Reopening the workplace – FAQ about employment and personal data

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Following the announcement on opening up the society from the Danish Government, many companies are taking the necessary precautions in reopening their workplaces in Denmark. For many companies, the reopening is a big and urgent task in securing that the gradual reopening takes place in consideration of health and safety.

In this FAQ we answer some of the questions that the reopening may raise, and that employers should be aware of. This especially applies to the control measurements that employers can or must initiate to protect their employees against COVID-19. We have considered both the questions relating to employment and to data protection law in connection with the reopening. Please note that the FAQ is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. .

Which employment conditions apply when furloughed employees are called back to work?

When an employee is called back to work, the employee will enter into the employment conditions in force at the time of the furlough. This applies regardless of whether the employee is furloughed with or without salary.

If an employer wants to materially change the employee's employment conditions, for example the number of working hours, when the employee returns to the workplace, changes shall be made according to current legislation, collective bargaining agreements, local agreements and staff policies. However, in many situations it might be possible to arrange voluntary agreements with the employees, i.e. regarding reduced working hours/reduced salary for a temporary period.

Which notice shall be given when calling the employees back to work?

Normally, the employer can call the furloughed employees back to work with 1 day's notice, unless otherwise agreed. This applies regardless of whether the employees are furloughed on a salary/wage compensation scheme; furloughed without salary or are part of a short-time working scheme.

The employer must secure that the notice of recall is given in writing. If the employer recalls an employee covered by the rules of short-time working, the employer must also give notice of the recall to the job center.

Many employees have worked from home during the furlough period. In these situations, the recall may cause some practical challenges for the employee, for example childcare, the transportation of IT-equipment, etc. It is therefore generally recommended that employees are given a few days to adapt to the new working day where appearance at the workplace is required.

Is an employer obliged to consult with the employees or the representatives about the process of returning to the workplace?

No. Normally, an employer is not obliged to consult with the employees or employee representatives about the working process regarding returning to the work space. Such decisions are deemed to be a part of the employer's managerial right. However, it is recommended that the employer continuously informs the employees or the employee representatives about future initiatives to secure a frictionless transition to the new working day.

Does the employer have a duty to organize the work or arrange the workplace in a manner ensuring that the risk of infection with COVID-19 is minimized?

According to the Danish Working Environment Act the employer is responsible for ensuring a healthy physical and mental working environment for the employees. An employer has the duty to initiate control measurements that prevent and minimize the risk of infection with COVID-19 at the workplace. The Danish Patient Safety Authority, in collaboration with the Danish Working Environment Authority, has composed certain guidelines regarding the control measurements that the employer can initiate to prevent the risk of infection with COVID-19 at the workplace, including:

1. Tell employees to stay at home in the event of illness.
2. Plan work so that employees can keep a distance to each other.
3. Make wash basins or hand sanitizer available.
4. Minimise contact with others.
5. Make regular cleaning a top priority.

The guidelines can be found here.

Is the employer allowed to check the employees' temperature?

In general, no.

The rules on scanning an employee's body temperature are regulated in the Act on the Use of Health Data etc. on the Labour Market. According to the Act, employers may, in certain situations, *offer* an employee to be tested for specific diseases in case of special considerations. However, this is subject to a number of conditions and restrictions which may raise difficulties in regard to the practicalities of carrying out temperature scanning.

The scanning may also be governed by the data protection law. In this respect, it is important to be aware that the Act on the Use of Health Data etc. on the Labour Market – unlike The General Data Protection Regulation (GDPR) – applies regardless of whether the information is registered electronically (digitally) or not.

In general, it is recommended not to check the employee's body temperature when the employee starts work. First, it may be transgressive to have one's body temperature checked, and second, the limits of using this type of control measurements can be quite narrow. If the company is covered by an collective bargaining agreement, the trade union must be informed before initiating control measurements.

Instead, we recommend that employers urge the employees to contact the company by telephone if they have a fever or feel ill. Accordingly, the employer can decide whether or not the employee should stay at home. Furthermore, it is recommended that the employee is requested to seek medical advice if the employee shows symptoms of being infected.

Is it allowed to check the temperature on guests of the company, customers, suppliers, etc.?

