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Covid-19 Data Privacy & Security Survey

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As Covid-19 quickly spreads across the globe and has now been officially declared a pandemic, many companies are facing difficult business and legal challenges and are required to make some urgent decisions in order to keep their workforce safe and ensure business continuity. Data plays a crucial role in containing the spread of the virus but not every data processing can be justified on that basis. A balance must be found between protecting public health and personal privacy.

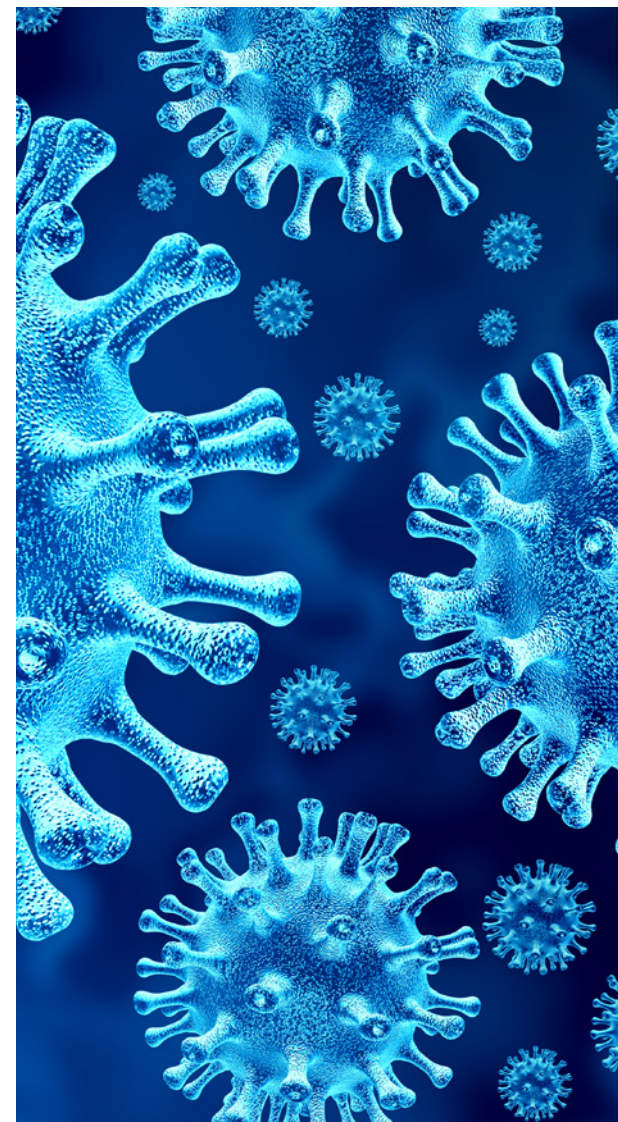
The Baker McKenzie network of data privacy and security experts is pleased to provide you with this guide designed to assist employers assess whether or not certain data processing they may consider in light of Covid-19 is compliant with data privacy regulation.

In this guide Baker McKenzie lawyers from 14 jurisdictions are sharing their high-level views on five common questions many companies are facing:

- Can an employer lawfully conduct temperature checks of employees and visitors in its premises?
- Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?
- Can an employer require employees (and visitors to its premises) to complete travel declaration forms?
- Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?
- Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19 to other co-workers?

We hope this short guide assists companies in making some of these difficult decisions. There are generally no clear-cut answers to these questions and it is imperative to carefully assess options against factual circumstances and their impact on data subjects' right to privacy. The content of this guide is current as of 12 March 2020 and does not constitute legal advice. The Coronavirus outbreak is an escalating situation, authorities are issuing advice on a daily basis and it is crucial to assess the effectiveness, proportionality and reasonableness of any proposed measures carefully on a case-by-case basis and in light of most recent information and developments on Covid-19.

You may also want to access **Baker McKenzie's Quick guide for employers**, dealing with 10 of the most pressing issues employers are currently facing in light of the Coronavirus outbreak. And we invite you to visit the **Baker McKenzie Coronavirus Resource page** to access a wealth of reference materials around this topic.



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US



1	Can an employer lawfully conduct temperature checks of employees and visitors in its premises?	No. This would qualify as a collection of sensitive data for which there is no apparent legal basis under the GDPR.
2	Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?	No. This, too, would qualify as a collection of sensitive data for which there is no apparent legal basis under the GDPR.
3	Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?	Yes. The collection of such data is covered by a prevailing legitimate interest (Art. 6(1)(f) GDPR).
4	Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?	No.
5	Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?	No. If done electronically, this would qualify as a processing of sensitive data for which there is no apparent legal basis under the GDPR. However, to the extent that such disclosure is performed orally in a face-to-face meeting, an argument can be made that the GDPR does not apply (cf. Art. 2(1) GDPR).



