

Coronavirus Information Hub: FAQ Data Protection

Is the application of Swiss data protection law affected by the Corona crisis?

No. Data protection law continues to apply fully as it has been prior to the Corona crisis. However, the Swiss data protection authority, the Federal Data Protection and Information Commissioner (FDPIC), will be aware of the particular challenges and constraints that employers face today.

Is their official guidance on data protection law issues arising now?

The FDPIC has not issued official guidance to date. There is guidance from European data protection authorities, but it is not officially binding, even less in Switzerland, and there are important differences between European and Swiss data protection and employment laws.

Can employers direct their staff to report symptoms of COVID-19?

Yes. Employers have an obligation to ensure the health and safety of its employees as well as a duty of care, which requires them to know about potential contractions of COVID-19 in their organizations.

If an employer knows that an employee may have potentially contracted COVID-19, can he inform its staff?

Yes. Employees should be kept informed about cases in the organisation. However, individuals should not be named, and only the required information should be given.

Can employers lawfully impose temperature, saliva or blood testing for COVID-19 for employees as a condition of entering work premises?

Temperature screening is acceptable as a measure to protect the health of their employees. A saliva test as a condition for entering work premises should be considered to be lawful as well provided saliva tests are more precise or yield faster test results than temperature screening. Blood testing would require consent unless, again, blood tests are known to be more reliable or faster than saliva testing.

However, the Swiss government has stated publicly that there is no necessity for general COVID-19 testing for employees. An employer wishing to carry out general testing should therefore be able to rely on a particular situation to justify the measure.

Since the dispensing to the general public of test kits for the diagnosis of transmissible human diseases is prohibited, Saliva and blood testing must be done by qualified medical personnel, unless authorized otherwise by Swissmedic.

Can an employer use laboratories outside Switzerland?

Yes. A transfer of health data to a laboratory abroad is permitted provided the laboratory is located in a country with an adequate level of data protection (which includes the EU/EEA countries and the UK). For recipients in other locations safeguards such as the EU Standard Contractual Clauses are required. Note that the use of the Standard Contractual Clauses must be notified to the FDPIC.

Where the laboratory receives only pseudonymized data (for example the testing kits with a bar code that is not personally identifiable to the laboratory) the above does not apply.

When the testing is implemented employees should be informed about the transfer to the laboratory abroad.

What other restrictions apply to employee data in relation with COVID-19?

- Where sensitive data is collected the employer must state expressly his identity, the processing purpose(s) and the categories of (contemplated) recipients of that data within and outside of the organisation.
- Employee data collected in relation with COVID-19 may not be processed for any other purposes, and must be erased when no longer needed.
- Access to identifiable employee data must be restricted based on the need-to-know principle.
- Where employee data needs to be shared with group companies the disclosing entity must ensure that restrictions on cross-border transfers are complied with (see Q6), and where the group companies are joint controllers or controllers and processors the appropriate contractual arrangements must be in place.

- Before implementing specific health protection measures employees must be informed and employees or their representatives have the right to make proposals in this respect. The employer has to justify its decision, if he only partially takes into account objections and proposals made by the employees or their representatives.

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Walder Wyss is committed to supporting our clients through the challenges the pandemic presents. We will be publishing regular insights on this Information Hub.

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