

Processing employees' personal data during the Covid-19 pandemic

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Abstract

While needing to ensure the health and safety of their employees during the Covid-19 pandemic, employers face many burning data protection questions, including under what conditions they can process employees' personal data (in particular health data) and whether gathering personal data concerning employees' medical history, trips and contacts with infected persons, is allowed. This article focuses on issues that are problematic, based on the analysis of guidance issued by the European Data Protection Board, as well as national data protection authorities and practitioners from 20 countries in response to these concerns. The first section of the article analyses concepts of personal data and health data in the context of Covid-19. Then the article proceeds with exploring what possible legal bases employers can use to process employees' personal data in general, and health data in particular, under the General Data Protection Regulation when applying different measures to combat Covid-19. In the latter part of the article two practical questions raised by employers – concerning the checking of employees' body temperatures and informing them of possible infection – are discussed. The analysis indicates that national data protection authorities seem to look for a reasonable and pragmatic approach regarding compliance with the GDPR in light of the Covid-19 emergency. However, their guidance differs in several areas and the views in between nation states are not always aligned. A more specific, clear and uniform pan-European vision concerning the processing of employees' data in times of emergency is needed to better protect employees and limit the spread of the virus.

Keywords

Employee, employer, data protection, personal data, health data, Covid-19, General Data Protection Regulation, GDPR

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1. Introduction

Covid-19 poses serious unprecedented obstacles for companies as they fight to continue business operations and face challenges concerning safety of their employees. In the case of infectious diseases such as Covid-19, workplaces are effective focal points for the dissemination of information and activation of occupational health and safety measures.¹ However, employers, who respond to the threat posed by Covid-19 by implementing policies and introducing safeguards, must navigate complex topics regarding data protection and safety. Employers are questioning, under what conditions they can process employees' personal data (in particular health data) and if they can gather information regarding their employees' exposure to, or positive testing for, Covid-19 (e.g. information concerning employees' medical history, trips and contacts with infected persons).

The above questions are forcing European Union and national data protection authorities (DPAs) in Europe to determine what personal information employers need to, or can, collect about employees to limit the spread of the virus. The European Data Protection Board (EDPB)² and several national DPAs have issued specific guidance to employers on dealing with Covid-19 and data protection issues in the workplace.³ Furthermore, several researchers have indicated possible deficiencies concerning privacy and data protection in employment in the context of Covid-19. For example, both Mangan, Gramano et al.⁴ and Hendrickx, Taes et al.⁵ have discussed employers' obligations concerning data processing to ensure health and safety in workplace and have questioned the extension of employee's duties to cooperate with employers to limit the spread of the virus.

Considering the above, this article broadens the discussion, as the topic of data protection in employment will continue to be relevant due to the continuous spread of the disease.⁶ The article focuses on issues that are problematic, based on the analysis of guidance issued by DPAs and the EDPB. In particular, the article relies on the guidance issued by national DPAs in 20 European countries - Belgium (BE), Czechia (CZ), Denmark (DK), Germany (DE), Estonia (EE), Ireland (IE), Greece (EL), Spain (ES), France (FR), Italy (IT), Lithuania (LT), Luxembourg (LU), Hungary (HU), Netherlands (NL), Austria (AT), Poland (PL), Finland (FI), Sweden (SE), United Kingdom (UK)⁷

1. International Labour Organisation, 'COVID-19 and the world of work: Impact and policy responses' (Dec 2020) https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/briefingnote/wcms_738753.pdf.

2. The EDPB is an independent European body, which contributes to the consistent application of data protection rules throughout the European Union.

3. Global Privacy Assembly, 'Data protection and Coronavirus (COVID-19) resources', <https://globalprivacyassembly.org/covid19/covid19-resources/>.

4. D. Mangan, E. Gramano. et al. 'An unprecedented social solidarity stress test.' *European Labour Law Journal* (2020) Vol. 11(3) 247–275.

5. F. Hendrickx, S. Taes et al. 'Covid-19 and labour law in Belgium.' *European Labour Law Journal* (2020) Vol. 11(3) 276–285.

6. D. Chinn, H. Engel, D. Härtl, Milena Quittnat et al, 'Europe needs to prepare now to get back to work—safely' McKinsey & Company (Dec 2020) <https://www.mckinsey.com/industries/public-sector/our-insights/europe-needs-to-prepare-now-to-get-back-to-work-safely>.

7. Brexit arrived on 31 January 2020. The transition period ends on 31 December 2020. During this period, EU law will continue to apply in the UK, including the GDPR.

and Norway (NO), and their interpretations of General Data Protection Regulation (GDPR)⁸ in the light of their national laws.

The first section of the article analyses concepts of personal data and health data in the context of Covid-19. Then the article proceeds with exploring what possible legal bases can employers use to process employees' personal data in general, and health data in particular, under the GDPR when applying different measures against Covid-19. In the latter part of the article two practical questions raised by employers – concerning the checking of employees' body temperatures and informing them of possible infection – are discussed.

2. Employees' personal data in the context of Covid-19

In the context of Covid-19, employers need to distinguish between the concepts of personal data and health data as additional and more stringent measures must be followed under the GDPR in case of processing health data of employees. According to the GDPR, 'personal data' covers any information that can be linked to the employee directly or indirectly, and 'data concerning health' means 'personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status'.⁹ At first glance the separation between personal and health data is an easy one. However, the Covid-19 pandemic has proven that these general notions can be confusing in the light of practical circumstances generated by the virus. The struggle to separate health data from personal data is also apparent when analysing the guidelines from different DPAs and the EDPB.

According to the EDPB, health data can be derived from different sources. For example: 1) information that becomes health data by cross-referencing with other data, thus revealing the state of health or health risks; 2) information from a 'self-check' survey, where data subjects answer questions related to their health (such as stating symptoms); and 3) information that becomes health data because of its usage in a specific context (such as information regarding a recent trip to, or presence in, a region affected by Covid-19 processed by a medical professional to make a diagnosis).¹⁰ Their guidance relies on the relevant jurisprudence of the European Court of Justice. According to its case law, the term 'health data' must be given a wide interpretation.¹¹ In the light of the guidance issued by the EDPB, any information that can reveal an employee's potential infection or contact with Covid-19, should be considered as health data, e.g. information regarding a recent trip to, or presence in, a region affected by Covid-19 or contacts with infected people must be considered as health data. The above suggests that interpretation of the term 'health data' by the EDPB is broad, especially in the context of Covid-19, and at times contradicting opinions have been expressed by DPAs in this analysis.

