



Landesbeauftragter für
Datenschutz und
Informationsfreiheit
Baden-Württemberg

Employee Data Protection under the GDPR

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Data Protection Commissioner
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Baden-Württemberg/Germany



Agenda

1. Employee Data protection – a short introduction
2. Employee Data protection – definitions, important provisions
3. Employee Data protection – Background Checks
4. Keynotes

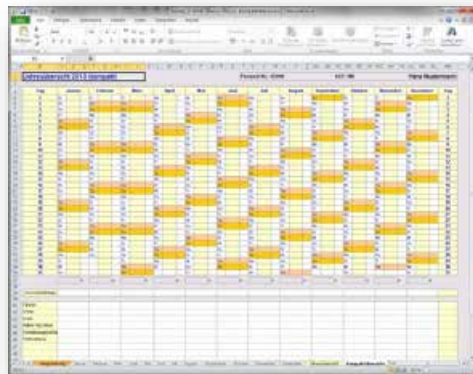


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1. Introduction





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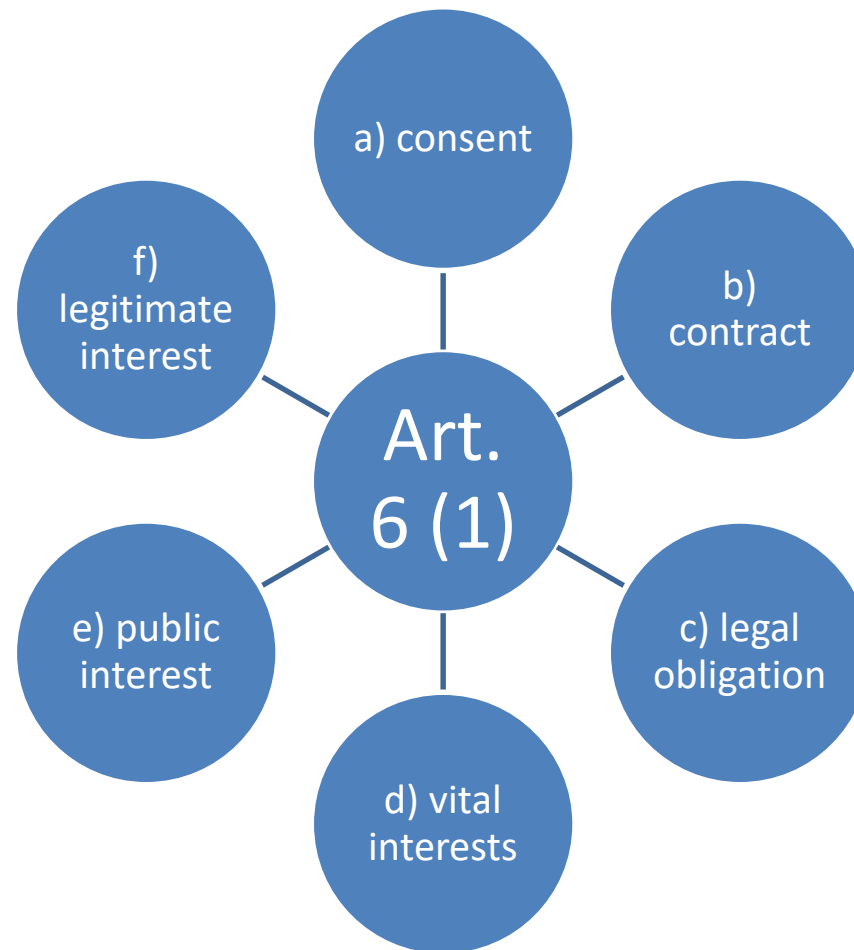
2. Definitions and regulations



Art. 6 (1): Processing shall be lawful only if and to the extent that at least one of the following applies:



2. Definitions and regulations





2. Definitions and regulations

- Processing in the context of employment:





2. Definitions and regulations

Art. 88 (1) GDPR:

Member States may, by law or by collective agreements, **provide for more specific rules** to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context [...].

Art. 88 (2) GDPR:

Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights [...].



2. Definitions and regulations

Federal Data Protection Act (BDSG)

Federal Data Protection Act of 30 June 2017 (Federal Law Gazette I p. 2097)

Part I Common provisions

Chapter 1 Scope and definitions

Section 1 Scope of the Act

(1) This Act shall apply to the processing of personal data by

1. public bodies of the Federation,
2. public bodies of the *Länder*, where data protection is not governed by *Land* law and where they
 - a) carry out federal law or
 - b) act in the capacity of judicial bodies in matters other than administrative matters.

