Draft bill adopted: Employers become entitled to test their employees for COVID-19

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In response to the increasing spread of the COVID-19, the Danish Parliament adopted on 19 November 2020 the bill to entitle an employer to require that its employees be tested for COVID-19 and to be informed of their test results. This article addresses the bill and puts the spotlight on some of the issues relating to employment and data protection law which may arise when, in pursuance of the Act, an employer requires its employees to undergo testing.

Objectivity requirement

An employer may require an employee to undergo testing if, for the purpose of limiting the spread of COVID-19, such test is justified by objective reasons, including working environment issues, or if the test is justified by material operational interests of the enterprise in question. Thus, objective reasons are necessary for an employer to require the testing of an employee. One example is a situation where a foreign importer of food products is subject to a statutory requirement that special measures against COVID-19 have to be taken as a condition for importing products from a Danish manufacturer. This, therefore, will be the case only in relation to

importers where health reasons apply, whereas a foreign importer of computer programmes etc. may not require that the employees at its Danish supplier undergo testing for the same reasons.

Testing must be carried out during the employee's working hours

Where an employee is required to undergo COVID-19 testing, such testing is, wherever possible, to be carried out during the employee's normal working hours. In the absence of such possibility, the employee must be financially compensated for the time spent on testing, transportation included. In addition, the employee must be compensated for reasonable costs paid in connection with undergoing the required testing (transportation costs etc.).

Sanctions

An employee not complying with a requirement to undergo COVID-19 testing and not informing his/her employer of the test result may face disciplinary action if such employee has been informed in writing beforehand that such action may be taken if the requirement is not complied with.

Where an employee has been required to undergo testing, and the statutory conditions have not been fulfilled, such employee may be awarded.

Amending the Danish Act on posting of workers

With the new Act comes an amendment to the Danish Act on posting of workers, because an employer's right to require employees to undergo COVID-19 testing also applies to foreign employees posted in Denmark, irrespective of the national law governing the employment relationship in question.

The purpose of the Act in today's legal perspective

Under the Danish Act on health details, an employer may request an employee to provide details of specified diseases or symptoms having a material impact on the employee's capacity for work. An employer may also require an employee to be examined for certain diseases or symptoms if the circumstances relating to the work to be performed so dictate. In general, an employer may not, therefore, collect information on whether an employee suffers from a disease, has symptoms of a disease, or presents a danger of infection, unless such information is necessary for safeguarding the operation of the enterprise. Thus, the purpose of the Act is to provide employers with the necessary legal basis for testing their employees for COVID-19, as the provisions in the current Act on health details provide no such legal basis.

The new Act enables employers, whether or not bound by collective agreements, to exercise their managerial authority to comply with the obligations laid down in the Danish Working Environment Act, and thereby facilitates the possibility for employers to implement control strategies to require COVID-19 testing of employees. In this regard, it is particularly important to keep in mind that the Act was passed to contain the spread of COVID-19; the Act does not provide for an employer to require that its employees undergo testing for other diseases, including for antibodies to COVID-19.

Whether an employer is entitled to register that an employee has been infected with COVID-19 is laid down in the data protection rules. Generally, in order to be legal, the registration must have a legal basis as defined in the data protection rules or special legislation. Prior to the registration, the employee in question must be informed of the collection of the health data.

Thus, the Act introduces national special rules of processing non-sensitive and sensitive personal data, ensuring that, based on the legal requirement of objectivity, the test results of the employees are registered for legitimate purposes, including when necessary in order to prevent the further spread of COVID-19. The period of time for which the personal data may be retained by the enterprise is, according to the Danish Ministry of Employment, to be based on an assessment in each case. DLA Piper Denmark is of the opinion that, in light of the necessity to contain the spread of COVID-19, the registered personal data may be retained for no more than 14 days, unless retaining the data for any longer period of time can be justified by objective reasons.

DLA Piper's observations

DLA Piper recommends that, if they in the future wish to process their employees' health data according to the Act, enterprises should update their internal guidelines and data records, so that, at in-house level, employees are informed of the potential disciplinary action triggered by any failure by the employees to comply with a requirement from their employer, under the given circumstances, to undergo testing for COVID-19 and to inform the employer of the test result.

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