8. European Parliament and Council Regulation (EU) 2016/679 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, O.J.L 119 of 4 May 2016, 1–88.

9. Articles 4(1) and 4(15) and 9 GDPR.

10. EDPB. Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak (2020).

11. ECJ 6.3.2003, C-101/01 (Lindqvist) paragraph 50.

Several DPAs (EL,¹² FI,¹³ AT,¹⁴ SE,¹⁵ NO)¹⁶ issued a statement clarifying what in their opinion classifies as health data under the GDPR. For example, information about the medical diagnosis of Covid-19 and information on whether an employee presents any signs of illness (e.g. cough, fever) was classified as health data. The Austrian DPA, however, argued that information about suspected cases should also be viewed as health data. These statements from DPAs are consistent with the guidance issued by the EDPB. Possible symptoms and diagnosis are health data as they reveal the state of a person's health.

Some DPAs (DK¹⁷ EL,¹⁸ FI,¹⁹ SE,²⁰ NO)²¹ also explained what can be considered personal data in the context of Covid-19. According to the authorities, information regarding the data subject's recent visits to a country with a high number of Covid-19 cases does not qualify as health data.²² These statements seem to be in contradiction with the guidance given by the EDPB as they give a narrower interpretation to the notion of health data. Nevertheless, it is reasonable to agree with the views of the DPAs in this matter. Data concerning trips to infected areas should not be hastily considered as health data, as the information is too broad to show with any certainty that the person has contracted Covid-19 or been exposed to the virus. The DPAs were also of the opinion that information on whether an employee has been quarantined (without mentioning the specific reason for this) does not qualify as health data. The Swedish DPA also specified that information specifying that the employee is in 'quarantine' (which means that for precautionary reasons they are not working in the workplace) it is not considered a personal health information. However, information related to someone being in quarantine according to national law, is considered health data. Current analysis reveals that the DPAs sometimes provide conflicting interpretations on this topic. The Danish DPA clarified that information about an employee's illness, without stating the reason, is personal data not health data. In contrast, the DPA from Greece, considered information on whether the employee remains at home due to illness, to be health data. The EDPB has not given a specific explanation in this issue. On the one hand, taking into account the context of Covid-19, any reference to quarantine, self-isolation and movement restrictions issued by the law, authorities or healthcare providers, can almost certainly refer to the possibility of being in contact with Covid-19 and therefore, classify as health data. On the other hand, simply asking a person if they are on

12. The Hellenic (Greek) Data Protection Authority, 'ΚαΤΕΥΘΥΝΤΗΡΙΕΣ ΓΡΑΜΜΕΣ ΓΙΑ ΤΗΝ ΕΠΕΞΕΡΓΑΣΙΑ ΔΕΔΟΜΕΝΩΝ ΠΡΟΣΩΠΙΚΟΥ ΧΡΑΚΤΗΡΑ ΣΤΟ ΠΛΑΙΣΙΟ ΤΗΣ ΔΙΑΧΕΙΡΙΣΗΣ ΤΟΥ COVID-19' (Dec 2020) <https://www.dpa.gr/APDPXPortlets/htdocs/documentSDisplay.jsp?docid=163,39,44,101,194,223,3,99>.

13. Office of the Data Protection Ombudsman, 'Data protection and limiting the spread of coronavirus' (Dec 2020) https://tietosuoja.fi/en/article/-/asset_publisher/tietosuoja-ja-koronaviruksen-leviamisen-hillitsemisen.

14. Datenschutzbehörde, 'Information der Datenschutzbehörde zum Coronavirus (Covid-19)' (Dec 2020) <https://www.dsb.gv.at/download-links/informationen-zum-coronavirus-covid-19-.html>.

15. Datainspektionen, 'Coronaviruset och personuppgifter' (Dec 2020) <https://www.datainspektionen.se/nyheter/coronavirus-och-personuppgifter/>.

16. Datatilsynet, 'Korona og personvern på arbeidsplassen' (Dec 2020) <https://www.datatilsynet.no/personvern-pa-ulike-omrader/korona-og-personvern-arbeidsplassen/>.

17. Datatilsynet, 'Hvordan er det med GDPR og coronavirus?' (Dec 2020) <https://www.datatilsynet.dk/presse-og-nyheder/nyhedsarkiv/2020/mar/hvordan-er-det-med-gdpr-og-coronavirus/>.

18. The Hellenic (Greek) Data Protection Authority, n12.

19. Office of the Data Protection Ombudsman, n13.

20. Datainspektionen, n15.

21. Datatilsynet, n16.

22. See, for example, statement from Danish DPA. Datatilsynet, n17.

sick leave, should not be considered as a health data as it does not reveal the diagnosis of the person.

To conclude, a broad interpretation of health data by the EDPB seems to hinder the clarity of the GDPR making the application of practical solutions by the employer more complicated than necessary. For employers who do not have a legal basis for processing employee's health data, the only possibility is to ask general questions, such as whether the employee is fit for work or does not pose a risk to other workers in the work environment, without specifying in any way the reasons for asking these questions.

3. Legal bases for processing employees' personal data at the time of Covid-19

Scholars have been critical of data protection principles and have expressed doubts about whether these cornerstones of data protection benefit privacy.²³ Some have criticised the fact that these principles originate from the Data Protection Convention 108 of the Council of Europe of 1981, and thus rely on a different technological landscape than we are currently dealing with.²⁴ Regardless of the criticism, the European Commission is convinced that data protection principles remain sound.²⁵ The importance of these principles is also clear in the context of Covid-19, as most of the DPAs guidelines analysed for the present article underline the importance of general principles of data processing.²⁶ The overall advice from the authorities is that employers should have accurate purposes for processing data, should rely on the legal bases for compliance, should observe the principle of proportionality and not collect more data than they need.²⁷ As a rule, employers must refrain from unauthorised investigations (Germany)²⁸ and must not take on the role of a health authority (Sweden).²⁹

Not surprisingly, the principle of lawfulness – the right to process personal data only under certain legislative grounds³⁰ – is the first principle enacted in the GDPR and therefore referenced by the EDPB and DPAs extensively in their guidance. According to Andrea Jelinek, the chair of the EDPB, the GDPR provides several legal grounds that enable companies to process personal data during the Covid-19 pandemic, without the consent of data subjects.³¹ According to the EDPB, employers may process employees' personal data if it is necessary to comply with their 'legal obligations'³² (e.g.

