
EMPLOYMENT

ALERT

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POPI – CAN YOU AFFORD NOT TO COMPLY?

Purpose and application of the Protection of Personal Information Act, No 4 of 2013 (Act)

The Act regulates how anyone who processes personal information must handle, keep and secure that information. If an individual or a company processes personal information relating to a person, that individual or company must comply with the Act. Failure to comply with the Act may lead to the imposition of certain penalties under the Act.

Punishable offences in terms of the Act

The following offences are, if committed, punishable with either a fine (not exceeding R10 million), or imprisonment (for a period not exceeding 10 years), or both:

- Obstruction of a Regulator - a person will be guilty of an offence if they hinder, obstruct or unlawfully influence the Regulator or any person acting on behalf of or under the direction of the Regulator;
- Failure to comply with enforcement or information notices - if a responsible party fails to comply with an enforcement notice, they will be guilty of an offence;
- Offences by witnesses - a person will be guilty of an offence where such a person is summoned to give or produce evidence before the Regulator and that person, after being sworn in, gives false evidence before the Regulator on any matter;
- Unlawful acts by a responsible party in connection with an account number - if a responsible party contravenes s8 of the Act, subject to certain exceptions, that responsible party will be guilty of an offence. The responsible party, in terms of s8 of the Act, must ensure conditions for lawful processing; and
- Unlawful acts by third parties in connection with an account number - a person who knowingly or recklessly obtains or discloses an account number of a data subject, or who procures the disclosure of an account number of a data subject to another person, is guilty of an offence. In addition, if that person sells or offers to sell an account number obtained illegally, they will be guilty of an offence.



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continued

The following offences are, if committed, punishable with either a fine (not exceeding R10 million), or imprisonment (for a period not exceeding 12 months), or both:

- Failure to notify the Regulator that processing is subject to prior authorisation – if a responsible party fails to notify the Regulator that processing, which is about to be embarked upon, is subject to prior authorisation from the Regulator, that person will be guilty of an offence;
- Breach of confidentiality - any person who breaches the provisions of s54 of the Act, which states that a person acting on behalf of or under the direction of the Regulator must treat all personal information they come across as confidential, will be guilty of an offence;
- Obstruction of the execution of a warrant - a person who obstructs or fails to give assistance to a person executing a warrant in terms of the Act will be guilty of an offence;
- Failure to comply with enforcement or information notices - if a responsible party in purported compliance with an information notice served on it, makes a false statement, it will be guilty of an offence; and
- Offences by witnesses - a person will be guilty of an offence where such a person is summoned to give or produce evidence before the Regulator and that person either (i) does not attend; (ii) fails to remain in attendance; (iii) refuses to be sworn in or to make an affirmation; (iv) does not answer fully and satisfactorily; or (v) does not produce any item that they have been summoned to produce.

Conclusion

Despite the fact that the Act is quite onerous on Employers, there is a one year grace period from the date on which the Act commences to allow for compliance.

If a responsible party acquaints itself with the provisions of the Act timeously and puts in place the necessary measures, the penalties mentioned can easily be avoided.

Johan Botes, Lauren Salt and Tracy Robbins

ALTERNATIVES TO RETRENCHMENT

The latest Adcorp Employment Index (January 2014) indicates that the South African economy lost 36 290 jobs during January 2014. Unemployment, according to StatsSA, sits at 24.1% (or 4.8m people actively looking for work being unable to find jobs).

Businesses need to take steps to accommodate changes in its operating environment. With low GDP growth (1.9%) casting a gloomy view over the business road many organisations are resorting to the retrenchment of employees to curb operating costs. With labour costs being a significant aspect of most businesses, cutting the cost of employment often has direct and meaningful impact on the business. Or, at least, that seems to be the prevailing view. But is shedding jobs the best avenue to follow for businesses adjusting to depressed market conditions, let alone for a country struggling to find employment for a group that is larger in number than the population of Johannesburg?

Resorting to retrenchment as a default solution to managing the books is, at best, a strategy of limited application. There can be no doubt that businesses that have outgrown the need for certain skills or do not have sufficient work to keep all staff gainfully employed have the legal prerogative to restructure the business, even where this lead to redundancy of positions. However, where the reason for the proposed retrenchment relates to cutting costs employers should consider the secondary impact of using retrenchments to achieve the cost savings. Considering alternatives to retrenchment could have a positive impact on the business and its employees in the long run.

The Labour Relations Act, No 66 of 1995 compels an employer (and other consulting parties) to consider appropriate measures to avoid retrenchment, to minimise the number of such dismissals, to change the timing of the dismissals and to mitigate the adverse effects of the dismissal. In addition to the legal imperatives, there are also a number of negative consequences to retrenchment which may take the gloss out of the financial saving or envisaged operational efficiencies.

The direct saving occasioned by cutting an employee's salary from the payroll may not be a true reflection of the actual saving that will be

achieved. Various hidden costs of retrenchment cut into the envisaged savings the organisation set out to realise when planning the retrenchments.

Some of the hidden costs that are typically not included when calculating savings resulting from retrenchments include the following:

Overtime payments

When the work still needs to be done, businesses would often rather pay overtime to its workers than compromise on the delivery to customers. This may be exasperated by a drop in productivity of the remaining employees, a common side-effect of retrenchments caused by negative sentiment towards the organisation harboured by those who escaped retrenchment.

