

# COVID-19 - A PRACTICAL GUIDE TO DATA PROTECTIONS PRACTICES IN WORKPLACE TESTING IN THE UK- FRANCE - GERMANY

As we begin to see the easing off of many lockdown restrictions throughout Europe, businesses are considering how best they can quickly and safely return to the work place. This will involve the implementation of any number of 'back to work' safety measures to reduce the risk of COVID-19.

Such testing measures are subject to strict data protection rules. Specifically, all employers must consider the specific legal bases under which they can justify the processing of the health data and undertake a Data Protection Impact Assessment (DPIA). Although the General Data Protection Regulation (GDPR) applies throughout Europe and dictates the applicable principles, each national jurisdiction is subject to specific local rules which offer nuanced interpretations as to testing measures.

In the below table, our UK, French and German data experts offer practical guidance to health monitoring in the UK, France and Germany and look at the many differences and the similarities of the data protection rules and principles applying to workplace testing. As can be seen from the below, discrepancies arise from the differences in attitudes of the respective data protection regulators to health data processing, and from the different employment laws that are in force in each of these three jurisdictions.

|  | UK   | FRANCE  | GERMANY   |
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| <b>EU Supervisory Authorities Guidance</b> | Employee testing and monitoring is permitted provided personal data is processed lawfully, fairly and transparently in compliance with the GDPR and the Data Protection Act 2018 ( <b>Data Protections laws</b> ).   | Employee testing and monitoring is permitted provided it complies with the GDPR and the French Data Protection Act 1978 as amended in 2005 and 2019 ( <b>Data Protections laws</b> ).   | Employee testing and monitoring is permitted provided it complies with the GDPR and the German Federal Data Protection Act 2017 ( <b>Data Protections laws</b> ).   |
|  | <p>The Guidance clarifies the rules applying to testing or tracking of employees including:</p> <ul style="list-style-type: none"> <li>• Testing employees for symptoms of COVID-19</li> <li>• Use of lists of employees with symptoms or testing positive</li> <li>• Disclosure of positive cases to other employees</li> </ul> | <p>The Guidance covers the following issues:</p> <ul style="list-style-type: none"> <li>• Testing in line with health and safety obligations for employers and employees</li> <li>• Employers' obligations when receiving Covid-19 related information</li> <li>• Exceptions to the prohibition of processing health data and temperature screening</li> <li>• Interplay of Employment law and Data Protection law</li> </ul> | <p>Generally employers, while they have a duty of care toward employees, should not be entitled to investigate the health of their employees.</p> <p>However, the processing of personal data, and particularly health data, is possible under certain restrictions: personal data may be collected and processed to contain the coronavirus pandemic or to protect employees in accordance with Data Protection Laws.</p> <p>Where personal data is processed for such purposes, the principles of proportionality applies a</p> |