1	Can an employer lawfully conduct temperature checks of employees and visitors in its premises?	<p>No.</p> <ul style="list-style-type: none">▪ Firstly, in Belgium general health checks and temperature checks in particular may only be performed in specific circumstances, and in any case through the occupational physician.▪ Employees' or others' temperatures would constitute special category personal data (health-related data) that can only be collected and processed under specific circumstances. Assuming explicit consent would not work in the employment context, the only legal basis which appears likely to be available would be that these checks are necessary for reasons of substantial public interest or for reasons of public interest in the area of public health, on the basis of Union or Member State law providing for suitable and specific measures to safeguard the rights and freedom of data subjects.▪ For the time being, no such Belgian law seems to apply in relation to COVID-19.▪ In addition, the data minimization principle should be followed and there is a significant risk that such a blanket measure would be considered disproportionate by the Belgian data protection regulator.
2	Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?	<p>No.</p> <p>Although this appears less intrusive, the same conditions as outlined under Q1 would apply. If an employee begins to demonstrate flu-like symptoms, the employer could, however, ask the occupational physician to examine the employee in accordance with labour law requirements.</p>
3	Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?	<p>Yes, assuming information is limited to actual recent travel to high risk areas, and actual cases of COVID-19. Our view is that this processing could reasonably be deemed proportionate and justified on the basis of the employer's balanced legitimate interests to ensure health and safety at work in the context of a major COVID-19 outbreak in Belgium. In such context, the employer's interests do not appear to be overridden by the employee's or visitor's own legitimate interests or fundamental rights and freedoms, provided that the data collection is limited to:</p> <ul style="list-style-type: none">▪ whether the employee / visitor has recently visited any of those areas designated as highest risk; whether the employee/ visitor (is aware that he/she) has been in close contact (according to official guidance) with anyone confirmed with COVID-19▪ if yes, whether they have been tested for COVID-19 and the test results
4	Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?	<p>No.</p>



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Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No, in principle.

- Disclosing the identity of any person who is confirmed to have COVID-19 would amount to processing of special categories of personal data (health-related data) and could not be performed without a valid legal basis.
- Assuming consent is unlikely to be a valid basis in this context, the only possible legal bases are the necessity of the disclosure (i) for substantial public interest or for public interests in the area of public health, on the basis of a law (not in place regarding COVID-19 yet), or (ii) for the vital interests of the data subject or another person (where the data subject is physically or legally incapable of giving consent).
- This should, however, be assessed on a case-by-case basis as there may be cases where disclosure may appear as a necessary measure in order to protect the vital interests of other persons.
- This would in any case require to carry out a data protection impact assessment and to balance the interests and fundamental rights and freedoms of the different individuals, and to document that the vital interests of a person are at stake while the data subject is physically or legally incapable of giving consent.
- The fact that the data subject would make this information manifestly public could also be a possible legal basis for processing.

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- 1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?**
- Yes.
- The vast majority of cities in Mainland China mandatorily require employers to implement temperature checks on employees and visitors in the employer's premises.
 - In late February 2020, the State Council issued a notice requiring that an employee's temperature be checked every time the employee enters the company's premises. The notice requires the same for visitors.
 - In some cities, an employer's commitment to take this measure is made a precondition for the local government's approval or the company's resumption of business.
 - From a strict compliance point of view, we recommended employers obtain their employees' express consent to collect, process, use and transfer their body temperature information, and abide by the general principles of data protection.
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- 2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?**
- Yes.
- The vast majority of cities in Mainland China mandatorily require employees to do this, as employees are under a general obligation to contain COVID-19.
 - As temperature checks are mandatorily required each time the employee enters the company's premises, if any employee's temperature rises above the normal threshold, the employer will immediately know and would be required to take actions as per local government rules.
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- 3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?**
- Yes.
- Under the national and local rules issued to contain COVID-19 in Mainland China, employers are required to collect employees' and visitors' health and travel information and employees and visitors have an obligation to provide such information.
 - In many cities, employers can only re-open their offices after they submit employees' relevant health and travel information to the local authorities (and the required level of detail varies by city).
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4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

Yes.

In February 2020, the Office of Central Cyberspace Affairs Commission issued a notice emphasizing several general principles for protection of individuals' personal data in the situation of COVID-19. The principles the notice emphasizes include:

- no one can collect an individual's personal data without the individual's consent (except for those institutions / personnel authorized by the national health authority); note that employers are authorized and required by the government to collect employees' data related to containing COVID-19
- only information necessary for containing COVID-19 should be collected
- personal data should not be publicized without the data subject's consent (unless this is necessary for containing COVID-19 and the data is desensitized)
- personal data should be safeguarded

5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

Depends.

- From a data privacy perspective, it is preferable to keep an infected employee's identity anonymous, if there is no legitimate reason to disclose the infected employee's identity to other employees. For example, if an employee is confirmed to have COVID-19 but since then has not returned to the premises of the employer, the employer probably should not disclose the individual's identity to other co-workers.
- However, if an employee is confirmed to have COVID-19 on the employer's premises, or returns to the premises thereafter, the employer likely needs to disclose the employee's identity to other co-workers, as the employer is obligated to cooperate with local health authorities to track any co-workers who have been in close contact with the employee.

- 1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?**

No.
The French DPA (CNIL) has specifically stated in its online guidance on COVID-19 that mandatory body temperature checks for employees/agents/visitor are not permitted.
- 2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?**

No.
The French government had initially indicated that it was only “recommended” for employees to inform their employer if they have flu symptoms or if they visited the crisis area within the past 14 days.