23. W. Bonner, M. Chiasson, 'If fair information principles are the answer, what was the question? An actor-network theory investigation of the modern constitution of privacy.' *Information and Organization* (2005) Vol. 15 (4).

24. Omer Tene, 'Privacy: The New Generations.' *International Data Privacy Law* (2011) Vol. 1 (1).

25. European Commission, 'Commission Staff Working Paper. Impact Assessment' (2012) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0072&from=EN>.

26. Article 5 GDPR.

27. See, for example, statement from Belgium DPA: L'Autorité de protection des données, 'Covid-19 sur le lieu de travail' (Dec 2020) <https://www.autoriteprotectiondonnees.be/professionnel/themes/covid-19/covid-19-sur-le-lieu-de-travail>.

28. Der Landesbeauftragte für den Datenschutz und die Informationsfreiheit Baden-Württemberg, 'Häufig gestellte Fragen ("FAQs") zum Thema Corona', <https://www.baden-wuerttemberg.datenschutz.de/faq-corona/>.

29. Datainspektionen, n15.

30. Articles 5(1) and 6(1) GDPR.

31. Andrea Jelinek, 'Statement of the EDPB Chair on the processing of personal data in the context of the COVID-19 outbreak' (Dec 2020) https://edpb.europa.eu/sites/edpb/files/files/news/edpb_covid-19_20200316_press_statement_en.pdf.

32. Article 6(1)(c) GDPR.

obligations relating to health and safety in the workplace) or necessary in the ‘public interest’³³ (e.g. the need to control diseases and limit threats to public health).³⁴ In addition, Andrea Jelinek mentioned the ‘vital interest of the data subject or another natural person’³⁵ as possible legal grounds for data processing.³⁶ As two of the legal bases (‘legal obligation’ and ‘public interest’) need to be laid down by Union or Member State law,³⁷ the EDPB also reminds employers, that they are allowed to process personal data in accordance with national law and within the conditions set therein.³⁸

To date, almost all the DPAs in Europe have provided their own explanations or have specified the announcements made by the EDPB. For example, in its report,³⁹ the Spanish DPA highlights that Recital (46) of the GDPR already recognises that in exceptional situations, such as an epidemic, the legal base for processing activities can be based both on the ‘public interest’ and on the ‘vital interest of the data subject or another natural person’. The authority argues that the latter basis should be interpreted in the broadest possible way to justify the ‘processing of personal data aimed at protecting all those persons susceptible to being infected in the spread of an epidemic’. It would, therefore, justify adopting measures in the workplace that protect unnamed or in principle unidentified or identifiable people (e.g. employees, clients, visitors). Similarly, the Greek DPA considers this as a relevant legal basis that can be used by employers in the fight against Covid-19.⁴⁰ Conversely, the Belgian DPA advises against using ‘vital interests’ as a legal basis as the current Covid-19 situation in Belgium does not justify a broad and systematic application of this paragraph.⁴¹ It is noteworthy, that the use of this paragraph should be limited and take into consideration the real circumstances in the country or a region (e.g. infection rate among population).

Current analysis suggests that the processing activities should be based on ‘legal obligation’.⁴² This is also the preferred legal base by the majority of DPAs. In the context of Covid-19, the authorisation comes from employer’s obligation to protect employees and take the necessary measures to ensure a safe working environment. Employers may also process employees’ data if it is ‘necessary for the purposes of the legitimate interests pursued by the controller’,⁴³ as advised by some DPAs (e.g. DE⁴⁴

33. Article 6(1)(e) GDPR.

34. European Data Protection Board, ‘Statement on the processing of personal data in the context of the COVID-19 outbreak’ (Dec 2020) https://edpb.europa.eu/sites/edpb/files/files/news/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf.

35. Article 6(1)(d) GDPR.

36. Andrea Jelinek, n31.

37. Article 6(3) GDPR.

38. European Data Protection Board, n34.

39. La Agencia Española de Protección de Datos, ‘Report from the State Legal Service (Detached Department of the SLS at the Spanish DPA) on Processing Activities Relating to the Obligation for Controllers from Private Companies and Public Administrations to Report on Workers Suffering from COVID-19’ (Dec 2020) <https://www.aepd.es/es/documento/2020-0017-en.pdf>.

40. The Hellenic (Greek) Data Protection Authority, n12.

41. L’Autorité de protection des données, n27.

42. Article 6(1)(c) GDPR.

43. Article 6(1)(f) GDPR.

44. German Data Protection Supervisory Authorities joint information paper on data protection and the Coronavirus pandemic, ‘Datenschutzrechtliche Informationen zur Verarbeitung von personenbezogenen Daten durch Arbeitgeber und Dienstherren im Zusammenhang mit der Corona-Pandemie’ (Dec 2020) <https://www.bfdi.bund.de/DE/Datenschutz/Themen/Gesundheit/GesundheitSozialesArtikel/Datenschutz-in-Corona-Pandemie.html?nn=5217154>.

and HU).⁴⁵ However, in this case, organisations need to perform an interest evaluation test to verify whether the interest linked to the purpose to be achieved through data processing overrides the rights, freedoms or legitimate interests of the employee. Current analysis suggests that it is reasonable to assume, that the collection of employee data during the outbreak of Covid-19 should be aligned with the employees' individual interests in their well-being, so it is unlikely that there will be overriding compelling individual rights that would invalidate the processing. As suggested, both legal bases described above allow employers to rely on their obligation and/or interest concerning safe working environments and are therefore suitable to use in case of Covid-19.

Common examples of personal data processing activities described in DPA guidance concern information on employees' travel history. According to the majority of DPAs (DK,⁴⁶ DE,⁴⁷ IE,⁴⁸ EL,⁴⁹ LT,⁵⁰ AT,⁵¹ EE),⁵² as well as Ministries (CZ)⁵³ and practitioners (FI⁵⁴ and NL)⁵⁵ presently analysed, employers may ask employees to inform them if they have visited countries considered to be at risk during the Covid-19 crisis. Some DPAs (e.g. HU⁵⁶ and BE)⁵⁷ and practitioners (e.g. PL)⁵⁸ recommend that employers encourage employees to voluntarily provide their employers with information about their recent trips. In the case of Italy, the recent emergency regulation states that the employer shall notify the staff on the access ban to the company premises for those who have come from restricted areas or had contact with infected people.⁵⁹ Other DPAs (e.g. FR⁶⁰ and LU),⁶¹ however, emphasise that the collection of information related to the recent movements of

45. The Hungarian National Authority for Data Protection and Freedom of Information, 'Information on processing data related to the coronavirus epidemic' (Dec 2020) https://www.naih.hu/files/NAIH_2020_2586_EN.pdf.