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| <ul style="list-style-type: none"> <li>• Use of temperature checks or thermal cameras in the workplace</li> </ul> <p>Employers may be able to rely on the grounds that processing health data is necessary as part of their duty of care and health and safety obligations (Article 9(2)(b) GDPR, along with Schedule 1 of condition 1 of the DPA 2018).</p> <p>To demonstrate compliance with their accountability obligations, employers would need to undertake a Data Protection Impact Assessment (<b>DPIA</b>) which will need to cover:</p> <ul style="list-style-type: none"> <li>• details of the testing being proposed;</li> <li>• the data protection risks;</li> <li>• whether the proposed activity is necessary and proportionate; The assessment of what is necessary and proportionate is crucial and should include why alternative measures are not sufficient.</li> <li>• the mitigating actions that can be put in place to counter the risks; and</li> <li>• a plan or confirmation that mitigation has been effective.</li> </ul> <p>Data minimisation applies as only the health data that is necessary and proportionate should be collected and processed for testing purposes.</p> <p>In line with the transparency requirement, employees should be given clear privacy information before any health data processing begins and able to exercise their information rights.</p> | <ul style="list-style-type: none"> <li>• Rules on health screening and recommended business continuity plans</li> </ul> <p>Employers must refrain from collecting in a systematic and generalised manner, or through individual inquiries and requests, health information relating to possible symptoms presented by an employee / agent and their relatives.</p> <p>It is therefore not possible to implement:</p> <ul style="list-style-type: none"> <li>• mandatory readings of the body temperatures of each employee / agent / visitor to be sent daily to their hierarchy; or</li> <li>• the collection of medical sheets or questionnaires from all employees / agents.</li> </ul> <p>Employers may be able to process health data by relying on employers' duty of care and health and safety (Article 9(2)(b) GDPR) and under the French Labour Code.</p> <p>However, employers can only process data that is strictly necessary. Therefore, only the following information can be processed:</p> <ul style="list-style-type: none"> <li>• information linked to the date;</li> <li>• the identity of the person; and</li> <li>• the fact that they have indicated being infected or suspected of being infected.</li> <li>• the identity of persons affected must not be communicated to other employees.</li> </ul> | <p>lawful basis must always be established. In particular, the following applies:</p> <ul style="list-style-type: none"> <li>• Employers may collect and process personal data (including health data) of employees and visitors in order to detect whether they tested positive, had contact with an infected person, or stayed in a risk-area (legal bases: Section 26(1) BDSG and Art. 6(1)(e) or (f) GDPR; Section 26(3) BDSG and Art. 9(2)(b) GDPR; Section 26(3), 22(1)(c) BDSG and Art. 9(2)(i) GDPR) for special categories of personal data .</li> <li>• Personal data may only be processed for a specific purpose (COVID-19 containment) and must be deleted after the end of the pandemic, at the latest.</li> <li>• Employers are generally not permitted to disclose the name of infected employees, as this could lead to social stigmatization and discrimination. Exceptions may apply where disclosure of the name is necessary in order to allow the employer to take effective precautionary measures.</li> </ul> <p>Employees may be required under employment law to inform the employer should they become ill infected with the coronavirus. As a consequence, employees may disclose information to their employer about persons they have been in contact with (legal basis: Section 26(1) BDSG and Art. 6(1)(f) GDPR).</p> |
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Transparency in relation to any processing of employee health data is required at all times.

**Self-report symptoms and concerns by employees**

Should be recommended to employees:

- For any test results or health data voluntarily disclosed, the employer must have due regard to the security of the data and any duty of confidentiality owed to the individual before considering sharing such data with authorities and/or processing it for health and safety purposes.
- The use of the data must be necessary and relevant, and any sharing or collection of irrelevant or excessive data should be avoided.
- DPIA to ensure any health information reported to employer is processed in accordance with applicable Data Protection Laws.

Should be recommended to employees:

- Employers should remind employees working in contact with other people of their obligation to provide information in the event of infection or suspected infection.
- Employers should facilitate this exchange of information by setting up, if necessary, dedicated and secure channels.
- However, employers can only process data for strictly necessary purposes such as reporting to the health authorities or implementing workplace safety measures to protect other employees.
- Only the following information can be processed:
  - information linked to the date;
  - the identity of the person; and
  - the fact that they have indicated being infected or suspected of being infected.
- If necessary, the employer will be able to communicate to the health authorities which have the competence, the elements necessary for a possible medical or medical care of the exposed person.
- In any event, the identity of the person likely to be infected must not be communicated to other employees.

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- If necessary, the employer will be able to communicate to the health authorities which have the competence, the elements necessary for a possible medical or medical care of the exposed person.
- In any event, the identity of the person likely to be infected must not be communicated to other employees.

