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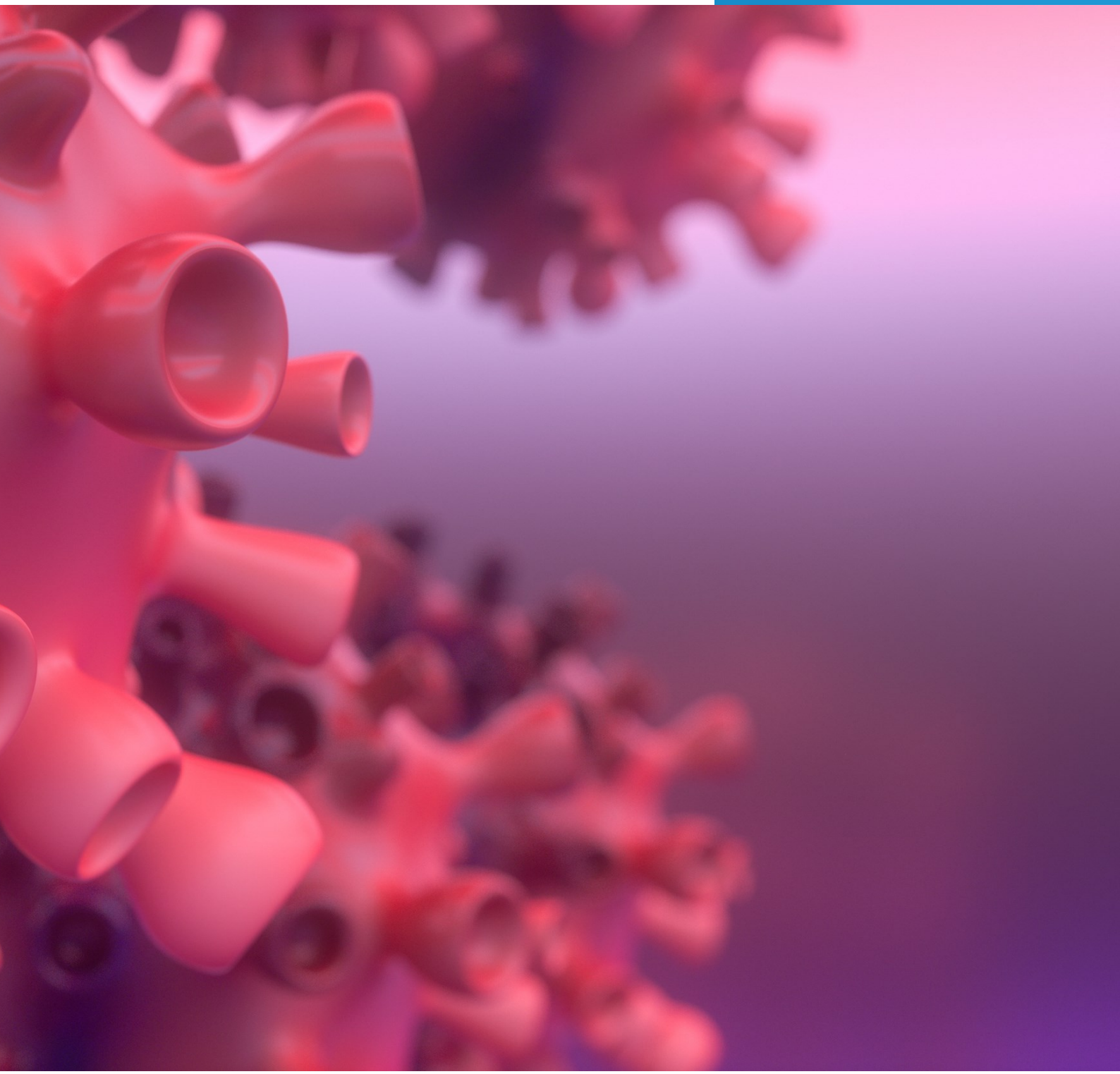
COVID-19
Pandemic and Data protection

March 2020



COVID-19: Data protection effects for employers in Germany

Introduction

Even in the times of COVID-19, data protection law is still applicable. This is because the General Data Protection Regulation ("GDPR") and national laws that implement it - in Germany the Federal Data Protection Act ("BDSG") - set out general rules which govern personal data processing, even in times of crisis. It is in times of crisis that the strength of these fundamental rights become apparent, and even an exceptional situation like this does not justify any interference with the data protection rights of employees. This FAQ therefore provides specific, easy to understand advice about COVID-19 data protection related questions, in the context of employment in Germany. This advice will examine available options and provide specific advice about which to take.

May employers process employees' personal data for purposes relating to COVID-19?

The legality of processing personal data is subject to the existence of a valid legal basis. As personal data processed for purposes relating to COVID-19 will, in most cases, concern the employee's health, the controller must satisfy the stringent requirements for processing special categories of personal data that are set out by Article 9 GDPR. However, there are also processing activities that could solely rely on one or more legal bases set out in Article 6 GDPR. At any rate, to be consistent with the principle of data minimisation pursuant to Article 5(1)(c) GDPR, employers may only process the personal data necessary in order to satisfy the purposes as described below.

May employers collect and use an employee's private contact details to inform staff of current incidents and closures of premises?