The authorities have now recently emphasized the fact that employees must inform their employer of any situation that could present a risk for other employees’ health. However, a rise in temperature alone would not need to be reported if this does not seem to be related to COVID-19.

Employers should be aware of employees’ right of privacy and only request strictly necessary information. It is recommended to ask employees to voluntarily disclose relevant information whilst insisting on the reasons for the request for such information (to protect the workforce). Indeed, since employees have an obligation to protect other employees’ health, employees should be kindly asked to disclose any relevant information.
- 3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?**

Yes, assuming information is limited to actual recent / planned travel, and actual cases of COVID-19.

Our view is that this could reasonably be deemed to be proportionate and low risk given the current major COVID-19 outbreak in France.

4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

Yes.

The CNIL has published online guidance on COVID-19. It states notably that it is permitted for employers to collect and register: date, identity of the person suspected of having been exposed to the virus and organizational measures taken as a result (confinement, distance working, orientation and contact with occupational doctor etc.).

On the contrary, employers must refrain from systematically and generally collecting information relating to possible symptoms presented by an employee/agent and his/her relatives. The CNIL states it is not permitted to carry out body temperature checks for each employee/agent/visitor nor is it permitted to collect personal data via medical questionnaires from all employees/ agents.

5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No, generally speaking.

- Informing employees or others about the identity of any specific employee who is confirmed to have COVID-19 would involve disclosing special category personal data, and so has the potential to both be unlawful from a data privacy perspective and employment law perspective (since it may carry a certain stigma, cause embarrassment etc).
- It will generally not be necessary to disclose an individual's identity, even where implementing appropriate precautions. If individuals appear to be at high-risk of infection and should self-isolate, this can be achieved without disclosing the particular employee's identity.
- That said, there may be very limited circumstances where, based on the nature of the job, or an inability by the employer to assess whether a high risk of infection exists, confirming the identity of an infected person could be justified because of the high risk of onward infection (on the basis of substantial public interest, or vital interests).
- Overall, this requires a balancing act, and where an infected employee's identity can be kept anonymous, that is preferable.
- Organisations should prepare an impact assessment which records how they will approach the issue of identifying infected persons.



1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?	<p>Depends.</p> <ul style="list-style-type: none">▪ Conducting temperature checks qualifies as a processing of personal data if the checks are carried out with an electronic thermometer irrespective of whether the result is recorded or not. For employees, even non-automated processing by analogue thermometers will qualify as processing of employee data under German data protection law. Employees' or others' temperatures would constitute special category personal data.▪ In order to have a legal basis for collecting employees' temperatures, an employer would most likely need to rely on the argument that the measure is necessary in the context of substantial public interest, for reasons of public interest in the area of public health (such as in order to protect against serious cross-border threats to health) or consent. Whether or not checking employees' temperatures will be justified will depend entirely on the individual circumstances, in particular on how necessary they are and whether the measure is deemed proportionate.▪ In any event, the results of the temperature checks should not be recorded or shared with anyone outside the local entity and the individuals must be clearly informed about the data processing activities.
2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?	<p>Yes.</p> <ul style="list-style-type: none">▪ Employees with a confirmed infection need to disclose this to their contractual employer.▪ Employees with flu symptoms, such as fever, who (i) visited or (ii) had contact with individuals from regions classified as COVID-19 risk areas by the German Robert-Koch-Institute within the past 3 weeks are required to inform their employer.▪ Employees must be informed pursuant to GDPR about any such processing activities.
3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?	<p>Yes, assuming information is limited to travel within the last 3 weeks.</p> <ul style="list-style-type: none">▪ Questions should be limited to past travel to regions classified as COVID-19 risk areas by the German Robert-Koch-Institute within the past 3 weeks.▪ Employees / visitors can also be asked if they: (i) have an individual who is confirmed to have COVID-19 living in their household; or (ii) visited an event, which later became known to be a venue from which the COVID-19 disease spread.



4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

No.

5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No.

- Informing employees or others about the identity of any specific employee who is confirmed to have COVID-19 would involve disclosing special category personal data, and so has the potential to both be unlawful from a data privacy perspective and employment law perspective (since it may carry a certain stigma, cause embarrassment etc.).
 - It will generally not be necessary to disclose an individual's identity, even where implementing appropriate precautions. If a company has assessed that a certain group of people are at high-risk of infection and should self-isolate, this can typically be done without disclosing the particular employee's identity.
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1	Can an employer lawfully conduct temperature checks of employees and visitors in its premises?	<p>Yes.</p> <p>The Centre for Health Protection has issued a Guidance Note on Monitoring Body Temperature which says that offices have the discretion to initiate temperature checks as a measure to prevent the spread of infectious diseases.</p>
2	Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?	<p>Yes.</p> <p>Requiring employees to do this is less intrusive than forcing all employees to undergo temperature checks.</p>
3	Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?	<p>Yes, as long as employers comply with the usual notification requirements under the Personal Data (Privacy) Ordinance (PDPO), and only collect personal data which is necessary but not excessive for the purpose of use.</p>
4	Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?	<p>No, in relation to collection of personal data by employers.</p> <p>However, the Privacy Commissioner has issued a media statement on “The Use of Information on Social Media for Tracking Potential Carriers of COVID-19”, which states that “there are <u>sufficient legal and justifiable bases</u>, whether under international law or local health-specific and personal data privacy legislation, on which the government may collect and use information obtainable offline or online with the aid of devices, applications, software or supercomputers with a view to tracking potential COVID-19 carriers or patients in the interests of both the individuals concerned and the public, not to mention the fact that the same approach has been adopted in many other jurisdictions”.</p>
5	Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?	<p>Depends.</p> <ul style="list-style-type: none">▪ From a data privacy perspective, it is preferable to keep an infected employee’s identity anonymous.▪ Under Data Protection Principle (DPP) 3 of the PDPO, consent is required in order to use personal data for a “new purpose” that was not notified to the data subject on or before initial collection of their personal data.▪ However, section 59 of the PDPO contains a “health exemption”. In particular, personal data relating to the identity or location of a data subject is exempt if the application of the DPP3 consent requirement would be likely to cause serious harm to the physical or mental health of the data subject; or any other individual.

