

# Should we reveal everything to the employer? The problem of age disclosure during the recruitment process

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**For citation:** Sypecki, Piotr. 2022. “Should we reveal everything to the employer? The problem of age disclosure during the recruitment process”. *Russian Journal of Labour & Law* 12: 247–250. <https://doi.org/10.21638/spbu32.2022.120>

Recruitment is a process that usually leads to an employment relationship. It is the phase during which the potential employee and employer gather information that will determine the establishment of a contract. The party interested in presenting him/herself in the best possible way is usually the applicant, who wants to obtain the desired employment. To achieve this, he or she diligently prepares documents that include information required by the employer. Over the last few years, the scope of this required information has changed considerably — there has been a gradual move away from providing data typically regarded as unnecessary for the recruitment process, and an objective approach has been adopted instead. Currently, finding data like criminal records, marital status, or even a candidate’s image in application documents is uncommon. Sometimes employers recommend limiting the scope of information and even implement anonymizing processes in which applicants indicate their experience and skills only. The reason for this can be attributed to the development of anti-discrimination and data protection legislation, and the willingness of employers to comply with these laws. Considering the above, all practices and regulations that allow the processing of data unnecessary for the recruitment process should be viewed critically. An example of such legislation is the Polish Labor Code, which allows for the date of birth (age) of every applicant to be obtained. This essay critically analyzes this regulation through several supporting arguments.

*Keywords:* recruitment process, employment, personal data protection, privacy, ageism, discrimination, age, Polish legal system.

## 1. Introduction

Recruitment is an essential procedure preceding the employment contract. Its most typical course involves the preparation and publication of a job advertisement, the sending of resumes by candidates, and an interview (Armstrong and Taylor 2020, 299–327). It is common knowledge that an applicant provides a fair amount of information to a potential employer. However, the scope of this data can present a problem. In our current age of living in an information society, many people realise that we should not disclose all our information. This notion also applies to employment relations — the subject of my interest and this article.

In this article, I will discuss the issue of revealing a candidate’s date of birth during the recruitment process in relation to the Polish legal system — specifically that laws still contain a regulation according to which an employer may obtain certain data. In article

22<sup>1</sup> of the Labour Code of 26 June 1974<sup>1</sup>, it is indicated that the employer demands from a person applying for employment, personal data including: name(s) and surname, date of birth (age), contact details indicated by such person, education, professional qualifications, and employment history. This provision raises several questions and, in my opinion, should be examined more closely — particularly from the perspective of the processing of personal data and the increasingly frequent problem of ageism.

## 2. Basic research

To begin this analysis, it is important to point out that the scope of information that can be provided during the recruitment process changes regularly. Until recently, it was common practice to provide marital status and criminal record data (Grzeszczyk 2017, 64–65), while currently, including even a photo in a resume is questioned (Kuba 2017, 117). An interesting concept is the complete anonymisation of the recruitment process which has become a focus for researchers and an interesting tool available to employers (Lacroux and Martin-Lacroux 2019, 106–107).

The changes in the data provision of candidates can be of a legal nature, such as limiting the acceptability of processing data concerning criminal records or by narrowing the catalogue of data that can be obtained from the candidate by the employer (Tomaszewska 2020, 223–225). There is also the matter of personal data protection — current regulations greatly emphasise processing only the most important information. The growing awareness of current society also plays an important role. That is, it is often increasingly noticed that some of the information included in the resume may constitute a reason for discrimination and not actually present any relevant details that would assist in getting the job (Derous and Decoster 2017).

Undoubtedly, the recruitment process should be based solely on merit criteria and the data provided by the employee should refer to his/her knowledge, skills, and competencies (On the impact of data on decision-making, see Brown and Campion 1994, 897). Besides this, contact information should be considered important as this is essential to conduct recruitment without organisational difficulties. The remaining data, which may be disclosed by the candidate himself (for example, adding a hobby to a resume) or at the employer's request, does not fit into either group. Therefore, the question of the legitimacy of the requirement to provide this information can be raised.