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| <p><b>Temperature checks taken by employees themselves</b></p>  | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>For any test results or health data voluntarily disclosed, the employer must have due regard to the security of the data and any duty of confidentiality owed to the individual before considering sharing such data with authorities and/or processing it for health and safety purposes.</li> <li>The use of the data must be necessary and relevant, and any sharing or collection of irrelevant or excessive data should be avoided.</li> <li>DPIA to ensure any health information reported to employer is processed in accordance with applicable Data Protection Laws.</li> </ul> | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>For any test results of health data disclosed, the employer must ensure it is kept securely and is only used for the permitted purposes.</li> <li>In any event, the identity of the person likely to be infected must not be communicated to other employees.</li> </ul>                | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>If a particular risk can be deduced for certain employees because e.g. they were previously travelling in high-risk regions,</li> <li>Special treatment could also be derived for employees if an increased number of cases of infection were detected in a particular department of the company.</li> <li>Overall, we see reservations against a general temperature screening for employees.</li> </ul> |
| <p><b>Keeping and recording information on employees who either have symptoms or have been tested as positive</b></p> | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>Data Protection Impact Assessment (DPIA)</li> <li>Privacy information for transparency;</li> <li>Use of the data is necessary and relevant for the purpose;</li> <li>Lawful basis: employment and health and safety duties</li> <li>Data is securely processed;</li> </ul>   | <p><b>Keeping and recording on employees who either have symptoms or have been tested as positive:</b></p> <p>Permitted, subject to:</p> <p>The employer must ensure it is kept securely and is only used for the permitted purposes.</p> <p>In any event, the identity of the person likely to be infected must not be communicated to other employees.</p> | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>Only as much data as necessary may be collected and, in the sense of storage limitation, this data is only stored for as long as it is necessary to fulfil the task.</li> <li>A conceivable time is the end of any quarantine measure.</li> <li>Questions regarding typical corona symptoms and travelling to risk areas are allowed.</li> <li>Data is highly confidential.</li> </ul>                    |
| <p><b>Health screening of employees</b></p>   | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>Data Protection Impact Assessment (DPIA)</li> <li>Privacy information for transparency;</li> <li>Use of the data is necessary and relevant for the purpose;</li> <li>Lawful basis: employment and health and safety duties</li> <li>Data is securely processed;</li> </ul>   | <p><b>Health screening of employees through questionnaire and health swabbing:</b></p>   | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>Only as much data as necessary may be collected and, in the sense of storage limitation, this data is only stored for as long as it is necessary to fulfil the task.</li> <li>A conceivable time is the end of any quarantine measure.</li> <li>Questions regarding typical corona symptoms and travelling to risk areas are allowed.</li> <li>Data is highly confidential.</li> </ul>                    |

**through questionnaire**

- Duty of confidentiality; and
- Records do not result in any unfair or harmful treatment of employees.
- Kept for no longer than needed

Not permitted:

- Employers are not permitted to mandate employee health questionnaires
- Employers are not allowed to conduct serology tests to detect COVID-19 AS results of serology tests are subject to medical professional secrecy
- Only competent health personal can collect, implement and access medical files or questionnaires from employees containing data relating to their state of health of information relating in particular to their family situation or living conditions.

- If there is a suspicious case, the name of the employee must not be published, not even to co-workers.
- If an employee is tested positive, the name can only be told to those co-workers who had direct contact to the infected person.
- Temperature checks are only allowed when there is a suspicious case in the company or if the company is based in a risk area.
- General temperature checks might be useful in food companies or in health care but can only be allowed if their workers' council agreed and the measure is still not made compulsory.

**Health swabbing (antigen or antibody)**

- Employer can only receive any notice of fitness or inability to return to work if issued by a health professional.
- Employees working remotely are not required to inform their employer if they suspect they may have become infected, except if they need to take medical leave

**Temperature checks by employer prior to entry**

**Temperature checks by employer prior to entry:**

If temperature checks are done manually at the entrance of a site, and no data or record of the results are kept, then this would not fall under applicable Data Protection Laws and would be permissible.