<p>1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?</p>	<p>No.</p> <p>In Italy, temperature checks, as well as any processing of personal data and health data of individuals for purposes relating to the COVID-19 outbreak, may only be performed by authorized authorities/entities. In a recent order, the Italian DPA clearly condemned self-managed initiatives. Checks, including health checks, may be performed only in limited and exceptional circumstances, and in any case through the company doctor.</p>
<p>2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?</p>	<p>No.</p> <p>The right addressee of said communication is the company doctor or personal doctor of the employee, or the health authorities - not the employer. However, if notified, the employer should immediately give notice to the competent authorities. In any case, the employee has a duty to notify the employer of any circumstance which may give rise to a health and safety risk at the workplace. The employer may consider facilitating this by setting up a dedicated communication channel for reporting health and safety concerns relating to COVID-19.</p>
<p>3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?</p>	<p>No, according to the Italian DPA.</p> <p>The rationale behind this ban is that anyone travelling to/ through high risk areas has a specific obligation to notify local competent authorities. It follows that another collection of the same data by a different controller would be redundant and disproportionate.</p>
<p>4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?</p>	<p>Yes.</p> <p>The Italian DPA has issued specific guidance available here.</p> <p>The overall message and rationale behind this guidance is to avoid companies introducing new measures on their own initiative, and instead to leave the handling of the crisis to the competent government and health authorities. Of course, in some specific high risk cases, the employer may be permitted to act on its own initiative, but when capturing health data, any initiative should be driven through the company doctor.</p>

5 **Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?**

No, generally speaking.

- Informing employees or others about the identity of any specific employee who is confirmed to have COVID-19 would involve disclosing special category personal data, and so has the potential to both be unlawful from a data privacy perspective and employment law perspective (since it may carry a certain stigma, cause embarrassment etc.).
 - It will generally not be necessary to disclose an individual's identity, even where implementing appropriate precautions. If you have assessed that a certain group of people are at high-risk of infection and should self-isolate, you can do this without disclosing the particular employee's identity.
 - This requires a balancing act, and as a general principle, an infected employee's identity should be kept anonymous.
 - There may be some very limited circumstances where, based on the nature of the job, or an inability by the employer to assess whether a high risk of infection exists, confirming the identity of an infected person could be justified because of the high risk of onward infection (on the basis of substantial public interest, or vital interests).
 - Organisations should prepare an impact assessment which records how they will approach the issue of identifying infected persons.
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<p>1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?</p>	<p>No (unless consent is obtained).</p> <ul style="list-style-type: none"> ▪ Employees' or others' temperatures without any additional information concerning doctor's assessment or consultation should not constitute sensitive personal data per se. However, considering that the practical sensitivity of the issue, it would be recommended to obtain the consent of the employee or visitor. Note that the consent is not required if there is a need to protect human health or lives or to enhance public hygiene, and when it is difficult to obtain a data subject's consent. ▪ In most cases, we would expect that a data subject will be able to provide their consent prior to the temperature check. ▪ A difficult situation may arise if an employee does not consent to the temperature check - what may the employer do in such a situation?
<p>2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?</p>	<p>Yes. From a data protection law perspective, there are no prohibitions on this approach.</p>
<p>3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?</p>	<p>Yes.</p> <ul style="list-style-type: none"> ▪ Employee travel data or data on whether an employee has been in close contact with someone who has been positively tested for COVID-19 would be non-sensitive data. Employers may collect such data by notifying the employees of how the data will be used. This can be done through updating privacy policies, or sending out emails or notifying employees on an individual basis.
<p>4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?</p>	<p>No.</p>
<p>5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?</p>	<p>It depends If the co-workers' health is at stake, and the data subject's consent is difficult to obtain, then disclosure should be permitted. The legal position would be uncertain though should the worker infected with COVID-19 refuse to provide consent.</p>



