To: [INSERT DETAILS]

Date: [INSERT DATE]

Re: Temperature Checking Policy and Data Protection

Dear xxxxxx,

With regard to your request that I submit to daily temperature checking, I wish to make you aware of the following.

During 2020, the office of the Data Protection Commission published guidance titled: - *“Data Protection implications of the Return to Work Safely Protocol*” (the “**Guidance**”). Please be advised that the Guidance states the following: -

***“Temperature Testing****The Protocol recommends that employers implement temperature testing “in line with Public Health advice”. The DBEI’s explanatory guidance clarifies that:*

 *“This measure should only be introduced by Employers in line with Public Health advice. The recording of temperature checks with the names or images of Workers is not required. The purpose of taking a Worker’s temperature is to let the Worker know if they have a raised temperature which is one of the symptoms of possible COVID-19 infection. Temperature testing should only be conducted in line with current public health advice.”*

*The DPC is not aware of any current Public Health advice recommending the implementation of temperature testing in the workplace. Accordingly, temperature testing should not be considered a requirement of the Protocol at this time. Employers currently considering the implementation of temperature testing as a COVID- 19 response measure, perhaps in the context of a particularly high-risk workplace and in response to a particular risk that has been identified, must be in a position to justify why any consequent processing of personal data is necessary for the purpose of mitigating against the identified risk. In general, the advice of the public health authorities, in this respect, will be a key element in the assessment of the necessity and proportionality of the implementation of such a measure. Where such measures are under consideration, employers should remember to consider whether a Data Protection Impact Assessment (“****DPIA****”) might need to be carried out before any personal data is processed in conjunction with the measure. “*

***“Legal Basis for Processing****When processing personal data, in the context of implementing the measures recommended by the Protocol or otherwise, an employer must have a ‘legal basis’ for doing so (by reference to the options set out in Article 6 GDPR). When processing special category personal data such as data relating to an employee’s health, an employer must also be able to satisfy one of the requirements of Article 9 GDPR.*

*Consent is unlikely to constitute a suitable legal basis for the majority of processing operations concerning employee data in the workplace. Where an employee has no real choice in the matter, because, for example, his/her personal data is going to be processed in connection with a measure that is introduced to meet a legal obligation or for public health reasons, then the employee is not in a position to decline consent and, accordingly, consent is not an appropriate legal basis for the processing in question.”*

For the sake of clarity, I set out below the reasons why the processing of my special category data (record of temperature) is not considered lawful at this time.

**General Data Protection Regulations**

The General Data Protection Regulations which came into force on the 25th of May 2018 lay down rules relating to the protection of persons with regard to the processing of their personal data.

The recitals to the regulations state that “*The protection of natural persons in relation to the processing of personal data is a fundamental right*”. Article 8 of the EU Charter of Fundamental Rights states that everyone has the right to the protection of their personal data and such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned, or some other legitimate basis laid down by law.

Temperature data constitutes health data which is a type of special category data under the General Data Protection Regulations.

**Article 6 (Lawfulness of Processing) of the General Data Protection Regulations**

In order to lawfully process health data, an employer must first determine a legal basis for the processing of such data under Article 6 of the Regulations, such as on the basis of consent or to comply with a legal obligation. In this regard it is important to note that consent (under Article 6(1)(a)) is generally not regarded as a valid basis for processing an employee’s personal data because of the inequality in bargaining power between an employer and an employee.

In fact, in the Guidance note prepared by the Data Commissioner it specially states: - “*Consent is unlikely to constitute a suitable legal basis for the majority of processing operations concerning employee data in the workplace. Where an employee has no real choice in the matter, because, for example, his/her personal data is going to be processed in connection with a measure that is introduced to meet a legal obligation or for public health reasons, then the employee is not in a position to decline consent and, accordingly, consent is not an appropriate legal basis for the processing in question.*

From this I conclude that, where an employer requests an employee to provide the records of their temperature, and in circumstances where an employee provides this information - it is highly likely that the collection and processing of such personal data would be considered unlawful – in which case an employee could raise a complaint with the Data Protection Commission.

**Article 9 (Processing of Special Categories of Personal Data) of the General Data Protection Regulations**

In circumstances where an employer can determine a legal basis for the processing of health data under Article 6 (which appears unlikely in circumstances where the Department of Health has not provided any guidelines stipulating the necessity of doing so), then an employer should be aware that the processing of special categories of personal data (which includes health data) is generally prohibited unless an employer can avail itself of one of the exemptions under Article 9.

**Data Protection Impact Assessment**

Article 35 (Data Protection Impact Assessment) of the General Data Protection Regulations states: -

*“1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks…..*

*3. A data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of: …. (b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10;…”*

**In light of the above, I would be grateful for your response to the following questions:**

1. Please provide the legal basis upon which the collection and processing of my special category data is considered lawful under Article 6 of the General Data Protection Regulations.
2. Please provide the legal basis upon which the collection and processing of my special category data is considered lawful under Article 9 of the General Data Protection Regulations.
3. In circumstance where you consider that there is a lawful basis to process my special category data under 6 and 9 of the General Data Protection Regulations, please advise what the purpose of such data collection would be.
4. Please provide a copy of the Data Protection Impact Assessment required under Article 35 of the General Data Protection Regulations.

In circumstances where a decision is made to cease the collection and processing of health data at this time, I would be grateful if you would confirm same.

Yours sincerely,

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