

NKF Client News

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Coronavirus and Data Protection

As the Coronavirus continues to spread, companies are implementing an increasing number of measures to prevent contamination amongst their employees. These measures sometimes require them to collect, analyze and share information about employees/individuals, to comply with health and safety regulations. This also raises data protection questions which emerge in an employment relationship, but they also arise when dealing with customers, contractors and other visitors.

In the following we shall briefly analyze these questions from a Swiss Data Protection law and GDPR perspective.

1. What Health and Travel Data can be collected by Companies?

Companies should only collect the necessary personal data. In the context of Coronavirus containment, this means collecting the minimum information needed to evaluate the risk that an individual carries the virus and take proportionate, risk-based measures. For example necessary information is: calling in sick, the existence of Coronavirus symptoms, information on recent professional and non-professional travel to risk countries and close contact to persons who have recently been to risk countries and/or show Coronavirus symptoms.

Not necessary information is: nationality or race, identity of the persons to whom the individual had contact, countries visited which are not considered risk countries and/or travel prior to the incubation time. It goes without saying that the term "risk country" and the scope of necessary information currently changes daily and companies are well advised to follow the official statements issued by the competent authorities.

2. What is the Legal Basis for collecting Health and Travel Data?

In the Coronavirus context, the legal basis for collecting health and travel data is the legal obligation basis. The applicable data protection, labor, health and security laws will contain some legal obligation on the company to ensure the employees'/individuals' health and safety that justifies measures to limit the spreading of the Coronavirus. In addition, the company will have overriding legitimate interests to collect and process such data. However, it needs to be kept in mind that in certain countries, stricter regulations apply and a consent might be necessary. Under Swiss law this is not necessary.

3. Does a Privacy Notice have to be issued?

In order to comply with the principle of transparency, the employees/individuals should receive a privacy notice prior or at the moment of collection setting out the type of data that will be collected, the purpose, whether it will be shared with third parties (e.g. insurances, health authorities, etc.) and that the collected personal data will be deleted once no longer necessary for the purpose indicated. The company can do so by updating an existing data protection notice or by issuing a Coronavirus specific data protection notice. In addition, the company must ensure that the access to such data is limited to an absolute minimum, since it is very sensitive data. And finally, the necessary IT security measures must be implemented to protect this sensitive personal data.

4. Do Health and Travel Data Collections need to be notified?

Collections with sensitive personal data, which are regularly processed or disclosed to third parties, need to be registered with the Swiss Federal Data Protection and Information Commissioner (FDPIC). There are exceptions: e.g. if the collection is legally required for HR or if the company has appointed a data protection officer (DPO). As regards the legal obligation, most likely not all health data collected are also legally required. If in doubt we therefore advise to register these databases with the FDPIC. This is, however, not necessary if the company has appointed a DPO.

5. Is a DPIA necessary?

Depending on the type and scope of personal data that are being collected in the Coronavirus context (e.g. evaluation of health risks), a data protection privacy impact assessment (DPIA) might be required under the GDPR and the required safety measures will need to be implemented. Under the Swiss Data Protection Act, this currently not (yet) necessary.

6. What about Reporting Obligations?

If possible, appropriate data on flu symptoms such as fever should be collected and passed on by those affected themselves and not by the employer. I.e., as far as possible, the affected persons themselves must report the incident.

Hospitals and other public or private health care institutions as well as laboratories and medical personnel are subject to special reporting obligations under the Swiss Epidemics Act. Furthermore, anyone operating a ship or an aircraft reports observations to the operator of port facilities or the airport operator that indicate a danger to public health.

7. What applies beyond Data Protection Laws?

Besides labor, health and security laws, also cantonal laws and local laws in the EU apply which must be complied with, if the company operates outside of Switzerland.

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