1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?	<p>No.</p> <ul style="list-style-type: none">▪ Employees' or others' temperatures would constitute special category personal data - these could only be collected in this way if there is a substantial public interest, or a public interest in the area of public health, in doing so. (We assume that consent doesn't work in this context).▪ There is a significant risk that this measure would be considered disproportionate by the data protection regulator in the Netherlands, especially if it is enforced on all employees or visitors as a blanket measure.▪ If there was a significant COVID-19 outbreak in a specific location (e.g., Amsterdam), and the National Health Institute would issue recommendations, this could change the picture. We do not consider this a likely scenario, especially as there is already press coverage on infected individuals having suppressed their fever by taking paracetamol. More generally an organization would need to be able to demonstrate effectivity of the measure and temperature as a single data point does not seem to be a reliable proxy for COVID-19 infections. In combination with whereabouts and any respiratory symptoms, it is, we understand.
2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?	<p>Yes.</p> <ul style="list-style-type: none">▪ Requiring employees to do this is less intrusive than forcing all employees to conduct temperature checks, and is not dissimilar to employees self-certifying to their line manager that they are unwell.▪ In the context of a major outbreak of COVID-19 this is more likely to be considered proportionate in the circumstances, and in any event employees are under an express and implied duty to their employer to disclose themselves as a "risk-factor" to their employer if they have been in contact with a confirmed case of COVID-19, or because they have visited a high-risk area.
3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?	<p>Yes, assuming information is limited to actual recent / planned travel, and actual cases of COVID-19. Our view is that this could reasonably be deemed to be proportionate and low risk in the context of a major COVID-19 outbreak in the Netherlands.</p> <p>In fact it is already standard practice to take precautionary measures to avoid contact with people who live or have recently been in any risk-area, including the southern part of the Netherlands.</p> <p>We recommend that such a declaration form focuses only on those areas of risk and limits personal data processing.</p>



4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

Yes.

The Dutch DPA has updated the FAQ pages on its website and added a special item which confirms that an employer is not allowed to collect and register medical data of its employees, but can do this only via the company doctor's service. See the FAQ item (in Dutch) [here](#).

5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No, generally speaking.

- Informing employees or others about the identity of any specific employee who is confirmed to have COVID-19 would involve disclosing special category personal data, and so has the potential to both be unlawful from a data privacy perspective and employment law perspective (since it may carry a certain stigma, cause embarrassment etc).
 - It will generally not be necessary to disclose an individual's identity, even where implementing appropriate precautions. If you have assessed that a certain group of people are at high-risk of infection and should self-isolate, you can do this without disclosing the particular employee's identity.
 - This requires a balancing act, and where an infected employee's identity can be kept anonymous, that is preferable.
 - That said, if it is impossible to prevent that the data point of someone being infected can be related to an identified individual - e.g., because only a limited number of people is working in the organization and hence it is easy to figure out who the infected person was - this does not impede the employer from telling the other workers that there has been an infection, as in such cases the balancing test will often show that the health interests of the exposed colleagues override the interests of the sick employee.
 - Organisations should prepare an impact assessment which records how they will approach the issue of identifying infected persons.
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1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?	<p>Unclear.</p> <ul style="list-style-type: none"> ▪ Employees' or others' temperatures would constitute special category personal data - these could only be collected in this way in exceptional circumstances e.g., if there is a substantial public interest, or a public interest in the area of public health, in doing so, or if necessary for the purposes of carrying out the obligations of the controller or of the data subject in the field of employment, in so far as it is authorised by the law. ▪ Under the labour laws, the employers are responsible for the state of health and safety at the workplace. It may be argued that under the current circumstances this labour law provision could be interpreted as a legal basis for conducting temperature checks of employees or visitors at the company as an exceptional measure to ensure a safe work environment for other employees during the outbreak. The test results should not be recorded or stored in electronic or paper form. ▪ However, such potential interpretation has not been explicitly confirmed or denied by the Polish data protection authorities.
2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?	<p>Unclear.</p> <ul style="list-style-type: none"> ▪ Requiring the employees to do this is less intrusive than mandatory temperature checks for the employees. It is not dissimilar to employees self-certifying to their line manager that they are unwell. Thus, in the context of the current situation relating to outbreak of COVID-19, it is more likely to be considered as a proportionate measure. However, the position of the Polish data protection authority is still unknown. ▪ From the employment law perspective, it is recommended to gather such data in a form of declaration of the employee (not enforced by the employer). ▪ In any event employees are under an express and implied duty to their employer to disclose themselves as a "risk-factor" to their employer if they have been in contact with a confirmed case of COVID-19, or because they have visited a high-risk area.
3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?	<p>Yes, our view is that this could reasonably be deemed to be proportionate and low risk in the context of the current situation in Poland.</p> <p>We recommend that such a declaration form focuses only on those areas of risk and limits personal data processing by asking:</p> <ul style="list-style-type: none"> ▪ whether the employee/ visitor has recently visited any of those areas designated as highest risk ▪ whether the employee/ visitor has been in close contact (within 2 meters for 2 minutes or more) with anyone confirmed with Covid-19 <p>Gathering the above information may be justified as a measure to ensure health and safety at the workplace.</p> <p>However, the employer should not require employees to disclose any future travel plans, i.e. whether they plan to visit areas designated as high risk.</p>



4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

Yes.

- On 12 March, the Polish DPA issued a high-level statement in relation to the COVID-19 outbreak.
- The Polish DPA discusses the recent “anti-virus” statute and states that “the provisions on personal data protection must not be viewed as an obstacle to the implementation of actions in connection with the fight against the coronavirus”
- The DPA does not directly indicate what actions the employers may take on their own initiative. However, the DPA states that in accordance with recital 46 of the GDPR, processing of personal data should be considered lawful also where it is necessary for the protection of an interest which is essential for the life of the data subject, e.g., where processing is necessary for humanitarian purposes, including monitoring of epidemics and their spread.

