necessity requirements. In practice, it is often difficult to know how to implement this, particularly in the area of reintegration. The Dutch DPA is therefore urging for clear regulations covering the exchange of data relating to reintegration between an employer, the occupational safety & health services, the reintegration services, the social security agency and the insurance companies. There are as yet no clear rules based on regulations or protocols. The branch organisation for reintegration services could also contribute by means of a code of conduct.

Medical confidentiality

Extra protection applies to information concerning health matters. This is laid down in both the Personal Data Protection Act and in specific legislation (including legislation on professional medical confidentiality). The very nature of this information means that processing will lead to an invasion of the privacy of the data subject. Health issues are often very personal and should therefore be treated with extra confidentiality. The first concern is that the data subject receives the correct medical treatment. It is also often the case that a person's health determines the way he is judged by society. This is why people want to decide for themselves whether they wish to divulge certain information and to whom.

The company physician plays an important part in the exchange of information on a sick employee. He is often the only person (apart from the doctors treating the data subject) to have all the relevant information regarding a sick employee. In this respect, his duty of professional confidentiality as a physician has an important function. It is the company physician's job to act as a filter and to transform the medical data into the information that is needed by, and relevant to, the other parties involved. He demedicalizes the information.

For example, in order to comply with his reintegration obligations, in principle, an employer does not need medical information from the company physician on the nature and cause of an illness. However, he does need to know about the functional limitations of the data subject and the modifications that may be needed for his reintegration. In some cases, it is unavoidable that information on the nature and cause of the illness is passed on. This is the case when the nature of a person's illness is evident due to information on his functional limitations and reintegration measures. This is also the case when information is distributed regarding the extent and way in which the sick leave is related to work if the available data on the functional limitations and the necessary modifications do not contain sufficient information for

the reintegration process.

In principle, the company physician does not provide the reintegration services with medical information. This is only permitted in specific situations when it is needed for the purposes of the agreed reintegration activities.

The information obligation on the part of the sick employee

A sick employee does not have an absolute right to privacy. He is obliged to cooperate with his return to work. Various laws regulate information obligations for sick employees. A sick employee is, of course, at liberty to withhold any information from his employer, the company physician, the reintegration agency or the social security organisation. This can have serious implications, such as the suspension of continued payment of wages, instant dismissal or the refusal of disability benefit.

Periods for retaining information

This study looked seriously into the issue of which data may be processed and exchanged, and which data may not. However, it is also important to consider the matter of destroying information. The situation in which an employee is forever confronted with information that has been collected (and which is often out-of-date) should be avoided. Destroying data also reduces the risk of information being used for other, possibly unwarranted, purposes. This study therefore also provides detailed information on retention periods for the various parties. The Dutch DPA urges all the parties involved to ensure that personal data is destroyed in accordance with the necessary retention periods.

Bottlenecks

During the past few years, the government has been distancing itself from the inspection, payment and reintegration of sick employees. Since the introduction of the Gatekeeper Improvement Act (law pertaining to reintegration from sick leave), an employer and a sick employee are both responsible for the process of reintegration. Besides that, the duty to continue payment of wages has become a greater responsibility for an employer. Private parties such as the reintegration services and the insurance companies are now playing a larger role in terms of paying insurance claims to the employer and the reintegration of sick employees. A free market is an important point of departure, the government is only willing to act as a safety net. The process of deregulation has also contributed to the fact that there are very few specified regulations relating to the processing of information on sick employees. These social trends have had implications for the privacy of sick employees in a way that they have resulted in situations whereby there is too much pressure to treat personal information relating to a sick employee proper and careful. This study treats a number of these bottlenecks resulting from both practical situations and pure legislation. In its capacity as a supervisor, the Dutch DPA has pointed out these bottlenecks in legislation to the relevant authorities, including the Minister of Social Affairs and Employment, and advised them to amend the legislation and regulations accordingly.

Transparency in the division of roles

The first bottleneck concerns the transparency in the division of roles between an employer and the occupational safety & health services with regard to the inspection and coaching of sick employees during their absence from work. Both an employer and the occupational safety & health services perform tasks relating to the inspection and coaching of sick employees. The employer is responsible for carrying out the tasks in question and the occupational safety & health services has an advisory role. In practice, there is a great deal of confusion regarding who is actually responsible for these two diverse tasks. Employees tend to see the occupational safety & health services as a kind of inspector. On the other hand, the company physician is sometimes regarded as being a person in a position of trust. It is essential that this division

of roles be clarified in order to ensure that information is processed proper and careful. Based on the Personal Data Protection Act, it is the duty of both an employer and the occupational safety & health services to keep a sick employee properly informed. The Dutch DPA would therefore like to draw the attention of both parties to the importance of treating this information obligation seriously.

Disability to work

The second bottleneck involves the issue of a sick employee informing his employer about his status with regard to his disability to work. Based on various legal regulations, an employee is obliged to inform his employer if his illness is covered by one of the safety net provisions contained in the Sickness Benefits Act. In this way, an employer can obtain information indirectly about an employee's status as disabled for work. This information obligation is conflicting with the basic principles of the Disability (Reintegration) Act, which allows an employee to choose whether or not he reveals his status as being disabled for work when entering new employment. It is to be considered an invasion of the employee's privacy if an employer asks for the status of disability for work, while the employer has an increasing financial interest to be informed because of the extended obligation to continue payment of wages.