46. Datatilsynet, n17.

47. German Data Protection Supervisory Authorities. . . , n44.

48. The Data Protection Commission, 'Data Protection and COVID-19' (Dec 2020) <https://dataprotection.ie/en/dpc-guidance/blogs/data-protection-and-covid-19>.

49. The Hellenic (Greek) Data Protection Authority, n12.

50. The State Data Protection Inspectorate of the Republic of Lithuania, 'Personal Data Protection and Coronavirus COVID-19' (Dec 2020) <https://vdai.lrv.lt/en/news/personal-data-protection-and-coronavirus-covid-19>.

51. Datenschutzbehörde, n14.

52. Andmekaitse Inspektsioon. 'Töötajate isikuandmete töötlemisest koroonaviiruse kontekstis' (Dec 2020) <https://www.aki.ee/et/uudised/tootajate-isikuandmete-tootlemisest-koroonaviiruse-kontekstis>.

53. I. Sagal, F. Hron, 'COVID-19: Guidance for Employers in the Czech Republic' (Dec 2020) <https://www.twobirds.com/en/news/articles/2020/czech-republic/covid-19-guidance-for-employers-in-the-czech-republic>.

54. M. Nikkola et al, 'COVID-19: Guidance for Employers in Finland' (Dec 2020) <https://www.twobirds.com/en/news/articles/2020/finland/covid-19-guidance-for-employers-in-finland>.

55. O. Sleeking, 'European regulators' views on data protection and COVID-19' Global Data Hub (Dec 2020) <https://globaldatahub.taylorwessing.com/article/european-regulators-views-on-data-protection-and-covid-19>.

56. The Hungarian National Authority for Data Protection and Freedom of Information, n45.

57. L'Autorité de protection des données n27.

58. I. Kowalczyk-Pakula, P. Koczara, 'COVID-19: Guidance for employers in Poland' (Dec 2020) Available: <https://www.lexology.com/library/detail.aspx?g=9e152161-ce6e-4f4d-b8eb-266c4a005e0f>.

59. The Decree of the President of the Council of Ministers (22 March 2020) refers to the Protocol co-signed by the Italian Government and the Unions: 'Protocollo condiviso di regolamentazione delle misure per il contrasto e il contenimento della diffusione del virus Covid-19 negli ambienti di lavoro' (14 March 2020).

60. Commission Nationale de l'Informatique et des Libertés, 'Coronavirus (COVID-19): les rappels de la CNIL sur la collecte de données personnelles' (Dec 2020) <https://www.cnil.fr/fr/coronavirus-covid-19-les-rappels-de-la-cnil-sur-la-collecte-de-donnees-personnelles>.

61. National Commission for Data Protection, 'Coronavirus (COVID-19): Recommendations by the CNPD on the processing of personal data in the context of a health crisis' (Dec 2020) <https://cnpd.public.lu/en/actualites/national/2020/03/coronavirus.html>.

employees is the responsibility of public health authorities (not the employer), as they are qualified to take the appropriate action. Some DPAs also addressed the question of whether an employer can require all staff to fill out a questionnaire requesting information related to employees' recent travel history. For example, in Belgium, employers are not allowed to require employees to fill out a form detailing their recent travel history;⁶² while some other DPAs (e.g. IE,⁶³ EL,⁶⁴ HU),⁶⁵ deem the use of questionnaires to be acceptable, if the employer decides that this is necessary and proportionate. In the light of the above, in most of the nation states studied, employers are justified in asking their employees about travel to infected areas.

4. Legal bases for processing employees' health data for tackling Covid-19

Employers may process employee's health data only in exceptional cases,⁶⁶ as health data belongs to the special categories of personal data and requires specific protection. Therefore, if the personal data falls within the category of health data (which is likely in the context of the Covid-19 crisis), a further condition under the GDPR must be satisfied in addition to the legal basis for processing. In this section possible legal justifications for processing employee's health data will be discussed, together with some examples of guidance given by the EDPB and DPAs.

According to the EDPB, employers may process health data, when it is necessary for reasons of substantial 'public interest in the area of public health',⁶⁷ on the basis of Union or national law.⁶⁸ Some DPAs (BE,⁶⁹ IE,⁷⁰ ES,⁷¹ AT)⁷² also explain, that employers may rely on this condition to justify the processing of health data relating to the coronavirus, if they are executing explicit instructions and acting on the advice of competent authorities (e.g. providing specific cases of infection to public health authorities). The EDPB⁷³ also states that processing health data might be permissible to 'protect the vital interests of the data subject or another natural person' where necessary and in cases where the data subject is incapable of giving their consent.⁷⁴ In their guidelines, the Irish⁷⁵ and Estonian⁷⁶ DPAs specify that this legal basis will typically apply only in emergency situations, where no other legal basis can be identified. In addition, the Hungarian⁷⁷ and Spanish⁷⁸ authorities advise employers to act on the advice of its medical advisors to justify the processing of health data relating to Covid-19 if it is necessary for the purposes of

62. L'Autorité de protection des données n27.

63. The Data Protection Commission n48.

64. The Hellenic (Greek) Data Protection Authority, n12.

65. The Hungarian National Authority for Data Protection and Freedom of Information, 45.

66. Article 9(2) GDPR.

67. Article 9(2)(i) GDPR.

68. European Data Protection Board, n34.

69. L'Autorité de protection des données n27.

70. The Data Protection Commission n48.

71. La Agencia Española de Protección de Datos n39.

72. Datenschutzbehörde n14.

73. European Data Protection Board, n34.

74. Article 9(2)(c) GDPR.

75. The Data Protection Commission n48.

76. Andmekaitse Inspektsioon. n52.

77. The Hungarian National Authority for Data Protection and Freedom of Information, n45.

78. La Agencia Española de Protección de Datos n39.

preventative or occupational medicine.⁷⁹ Thus, it could be argued that after evaluating all information available to them, employers may decide that certain employees, who have had an increased chance of exposure, have to be checked by an occupational physician. In accordance with data minimisation principle, the employer is only entitled to find out the result of the test and no other medical information.