That raises the problem of the provision of Article 22<sup>1</sup> of the Labour Code. As indicated in the introduction, it entitles the employer to demand the disclosure of a candidate's date of birth. In my opinion, the provision consolidates a harmful practice and should be perceived negatively. Several arguments can be put forward in support of this thesis.

Firstly, as a general rule, age is not a relevant factor and does not determine the skills of a candidate. Age should not be used as a substitute for seniority as seniority is usually indicated in the work experience section of a resume. Cases of justifiable disclosure of age in the selection process can arise from laws regulating professions in which age is one of the selection criteria. In theory, this factor may also appear as if it is an objective professional criterion; however, it is difficult to identify a concrete example of this.

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<sup>1</sup> Labour Code of 26 June 1974, Dz. U. 1974 nr 24 poz. 141 with amendments. Available at: <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19740240141> (accessed: 29.04.2021).

Secondly, age disclosure should not occur before the employment contract is established. It is true that this criterion determines the capacity to be an employee and affects certain rights, but in my opinion, in the recruitment process, the candidate should only declare that he/she has the capacity to be an employee.

Thirdly, age is a commonly mentioned discriminatory criterion in legal acts<sup>2</sup> and literature — unjustified differentiation based on this feature is referred to as ageism (Szukalski 2008, 156). This can mean that a rejected candidate may argue that such discrimination has occurred. From the employer's point of view, it is safer to conduct the selection process without taking into account this kind of data because, as mentioned, it is difficult to justify that age is an objective criterion for differentiation. It should be noted that excluding the date of birth in recruitment is increasingly common in many countries currently<sup>3</sup>.

Fourthly, it should be noted that the recruitment process is regulated by the provisions on personal data protection. The processing of candidates' data is subject to the principles indicated in, among others, the General Data Protection Regulation (GDPR)<sup>4</sup>. Article 5 (1) (c) indicates the requirement of data minimisation or adequacy, meaning that the amount of data should be as small as possible. However, it is emphasised that the statutory regulation provides a simplification for the controller (Fajgielski 2018, 151); that is, obtaining the date of birth from candidates is legitimised by Article 22<sup>1</sup> of the Labour Code. On the other hand, doubts about the compatibility of this provision with the principle of minimisation may be raised.

### 3. Conclusion

In conclusion, it is my opinion that the obligation to provide the date of birth as expressed in Article 22<sup>1</sup> of the Labour Code is not justified, and the regulation itself favours ageism. The arguments presented above justify the formulation of a *de lege ferenda* postulate to amend the aforementioned provision by removing the “date of birth” from the scope of data that an employer may demand from candidates. Furthermore, I think that an alternative could be a declaration by the candidate that he/she has the capacity to be an employee, and that the age itself could be verified at a later stage of the recruitment process or before establishing the employment relationship. An additional change would be a complete reworking of regulations by indicating the principles of data processing but without constructing a catalogue. With this in mind, the discussed issues should be met with greater interest in the doctrine of labour law.

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<sup>2</sup> E. g. Art. 11<sup>3</sup> and 18<sup>3a</sup> of Polish Labour Code. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, L 303/16. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078> (accessed: 29.04.2021).

<sup>3</sup> Examples: A step-by-step guide to preventing discrimination in recruitment // Australian Human Rights Commission. Available at: <https://humanrights.gov.au/our-work/employers/step-step-guide-preventing-discrimination-recruitment> (accessed: 29.04.2021); Employers: preventing discrimination // GOV.UK. Available at: <https://www.gov.uk/employer-preventing-discrimination/recruitment?step-by-step-nav=47bcd4c-9df9-48ff-b1ad-2381ca819464> (accessed: 29.04.2021); Prohibited Employment Policies/Practices // U.S. Equal Employment Opportunity Commission. Available at: <https://www.eeoc.gov/prohibited-employment-policiespractices> (accessed: 29.04.2021).

<sup>4</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L 119/1. Available at: <https://eur-lex.europa.eu/eli/reg/2016/679/oj> (accessed: 29.04.2021).

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Received: October 7, 2021  
Accepted: December 14, 2021

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