Corona Reporting and Data Protection – DSK Guidelines and Prevention Duties to Protect Employee Health

INTRODUCTION

In addition to the economic challenges due to the SARS-CoV-2 pandemic and COVID-19 disease (cf. Client Newsletter 01/2020 on Short-Time Work) many businesses are confronted by the question of how to address and manage (potential) health risks for their workforces. An equivalent concept on occupational health not only appears meaningful in a business's very own interests, but is being expected by the workforce and employee representatives in many places to prevent the risk of infection at work and to warrant that workplaces are as safe as possible.

The legal basis for such action is the general **duty of care of employers** in relation to its employees, which, *vice versa*, also involves a duty to cooperate with regard to effective occupational health safety, particularly when serious health threats can be expected in the imminent future due to the cases of documented and suspected disease. The introduction or anticipation of a mandatory "reporting duty" on the part of employees regarding their own actual or suspected sickness or that of their coworkers, may appear to be the logical consequence of effective health safety, but the legal limitations of comprehensive *„Corona Whistleblowing"* are too great to be overlooked. This not only concerns the constitutional rights of the employees in question (both those who are sick and those who are „suspects"), but also their data privacy rights, given the fact that **health data are particularly sensitive data** falling under special legal protection, whose processing is only permitted under very special exceptional circumstances (cf. Art. 9 GDPR, Sec. 26 (3) Federal Data Protection Act = *BDSG*).

The most recent advice of the Independent Federal and State Data Protection Authorities (DSK) on the *„Processing of Personal Data by Employers in Connection with the Corona Pandemic"* provides initial guidance.

DSK ADVICE ON CORONA DATA IN THE EMPLOYMENT RELATIONSHIP

The core message of this advice is found at the very end: (cf. www.bfdi.bund.de). It is stated there:

"The employer's duty of care obliges them to ensure the protection of the health of all employees. In the view of the independent data protection authorities, this also includes an appropriate reaction to the epidemic spread, and meanwhile pandemic spread, of a disease subject to the mandatory reporting to the authorities which serves the prevention and tracking of the disease (thus, a basically downstream duty of care to the people they have come into contact with). Of course, these measures must always comply with the principle of reasonableness. The data must be treated confidentially and used strictly for this purpose. After the purpose of processing ceases to exist (which will regularly be by no later than the end of the pandemic) the collected data must be deleted without undue delay.

It must first be stated that so-called **Corona data**, that is data on

- an infection,
- contact to an infected person
- and/or the return from a risk area (this is probably not very "current" at this stage)

may generally be processed – that is, particularly upon compliance with the above restrictions. The DSK and the Data Protection Authorities stressed that the GDPR and the Act itself provide sufficient legal justifications where particularly sensitive health data is concerned (e.g. Art. 6 (1) sentence 1 f), 9 (2) b) GDPR, Sec. 26 (1), (3) BDSG).

ADVICE FOR PRACTITIONERS

Doing nothing, that is, refraining from having any employee health protection concept to safeguard against the Corona virus by invoking data protection, particularly the sensitive health data of employees under Art. 9 GDPR, will be fairly difficult, to say the least. Aside from this, there are other provisions that indicate such **introduction of business concepts to protect employee health** (e.g. Sec. 16 Occupational Safety Act). A general duty to report for all employees will most like go too far with regard to (suspected) cases among coworkers in the sense of *„Corona Whistleblowing".*

Action will thus remain governed by the individual case, and in the absence of clear statutory obligations, there will be a certain degree of discretion on the part of those in charge. **Information on health risks at work, rules of conduct and the setting up of a reporting office or designation of a person in charge** (and be this merely the relevant manager) are likely the minimum, but the drafting of a general **expectation that reporting will take place and, to a smaller extent, reporting duties** may also be advisable. One example: Given the potential risk of infection for other coworkers and possibly for a significant portion of the workforce, the duty of an employee to promptly report a positive COVID-19 test (upon threat of disciplinary action) will likely not only be indicated by the employer

duties of care but will be permitted under data protection law on the basis of the principles stated above, provided this person had contact to coworkers at work – irrespective of the government reporting chain and any time delays.

The issue at hand is to develop a multi-level concept on this basis with which employers can comply with their duty of care while keeping a firm eye on employee data privacy. Levels in the sense of limited access rights for a small confidential circle and deletion concepts for directly after the end of the pandemic must be unequivocal elements of a business's employee health concept. A certain degree of discretion must remain, but by doing nothing, employers could be violating their legal obligation under general duties of care and could be subject to equivalent sanctions.

In businesses with a works council, there is the opportunity for a quick agreement on these issues and the conclusion of a short Company/Works Agreement, which can also contain rights of the works council to receive information on reported cases, for instance, in addition to the material provisions discussed above. In terms of data protection law, this offers an additional advantage that such a works agreement could also form the justification under data protection law for giving the employer and employee representatives a certain level of discretion in implementing this kind of concept for employee health protection (Art. 88 GDPR, Sec. 26 (4) BDSG).

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