For private bodies, this Act shall apply to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system unless such processing is conducted by natural persons in the course of a purely personal or domestic activity.



2. Definitions and regulations

Sec. 26 para. 8 BDSG:

For the purposes of this Act, **employees are**

1. dependently employed workers, including temporary workers contracted to the borrowing employer;
2. persons employed for occupational training purposes;
3. participants in benefits to take part in working life, in assessments of occupational aptitude or work trials (persons undergoing rehabilitation);
4. persons employed in accredited workshops for persons with disabilities;
5. volunteers working pursuant to the Youth Volunteer Service Act or the Federal Volunteer Service Act;
6. persons who should be regarded as equivalent to dependently employed workers because of their economic dependence; these include persons working at home and their equivalents;
7. federal civil servants, federal judges, military personnel and persons in the alternative civilian service.

Applicants for employment and persons whose employment has been terminated shall be regarded as employees.





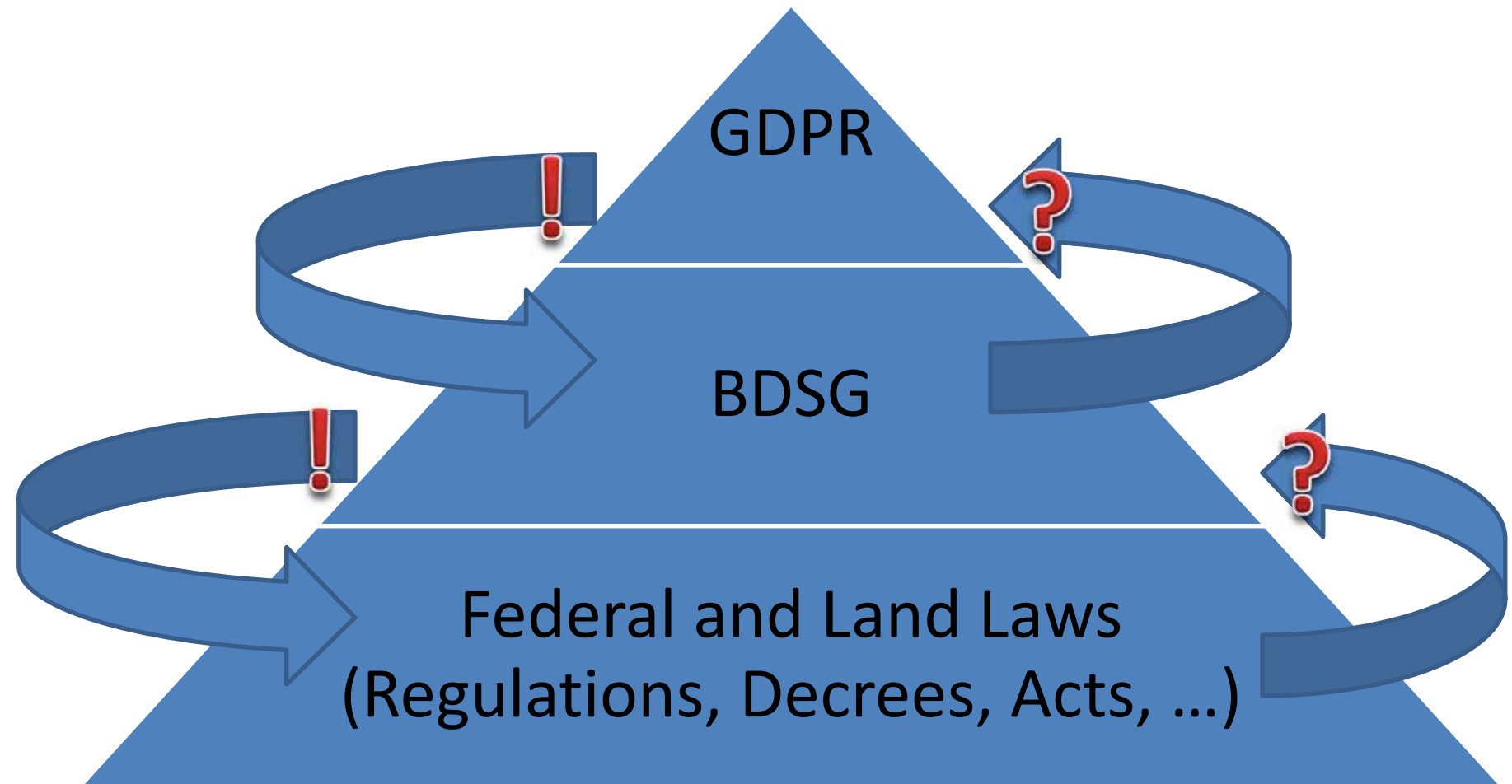
2. Definitions and regulations

Sec. 26 para. 7 BDSG:

Subsections 1 to 6 shall also apply when personal data, including special categories of personal data, of employees are processed without forming or being intended to form part of a filing system.



2. Definitions and regulations



2. Definitions and regulations

Consent as legal basis:





2. Definitions and regulations

Consent as legal basis:





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3. Background Checks



3. Background Checks



- GDPR does not forbid Background Checks
- **But:** all GDPR standard rules are applicable, especially Art. 14 GDPR (information) and Art. 15 (right of access)
- Legal basis:
 - Consent (-)
 - Legitimate interest?
 - No ultimate rule, but case by case decision
 - Very limited scope
 - Public safety is not sufficient

3. Background Checks



- Practical tips:
 - Avoid background checks whenever possible
 - Use only information given by the applicant
 - Platforms like LinkedIn can be checked because the applicant uses it for self presentation, but even then: Art. 14 GDPR is applicable!
 - Questions/checks only allowed on content that is covered by the questionnaire of the employer (not allowed: pregnancy, sexual preferences, ...)



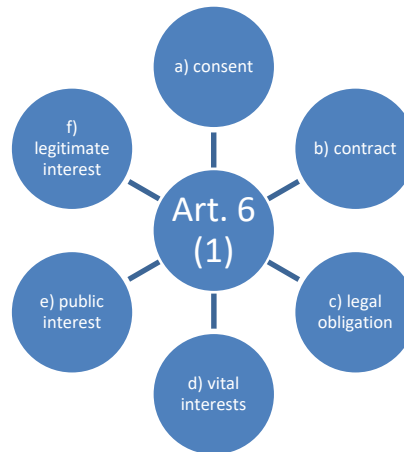
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4. Keynotes

1. There are six legal bases permitting the processing of personal data.





4. Keynotes

2. Employers cannot rely on the consent as a legal bases because it needs to be voluntary given and can be withdrawn at any time.





4. Keynotes

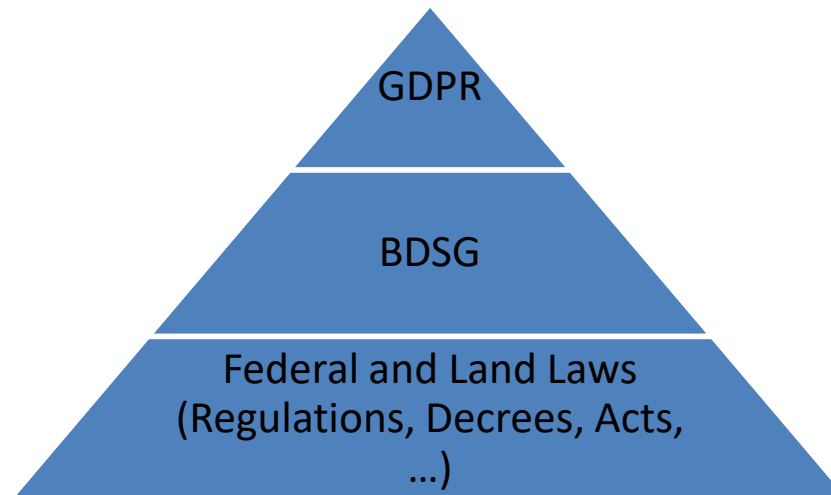
3. Art. 88 GDPR opens Member States to provide for more specific rules on Employee Data Protection.





4. Keynotes

4. But even then, those rules must regard the regulations of the GDPR.





4. Keynotes

5. Background Checks may be possible whenever the employer can demonstrate a legitimate interest.





4. Keynotes

5. Background Checks can never be hidden.

Employers have to inform about all information found during that process (Art. 14 + 15 GDPR).





Further Information on our Website www.baden-wuerttemberg.datenschutz.de