Yes, they may. However, the legal basis on which this data processing operation can be based is not yet uniformly interpreted. Contact details (e.g. phone number or email) do not count as special categories of personal data. In our view, an employer may rely on a change of purposes pursuant to Article 6(4) GDPR to use private con-

tact details of employees, which the employer has previously stored for other purposes, in order to inform staff of any important news. However, if the employer cannot access existing private contact information, the State Data Protection Commissioner of Baden-Württemberg considers the employee's "agreement" to the collection to be necessary. Despite this, in our opinion it should also be possible to collect and use an employee's private contact data on the basis of Section 26(1) BDSG (i.e. without consent).

May employers collect information on destinations an employee has travelled to?

Yes, they may. Employers are obligated by law to protect the welfare of their staff. Because of this they may collect information about where dangers to an employee's health could derive. The legal bases for this related processing of personal data are Articles 6(1)(c), 9(2)(b) and 88(1) GDPR, in conjunction with Section 26(3) BDSG and Sections 618 and 242 of the German Civil Code ("BGB"). In practice, employers may therefore collect data on whether an employee travelled to a high-risk territory. However, in order to protect the employee's welfare, it is not necessary to know exactly which location the employee travelled to.

May employers collect information on an employee's social contact with (possibly) infected individuals?

The same principles behind our advice regarding travel destinations also apply to this question. In order to protect employees from health risks, it is only necessary for an employer to be informed about the contact of employees with infected persons. Employees are not required to disclose all social contacts to their employer (i.e. employees only need to report social contacts with confirmed infected individuals, not contacts with possibly infected individuals). Furthermore, employees are not obligated to disclose the infected person's identity but just the fact that they were in contact with an infected person.

May employers inform staff about another employee's infection?

The only reason an employer could validly inform staff of another employee's infection is to prevent the virus from spreading among staff. For example, if the employer is able to identify the colleagues the infected employee came into contact with without revealing his or her identity, or if the employer would need to send home all employees in any case, the disclosure of an infected individual's identity would not be necessary. However, if preventing the virus from spreading can only be achieved by disclosing the infected employee's identity (e.g. because it is unclear with whom the infected individual came into contact), then the employer may inform staff of the infected employee's identity.

May employers perform medical checks (e.g. temperature checks) and undertake the processing of personal data associated with these?

Personal data processed in the scope of medical checks is considered health data pursuant to Article 9(1) GDPR. Thus, Article 9(2)(b) and 88(1) GDPR, in conjunction with Section 26(3) BDSG and Sections 618 and 242 BGB would constitute the relevant legal bases. However, this is only true if such medical checks are necessary to safeguard the welfare of staff. This needs to be assessed on a case-by-case basis but, in the current circumstances, should generally apply in cases of fever testing or using thermal imaging cameras. Nevertheless, works councils' right of co-determination, pursuant to § 26(1) BDSG, in conjunction with Section 87(1) no. 6 and 7 German Works Constitution Act ("BetrVG"), may also have to be observed in practice. Furthermore, it has to be considered that such medical checks are not only carried out on staff, but also on external parties who enter the workplace. In the case of external parties, the legal basis would be the property rights of the organisation. At any rate, employers should opt for procedures that are the least invasive as possible and they should delete the collected data as soon as the relevant purpose is achieved. If the tests are not recognizable as occurring, corresponding signs which clearly notify people about the tests should be put in places where they can be clearly seen by anyone entering the building.

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May employers have their staff work from home?

Yes, they can, as this can be an efficient way for employers to perform the duty to safeguard the welfare of their staff. The employer must make sure that appropriate technical and organizational measures, to ensure an appropriate level of data security (refer to Article 32 GDPR), are in place for any virtual applications that employees are using to connect to the workplace server from home. If applicable, respective works council agreements could also govern further specifics of such measures. Apart from that, employees should also be made aware of the need to protect personal data when working from home and, where appropriate, the measures to be taken (e.g. making the laptop inaccessible to further family members, screen locking, document locking etc.).

May employers (upon request) inform authorities of an employee's Corona infection and provide them with other virus related data?

Yes, they can, but there is no obligation to do so. However, employers might still have a valid interest in reporting such data to the authorities in order to safeguard the remaining staff's welfare. Whether this is legally necessary must be assessed on a case-by-case basis beforehand. Again, Articles 6(1)(c), 9(2)(b) and 88(1) GDPR, in conjunction with Section 26(3) BDSG and Sections 618 and 242 BGB would be the applicable legal bases. Beyond that only medical professionals are legally obligated to report data on an individual's infection with COVID-19 to the authorities.

Is an employee obligated to disclose to his or her employer that he or she is infected with COVID-19?

No, they are not. They are only required to report that they are sick, but not what the illness is. Nonetheless, employers may be informed by the authorities of a staff member's illness. This is because medical professionals who diagnosed the illness are obligated to report their diagnosis to the authorities who, in turn, may inform the infected person's employer.

May employees in times of COVID-19 exercise their data subject rights?

Yes, employees may of course exercise their data subject rights because of the ongoing applicability of GDPR. These rights include rights of access, to rectification, to erasure, to restriction of processing, to data portability and to object. Please note, however, that if numerous data subjects contact employers with respective requests, it could take one, or even up to three, months for the employer to respond to the request (refer to Article 12(3) GDPR).

For further information on this topic, please also refer to our article on "Coronavirus and the GDPR – keep calm and carry on?" and to various other insights relating to legal implications of Coronavirus on our website.

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