However, the Ministry of Labour has clarified that temperature testing measures are required to:

- comply with the provisions of the French Labour Code, in particular those relating to the company's internal regulations
- be proportionate to the objective sought
- preserve employees' dignity
- be subject to prior information about:
  - the process generally;
  - how long their data will be retained;
  - the consequences of submitting (or not) to a temperature test

Subject to the above conditions, an employer may refuse an employee access to the workplace premises should the employee refused to have their temperature taken.

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**Temperature checks with contactless infrared thermometer by employer**

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**Infrared temperature testing:**

Permitted provided the results are not recorded either electronically or in any handwritten filing system.

- Only competent health personnel can collect information relating to the health of employees.
- Employers are expressly prohibited from installing automatic temperature sensing tools or any temperature record of employees or if they results are recorded in an automated processing or in a paper register.

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| <p><b>Temperature checks taken by employees themselves</b></p>             | <p>Permitted subject to:</p> <ul style="list-style-type: none"> <li>For any test results or health data voluntarily disclosed, the employer must have due regard to the security of the data and any duty of confidentiality owed to the individual before considering sharing such data with authorities and/or processing it for health and safety purposes.</li> <li>The use of the data must be necessary and relevant, and any sharing or collection of irrelevant or excessive data should be avoided.</li> <li>DPIA to ensure any health information reported to employer is processed in accordance with applicable Data Protection Laws.</li> </ul> | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>For any test results of health data disclosed, the employer must ensure it is kept securely and is only used for the permitted purposes.</li> <li>In any event, the identity of the person likely to be infected must not be communicated to other employees.</li> </ul> | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>If a particular risk can be deduced for certain employees because e.g. they were previously travelling in high-risk regions.</li> <li>Special treatment could also be derived for employees if an increased number of cases of infection were detected in a particular department of the company.</li> <li>If the employee has no increased temperature, the data must be deleted.</li> <li>Overall, we see reservations against a general temperature screening for employees.</li> </ul> |
| <p><b>Thermal imaging checks prior to entry and during working day</b></p> | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>DPIA (Please see below)</li> <li>Privacy information for transparency;</li> <li>Use of the data is necessary and relevant for the purpose;</li> <li>Lawful basis: employment and health and safety duties</li> <li>Data is securely processed;</li> <li>Duty of confidentiality;</li> </ul>   | <p>Not permitted:</p> <p>The automated monitoring of employee temperatures via thermal cameras is prohibited.</p>   | <p>Permitted, subject to:</p> <ul style="list-style-type: none"> <li>Temperature checks must not be compulsory.</li> <li>Data must not be kept if unnecessary but deleted directly, e.g. body temperature is average.</li> <li>If a particular risk can be deduced for certain employees because e.g. they were previously travelling in high-risk regions,</li> <li>Special treatment could also be derived for employees if an increased number of cases of infection were detected in a particular department of the company.</li> </ul>                     |

- Records do not result in any unfair or harmful treatment of employees; and
- Kept for no longer than needed

Further, due to the inherently intrusive nature of surveillance technologies, especially for capturing health information, a specific DPIA will be required.

Please see ICO specific template DPIA for using surveillance cameras:

<https://www.gov.uk/government/news/updated-data-protection-impact-assessment-template-and-guidance-launched>

- Overall, we see reservations against a general temperature screening (including thermal imaging checks) for employees.

