

1 September 2009

## **LEGAL UPDATE FAW 15/2009: PROTECTION OF PERSONAL INFORMATION BILL, 2009**

The Protection of Personal Information Bill, 2009, which is intended to protect our personal information which is processed by public and private bodies, was tabled in Parliament on 24 August 2009. This means the Bill has now been handed over by the relevant Minister (Justice and Constitutional Development who is part of the Executive arm of Government) to Parliament as the legislative arm of Government. Once tabled, the Bill is administered by the Parliamentary Portfolio Committee on Justice and Constitutional Development. This Committee will decide when to invite comments from the public, how long they will have to submit comment and when public hearings will be held. The public will be informed by the Committee of these dates by way of an advertisement in the print media. After due consideration has been given to the effects of the Bill, and the role it will play in society, it will be passed into law. Below is a very brief overview of the Bill and how, if any, it will affect BenefitsAtWork. Please do not get confused with this legislation and the Promotion of Access to Information Act, which deals with the process involved in giving information we have on our records to other parties. This Bill deals with the requirements to be met for the **processing** of the personal information we have on record.

### **Salient Features**

The principle aims of the Protection of Personal Information Bill ("the Bill") are to –

- a) promote the protection of personal information processed by public and private bodies;
- b) introduce information protection principles so as to establish minimum requirements for the processing of personal information;
- c) provide for the establishment of an Information Protection Regulator;
- d) provide for the issuing of codes of conduct;
- e) provide for the rights of persons regarding unsolicited electronic communications and automated decision making;
- f) regulate the flow of personal information across the borders of the Republic; and
- g) provide for matters connected therewith.

### **Scope**

The scope of the Bill is to regulate the **processing of personal information** of any individual or juristic entity ("data subject") by a **responsible party** and will apply to almost all private and public sector bodies.

### **Purpose**

The purpose of the Bill is to give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party.

### **Specific meanings to certain terms**

The following terms will have the meaning as specified:

- (a) Reference to a **"data subject"** shall mean the person to whom the personal information relates.

- (b) **“Personal information”** is broadly defined and includes almost any form of information capable of identifying a person, whether a natural person or an existing juristic person. It includes information about a person’s race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language, and birth; information relating to a person’s education or medical, financial, criminal or employment history; ID number; symbol, email address, physical address, telephone number; blood type etc. Controversially, it also includes personal opinions, and the views or opinions of another individual about the person.
- (c) **“Processing”** means any operations concerning personal information, including the collection, receipt recording, organisation, collation, storage, updating, modification, retrieval, alteration, consultation, use, dissemination by means of transmission, distribution or making available in any other form, merging, linking, as well as blocking, degradation, erasure or destruction of information. The Bill deals with both the automatic and manual processing of information.
- (d) **“Responsible party”** means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information. In practice, this means any organisation that has employees, clients and/or stakeholders.

### **Application of Bill to BenefitsAtWork**

The Bill applies to the processing of personal information entered into a record by or for a responsible party that is residing in SA or who is not residing in SA but uses automated or non-automated means for forwarding personal information.

BenefitsAtWork is an underwriter of employee benefits, and receives the following information in respect of employees who are members of retirement funds, or beneficiaries of death and disability policies:

1. Employee name and surname;
2. Employee identity number;
3. Copy of identity document at claim stage;
4. Medical records (underwriting, disability claims, medical reports, and decisions);
5. Death, Disability and Assistance business claim records;
6. Contributions received and invested on behalf of retirement fund members;
7. Annuity payment records (banking details, and address details);
8. Copies of correspondence between the member and BenefitsAtWork, if any.

### **Protection Principles**

The Bill states that personal information may only be processed –

- (1) if the data subject (employee/member) has consented thereto;
- (2) if it is done to give effect to a contract with or instruction from the data subject;
- (3) to carry out actions for the conclusion or performance of such a contract;
- (4) to protect a legitimate interest;
- (5) to comply with the law – where it is necessary for the public performance of a public law duty by a public body;
- (6) to pursue the legitimate interests of a party or a third party or responsible party to whom the information is supplied.

Membership of retirement funds and group risk policies which BenefitsAtWork underwrites are established as a consequence of an employee/employer relationship, in terms of which the

employment contract establishing such relationship makes it mandatory for the employee to join such employee arrangements and to be subject to the terms and conditions of the rules of the retirement fund and/or the policies. The employee therefore agrees to become bound by these terms and conditions and therefore gives the employer the authority to furnish an insurer with personal information relevant to establishing the employee benefits schemes. BenefitsAtWork does not expressly have to obtain the consent of the members to obtain and process the personal information on its systems, as it requires the information to set up the relevant contract.

### **Restrictions**

The Bill sets out a few limitations in terms of the processing of information. Records must be destroyed, deleted or "de-identified" after their retention is no longer authorised in terms of the Bill. This must be done in a manner which prevents the reconstruction of the information containing personal information in an intelligible form

Records may be kept longer for historical, statistical or research purposes and appropriate safeguards must be implemented against the use of the records for any other purposes, provided the consent of the data subject is obtained.

Personal information may only be processed after notifying the Information Protection Regulator. In terms of Section 17(6) such responsible party does not have to notify the Regulator if a manual in terms of section 14 or 51 of the Promotion of Access to Information Act, No 2 of 2000 was compiled and submitted to the Human Rights Commission. The manual contains details of the type of records and information a responsible party holds in respect of a data subject.

Momentum has submitted the manual in terms of section 51 to the Human Rights Commission and therefore does not have to notify the Regulator.

### **Unsolicited Electronic Communications and Automated Decision Making**

Should BenefitsAtWork at any stage decide to go into the direct marketing business then the following provisions will apply to it in respect of the processing of personal information.

- a) The processing of personal information of a data subject for the purposes of direct marketing through automatic calling machines, fax machines, SMSs or electronic mail is not permitted unless the data subject consented thereto or is a customer of the responsible party. The identity of the sender of electronic mail for direct marketing purposes may not be disguised, concealed or indicated without a valid address to which the recipient may send a request to end communications.
- b) A subscriber to a directory must be informed about the purpose of the directory and the usage possibilities of the directory. A data subject must be given the opportunity to object to the use of his/her electronic details.
- c) A data subject may not be bound to a decision that has legal consequences taken solely on the bases of automated processing of personal information.

### **Penalties**

Any person convicted of not complying with the provisions of the Bill may be liable to a fine or imprisonment for a period of 10 (ten) years or both a fine and imprisonment. The Magistrates Courts have the jurisdiction to impose the penalties.

The Bill must still be formally tabled by the Department of Justice in Parliament and, thereafter, comments will be invited by the Parliamentary Portfolio Committee on Justice by notice in the Gazette.

If there is anything which substantially changes the way we operate once the final Act comes into operation, we will advise everyone and make appropriate adjustments to our processes.

Max Moonsamy  
Legal Advisor  
BenefitsAtWork

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