

# Employment and Data Protection Newsletter

## on employment and data protection requirements in connection with coronavirus

The worldwide spread of coronavirus (COVID-19) puts heavy responsibility on employers. They must choose the measures to be taken in order to fight this escalating pandemic and arrest its spread in the workplace. Many employers have taken to monitoring their employees' state of health or keeping track of their travel plans, so as to prevent the spread of the virus. However, it is important to ensure that all such measures comply with the employment and data privacy requirements in force.

**Please note that the information contained herein is as of 13 March, 2020 and changes may be applicable in view of subsequent government measures and steps taken by public authorities or official guidelines or recommendations issued.**

### Providing Conditions for a Safe and Healthy Working Environment

Employers are required to provide conditions for a safe and healthy working environment under the laws of Hungary, which places them under an obligation to take actions aimed at mitigating the risks associated with COVID-19 and limiting the exposure of their employees to infection, including – for example – the following:

- directing special attention to cleanliness of work spaces by disinfecting restrooms, checking ventilation systems, providing hand sanitizers and encouraging employees to pay special attention to their personal hygiene;
- re-evaluating whether any previously arranged meetings, workshops, business travel or other planned events are necessary and justified in view of the COVID-19 emergency and issuing cancellations or opting for videoconferencing or other forms of remote access if possible and informing prospective participants/organizers accordingly; and
- reviewing rules and practices applicable to access of company premises in order to limit unnecessary person-to-person contact and placing/sending notices accordingly.

### Keeping Employees Informed

Employers should keep their employees informed of developments as new information becomes available and governments or public authorities issue new recommendations or introduce rules applicable to the workplace or the employer, which information should optimally include the following:

- general information on COVID-19, including the associated symptoms (fever, tiredness, dry cough, muscle pain, shortness of breath, sore throat, nasal congestion);
- list of high risk countries or regions (currently officially designated areas of concern include: China (mainland), Hong Kong SAR, Macau SAR, Iran, Italy and South Korea);
- employee obligations in the event of detecting symptoms, including when symptoms are detected on employees themselves or on their friends and family;
- recommended course of action in terms of seeking medical help; and
- information on processing of employee data in relation to the emergency (see below for further details).

### Preparing a Pandemic Business Continuity Plan

**Employers are advised to adopt *pandemic business continuity plans*, i.e.: preventive steps designed to reduce exposure to the virus; counter-measures to be taken in face of potential infection; preliminary assessment of data protection aspects of the applied measures; the allocation of tasks and responsibilities within the organization in face of viral emergency; creating effective emergency communication channels.**

In addition to the regulation of the above mentioned issues (informing employees, attention to cleanliness of work spaces, cancelling events or organizing them remotely, reviewing access to premises), such Action Plans should also allocate pertinent responsibilities within the organization and specify the procedure followed by the employer in the case of employees returning from high risk areas and infected or potentially infected employees. As part of the pandemic business continuity plan, it is recommended to establish an enhanced third party monitoring regime for clients and visitors entering an organization's direct area of operations and the concomitant restrictions. It is also recommended to regulate measures to be enforced (for example, partial, selective or complete prohibitions of entry onto an organization's premises).

**Employers should also elaborate any special employee obligations arising in connection with the provisions of a Pandemic Action Plan, which may include – among others – those outlined below:**

- employees may be required to report to HR (or a designated person) in the event of detecting symptoms associated with COVID-19 on themselves, their friends and family or co-workers;
- employees should be encouraged to seek medical attention if detecting symptoms or having been exposed to a threat of infection, check-up of such employees conducted by an occupational physician may also be mandated;
- employees may also be required to inform the employer if they have visited high risk areas or have plans to visit such areas (even if such previous or planned visit took place during their leave and was of private nature);
- employers may encourage employees to work remotely wherever possible in accordance with their remote work policy or may introduce mandatory work from home schemes on a temporary basis as a precautionary measure if the nature of the work allows it; and
- employers intending to introduce questionnaires or body temperature checks designated to survey their company's exposure to the risk of infections within their labour force should pay special attention to data protection concerns related to the processing of employee healthcare data (see below for further details).

**As regards of the procedures undertaken by Employers and concerning exposed employees we note the following and make the below recommendations:**

- Employees diagnosed with Coronavirus infection will be placed under government mandated quarantine (*in Hungarian: járványügyi zárlat*) in a designated healthcare facility.
- Employees returning to Hungary from high risk areas will be placed under a government mandated quarantine of 14 days in their homes ("home quarantine") (*in Hungarian: hatósági házi karantén*) in accordance with emergency government decree no. 41/2020. Observance of home quarantine will be monitored by law enforcement authorities and just as in the case of persons quarantined in healthcare facilities, breaches of quarantine may be criminally sanctioned.
- Employees potentially infected by Coronavirus should follow the protocol proposed by the Government's COVID-19 Task Force by contacting their GPs by phone if they detect any symptoms. Depending on their evaluation of the employee's account of symptoms GPs either (1) clear the employee for work; (2) request that the employee remain under voluntary self-isolation in their home; or (2) arrange for his/her transport to a healthcare facility for purposes of conducting a Coronavirus test – if positive they'll be quarantined as noted above, if negative, they should be encouraged to maintain self-isolation and repeat testing after a few days.
- Employees in voluntary self-isolation may (1) work remotely; (2) be placed on paid leave by employers either unilaterally – provided that a notice of 15 days is respected – or with their consent; (3) take unpaid leave; (4) be placed on gardening leave by employers; or (5) be placed on sick leave if they obtain a certificate from their GP.
- Employees may lawfully refuse work *only* if their presence at the workplace would entail a *direct and serious danger to their life or health*. In view of the current spread of the COVID-19 crisis in Hungary, we are of the view that employees may not lawfully refuse work on grounds of exposure to a risk of infection at the workplace, especially if their employer has complied with the obligation to mitigate risk of infection by implementing the above mentioned actions at least in part.
- We note furthermore that employers may lawfully refuse employee requests for remote work – provided of course that employment agreements and internal company policies confer no entitlement to work from home to the employee in question. Note that this assessment is based on the current spread and severity of coronavirus in Hungary and may be subject to change as the situation develops.