5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No, generally speaking.

- Informing employees or others about the identity of any specific employee who is confirmed to have COVID-19 would involve disclosing special category personal data, and so has the potential to both be unlawful from a data privacy perspective and employment law perspective (since it may carry a certain stigma, cause embarrassment etc).
- It will generally not be necessary to disclose an individual's identity, even where implementing appropriate precautions. If you have assessed that a certain group of people are at high-risk of infection and should self-isolate, you can do this without disclosing the particular employee's identity.
- This requires a balancing act, and where an infected employee's identity can be kept anonymous, that is preferable.
- There may be very limited circumstances where, based on the nature of the job, or an inability by the employer to assess whether a high risk of infection exists, confirming the identity of an infected person could be justified because of the high risk of onward infection (on the basis of substantial public interest, or vital interests).
- Organisations should prepare an impact assessment which records how they will approach the issue of identifying infected persons.



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| 1 | Can an employer lawfully conduct temperature checks of employees and visitors in its premises? | <p>Yes, generally.</p> <p>As Spain is facing a major outbreak of COVID-19, carrying out temperature checks as a precautionary measure might potentially be justified on the basis of public interest or for reasons of public interest in the area of public health. That said, we deem it more likely that the collection of the information described in question 2 is a more proportionate measure than requiring all employees and visitors to undergo temperature checks.</p> |
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| 2 | Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold? | <p>Yes.</p> <ul style="list-style-type: none">▪ The Spanish DPA has expressly stated that employees “shall immediately inform their superior and the employees designated to carry out protective and preventive activities or, where appropriate, the preventive service, of any situation which, in their opinion, involves a risk to the safety and health of employees.”▪ However, we would recommend to require employees to inform HR / their line manager when they feel that they are developing any of the symptoms typical of COVID-19 (not just a temperature increase) since, regardless of the relevant symptom, such notification would trigger the implementation of certain measures.▪ In Spain (and more precisely in Madrid), we are now facing a major outbreak of COVID-19, so we understand that the above would more likely be considered proportionate as the processing of the relevant data would be carried out on the basis of substantial public interest or for reasons of public interest in the area of public health. |
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| 3 | Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19? | <p>Yes.</p> <ul style="list-style-type: none">▪ Given the major outbreak of COVID-19 that Spain is facing, we deem it proportionate that employers may require employees and visitors to their premises to provide information regarding any visits to high risk areas. Of course, employers should always adhere to the data protection principles set forth in the applicable legislation (data minimization, storage limitation etc.). |
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4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

Yes.

- The DPA mentions that, whilst there are necessary safeguards and rules to legitimately allow the processing of personal data in a situation like this (in which there is a health emergency of wide scope), data protection legislation should not act as a stopper when adopting measures for the management of COVID-19.
- According to the DPA, the following are possible legal grounds for data processing activities in the context of COVID-19:
 - Processing is necessary on the grounds of public interest (Art. 6.1 e GDPR) and the vital interests of the data subject or other individuals (Art. 6.1.d GDPR). The DPA emphasizes the processing is justified not only when it comes to the vital interests of the data subject but also with regards to the vital interests of "other individuals", even if they are unnamed or in principle unidentified or identifiable persons.
 - Processing is necessary for compliance with legal obligations.
- According to the DPA, the following are possible legal grounds for the processing of health data in the context of COVID-19:
 - Processing is necessary for reasons of substantial public interest in the area of public health (Art. 9.2 g and i GDPR).
 - Processing is necessary for medical diagnosis or for the assessment of the working capacity of the employee (Art. 9.2 GDPR).
 - Processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent (9.2 c GDPR).
- In any case, privacy principles still apply and must be respected. Importantly the DPA reminds companies not to confuse "necessity" with "convenience" when applying the data minimization principle.

5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No, generally speaking.

- Informing employees or others about the identity of any specific employee who is confirmed to have COVID-19 would involve disclosing special category personal data, and so has the potential to both be unlawful from a data privacy perspective and employment law perspective (since it may carry a certain stigma, cause embarrassment etc.).
- It will generally not be necessary to disclose an individual's identity, even where implementing appropriate precautions. If you have assessed that a certain group of people are at high-risk of infection and should self-isolate, you can do this without disclosing the particular employee's identity.
- This involves a balancing act, and where an infected employee's identity can be kept anonymous, that is preferable.
- There may be very limited circumstances where, based on the nature of the job, or an inability by the employer to assess whether a high risk of infection exists, confirming the identity of an infected person could be justified because of the high risk of onward infection (on the basis of substantial public interest, or vital interests).
- Also, where an employee has tested positive, then the relevant notification should be made to the competent authorities and the latter should provide guidance on whether the employer should notify any other employees or instead or whether the competent authorities are responsible for such notifications.
- Organisations should prepare an impact assessment which records how they will approach the issue of identifying infected persons.



1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?

No.