However, the EDPB and majority of the DPAs⁸⁰ included in this analysis, suggest that employers may process health data if the processing is necessary for the purposes of carrying out the obligations and exercising specific rights in the field of employment (e.g. obligation to ensure the safety of their employees) in so far as it is authorised by Union or Member State law.⁸¹ It is noteworthy, however, that this derogation from the general prohibition on the processing of health data is determined in a surprisingly broad and unclear manner for such a special regime of protection. According to the GDPR, employers may process employees health data if ‘processing is necessary for the purposes of carrying out the obligations and exercising specific rights’ of the employer ‘in the field of employment . . . law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject’.⁸² The criteria set out in this Article, are ambiguous, raising several questions. For example: 1) whether the national law must explicitly allow for data processing or if specific obligations in the field of employment law are enough to justify processing health data; and 2) what can be considered appropriate safeguards for the employee. A narrow interpretation of this Article suggests that employers should refrain from using the derogation if their national regulations do not explicitly mention the right to process health data in the context of their relevant obligation and if there are no adequate safeguards set in place for the employee. Due to these difficulties, the Estonian DPA has advised employers to use employees’ consent⁸³ as a legal basis for processing health data in the context of Covid-19. Interestingly, the only other DPA that mentions consent as possible legal ground is Germany.⁸⁴ The use of consent has also been suggested by many practitioners.⁸⁵ However, the solution of using consent is also flawed. The consent is said to be powerless in circumstances where a data subject requires a certain good,⁸⁶ as is the case with employees. In fact, due to the imbalance of power that exists in the employment relationship employees are rarely able to exercise their free will.⁸⁷ This is also relevant during the spread of Covid-19 as employees are in a particularly vulnerable position as they might be justifiably afraid of losing their job when unemployment is growing rapidly and

79. Article 9(2)(h) GDPR.

80. See for example previously referred statements from BE, DE, IE, ES, SE, AT, HU, NO.

81. Article 9(2)(b) GDPR.

82. Article 9(2)(b) GDPR.

83. Articles 6(1)(a) and 9(2)(a) GDPR.

84. German Data Protection Supervisory Authorities . . . , n44.

85. For example, S.D. Goldstick, ‘Key Considerations and Guidance for Employers on How to Comply with GDPR During the Novel Coronavirus Pandemic.’ Foley & Lardner LLP (Dec 2020) <https://www.foley.com/en/insights/publications/2020/04/considerations-guidance-employers-gdpr-coronavirus>; A.A. Malik, ‘The Processing of Personal Health Data according to the GDPR for Organizations in the time of Coronavirus (COVID-19)’ CPO Magazine (Dec 2020) <https://www.cpomagazine.com/data-protection/the-processing-of-personal-health-data-according-to-the-gdpr-for-organizations-in-the-time-of-coronavirus-covid-19/>.

86. L. Belli et al, ‘Selling Your Soul While Negotiating the Conditions: From Notice and Consent To Data Control By Design’ (2017) 7, 4 Health and Technology 453–467.

87. Article 29 Working Party Opinion 15/2011 on the definition of consent 01197/11/EN/WP187, p. 35.

new jobs are scarce. In this context, relying on consent as the legal basis for processing health data is questionable. Practically, the use of consent as a legal basis for processing employee data is also not recommended from an employer's perspective, as the employee will always be able to withdraw his/her consent.⁸⁸

As shown in this analysis, the guidance issued by DPAs and the EDPB enables organisations to rely on several legal bases under the GDPR when processing health data connected to Covid-19. In this context, the approach of nation states should not vary considerably as the health and safety framework Directive and biological agents Directive enact uniform rules across the EU obliging employers to maintain a safe working environment and take measures to protect their workers. However, when it comes to processing health data processing in practice, it can be confusing and chaotic from an employer's perspective, as the guidance issued by DPAs differs widely across Member States. The similarities and differences in the guidance of DPAs are discussed below in relation to processing health data, e.g. in respect of employee symptoms and diagnosis.

In some countries, DPAs (e.g. DK,⁸⁹ IE,⁹⁰ and LT)⁹¹ and practitioners (SE)⁹² argue that an employer is allowed to process an employee's health data, e.g. pertaining to whether an employee is infected with Covid-19, to apply adequate protective measures in the workplace; while in others (e.g. FI),⁹³ employers may process the personal data of employees only when necessary. In fact, some of the DPAs (e.g. LT) specify, that if possible, employers should refrain from asking for a diagnosis and only process information on whether the person is ill or in quarantine. A few DPAs (IE, LT, UK)⁹⁴ state that employers would also be justified in asking employees to inform them if they are experiencing symptoms of Covid-19. Several DPAs (DE, LT, AT, EE) clarify that an employer may ask whether the employee has been in contact with anyone suffering from Covid-19. Current analysis suggests that asking questions that can be answered on a 'yes' or 'no' basis is usually considered to be sufficient. If there are further indications, however, a request for more information is justified. Conversely, other DPAs (e.g. IT,⁹⁵ FR,⁹⁶ LU,⁹⁷ NL)⁹⁸ and practitioners (PL,⁹⁹ FI)¹⁰⁰ included in the current analysis, state that employers should refrain from collecting information on possible symptoms experienced by an employee and their relatives/closest contacts in a systematic and generalised manner, or through individual inquiries and requests. The analysis above clearly illustrates the wide range of views held among DPAs. On the one hand these various

88. Eklund. Monitoring employees' e-mail correspondence and Internet use – A Finnish perspective – PART II. European Labour Law Journal 2019, Vol. 10(2) 134–153.

89. Datatilsynet, n17.

90. The Data Protection Commission n48.

91. The State Data Protection Inspectorate of the Republic of Lithuania n50.

92. R. Boardman, A. Mole, O. Kiazim, 'COVID-19 Data Protection guidance' Bird & Bird LLP (Dec 2020) https://www.twobirds.com/~media/pdfs/in-focus/coronavirus/data-protection_covid-19-v03.pdf?la=en&hash=0DDE82B226D1F39F7F791FE577D24BB6661BF5E9.

93. Office of the Data Protection Ombudsman n13.

94. Information Commissioner's Office, 'Your data matters blog' <https://ico.org.uk/your-data-matters/your-data-matters-blog#18march>.

