

How POPI Implementation affect recruitment and the right to privacy

By Johanette Rheeder

The Protection of Private Information act (POPI) was promulgated on 26 November 2013, but implementation was held over until the set-up of the Regulator's office. Non-compliance with POPI regulations can lead to criminal and civil fines against companies and complaints to the Regulator.

On 17 May 2016, former IEC chairperson, Pansy Tlakula, was recommended as chairperson of the newly-formed Information Regulator. The National Assembly still needs to approve this recommendation and it is expected that the Information Regulator's appointment will be finalised in August 2016. Regulations to the POPI act and dates of actual implementation will be published thereafter and there will be a year's grace period after implementation, to comply with POPI. Employers need to start considering its obligations when it comes to employees, their right to have their private information protected, their right against unfair discrimination and privacy.

These rights all kick in when the employee applies for a position and is invited to submit his or her CV for consideration by the prospective employer. Chapter 2 of the Employment Equity Act 55 of 1998 (EEA), dealing with unfair discrimination, applies to all employees, job applicants and employers or prospective employers. A job applicant for the purpose of the EEA is a person who *applied* for a position with an employer. Unfair discrimination outside the employment relationship should be dealt with in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000. A person who submits a CV with a recruitment agency, without applying for a specific position, can therefore not claim to be an applicant for the purpose of the EEA. The EEA prohibits unfair discrimination against an employee or job applicant based on the prohibited grounds (as set out in the Constitution) as well as unfair discrimination on an arbitrary ground. This information, on which an employer may not unfairly discriminate, such as person information relating to a wide array of subjects such as the sexual orientation, HIV status, cultural beliefs and practices, family responsibility, medical information, political and religious opinions or beliefs, disability is now not only prohibited grounds of unfair discrimination, it also constitutes information which is regulated and protectable under the POPI legislation.

For instance, in terms of the EEA, an employer may not perform medical testing, as defined by the EEA, on an employee or job applicant without his/her permission unless, legislation permits or requires the testing, or such testing is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employment benefits; or the inherent requirements of a job. What is typically referred to here is medical testing with regard to requirements of the job such as drivers who must have good eyesight, or serious infectious diseases such as Tuberculosis. This medical information, including testing done for Pension fund, Medical aid and health and safety legislation, before or after employment, must also be kept or destroyed and protected in terms of POPI regulations, when promulgated. It should be noted that **Medical testing** is defined by the EEA to include any test, question, enquiry or other means designed to ascertain or which has the effect of enabling the employer to ascertain whether the employee has any medical condition. It should be noted that this not only includes a medical test, but also any questionnaire or written or verbal enquiry into the medical condition of an employee.

The same applies to private information gathered as part of psychometric testing of employees or candidates, for recruitment purposes. These tests are prohibited by the EEA unless the tests or assessments comply with certain requirements such as the tests must be scientifically shown to be valid and reliable, it must be applied fairly to employees; and it is not biased against any employee or group.

THE RIGHT TO PRIVACY DURING THE INTERVIEW

The EEA is clear that an employee must only disclose that information during an interview that is part of the inherent requirements of the job. A job applicant's right to privacy must be respected and protected and only the inherent job requirements can trump this right. For instance, a person's medical history and medical information is private, however, if it is an inherent requirement of the job or an occupational and health requirement not to have a certain condition, the employer can request the employee to disclose this information.

In terms of section 10 of the Constitution, anyone has inherent dignity and a right to have that dignity respected and protected. This will apply in the way the interview is conducted. Questions about a person's sexual preferences, religion, and sexual orientation or HIV status may not only be discriminatory, but also tamish a person's human dignity.

Section 14 of our Constitution protects the right to privacy. Privacy has been defined in many ways, but in essence amounts to that part of the personal characteristics which are excluded by the individual from public scrutiny and of which the individual has expressed the will to exclude it from the public eye.

The invasion of privacy by way of interview practices resolves mainly around a violation of the individuals private actions, his private communications, beliefs, morals, being or personal preferences which does not relate to or have any bearing on the employer, its business or practices. It will amount to unfair discrimination if it is taken into account and held against the applicant without substance, therefore it is not an inherent requirement of the job.

Not only are the job applicant and the employee protected by the Constitution and the EEA, the job applicant and the employee will also acquire new rights in terms of POPI. Employers should ensure that reputable recruitment agents are appointed and that the agent they use adhere to POPI legislation and regulations.

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