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# EMPLOYMENT

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# ALERT

10 MARCH 2014

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## OPENNESS - NOT JUST A VALUE

The Protection of Personal Information Act, No 4 of 2013 (POPI) is aimed at protecting individuals' constitutional right to privacy. This article is a further instalment in our series where we consider the employment law impact of POPI.

POPI prescribes eight conditions for the lawful processing of personal information. The eight conditions are:

1. accountability;
2. processing limitations;
3. purpose specification;
4. further processing limitation;
5. informal quality;
6. openness;
7. security safeguards; and
8. employee participation.

This article only deals with condition 6, namely openness.

### Openness

This processing condition is aimed at ensuring transparency and fairness in the processing of personal information.

A particularly onerous duty placed on the employer is that before processing, it must take reasonably practicable steps to ensure that the employee is aware of a number of facts, such as:

- The information being collected;
- The purpose of such collection;
- The law authorising or requiring the collection of information, if applicable;
- The name and address of the employer;
- The consequences of failure to provide information;
- Whether the supply of information by the data subject is voluntary or mandatory; and
- Who will have access to the information.

Employers must maintain documentary records of all processing of the personal information of their employees.



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If the employer intends to transfer employees' personal information to a country outside of South Africa, the employees must be notified of this.

The employee must also be informed of their right to access that information and the right to rectify it and/or object to the processing of the personal information.

An employee must be informed of their right to lodge a complaint with the Information Regulator together with the Information Regulator's contact details.

Employment agencies must make a job applicant aware of the names of the various organisations to which they will be sending an applicant's information and how that information will be used.

POPI also requires an employer to notify the Information Regulator of its intention to process personal information and state the true purpose served by such processing.

### Exceptions

Section 18(4) of POPI provides for limited instances when a responsible party is not required to notify the data subject of the relevant information pertaining to the processing of their personal information.

These instances include where:

- the data subject has provided consent to the non-compliance;
- where non-compliance would not prejudice the legitimate interests of the data subject;
- where non-compliance is necessary to comply with an obligation imposed by law, for the conduct of proceedings in court or in the interests of national security;

- compliance would prejudice the lawful purpose of the collection;
- compliance is not reasonably practicable in the circumstances of the case; and
- the information will not be used in a form in which the data subject may be identified or will only be used for historical, statistical or research purposes.

POPI requires that employees be made aware of their rights in relation to the processing of their personal information before an employer embarks on such processing.

It is advisable that employees and job applicants be made aware of their rights and are provided with the relevant information (as set out below) in writing. This could be done in job advertisements in respect of applicants for employment and in contracts of employment in respect of employees.

However, merely notifying employees or applicants may be insufficient. It is therefore advisable that job applicants be required to sign an acknowledgement that their personal information may be processed, how it may be processed, the purpose for which it may be processed and the like. Employees should be required to provide a similar acknowledgement in their contracts of employment.

*Kirsten Caddy and Tricia Tsoeu*

## 7 MAY 2014 DECLARED A PUBLIC HOLIDAY

Employers should consider impact on operations.

On 20 February 2014, the President of the Republic of South Africa signed a proclamation declaring Wednesday, 7 May 2014, a statutory public holiday. The proclamation was issued pursuant to s2A of the Public Holidays Act, No 36 of 1994, as the national elections are now due to take place on that day. The effect of the proclamation is that employees are entitled to an additional paid public holiday (in terms of s18 of the Basic Conditions of Employment Act, No 75 of 1997).

Employers are advised to consider the implications of two consecutive weeks comprising mid-week public holidays, as Thursday, 1 May 2014, is Workers Day. This may result in employees requesting additional time off on Friday, 2 May 2014 and/or Monday and Tuesday, 5 and 6 May 2014. As a consequence, employers are advised to make timeous arrangements

with employees who request to take any additional time off work around those days. An employer is normally at liberty to consider requests for ad hoc annual leave, subject to operational requirements, or agree to timeous 'working-in' arrangements to make up for any additional time off that is given. Employers may also consider advising employees that it would carefully scrutinise all sick leave usage during this period in an effort to curb abuse.

*Fiona Leppan and Benjamin Cripps*

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