Opposite employees, the Act on the Use of Health Data etc. on the Labour Market does not cover "external persons" such as guests, customers, suppliers and others. This means that temperature scanning of such persons is allowed, but only if the results of the test are not registered. If you omit registering the result of the test in a way that may be assigned to a specific person, the test falls outside the scope of the data protection laws and is therefore not restricted by the data protection law.

On the other hand, if the test is registered in a way that the results can be referred to a specific person, the registration is only allowed if the specific person gives its consent.

Furthermore, it is important to note that in some cases it may be a breach of the company's contractual obligations to deny access to the company's premises. For example, it may be a breach of contract if a customer is denied access to a product or service to which the customer is entitled by referring to the customer's refusal to having its temperature scanned.

Finally, it is important to remember that just because something is allowed from a legal point of view, it might not necessarily be a good idea. Therefore both commercial and a cultural perspectives should be considered when deciding whether it is appropriate and in accordance with people's expectations to initiate such control

measurements. Most people in Denmark will likely find it transgressive to be asked to be subject to an unsolicited temperature scanning.

What can an employer ask the employee about?

The Act on the Use of Health Data etc. on the Labour Market allows in general that employers ask for information on specific illnesses and symptoms that may be essential for the employee's capacity to work. The Act also allows that the employee is tested for specific illnesses or symptoms if necessary due to the working conditions. It is important to meet the particular requirements in the Act on the Use of Health Data when applied.

Furthermore, it may be necessary that the employer is informed whether an employee is or has been infected with COVID-19 to obtain the appropriate sickness benefit reimbursement (see question below regarding registration of the information).

Normally, an employer is not able to ask the employee to give information about a diagnose or symptoms. Instead, it is recommended that the employer, with reference to the managerial right, implements internal guidelines that require the employee to stay at home and seek medical advice if the employee shows symptoms of being infected with COVID-19.

The Act on the Use of Health Data etc. on the Labour Market does not prevent the employee to voluntarily inform the employer of illness or symptoms. However, the employer must be aware that registration of such information is subject to the rules in the General Data Protection Regulation (GDPR) and therefore cannot be obtained.

However, the employer may request the following information:

- Whether the employee have been near persons who have been infected with COVID-19
- Whether the employee is or has been sick (without giving the specific diagnose)
- Whether the employee is or has been in quarantine (without giving the specific diagnose)
- Whether the employee has been in a "risk area".

Which kind of information should be given by the employee on own initiative?

There are no specific rules applying to the employee's duty to provide information to the employer.

According to the Act on the Use of Health Data etc. on the Labour Market the employee must, on its own initiative and before commencement of the employment (in certain cases), inform about sickness or symptoms on sickness. This only applies before commencement of the employment. Therefore, it is not considered a breach of the Act on the Use of Health Data in the event that an employee does not inform the employer that the employee has symptoms of COVID-19. Instead, it is recommended that the employer, with reference to the managerial right and the obligations of which employers are subject under the Working Environment Act, draws up internal guidelines or policies (see below), which oblige the employee to stay at home and consult a doctor in case of symptoms.

May an employee register and save information on employees who have been infected with COVID-19?

Generally, an employer may not register the specific symptoms an employee has or has had. However, there are some exceptions. For example, it may be necessary – and legal – for an employer to register that an employee is or has been sick with COVID-19 if the purpose of the registration is to make use of the right to receive sickness benefit reimbursement due to COVID-19, or if COVID-19 must be registered as an industrial injury.

Furthermore, the Danish Data Protection Agency on 5 March 2020 announced that – depending on the given circumstances – it may be legitimate for an employer to register and shares personal data regarding the health of an employee (e.g. that an employee has been infected with the coronavirus), for instance for the purpose of the management and colleagues to take the appropriate precautions.

The Danish Data Protection Agency has not indicated the legal basis for such registration or sharing. However, based on the announcement, it is our assumption that the Danish Data Protection Agency will have a pragmatical and light approach to cases where the employer registers and discloses information about COVID-19 cases where collecting is substantial and reasoned (for example to avoid the spreading of virus) and is limited to what is necessary to pursue the purpose. Similar announcements have also been made by other European Data Protection Agencies.

Is an employer allowed to share COVID-19 related information with the public authorities?

