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DATA PROTECTION & PRIVACY PRACTICE

## COVID-19 - Potential data disclosure in the workplace

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April 2, 2020

# COVID-19 - Potential data disclosure in the workplace

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Facing the rapid outbreak of coronavirus in Europe and while governmental and health authorities are struggling with its wildfire spread, taking tight measures in response to this situation (ranging from meticulous social distancing to general confinement and massive non-essential business lockdowns), businesses are also facing unprecedented challenges in their day-to-day operation. Depending on the intensity of the pandemic in each country and the industry sector affected, employers have emphasized on the need to implement exceptional measures to contain the spread and mitigate the effects of COVID-19, especially in cases where adoption of flexible work arrangements in the form of remote working is impossible. Many of these measures contemplated entail extensive collection, recording, use and disclosure by the company of vast amounts of employees' personal data, including special category personal data (i.e. health data). This article addresses the question of permissibility of disclosure of personal

data collected by means of said measures in the light of relevant regulatory guidance issued so far.

In the wake of this evolving crisis, numerous companies, which opt to actively collect information about their employees' as well as their families' state of health, by requiring them to regularly fill out health questionnaires or provide medical certificates and/ or performing temperature and other medical checks, envisage to make use of such information to the utmost, in their efforts to combat the spread of the virus. Employers are therefore tempted to further process information gathered this way, with a view to inform in a preventive context their personnel or other third parties, such as public health authorities, about confirmed or suspected coronavirus cases, naming yet the employee who contracted the virus. Although said strategy is allegedly justified by reasons relating to protection of public health and the employers' duty to ensure the health and safety at workplace, it might be

perceived as being privacy intrusive and incompatible with data processing principles and hence raise serious privacy concerns.

The national or European data protection regulators have expressed slightly divergent views on this matter, as outlined below. The [European Data Protection Board](#) (EDPB), the [German Federal Commissioner for Data Protection](#) (Bundesbeauftragte für den Datenschutz und die Informationsfreiheit) and the [Danish DPA](#) (Datatilsynet) have adopted a less stringent approach. Their guidance acknowledges that disclosure by the employer of the name of the employees who contracted the virus to third parties is not a priori precluded but can be under conditions justified, provided such disclosure is indeed absolutely necessary in view of the aim pursued and, according to the additional EDPB requirements, the employees concerned are informed in advance of the intended disclosure and their dignity and integrity is adequately protected.

By contrast, other data protection authorities are rather skeptical towards said measure, albeit following the same reasoning. [ICO](#) as well as the [Irish DPA](#) (Data Protection Commission) have held that whereas employers may lawfully disclose such persona data to the public health authorities in order for them to

carry out their functions, principles of data minimization and confidentiality prevent the employer from providing the full personal details of the affected individual to its co-workers or even its family. Instead, companies have the right, if not duty, to inform their staff in general terms that there has been a case of COVID-19 in the organization, mandating them to work from home. By the same token, [French DPA](#) (CNIL) despite discouraging employers to collect employees' health data, states that data protection law does not stand in the way of disclosure of COVID-19 cases in the workplace to the competent public authorities for treatment purposes. Taking a more firm stance, the [Greek DPA](#) (HDDPA) considers that disclosure of health data by the employer to third parties is not in principle permissible not only on practical grounds, since it might undermine compliance with and effectiveness of the measures imposed by the authorities, but also for reasons of respect for human rights, given that it can easily lead to stigmatization against the employee concerned. It is the employee experiencing COVID-19 symptoms who, according to [Guidelines of the Institution for Health and Safety in the Workplace](#), is responsible for contacting the competent authorities.

The key issue for most employers amidst this state of emergency is to find the right balance between preserving business continuity and soundness, on the one hand and safeguarding the safety and wellbeing of each and all their employees, on the other. In a nutshell, any decision of an employer to disclose, in the battle against this pandemic, the name and other details of its employees who have contracted coronavirus should be (i) fully informed by the guidance of the data protection and public health authorities, (ii) comply with the data processing principles, particularly the principle of data minimization, and (iii) take fundamental rights and principles, primarily the principle of necessity and proportionality, as well as any labour law obligations towards public health or social care authorities, into consideration.

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