In view of this conflict of interests, the Dutch DPA would like to see an end to the discrepancies between the various laws. In the Sickness Benefits Act and the Code of Civil Procedure, the emphasis is put on the financial interests of the employer in being provided with information about a safety net provision under the Sickness Benefits Act, while the Disability (Reintegration) Act stresses the importance of the privacy of a sick employee and his right not to disclose his status as disabled for work. In practice, attempts have been made to address this discrepancy in legislation. In 2003 for example, the social security services created the possibility for repaying backdated sicknesspay to employers in cases where a sick employee had failed to disclose his status as incapacitated for work to a new employer. In the opinion of the Dutch DPA, the Minister of Social Affairs and Employment should decide whether there should be a point at which a person who is incapacitated for work, should be candid about his status, and if so, when. The various laws and regulations should subsequently be amended in accordance with this decision.

Civil proceedings

Thirdly, it is the opinion of the Dutch DPA that more attention should be paid to protecting the privacy of a sick employee during civil proceedings. During the entire process of reporting in sick, inspection, reintegration and the granting of disability benefit, an employer is only supplied with the information he needs to perform the relevant tasks and is in principle not provided with information concerning the nature, cause or treatment of an employee's illness. However, as soon as the employer and employee appear before a magistrate, it sometimes seems as if the restrictions no longer apply to the employer. It is not unusual in dismissal cases involving sick employees for the diagnosis and course of the illness to be discussed openly and in detail. The Dutch DPA would like to remind all parties concerned that in civil proceedings, the privacy of a sick employee should be respected in accordance with the legal principles of the Personal Data Protection Act. This means that restraint must be exercised during proceedings of this kind; both by the parties concerned when submitting court documents and also by the judge when issuing orders to produce evidence.

Data exchange during reintegration

The fourth bottleneck concerns the lack of clarity in the regulations on data exchange relating to reintegration. Among others this concerns the basis on which an employer and the occupational safety & health services provide and return data to and from the reintegration agency. The scope of medical confidentiality also plays a role here.

Article 8, paragraph 6, of the Disability (Reintegration) Act states that an employer and the occupational safety & health services should only provide reintegration services with the

information it needs for reintegration activities. In practice, it appears that it is not always easy to comply with the necessity requirements. Until there is a detailed description of the necessity requirements, an employer and the occupational safety & health services will be obliged to consider the specific information that needs to be supplied for the purposes of reintegration for each case individually. Should this include medical information, the matter is further complicated by the fact that the company physician is bound by professional confidentiality with regard to this information. He is therefore also obliged to consider each case individually and assess whether providing the reintegration services with said information would justify breaking his oath of medical confidentiality. It should be taken into account whether or not the person processing the information within the reintegration services is also bound by professional confidentiality. The Dutch DPA is of the opinion that, based on the legal regulations mentioned before, the necessary data the company physician provides to the reintegration services, can contain medical information/data in certain situations.

The Dutch DPA ascertains that in practice, there is a lack of clarity regarding the scope of the necessity requirements in relation to medical confidentiality. This has led to a situation in which company physicians tend to err on the side of safety and always seek permission (often by means of authorisation) before issuing information. Seeking permission for providing information gives a sick employee the opportunity to prevent data being supplied, although he is also duty bound to cooperate with the process of reintegration. The Dutch DPA considers that it should only be necessary to seek permission for providing information in a limited number of situations, for example when the information concerned is covered by medical confidentiality.

The Dutch DPA has repeatedly urged the Minister of Social Affairs and Employment to address the issue of clarifying the regulations on the exchange of data relating to reintegration. In the opinion of the Dutch DPA, there should be more detailed regulations governing data exchange relating to reintegration, by means of regulatory measures, protocols or a code of conduct initiated by the sector itself.

Privatisation of social security

Finally, the Dutch DPA has noted that the privatisation of the social security system is progressing steadily. As well as the recent extension of an employer's obligation to continue paying wages up till to two years, the Cabinet is currently working on proposals to partly privatise the implementation of the Disablement Insurance Act. Experience has shown that when information is to be processed by private parties, the legislation that the legislator lays down is less detailed (as is the case for the reintegration agencies and the medical insurance companies). This leads to confusion on the part of the parties concerned regarding what is permitted and what is not. The Dutch DPA considers this to be an undesirable situation, for which a solution must be found. The insurers find the legislation too restrictive with regard to the information they are given in order to perform their tasks. It is often only possible for them to acquire information on a sick employee by seeking the permission of the employee in question. The Dutch DPA does not consider seeking the permission of employees in such situations to be a desirable basis. On the one hand there is the question of whether this permission can be considered to have been given voluntarily, and on the other hand permission in itself does not provide the insurers with much security, as permission can always be denied or withdrawn later. The Dutch DPA therefore recommends that future legislation on the partial privatisation of the implementation of the Disablement Insurance Act should lay down clear rules governing the provision and exchange of data between public and private parties. The Dutch DPA considers structural supervision of the data processing in question to be essential.