The costs of errors

Many times it is envisaged that the work of two people can be effectively done by one, but in practice this may result in an increase of errors in the work or processes. This has a direct impact on the cost of production.

Loss of staff and decrease in staff morale

Increases in absenteeism and industrial sabotage may occur after a retrenchment as surviving staff may be angry and depressed after the process. Surviving employees may also feel loyalty to those who were retrenched. Whilst restructuring may create vacancies, positions are mostly shed and this may result in employees feeling that they have less chance for career advancement. Streetwise competitors may also use this opportunity to play on such fears and head-hunt remaining talent. Losing staff may also change the workplace mix or composition. Losing the offbeat oddball with the funny ties may also mean losing the creative element in your group, with group-think setting in. Also, employees leave with their intimate knowledge of the business.

Loss of customers

Customers can become an unforeseen casualty during corporate restructuring. Where employee numbers are reduced, this may result in a drop in operational efficiency and service quality. Defective service delivery can test the resolve of any customer. Companies may also underestimate the value that customers place on specific relationships with individual employees. Negative attitudes of employees about to be retrenched or those remaining behind can also spill over to customers.

Future costs

Organisations that have been cut to the bone will have to compete with one another when they eventually need to recruit staff to expand their operations. These companies may find that a new war for talent emerges. This may have a negative impact on an organisation's ability to attract talent at an acceptable level of remuneration.

CONSIDERING ALTERNATIVES TO RETRENCHMENT

Without suggesting that employers should never retrench employees, businesses keen to explore achieve cost savings in manners other than reducing staff compliment could consider the following alternatives to retrenchment, when appropriate:

Reduction in remuneration

A salary cut can achieve the reduction in labour costs that are sought in many retrenchments. This may take various forms, including forgoing 13th cheques or bonus payments for a period; agreeing to a salary freeze and cutting salaries. Consider the positive message that can be relayed if management were to lead with a voluntary reduction in salary. On the negative side, cutting salaries of marketable employees may force them to consider the green grass on the other side of the employment fence.

Changing terms and conditions of employment

During the previous decade, South African employers were blessed with a period of relative

labour stability. Some employers may have concluded collective agreements based on the favourable economic times experienced, resulting in increases to benefits, remuneration or employment conditions. These factors may be capable of quantification and the effect it has on an organisation's labour bill.

When faced with the need to drastically reduce costs and, specifically, to reduce the cost of labour, employers may consider the feasibility of reducing terms and conditions of employment as an alternative to retrenchment. Terms and conditions of employment can only lawfully be changed with the consent of employees. Obtaining such consent may prove to be a challenge, but employers could use looming redundancies as the starting point for a discussion with employees or trade unions.

Eliminate overtime

Overtime can add significantly to an employer's labour bill. The operation of the business may dictate, though, whether it is more cost efficient to get a few workers to perform the work and pay them overtime or to keep a larger group of staff and to abolish overtime. Factors to consider may include the individual employee's overtime rate, the social cost element of the employees' remuneration, the cost of managing the employees, the nature of the work versus the number of staff capable of conducting such work, the risk and cost of errors that may increase when staff work long hours and a possible increase in absenteeism associated with longer hours.

Reduction in working time (short-time)

In certain sectors, a reduction in working time may be a viable alternative to retrenching employees. The underlying premise is that employees agree to reduce their working time for a commensurate reduction in salary. This is typically a short-term measure, but nothing prohibits the parties from agreeing to make the arrangement permanent. For example, where an employer draws heavily on manual labour from the surrounding community, it may be preferable to provide income to a larger group of staff working reduced working hours than to a small group at increased income.

Voluntary termination

The benefits of voluntary termination of employment can hardly be overstated. The legal risks associated with such termination pale in comparison with retrenchment or other forms of dismissal. To avoid a finding of unfair dismissal, employers should rather not retrench the employee but agree with him on the termination of his services. Such a termination by mutual consent is not a dismissal unless the employee can resile from the agreement.

Leave

Employers may force employees to take leave as a temporary savings measure. Employers with leave policies that allow for accumulation and/or payment of non-statutory leave may use this opportunity to reduce the company's leave liability. Unless the employment contract or policies provide otherwise, employees can be forced to take leave at the behest of the employer. By sending staff on leave, the employer may curb soft expenses, such as costs incurred to feed or accommodate staff and cellphone or telephone expenses, etc.

Where possible, employers should consider calling for volunteers who wish to take leave as forced leave (although legal) may have a negative effect on the employee relations climate.

Where paid leave is exhausted, the parties may agree that the employees will take unpaid leave.

Re-deployment or transfer

Employers should consider re-deploying redundant staff to other areas or workplaces. This is especially true for groups of companies or subsidiaries. Minor re-training may result in the employee being suitable for an existing vacancy, albeit in a different role. Consider the judgment of the Labour Appeal Court in *SAA (Pty) Ltd v Bogopa & Others* where Zondo JP stated as follows:

"An employer has an obligation to try to avoid the dismissal of an employee for operational requirements. This obligation entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position the duties of which the employee concerned can perform with or without at least minimal training".

Where such suitable alternatives exist, it presents the added advantage of virtually eliminating the need to pay severance pay if the employee unreasonably refuses the alternative position.

The pure economic benefit of retrenchment is often eroded by hidden cost and unforeseen negative consequences of such action. Linked with the disabling effect it may have on a business' ability to make full use of positive changes in the markets as and when this arise, employers should carefully consider other alternatives.

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