

Privacy in Employment

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The application of legislated privacy rules to employment in Alberta promises to become more complicated on January 1, 2004. At that time, provincial organizations will either become subject to the Federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), or will fall under Alberta Bill 44, the *Personal Information Protection Act* ("PIPA"). In order to understand which legislation will apply, you must know whether your organization is provincially or federally regulated. If your organization is provincially regulated, PIPA will apply to you unless the federal government decides that PIPA is not "substantially similar" to PIPEDA.

One significant area in which PIPA and PIPEDA differ is in the privacy rules that apply to employee information. Unlike PIPEDA, PIPA creates a special category for personal information related to employment; namely, "personal employee information" ("PEI"). PEI is defined as "personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing, or terminating an employment relationship". For information to be considered PEI, the individual in question must be an employee or in the process of being recruited as a potential employee, and the collection must be reasonable for the purposes for which it is being collected. PIPA contains a remarkably expansive definition of "employee" which includes apprentices, volunteers, participants, students, or persons under contract or in an agency relationship with the organization.

If personal information is PEI, then PIPA permits an employer to collect that information without the employee's consent. PIPA also allows an organization to disclose PEI to another organization without the individual's consent as long as the other organization is also collecting the information for the purpose of establishing, managing, or terminating the employment relationship. This may be especially useful with respect to reference letters, which appear to qualify as PEI; by contrast, under PIPEDA, an employer must obtain specific consent in order to check references regarding a potential employee.

PIPA requires that if an individual who is being recruited is not hired, an organization must destroy the information collected or turn it over to the individual unless he or she consents otherwise.

PIPA does not specify what an organization's duty is with respect to personal employee information that remains in its possession following the termination of an employment relationship, although it does provide that an organization may retain personal information for legal or business purposes so long as is reasonable. It should also be noted that section 15 of Alberta's *Employment Standards Code* requires employers to retain employment records for at least three years from the date each record is made.

In planning for compliance with new privacy legislation, employers should approach the PIPA rules regarding PEI with caution. First of all, the PEI category may be eliminated before PIPA becomes law in order to bring PIPA more in line with PIPEDA. Second, the information most employers collect or have on hand

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about their employees often includes information that exceeds the boundaries of PEI; that information will be considered personal information, which requires employee consent. One example of such information is medical documentation provided by employees to access sick leave or disability benefits. Third, while recruitment practices generally fall within PEI, employment application forms may contain questions that go beyond PEI and elicit personal information for which consent is required.

As a result, acknowledgement letters should advise job applicants of the purpose of gathering personal information about them and obtain their written consent to providing it. Letters recognizing new hires should do the same with the information that has been or will be gathered from employees. When providing a letter of reference, it would be prudent for the employer not only to obtain consent from the employee, but also to obtain a release of liability releasing the employer and the person giving the reference from any liability arising out of the reference being provided.

Certain privacy-sensitive aspects of carrying out job functions require employers' special attention. Because employees' online communications may well contain personal information, an employer should obtain consent from its employees for monitoring those communications. For new hires, this can be done as a condition of employment. For existing staff, it can be done by way of memo to each employee, providing a policy statement on email and internet usage which should include a provision that an employee's continued employment will be taken as consenting to the employer's right to monitor employees' on line communications.

Another privacy-sensitive issue involves surveillance. It is difficult to bring workplace video surveillance into line with privacy legislation. PIPA may permit it if the means used are demonstrably necessary to solve a problem of fraud, theft, etc. or to investigate whether there has been a breach of a collective agreement or employment contract. Even so, such surveillance has the potential to capture personal information that is broader than PEI and could require consent from the outset, unless the surveillance meets a strict "reasonableness" standard or is conducted for legitimate investigation purposes and justifies such drastic intrusion on employees' personal privacy.

It should also be noted that employee health information often originates with custodians of such information

under Alberta's *Health Information Act*, such as physicians or hospitals. Such information in the hands of the custodians is exempted from the application of PIPA. However, once it is held by organizations subject to PIPA, it should be treated as sensitive personal information, as it would be classified according to PIPEDA. Employers must consider the use to which such information will be put and obtain consent from the individual employees in question to collect, use, or disclose it for the purpose specified.

Finally, under the access provisions in both PIPA and PIPEDA, employees have a right of access to the personal information in their files. They may require correction to it, and it is subject to investigation and inquiry by the Information and Privacy Commissioner.

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