# Data processing requirements in connection with coronavirus

**On 10 March 2020, the Hungarian National Authority for Data Protection and Freedom of Information (“NAIH”) issued guidelines on data processing in connection with the coronavirus epidemic. The key points of these guidelines are set out in this newsletter.**

The rapidly spreading coronavirus has prompted the data protection authorities of numerous countries to issue guidelines on the matter, but their approach is not uniform. For instance, the Italian data protection authority prohibited employers to collect health data from their employees – including information regarding their personal travel plans - in an extremely restrictive way. The French data protection authority has adopted a similar approach denying employers the right to collect health data from employees – including the use of questionnaires on their state of health. The Danish data protection authority has taken a more lenient approach which allows employers to collect personal data on employees who have travelled to high risk areas. The NAIH guidelines are closer to the Danish ones in terms of the scale of severity.

In regard of data processing attaching to employment relationships, the essential requirement, providing conditions for a safe and healthy working environment, and establishing all related data processing procedures, is the employers' task. In this framework, the NAIH has set out measures that can be reasonably implemented:

- Employers are advised to produce detailed information notices for their employees. The NAIH suggests these should contain the most important information on coronavirus (source of infection, means of spread, incubation period, symptoms, prevention) and whom to contact in case of suspicion of exposure to it. Employers are also advised to flag and continuously update the list of high risk areas published by the World Health Organization.
- The NAIH advises employers to re-organize their modes of doing business, keeping points of potential contagion (business trips, meetings, events) down to an absolute necessary minimum and facilitating work from home to the maximum extent possible; such measures, as introduced by the given employer, should be recorded in their data processing policies.
- According to NAIH's recommendations, employers should elaborate data protection aspects by amending privacy notices issued to employees if they opt to introduce special rules on business operations, business travel or remote work.

If an employee reports an assumed contact with the virus to his/her employer, or if the employer suspects, from the information provided by that employee, that he/she has been exposed to it, the employer may record the following data in connection with the report:

- time of the report and the personal data necessary for the identification of the employee concerned;
- any travel itineraries of employees – even if it was for personal reasons – that overlap with territories classified as high risk areas and dates, as determined in the information notice of the employer;
- data on any contacts of employees with persons coming from risk areas as specified in the employer's information notice;
- measures taken by the employer based on the information available (for example providing the possibility to seek medical help from the company doctor, authorized home-quarantine).

The NAIH considers it acceptable to ask employees to fill questionnaires covering the above data if the employer, based on a preliminary risk assessment, comes to the conclusion that such suspension of the employee's right to privacy is necessary and proportionate to the scale of the emergency.

**However, it is important that the questionnaire must not contain information regarding health history and the employer must not require employees to attach health records to it.**

Based on the communication of the NAIH, the legal ground for processing personal data in the above case is the legitimate interest of the employer, and in the case of data processing by public-service bodies and public authorities, processing is necessary for the performance of the task carried out in the exercise of the official authority vested in them. There may be stricter conditions for processing health data by the GDPR, as, in this case, the processing is necessary for compliance with legal obligations arising from legal requirements governing employment and social security. It is because employers have obligations arising from the labour law to provide conditions for a safe and healthy working environment.

The NAIH outlined that considering the current pandemic situation in Hungary, ordering the use of diagnostic equipment (in particular thermometers) for all employees in general by employers is not proportionate, as collecting and evaluating information regarding symptoms of coronavirus and drawing conclusions from them is the duty of healthcare professionals and authorities.

However, in individual cases and with due regard to the circumstances, or based on employers' risk assessments, employers may order tests for employees having to work at stations of higher exposure to contagion, but these tests may only be carried out by a healthcare professional or under liability of a healthcare professional, and only the employer may have access to the results of these tests.

The NAIH also outlined that based on the general information and cooperation obligations, employees must inform their employers about any health or other risks affecting the workplace, other co-workers or any third parties with whom they may come into contact at work, and the risk of their own potential infectious disease (including having previous contact with an infected person). Based on the data processing by the employer as outlined above, employees are entitled to exercise their rights as data subjects, as stipulated in the GDPR, and employers must support them in exercising such rights.

The NAIH outlined that any person who refuses to comply with any pandemic measure ordered by the competent authorities commits a crime and, moreover, criminal liability is borne by anyone who contaminates another person by intentional conduct.

## Conclusions

We suggest employers review their current data processing practices in light of the epidemic and recommend developing **pandemic business continuity plans** and **information notices** in order to minimize exposure to coronavirus, and that all risk assessment documentation regarding health data processing is kept on file.

We also recommend keeping detailed employee health records (e.g. reports) on suspected or actual infections, in compliance with data protection requirements.

Remember: while all organisations must be prepared to cope with the current uncertain and fast-changing situation, they must always follow the data privacy recommendations.

If you have any questions regarding the issues raised above, please do not hesitate to contact us.

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