- Employees' or others' temperatures would constitute special category personal data - these could only be collected in this way if there is a substantial public interest, or a public interest in the area of public health, in doing so. (We assume that consent doesn't work in this context).
- There is a significant risk that this measure would be considered disproportionate by the Swedish data protection regulator, especially if it is enforced on all employees or visitors as a blanket measure.
- If there was a significant COVID-19 outbreak in a specific location (e.g., Stockholm), then this sort of measure is more likely to be seen as proportionate in the circumstances.

2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?

Yes.

- Requiring employees to do this is less intrusive than forcing all employees to conduct temperature checks, and is not dissimilar to employees self-certifying to their line manager that they are unwell.
- In the context of a major outbreak of COVID-19 in Sweden this is more likely to be considered proportionate in the circumstances. In any event, employees are under a legal obligation to disclose if they have tested positive for COVID-19 themselves or have a reason to suspect that they have it.
- Also, in the context of a major outbreak of COVID-19 in Sweden it is likely to be considered proportionate for an employer to ask its employees to disclose if they are a potential "risk-factor", for example because they have been in contact with a confirmed case of COVID-19, or because they have visited a high-risk area.

3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?

Yes, assuming information is limited to actual recent / planned travel, and actual cases of COVID-19. Our view is that this could reasonably be deemed to be proportionate and low risk in the context of a major COVID-19 outbreak in Sweden.

We recommend that such a declaration form focuses only on those areas of risk and limits personal data processing by asking:

- whether the employee / visitor has recently visited any of those areas designated as highest risk
- if yes, have they had any symptoms and/or been tested for COVID-19 and, if so, what are the results
- whether the employee has plans to visit of those areas designated as highest risk
- whether the employee / visitor has knowingly been in close contact (within 2 meters for 2 minutes or more) with anyone confirmed as having COVID-19

Please note that citizenship, nationality and passport information should not be processed as it would be difficult to justify why such data is being collected for all employees when a large number of them won't have travelled to the specified high-risk destinations.



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Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

No.

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Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No, generally speaking.

- Informing employees or others about the identity of any specific employee who is confirmed to have COVID-19 would involve disclosing special category personal data, and so has the potential to both be unlawful from a data privacy perspective and employment law perspective (since it may carry a certain stigma, cause embarrassment etc.).
- It will generally not be necessary to disclose an individual's identity, even where implementing appropriate precautions. If you have assessed that a certain group of people are at high-risk of infection and should self-isolate, you can do this without disclosing the particular employee's identity.
- This involves a balancing act, and where an infected employee's identity can be kept anonymous, that is preferable.
- There may be very limited circumstances where, based on the nature of the job, or an inability by the employer to assess whether a high risk of infection exists, confirming the identity of an infected person could be justified because of the high risk of onward infection (on the basis of substantial public interest, or vital interests).
- Organisations should prepare an impact assessment which records how they will approach the issue of identifying infected persons.

1 Can an employer lawfully conduct temperature checks of employees and visitors in its premises?	<p>No.</p> <ul style="list-style-type: none"> ▪ Employees' or others' temperatures would constitute special category personal data - these could only be collected in this way if there is a substantial public interest, or a public interest in the area of public health, in doing so. (We assume that consent doesn't work in this context). ▪ There is a some risk that this measure would be considered disproportionate by the data protection regulator in the UK (the ICO), especially if it is enforced on all employees or visitors as a blanket measure. But the regulator says it will take a pragmatic approach to enforcement (see question 3). ▪ If there was a significant COVID-19 outbreak in a specific location (e.g. London), then this sort of measure is more likely to be seen as proportionate in the circumstances.
2 Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold?	<p>Yes.</p> <ul style="list-style-type: none"> ▪ Requiring employees to do this is less intrusive than forcing all employees to conduct temperature checks, and is not dissimilar to employees self-certifying to their line manager that they are unwell. ▪ In the context of a major outbreak of COVID-19 this is more likely to be considered proportionate in the circumstances, and in any event employees are under an express and implied duty to their employer to disclose themselves as a "risk-factor" to their employer if they have been in contact with a confirmed case of COVID-19, or because they have visited a high-risk area.
3 Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19?	<p>Yes, assuming information is limited to actual recent / planned travel, and actual cases of COVID-19. Our view is that this could reasonably be deemed to be proportionate and low risk in the context of a major COVID-19 outbreak in the UK. According to the ICO, "it's reasonable to ask people to tell you if they have visited a particular country, or are experiencing COVID-19 symptoms".</p> <p>We recommend that such a declaration form focuses only on those areas of risk and limits personal data processing by asking:</p> <ul style="list-style-type: none"> ▪ whether the employee / visitor has recently visited any of those areas designated as highest risk ▪ if yes, have they been tested for COVID-19 and, if so, what are the results ▪ whether the employee has plans to visit any of those areas designated as highest risk ▪ whether the employee / visitor has been in close contact (within 2 meters for 2 minutes or more) with anyone who has tested positive for COVID-19

4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

Yes.