95. Garante per la protezione dei dati personali.

96. Commission Nationale de l'Informatique et des Libertés n60.

97. National Commission for Data Protection n61.

98. Autoriteit Persoonsgegevens, 'Corona op de werkvloer' <https://autoriteitpersoonsgegevens.nl/nl/onderwerpen/corona/corona-op-de-werkvloer>.

99. I. Kowalczyk-Pakula, n58.

100. M. Nikkola et al n54.

explanations give employers and data protection specialists an idea of the possible actions allowed under national law; on the other, the situation appears chaotic as a lack of uniform approach in EU is confusing for both employers and employees.

Most of the authorities presently analysed, agree that employees are obliged, under employment law, to inform the employer if they suspect that they have been exposed to the virus (ES,¹⁰¹ HU,¹⁰² FR,¹⁰³ LU,¹⁰⁴ AT),¹⁰⁵ have a medical diagnosis of Covid-19 (AT, HU, IE,¹⁰⁶ LT,¹⁰⁷ HU) or are a threat to others in the workplace (EE).¹⁰⁸ In some nation states, DPAs (FR, LU, AT, EL,¹⁰⁹ EE)¹¹⁰ also suggest that employers should raise awareness and invite employees to provide information regarding any possible exposure to the employer or to the health authorities; while in other nation states DPAs (BE,¹¹¹ NL)¹¹² and practitioners (CZ)¹¹³ recommend that employees should voluntarily communicate symptoms to the physician. Current analysis indicates, that based on the guidance given by DPAs, employers should rely on employees' willingness to share the information. Unfortunately, this outcome leaves employers without effective means to receive relevant data.

Inside some countries, there are also inconsistencies. For example, the Italian DPA claims that the collection of information on the symptoms of Covid-19 is the responsibility of healthcare professionals.¹¹⁴ However, this contradicts the recent emergency regulation, which states that an employee is required to notify the employer if they have symptoms during the working day.¹¹⁵ Similarly, in case of Germany, the Supervisory Authority of Baden-Württemberg argues that employees are not obliged to reveal if they have contracted Covid-19, except to the competent authorities.¹¹⁶ This contradicts information given by the German Federal Ministry of Labour and Social Affairs. According to the Ministry, an employer must normally not ask for the diagnosis of an employee who is sick, however, in the current situation employers are authorised to ask whether an employee is infected with Covid-19.¹¹⁷ Similarly, the joint statement from German DPAs seems to agree with the latter statement, as it allows employers to process information regarding identified cases of Covid-19 and in situations where an employee has been in contact with infected

101. La Agencia Española de Protección de Datos n39.

102. The Hungarian National Authority for Data Protection and Freedom of Information, n45.

103. Commission Nationale de l'Informatique et des Libertés n60.

104. National Commission for Data Protection n61.

105. Datenschutzbehörde n51.

106. The Data Protection Commission n48.

107. The State Data Protection Inspectorate of the Republic of Lithuania n50.

108. Andmekaitse Inspektsioon n52.

109. The Hellenic (Greek) Data Protection Authority, n12.

110. Andmekaitse Inspektsioon n52.

111. L'Autorité de protection des données n27.

112. Autoriteit Persoonsgegevens n99.

113. T. Procházka, P. Perniš, 'Coronavirus – a practical guide for employers in the Czech Republic' (Dec 2020) https://www.eversheds-sutherland.com/global/en/what/publications/shownews.page?News=en/czech-republic/en/Coronavirus_a_practical_guide_for_employers.

114. Garante per la protezione dei dati personali.

115. Protocollo condiviso... (14 March 2020) n91.

116. Der Landesbeauftragte für den Datenschutz und die Informationsfreiheit Baden-Württemberg n13.

117. Bundesministerium für Arbeit und Soziales, 'Antworten zu Arbeitsrecht und Arbeitsschutz' (Dec 2020) <https://www.bmas.de/DE/Schwerpunkte/Informationen-Corona/Fragen-und-Antworten/Fragen-und-Antworten-corona/corona-virus-arbeitsrechtliche-auswirkungen.html>.

person.¹¹⁸ Current analysis shows that inconsistencies are not only present at EU level but also at the national level.

In addition, most of the DPAs (BE,¹¹⁹ FR,¹²⁰ LU,¹²¹ LT,¹²² HU,¹²³ IT)¹²⁴ studied are in agreement, that employers should refrain from collecting the medical records of staff, for example, by requiring their employees to fill in medical forms or questionnaires. The Italian DPA asks employers not to carry out autonomous initiatives for the collection of health data and instead follow the indications provided by the competent institutions.¹²⁵ At the same time, some DPAs (e.g. EL,¹²⁶ SE)¹²⁷ do not exclude the possibility of drawing up questionnaires, although, it is evident from their statements, that the systematic, constant and generalised collection of personal data leading to the creation and regular updating of employee health profiles is highly unlikely to be compliant with the principle of proportionality. Also, according to the statements of the Irish DPA, the use of such a questionnaire would have to have a strong justification based on necessity and proportionality and on an assessment of risk.¹²⁸

5. Processing operations with employee's data: example of body temperature readings

During the Covid-19 pandemic, many employers have started to question under what rules they can perform medical check-ups on employees, e.g. checking employees' body temperatures before they enter the workplace or subjecting them to other medical measures (e.g. by taking throat swabs for saliva samples). This question is relevant as employers are obliged to take necessary measures under the occupational health and safety framework Directive and biological agents at work Directive. Body temperature readings might help to detect possible cases of infection and therefore limit the spread of Covid-19 in the workplace.¹²⁹

Considering that the material scope of the GDPR is limited to the processing by automated means or using filing systems,¹³⁰ it is no surprise that employers are starting to ponder the applicability of GDPR to their potential precautionary actions. Unfortunately, the explanation provided by the EDPB on this issue is not clear and does not address the applicability of GDPR directly. On the one hand, the EDPB reiterates that the answer to this question depends upon national laws; on the other hand, it refers to temperature checks as health data, indicating the applicability of GDPR.¹³¹ It is noteworthy

118. German Data Protection Supervisory Authorities . . . , n44.

119. L'Autorité de protection des données n27.

120. Commission Nationale de l'Informatique et des Libertés n60.

121. National Commission for Data Protection n61.

122. The State Data Protection Inspectorate of the Republic of Lithuania n50.

123. The Hungarian National Authority for Data Protection and Freedom of Information (10 March 2020) n9.

124. Garante per la protezione dei dati personali.

125. Ibid.

126. The Hellenic (Greek) Data Protection Authority, n12.

127. Datainspektionen (12 March 2020) n14.

128. The Data Protection Commission n48.

129. World Health Organisation has advised employers that 'anyone with even a mild cough or low-grade fever (37.3 C or more) needs to stay at home' World Health Organisation, 'Getting your workplace ready for COVID-19' (Dec 2020) <https://www.who.int/docs/default-source/coronavirus/advice-for-workplace-clean-19-03-2020.pdf>.