#### **Use of contact tracing apps**

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| <ul style="list-style-type: none"> <li>• Use of the NHS Contact tracing app can be recommended to employees but not made compulsory.</li> <li>• DPIA to ensure any health information reported by employee is processed in accordance with applicable Data Protection Laws.</li> </ul> | <ul style="list-style-type: none"> <li>• Use of the StopCovid contact tracing app can be recommended to employees but not made compulsory.</li> <li>• Employers should encourage employees to comply with all health and safety initiatives to combat coronavirus.</li> <li>• For any health data disclosed by an employee, keep it securely and ensure it is only used for the permitted purposes in accordance with Data Protection Law.</li> <li>• In any event, the identity of persons affected must not be communicated to other employees.</li> </ul> | <ul style="list-style-type: none"> <li>• Use can be recommended to employees but not made compulsory.</li> <li>• Employers can encourage their employees to minimise social contacts in their free time and comply hygiene and safety measures to protect themselves and others.</li> </ul> |
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| <p><b>Testing and tracing</b></p>         | <ul style="list-style-type: none"> <li>• Employees should be encouraged by employers to heed any notifications to self-isolate.</li> <li>• DPIA to ensure any health information reported by employee is processed in accordance with applicable Data Protection Laws.</li> </ul>  | <ul style="list-style-type: none"> <li>• Employers should encourage employees to comply with all health and safety initiatives to combat coronavirus.</li> <li>• For any health data disclosed by an employee, keep it securely and ensure it is only used for the permitted purposes in accordance with Data Protection Law.</li> <li>• In any event, the identity of persons affected must not be communicated to other employees.</li> </ul> | <ul style="list-style-type: none"> <li>• Testing and tracing cannot be made compulsory.</li> <li>• Employees should be encouraged by employers to heed any notifications to self-isolate.</li> <li>• Employees should be encouraged to comply with hygiene and safety guidelines and reduce their social contacts to a necessary minimum.</li> <li>• In any event, they must not be traced by their employers.</li> </ul>   |
| <p><b>Sources and Further Reading</b></p> | <p>ICO Guidance on Workplace Testing of 12.05.2020:</p> <p><a href="https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/data-protection-and-coronavirus/workplace-testing-guidance-for-employers/">https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/data-protection-and-coronavirus/workplace-testing-guidance-for-employers/</a></p> | <p>CNIL Guidance of 07.05.2020:</p> <p><a href="https://www.cnil.fr/fr/coronavirus-covid-19-les-rappels-de-la-cnil-sur-la-collecte-de-donnees-personnelles-par-les">https://www.cnil.fr/fr/coronavirus-covid-19-les-rappels-de-la-cnil-sur-la-collecte-de-donnees-personnelles-par-les</a></p>  | <p>Various national and state level guidance, including:</p> <p>Bundesbeauftragter für den Datenschutz und die Informationsfreiheit (BfDI) / Datenschutzkonferenz (DSK):</p> <p><a href="https://www.bfdi.bund.de/DE/Datenschutz/Themen/Gesundheit_Soziales/GesundheitSozialesArtikel/Datenschutz-in-Corona-Pandemie.html?nn=5217154">https://www.bfdi.bund.de/DE/Datenschutz/Themen/Gesundheit_Soziales/GesundheitSozialesArtikel/Datenschutz-in-Corona-Pandemie.html?nn=5217154</a></p> <p>Datenschutzkonferenz:</p> <p><a href="https://www.datenschutzzentrum.de/uploads/dsk/20200403-DSK-Entschiessung_Pandemie.pdf">https://www.datenschutzzentrum.de/uploads/dsk/20200403-DSK-Entschiessung_Pandemie.pdf</a></p> <p>DPA for Baden Wuerttemberg:</p> <p><a href="https://www.baden-wuerttemberg.datenschutz.de/faq-corona/">https://www.baden-wuerttemberg.datenschutz.de/faq-corona/</a></p> <p>DPA for Rhineland-Palatinate:</p> <p><a href="https://www.datenschutz.rlp.de/de/themenfelder-themen/beschaefigtendatenschutz-corona/">https://www.datenschutz.rlp.de/de/themenfelder-themen/beschaefigtendatenschutz-corona/</a></p> |

DPA for Bavaria:

<https://www.datenschutz-bayern.de/corona/sonderinfo.html>

DPA for Brandenburg:

[https://www.la.brandenburg.de/media\\_fast/4055/Heimarbeit\\_200323.pdf](https://www.la.brandenburg.de/media_fast/4055/Heimarbeit_200323.pdf)

Hamburg Datenschutz:

<https://datenschutz-hamburg.de/pages/corona-faq>