

THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT

Some Practical Observations

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The introduction and implementation of the *Personal Information Protection and Electronic Documents Act* (the "Privacy Act") by the federal government has created a great deal of anxiety and uncertainty for employers who provide pension and benefit plans to their employees. This uncertainty and anxiety is created by two factors: the information collected in the context of pension and benefits plans is undoubtedly "personal information" that falls under the purview of the Privacy Act; and the Privacy Act is loosely drafted. As a result, employers may have difficulty in determining how to comply.

The purpose of this article is to set out who the Privacy Act applies to and to set out its requirements. Firstly, this article will suggest some practical ways to achieve compliance by focusing on the consent requirements of the Privacy Act.

Who Does the Privacy Act Apply To?

The Privacy Act applies, at this time, to "federal works and undertakings" (e.g., television or radio broadcasters, airlines or railways). Employers in these federally regulated industries must comply with the Privacy Act. Provincially regulated employers (the vast majority of employers) are not subject at this time to the Privacy Act. It is worth noting, however, that employers in provinces who do not implement their own privacy legislation will become subject to the federal Privacy Act. Finally, we also note that most draft provincial legislation seems to follow the federal example.

What type of information is covered by the Privacy Act?

The Privacy Act applies to the collection and dissemination of "personal information". Personal information is broadly defined in the Privacy Act as "information about an identifiable individual". Personal information does not include name, title or business address or the telephone number of an employee of an organization.

From the perspective of pension and benefits administration, it would seem that most information collected from employees in the course of providing benefits would be classified as "personal information". For example, salary and bonus information, benefit coverages, years of service, claims history, benefit choices, investment decisions are all "personal information" for purposes of the Privacy Act. As a result, the administration and

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collection of this information as well as what has historically been routine information sharing is governed by the Privacy Act.

What are the requirements of the Privacy Act?

The issue of what constitutes “consent” will be important for employers to understand. The first point of note is that consent must be informed. In other words, employers will have to state why the information is being collected, how it will be used and when and why it will be disclosed.

Although the Privacy Act and its related regulations suggest that consent can be express or implied, in the context of benefit plans it is hard to picture a scenario where consent could be anything other than express. This is the result because it will be necessary for employers to demonstrate that the employee agreed to the collection and use of personal information.

The harsh reality of consent

Obtaining the consent of employees in the real world of the workplace may lead to unanticipated consequences for employers. For example, what will be the result if an employee refuses to consent? Will employers respond by designating those employee as ineligible for benefits? What if this result conflicts with other legislation (e.g., pension legislation) or creates employment law consequences? While these are important questions they do not have answers at this time. The Privacy Act is freshly minted and has yet to be subject to judicial interpretation of its provisions. At this time the best practice for employers will be to develop appropriate ways to achieve the consent of employees.

How will consent be achieved in practice?

The best place to start is the enrolment form for pension and benefit plans. At a minimum the form should provide that:

- In order to participate in the plans it will be necessary to collect personal information.
- Personal information will be kept confidential except for certain purposes.
 - These purposes could include monitoring investment choices in pension plans or benefit levels in benefit plans. The reason for disclosure (e.g. complying with pension legislation, proper administration of benefit plans) will have to be identified as will the identity of the party to whom the information will be disclosed.

- Personal information will also be rendered anonymous and provided on a group (i.e., all employee) basis for the purpose of determining overall cost of programs or shopping the market to obtain alternate insurance carriers or investment managers. We note that this form of disclosure is, according to the Guide to the Privacy Act, permitted under the Privacy Act so long as no one individual employee can be identified. Notwithstanding this permissive approach, we believe that employers would be wise to make this form of disclosure to employees.

The Privacy Act represents a significant challenge to employers. Consent represents one way of meeting the challenge posed. The ideas presented above are intended to assist employers in meeting this challenge in a practical way.