130. GDPR art 2(1).

131. European Data Protection Board, n34.

that in the context of the ongoing pandemic, only a few DPAs (BE,¹³² and SE)¹³³ have analysed the applicability of the GDPR. Both national DPAs suggest that temperature checking should be addressed by national legislation, arguing that if the action of checking employees' temperatures does not accompany processing of personal data, the GDPR does not apply. They further note that only if an employer chooses to register personal data from the control, the GDPR applies. Scholars also tend to agree with this approach, stating that the GDPR will only apply if one is dealing with an automated processing operation or if the data will be entered into a file.¹³⁴ Automated processing occurs if the body temperature is measured using thermal cameras in the workplace. If the camera allows for recognition of a specific person, the GDPR is applicable.

Most of the DPAs, however, do not address the applicability of GDPR at all, limiting their guidance to the question of whether or not temperature checks are permitted without providing any additional explanation on the conditions under which they can be carried out. In fact, most of the DPAs (LT,¹³⁵ HU,¹³⁶ FR,¹³⁷ LU,¹³⁸ NL),¹³⁹ ministries (CZ)¹⁴⁰ and practitioners (FI, PL,¹⁴¹ EE)¹⁴² included in this analysis, suggest, that employers should refrain from requiring their employees to provide daily body temperature readings as this is the responsibility of medical professionals. The topic is also analysed by Mangan, Gramano et al., who argue that the question of who is allowed to take temperature checks – employers or medical professionals or both – is dependent on how a 'medical act' is defined in Member State law.¹⁴³ Only some authorities have accepted that employers may need to check employees' temperatures to limit the spread of Covid-19. For example, according to the Italian emergency legislation, employers, whose business is 'essential', are required to check the temperature of employees to decide whether they can enter the workplace.¹⁴⁴ However, several practitioners from different nation states (e.g. DE, ES, HU, UK) find that temperature testing can be considered admissible under certain limitations. For example, testing is acceptable to allow employees access the workplace (DE) or in the case that the employer has a reason to suspect a case of infection (HU).¹⁴⁵ Hendrickx and Taes et al.¹⁴⁶ consider the issue to be unclear under the Belgian labour law. However, they also argue that in the case that sufficient measures for the protection of the employee's personal integrity and the right to privacy are put in place, the measuring of body temperatures can hardly be excluded. Such a stance could also be a

132. L'Autorité de protection des données n27.

133. Datainspektionen n15.

134. F. Hendrickx, S. Taes et al. n5.

135. The State Data Protection Inspectorate of the Republic of Lithuania n50.

136. The Hungarian National Authority for Data Protection and Freedom of Information, n45.

137. Commission Nationale de l'Informatique et des Libertés n60.

138. National Commission for Data Protection n61.

139. Autoriteit Persoonsgegevens n99.

140. Ministerstvo práce a sociálních věcí, 'Koronavirus a pracovněprávní souvislosti' (Dec 2020) <https://www.mpsv.cz/documents/20142/1248138/TZ+-+Koronavirus+a+pracovn%C4%9Bpr%C3%A1vn%C3%AD+souvislosti.pdf/fb9728ac-3cd0-cdad-2f0b-da7ab6b412cf>.

141. In case of Finland and Poland see: R. Boardman, A. Mole, O. Kiazim n92.

142. The Occupational Health and Safety Act (RT I 1999, 60, 616) in Estonia does not allow employers to check employees' temperature.

143. Mangan, Gramano et al. n4.

144. Protocollo condiviso ... (14 March 2020) n91.

145. R. Boardman, A. Mole, O. Kiazim n92.

146. F. Hendrickx, S. Taes et al. n5.

reason why the Dutch DPA recommends that employers ask employees to take their own temperature.¹⁴⁷

In case the GDPR does not apply, employers still have to respect the privacy right enacted in the Convention for the Protection of Human Rights and Fundamental Rights (ECHR).¹⁴⁸ The ECHR case law reaffirms employees' privacy right in the workplace¹⁴⁹ and sets out criteria for guaranteeing the reasonable expectation of privacy. Privacy-friendly measures should take into account the extent of the monitoring and the degree of intrusion into the employee's privacy,¹⁵⁰ for example, whether temperature checks were carried out during limited period. Thus, the conflict between the employer's duty of care on the one hand, and the protection of the employee's personal sphere, on the other hand, needs to be carefully reconciled when an employer plans to introduce monitoring measures in the workplace.¹⁵¹ In the light of ECHR, it can be questioned whether temperature checks constitute an adequate and the least intrusive measure to fight the virus. The approach to limiting intrusions into employees privacy also features in the guidelines of some authorities (e.g. SE,¹⁵² AT)¹⁵³ guidelines as they emphasise that there are more moderate¹⁵⁴ means of collecting employee health data (e.g. health checks conducted by a physician), especially, since fever is only one of several possible symptoms of Covid-19. The Greek DPA also noted that, temperature checks should be completed only when the employer has concluded that there are no other less privacy-intrusive means of meeting the same objective.¹⁵⁵ Mangan, Gramano et al also consider temperature checks as an imperfect measure, as 'normal' temperature does not preclude the spread of the virus. However, in their view, the measure is useful if paired with other preventative measures in workplaces.¹⁵⁶

The above shows, that even such a simple act as taking a person's body temperature can lead to questions concerning complex issues related data protection rights, regulated by the GDPR, privacy rights protected by ECHR, as well as health and safety rights stemming from EU Directives. A worrying picture emerges from the guidance issued by DPAs, as a clear and unified understanding of if, and under what conditions, employers can check employees' temperatures is lacking.

