



6. New Corona Virus and Employee Privacy

1. Introduction

Coronavirus disease (COVID-19) is spreading across the world, and we hear about this every day. As the Coronavirus situation improves in some other countries, which have recently been implementing lockdown measures in their cities, we see economic activities resuming. In Japan, the number of newly confirmed cases of Coronavirus infection has been declining since the declaration of a state of emergency, and as such, various self-imposed restrictions are gradually being lifted. Infected patients are divided into severely ill patients and asymptomatic/mildly ill patients, and a significant number of patients are being treated at home. In the case of recuperation at home, such treatment could conclude without the patient ever undergoing testing to confirm recovery and Coronavirus negative status. Therefore, some individuals who contracted the virus could return to the workplace while still having the Coronavirus. Thus, there is the concern that a premature lifting of the self-imposed restrictions could trigger another outbreak of the disease. For these reasons, although we have passed the initial Coronavirus peak, it is predicated that a second wave of infection could occur. Managing the health of employees and preventing the spread of the virus in the workplace are unavoidable challenges for companies.

2. Corporate responsibility and privacy

Many companies have been prompted to think about balance between protecting the privacy of employees infected with the Coronavirus and maintaining workplace safety. Employers are struggling to determine how much information about an employee's health they can collect and disclose.

For example, companies should consider whether the following practices, which some companies have already begun implementing, pose a problem for personal information protection and if found problematic, what can be done to implement such practices without negative consequences

- (1) Requiring employees to have their temperature taken prior to entering the workplace and ordering employees with an elevated temperature to remain home; and
- (2) Conducting regularly surveys on employees' health and travel history.

Businesses must not only consider employee privacy issues but also the privacy of employee family members. Additionally, business partners may request certain infection prevention measures be implemented. For example, collecting and sharing information on infected individuals and their close contacts will pose the following issues:

- (1) Can a business require its employees to report a possible Coronavirus infection?

- (2) Can a business require its employees to report if any family members contract the Coronavirus?
- (3) How should a business internally disclose information on employees infected with Coronavirus and/or employees that come into close contact with a Coronavirus patient? What are some particularly important points to be aware of?
- (4) If an employee infected with the Coronavirus may have come into close contact with an employee of a business partner, how should this information be communicated to the business partner? What are some particularly important points to be aware of?

In addition to the above, there are many other ways that businesses may use information that could have consequences related to a company's duty to manage workplace safety and its corporate social responsibility. Furthermore, companies must ensure that the activities they engage in do not, and will not, give rise to any complaints of mishandling of personal information from employees or any of their family members.

3. Antivirus and personal information protection

In Japan, companies as business operators are required to conduct health checkups for their employees (Article 66 of the Industrial Safety and Health Act). Business operators are required to retain the results records of such screening for a

prescribed period (Article 66-3 of the same above). Due to these rules, there is a tendency to think that companies have the right to know the personal health information of their employees, and that the information acquired is freely available to companies to use at their discretion. However, from a personal information protection perspective, a person's medical history, such as viral infection, is information that constitutes special care-required personal information (Article 2, Paragraph 3 of the Act on the Protection of Personal Information).

The special care-required personal information refers to personal information that may cause discrimination or prejudice, such as race, creed, social status, medical history, criminal record, and being a crime victim, and by its nature, it must be handled more carefully than other personal information. In Japan, medical history has been used to limit human rights of, and discriminate against leprosy patients, so inappropriate use of medical history could create social issues.

The Act on the Protection of Personal Information ("APPI") does not prohibit the acquisition of personal information as long as the purpose of use is notified in advance and the information is acquired by proper means. However, in principle, the acquisition of the special care-required personal information is prohibited, and such information cannot be acquired without the prior consent of the person in question.

On the other hand, there are instances, such as the Coronavirus pandemic, where social demands require the use and sharing information about medical history even without the consent of the person in question.

In this regard, the APPI allows the handling of personal information without the prior consent of the person in question to protect interests that should be prioritized over consent, for example, when necessary to protect the life, body or property of a person, or when particularly necessary to improve public health. In such cases, special care-required personal information may be acquired without the prior consent of the person in question (Article 17, Paragraph 2, Items 2 and 3). Furthermore, the acquired personal information may be used beyond the scope of the purpose of use indicated to the person in question, or provided to third parties (Article 16, Paragraph 3, Items 2 and 3, and Paragraph 23, Items 2 and 3).

With regard to the Coronavirus, companies will want to obtain information of not only the infected person but also information of individuals who have come into close contact with a Coronavirus patient, and it is expected that companies will share the acquired information with related parties concerned as necessary. Under the APPI, companies are not prohibited from in engaging in such activities.

4. Conclusion

Companies may acquire and utilize personal information on Coronavirus infection related to their employees and their families without their consent. However, it should be noted that virus infection information cannot be freely used and understood that use of personal information without the consent of the person in question is the exception under the APPI. In principle, companies must obtain consent from employees and their families when handling their personal information including the special care-required personal information. Companies must make every effort to obtain consent, if obtaining consent is possible.

Additionally, when a company requests an employee to act, including giving consent, the power relationship between the company and the employee should be kept in mind. For example, if a city event organizer requires a participant to provide some personal information, the participant can refuse such request and opt not to attend the event. However, it is natural for an employee to be afraid of being fired if the employee refuses to provide personal information to the company as requested, and in that sense, the employee's action is not necessarily "voluntary."

It is a well-known that many labor problems have already occurred with the implementation of Coronavirus countermeasures and companies should take care in handling of personal information so as to avoid labor problems.

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