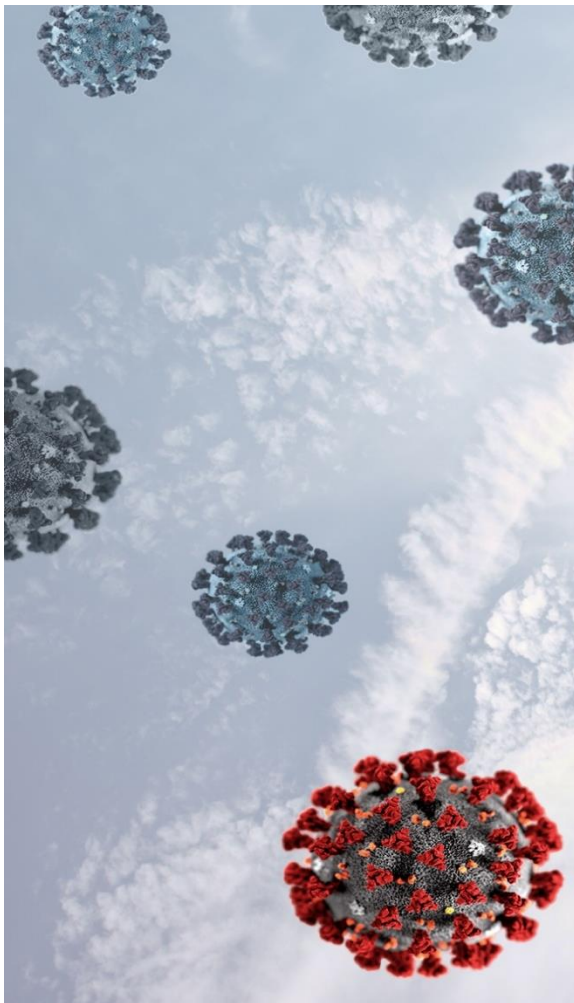

COVID-19: Temperature screening and testing in the workplace

Legal flash

May 8, 2020

In the context of the risk prevention and health and safety measures that companies should implement to prevent infection, particularly now that businesses and work centers will reopen following the Spanish government's transition plan to a new normality, many companies are seeking advice on the legal implications arising from adopting measures to conduct tests on and screen the temperature of employees, contractors and visitors that enter the company's premises.



From a data protection perspective, the Spanish Data Protection Agency (“AEPD”) has published several documents setting out guidelines that companies must take into account.

- Legal Report 17/2020 on data processing in relation to COVID-19
- FAQs on data protection and COVID-19
- Notice of the AEPD on temperature screening by businesses, work centers and other establishments
- Technical note of the use of technology in the fight against COVID-19



General aspects

Taking people's temperature and carrying out diagnostic tests are health surveillance measures that involve processing personal data, particularly the processing of health data, which is given strict protection. Therefore, as well as complying with labor and employment laws, it is necessary to observe data protection regulations, specifically the General Data Protection Regulation ("GDPR") and Spanish Act 3/2018, of December 5, on Data Protection and Guarantee of Digital Rights.

Temperature screening of employees

- The AEPD questions the **effectiveness** of this measure to prevent infection.
- The AEPD considers that, subject to the health care authorities' criteria, temperature screening may be **useful** in some contexts, particularly in the framework of measures for the prevention of health and safety risks related to employees.
- The legal basis for this processing could be the fulfillment of the **legal obligation to protect the health and safety of employees**, provided under article 22 of Act 31/1995, of November 8, on the Prevention of Occupational Risks ("LPRL").
- The consent and legitimate interest of the company are not valid legal bases.
- **Contractor employees.** Although the AEPD makes no reference to them, we assume the same medical examinations may be carried out on employees of contractor companies if the companies are bound by a legal relationship and they share the same workplace regularly, within the framework of coordinating business activities established under article 24 of LPRL.

Performing PCR/rapid/serological tests on employees

- The AEPD has made no specific reference to this to date.
- The legal basis for this processing could be the **fulfillment of the legal obligation to protect the health and safety of employees** (article 22 LPRL).
- The Ministry of Health has limited testing within the workplace to **particularly vulnerable employees** (Instructions dated April 19, 2020).
- In **Catalonia**, the regional government appears to have limited testing in the workplace to employees that have symptoms (Guidelines of May 4, 2020).



Prior steps

- Under Order SND 344/2020, of April 13, it is **obligatory to notify** the health care authorities of the acquisition of these types of tests.
- In Catalonia, resolution SLT/936/2020 obliges private companies to **request prior authorization** before carrying out diagnostic tests (which, if granted, would be the legal basis from a data protection perspective).

Aspects requiring a case-by-case analysis

- There is no standard solution. The necessity, appropriateness and proportionality of the measure must be analyzed in each specific case.
- Measures must be stipulated and justified by the Occupational Risk Prevention Services.
- A previous report must be issued by the employees' legal representatives.
- A Data Protection Impact Assessment (DPIA) is required.
- Prior information must be given on the characteristics of the processing (article 13 GDPR).
- The requirements set out under personal data protection regulations must be fulfilled.
- The Guidelines laid down by each autonomous region must be followed.
- Other existing hygiene and protection measures must be considered.
- It is vital to protect privacy when implementing these measures and the confidentiality of the results.

For additional information, please contact Cuatrecasas.

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