147. Autoriteit Persoonsgegevens n99.

148. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 8), as amended by Protocols No 11 and 14. CETS n° 005, Rome, 4 November 1950. Article 8 Right to respect for private and family life.

149. See for example *Niemietz v. Germany*, judgment of 16 December 1992 Application no. 13710/88, at 27.; *Halford v United Kingdom*, judgment of 25 June 1997 Application no. 20605/92, at 43–44; *Copland v. UK*, judgment of 3 April 2007, Application no. 62617/00 at 41.

150. *Bărbulescu v Romania*, European Court of Human Rights (2017, no. 61496/08), para 120–122.

151. M. Otto. THE RIGHT TO PRIVACY IN EMPLOYMENT IN SEARCH OF THE EUROPEAN MODEL OF PROTECTION. *European Labour Law Journal*, Volume 6 (2015), No. 4.

152. Datainspektionen, n15.

153. Datenschutzbehörde 51.

154. F. Hendrickx, S. Taes et al. n5.

155. The Hellenic (Greek) Data Protection Authority, n12.

156. Mangan, Gramano. et al. n4.

6. Covid-19 communication within the organisation: when an employee tests positive

On the one hand, DPAs agree with the employer's duty of care towards all employees to eliminate health risks in the workplace as far as possible. On the other hand, however, the authorities invite employers to be cautious when mitigating the effects of Covid-19, and underline the importance of the general principles of data processing. For example, according to the Hungarian DPA, employers must examine in every case whether there are efficient ways of tackling the virus that do not require the processing of personal data.¹⁵⁷ A similar stance is also taken in Belgium, where the DPA reiterates that employers may process only the minimum necessary amount of data.¹⁵⁸ The above indicates that an employer's obligation to protect their employees' health does not necessarily enable them to gather and disseminate lots of information.

Still, in the context of Covid-19, it is essential to keep employees updated. Thus, the EDPB advises that employers inform their staff about Covid-19 cases within their organisation so as to take protective measures while acknowledging that they should not communicate any more information than is necessary. In cases where it is necessary to reveal the name of the employee who has contracted the virus (e.g. in a preventive context) and the national law permits it, the employee concerned shall be informed in advance, and their dignity and integrity shall be protected.¹⁵⁹ Only in Italy¹⁶⁰ and in the Netherlands¹⁶¹ do the national DPAs propose that it is not for the employer to inform staff that an employee has tested positive for Covid-19, as this should be the duty of public health authorities (directly or through the occupational health doctor). All the other DPAs (BE,¹⁶² CZ,¹⁶³ DK,¹⁶⁴ DE,¹⁶⁵ IE,¹⁶⁶ EL,¹⁶⁷ ES,¹⁶⁸ FI,¹⁶⁹ LU,¹⁷⁰ SE,¹⁷¹ AT,¹⁷² EE,¹⁷³ NO,¹⁷⁴ UK)¹⁷⁵ and practitioners (PL,¹⁷⁶ FR, HU)¹⁷⁷ included in this analysis support the view that an employer may inform their staff about cases, or suspected cases, of Covid-19 within its organisation in order to

157. The Hungarian National Authority for Data Protection and Freedom of Information, n45.

158. L'Autorité de protection des données n27.

159. European Data Protection Board, n34.

160. Autoriteit Persoonsgegevens n99.

161. R. Boardman, A. Mole, O. Kiazim n92.

162. L'Autorité de protection des données n27.

163. Úřad pro ochranu osobních údajů, 'Ke zpracování osobních údajů v rámci opatření proti šíření koronaviru.' <https://www.uoou.cz/ke-zpracovani-osobnich-udaju-v-ramci-opatreni-proti-sireni-koronaviru/ds-6134/archiv=1&p1=2611>.

164. Datatilsynet, n17.

165. German Data Protection Supervisory Authorities . . . , n44.

166. The Data Protection Commission n48.

167. The Hellenic (Greek) Data Protection Authority, n12.

168. La Agencia Española de Protección de Datos n39.

169. Office of the Data Protection Ombudsman n13.

170. National Commission for Data Protection n61.

171. Datatilsynet (12 March 2020) n14.

172. Datenschutzbehörde n51.

173. Andmekaitse Inspektsioon n52.

174. Datatilsynet, n16.

175. Information Commissioner's Office, 'Data protection and coronavirus: what you need to know' <https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/data-protection-and-coronavirus/>.

176. I. Kowalczyk-Pakula, P. Koczara n58.

177. In case of France and Hungary see: R. Boardman, A. Mole, O. Kiazim n92.

protect their safety. At the same time, most of the DPAs claim that an employer is not permitted to disclose the name(s) of the infected person(s). Still, as noted by Hendrickx, potential problems of identification may still occur, especially within smaller organisations and units where individuals with a Covid-19 diagnosis might still be detectable by others.¹⁷⁸ In this case, employers risk being in conflict with GDPR, which does not allow for the unlawful disclosure of health data.

Some DPAs (e.g. BE, CZ, DK, DE, EE, SE, LU, AT, NO), however, suggest that disclosure of the identity of infected persons is lawful if the knowledge of the identity is exceptionally necessary to protect the well-being of other employees. Furthermore, several authorities (e.g. CZ, DE,¹⁷⁹ SE, AT, NO) also highlight the need to ensure that the infected employee's integrity and dignity are maintained as an employee's Covid-19 diagnosis can lead to stigmatisation.

Conclusion

Employers should do everything in their power to keep workplaces safe in the context of Covid-19. However, the rules of social distancing, teleworking and other protective measures may not be enough if the information concerning possible or proven cases of infection in the organisation are lacking. Employers, therefore, need to understand if, and under what conditions, they can process employees' personal data. Overall, the analysis indicates that national DPAs seem to look for a reasonable and pragmatic approach regarding compliance with the GDPR in light of the health emergency. Unfortunately, it also shows that during this serious public health crisis, the information distributed to employers by national DPAs varies considerably and the guidance issued by the EDBP is generic and leaves room for many interpretations. Despite the GDPR being EU-wide legislation, the position in different countries varies considerably and reveals the complexities national DPAs face in interpreting it. Thus, my analysis reveals that there is a need for a more specific, clear and uniform pan-European vision concerning the processing of employees' data in this time of emergency so as to better protect the employees and limit the spread of the virus.

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178. Hendrickx, Taes et al. n5.

179. Der Landesbeauftragte für den Datenschutz und die Informationsfreiheit Baden-Württemberg n13.