You can find the guidance here. It is, as expected, highly pragmatic. In the ICO's own words: "The ICO is a reasonable and pragmatic regulator, one that does not operate in isolation from matters of serious public concern. Regarding compliance with data protection, we will take into account the compelling public interest in the current health emergency. The safety and security of the public remains our primary concern." The guidance is high level and says:

- The ICO recognises that responding to information requests may take longer than usual - and the ICO will not take regulatory action against organisations that have to prioritise other areas during this extraordinary period. Information requests is not defined, but we assume it will include data subject rights requests.
- Data protection should not be a barrier to increased homeworking, and usual security measures should be applied.
- Staff can be kept informed of potential COVID-19 cases, but you probably don't need to name individuals to provide what is necessary.
- It's ok to ask people (visitors/employees) if they've visited a particular country or experiencing Covid-19 symptoms. It does not deal with temperature checks head-on but the guidance leaves room for those to be ok.

5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No, generally speaking.

- Informing employees or others about the identity of any specific employee who is confirmed to have COVID-19 would involve disclosing special category personal data, and so has the potential to both be unlawful from a data privacy perspective and employment law perspective (since it may carry a certain stigma, cause embarrassment etc.).
 - It will generally not be necessary to disclose an individual's identity, even where implementing appropriate precautions. If you have assessed that a certain group of people are at high-risk of infection and should self-isolate, you can do this without disclosing the particular employee's identity. This is also consistent with the ICO Guidance.
 - This involves a balancing act, and where an infected employee's identity can be kept anonymous, that is preferable.
 - There may be very limited circumstances where, based on the nature of the job, or an inability by the employer to assess whether a high risk of infection exists, confirming the identity of an infected person could be justified because of the high risk of onward infection (on the basis of substantial public interest, or vital interests).
 - Organisations should prepare an impact assessment which records how they will approach the issue of identifying infected persons.
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| 1 | Can an employer lawfully conduct temperature checks of employees and visitors in its premises? | <p>No, generally speaking.</p> <p>There would be an exception to this if COVID-19 is undergoing widespread transmission in the relevant community, declared to be a pandemic, or otherwise deemed to be severe in the community by state or local health authorities or the Center for Disease Control and Prevention (CDC). The concern is that, unless one of these conditions is met, mandatory temperature checks could be deemed to be improper medical examinations under the Americans with Disabilities Act ("ADA"). See earlier ADA guidance on pandemics from the Equal Employment Opportunity Commission ("EEOC"), available here. Employers may nevertheless choose to recommend that employees check their own temperature before coming to work or once arriving at work, as part of an effort to prevent illness transmission in the workplace. These ADA statutory restrictions do not extend to visitors or other non-employees.</p> |
| <hr/> | | |
| 2 | Can an employer require employees to inform HR / their line manager if their temperature rises above the normal threshold? | <p>Yes.</p> <p>However, employers should notify employees that they do not have to reveal information about underlying disabilities. Employers are generally free to ask employees if they are experiencing flu-like symptoms. Employers may also require employees to self-report those symptoms in connection with work (i.e., in advance of scheduled work shifts). Visitors or non-employees can be required to disclose if they recently have had a fever before being granted access to a facility.</p> |
| <hr/> | | |
| 3 | Can an employer require employees (and visitors to its premises) to complete a declaration / self-assessment as to whether they have or have plans to travel to any of the high risk areas as designated by the WHO/ local government, or whether they have been in close contact with someone who has been positively tested for COVID-19? | <p>Yes, generally speaking.</p> <p>However, employers must be mindful of the fact that Title VII and state law prohibit discrimination based on race, color, national origin, and other protected classifications. In fact, the Interim Guidance for Businesses and Employers released by the CDC (referenced below), specifically states that <i>"to prevent stigma and discrimination in the workplace, use only the guidance [provided by the CDC] to determine risk of COVID-19. Do not make determinations of risk based on race or country of origin, and be sure to maintain confidentiality of people with confirmed COVID-19."</i> As such, although employers may ask employees to complete such declarations, they must be mindful to administer them on a consistent basis and to avoid discriminatory use of the results. For example, it is not permissible to exclude employees from work activities simply because of their race or national origin and without evidence that they are ill or have recently travelled to a high risk area. Policies regarding future travel should similarly be neutral with respect to anti-discrimination laws.</p> |
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4 Have data privacy regulators issued any guidance either permitting or restricting the collection of personal data for purposes of identifying Covid-19 cases?

No.

As of the time of writing, US authorities have not released guidance specific to the collection of personal data for purposes of identifying COVID-19 cases. The Office of Civil Rights, Health & Human Services, issued guidance stating that federal health privacy law authorizes employers to request protected health information from health care providers without employees' consent, if necessary to "prevent a serious and imminent threat." The guidance makes clear, however, that health care providers are not required to provide the information, and should use their own professional judgment in deciding whether to do so. See www.hhs.gov.

The CDC has released Interim Guidance for Businesses and Employers, available [here](#). In addition, as noted above, the Equal Employment Opportunity Commission ("EEOC") has previously issued guidance in 2009 for employers in the context of pandemics under the ADA, available [here](#).

5 Is an employer permitted to disclose the identity of any worker who is confirmed to have COVID-19, to other co-workers?

No.

The ADA establishes the basic rule that, with limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee (42 USC § 12112(d)(3)(B)). The CDC's Interim Guidance for Businesses and Employers also cautions employers on this topic and reminds them of their confidentiality obligations.



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