The employer must comply with data protection law (in particular the GDPR and the Danish Data Protection Act) when sharing information about the employee. That means that collecting and sharing such information must have a legal basis which may be found in applicable data protection law or sector specific regulation.

In that context it is important to be aware that – given the current circumstances with COVID-19 – special rules that either allow or oblige the employer to share COVID-19 related information with the public authorities are currently being adopted. At the time of writing reference can be made to, among others, the Ministerial Order on the Processing of Personal Data in Connection with Offered Tests for Coronavirus Disease 2019 (COVID-19) as a result of Employment (in Danish), and Ministerial Order on Duty of Disclosure, and also on Processing of Personal Data for the Purpose of Preventing Spreading and Infection Regarding the Handling of the Corona Virus Disease 2019 (COVID-19) (in Danish).

However, it must be emphasized that the rules regarding the sharing of COVID-19-related information with public authorities are currently changing unprecedently fast. Therefore, we recommend seeking legal advice or to research the latest developments in the legal field before sharing the above information.

Furthermore, the employer must inform the employees before sharing the information according to data protection law.

Which information can you ask guests, customers and suppliers to provide regarding COVID-19 infection?

If the answers are not registered anywhere (for example if the answers and questions are given orally in an informal way), there are no specific limits regarding the questions one may ask.

On the other hand, if the answers are registered (for example if the answers are recorded in a questionnaire or the like), the registration must comply with data protection law. This means that there are limits of what you may

ask people about without their consent. When to draw this line, is to be determined specifically on a case-by-case basis, but consent is generally required if the questions asked include peoples' health information and other sensitive personal data.

What is an employer supposed to do if the employee is suspected to be infected with COVID-19?

An employer is responsible for ensuring a healthy, physical and mental working environment for employees at work. If an employer suspects an employee to be infected with COVID-19, the employer may ask the employee to work from home or to send the employee home with salary and encourage the employee to seek medical advice.

Is an employer allowed to require that the employee is tested for COVID-19?

No. An employer cannot usually require an employee to have a test for COVID-19. However, an employer may encourage employees who are ill to seek medical advice in order to get tested for COVID-19.

The Act on the Use of Health Data etc contains a special rule that allows employers to obtain information on whether employees suffer from an illness, have symptoms from an illness or there is a risk of infection. The rule only applies when it is deemed necessary to meet essential considerations of the company's operations. Employers should be careful when using this rule, which also requires approval from the employers' organization and the employee's professional organization.

Is it allowed to make sure that the company's guidelines (social distancing, handwash etc.) to minimize the spreading of COVID-19 are being respected?

According to the managerial right, the companies have the option of initiating control measurements to control employees if necessary in the interests of operations.

However, control measurements can only be implemented if the following conditions are met:

1. Control measurements must pursue a legitimate purpose.
2. Control measurements must not be offensive to the employees.

For companies covered by the collective agreement between DA and LO (now FH), the framework for implementing control measurements is generally narrower. The agreement entails, among other things, that both the employees and the trade union must be informed of new control measurements at least six weeks before they are implemented.

Often, data protection law must also be observed. This means, among other, that the measures must have a legitimate reason, be proportionate to the purpose the company wants to achieve, and that the employee must be informed in advance in accordance with the duty to inform data subjects. In addition, it is necessary to consider whether it is a requirement (or appropriate) to carry out an Data Protection Impact Assessment (DPIA).

Further, special rules apply for specific types of monitoring. For example, in Denmark there are specific rules and restrictions for eavesdropping, GPS-tracking (and other location tracking) and TV-monitoring.

The above also apply to data that is already being collected. If – before COVID-19 – the use of RFID cards or tags to open doors was logged due to security reasons, this data may only be used for other purposes if in accordance with data protection law . This should be considered before data is used for new purposes.

Is it allowed to penalize employees who do not comply with the company's COVID-19 restriction guidelines?

A violation of the company's guidelines for limiting the spreading of COVID-19 is comparable with a violation of the company's internal policies and a breach of the health and safety legislation. In this connection, it is important that the company's guidelines are clearly communicated to the employees. In addition, employees must be informed that the guidelines are an integral part of the terms of employment. In severe cases of reckless acts or the like, a breach of the company's guidelines could lead to employment law consequences for the employee. However, minor violations should only result in a warning or reprimand.

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