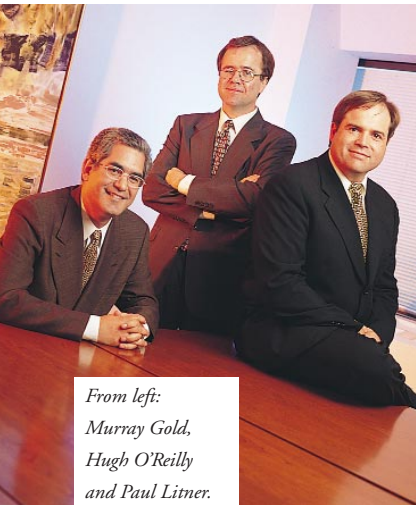
Privacy rights

Or are they privacy wrongs? The federal government's privacy legislation and the draft Ontario legislation may be a disaster for benefits and pension plan sponsors.

By Hugh O'Reilly

EMPLOYERS AND EMPLOYEES ARE ABOUT TO ENTER INTO A new regulatory arena—compliance with privacy legislation. The impact of privacy legislation on pension and benefits plans will be significant. Relationships between employers and employees as well as those with plan administrators and benefits providers will be profoundly affected by privacy legislation.



From left: Murray Gold, Hugh O'Reilly and Paul Litner.

The federal Personal Information Protection and Electronic Documents Act came into force on Jan. 1, 2001. Provinces are required to put in place similar legislation by Jan. 1, 2004. If they do not, the federal legislation will then apply to provincially regulated activities.

Ontario has recently produced draft privacy legislation, which was made available to the public for their comments. In particular, the draft legislation sets strict standards for how personal health information is collected and used by groups that are not in the healthcare industry, including employers, insurers and plan administrators.

From a pension and benefits perspective, the impact of privacy legislation will be profound. Personal information is protected from disclosure under both federal and provincial legislation. Personal information is broadly defined but it includes information that is gathered about employees in the course of providing pension and benefits programs.

HEADACHES AND CONSEQUENCES

In the absence of consent from the employee, personal information cannot be disclosed. This seemingly simple requirement may well end up creating headaches for employers and employees alike. It may also end up creating unintended consequences that could result in employers being unable to comply with other legislative requirements. Consider two examples.

First, what if a member of a defined contribution plan does not consent to the disclosure of his or her personal information? Will this affect the ability of the plan sponsor to monitor his or her investment choices? Will the plan sponsor be able to discharge a fiduciary duty that it may have to ensure that plan members get appropriate advice and consider the consequences of their investment choices?

Second, what if a benefits plan member doesn't consent to share personal information? Will the employer and its advisers be able to use the data that has been rendered anonymous to assess the effectiveness of the benefits programs? Will the employer be able to shop among insurance providers to obtain a lower-cost benefits program? A similar problem may also be created for the implementation of wellness programs.

THE BIG QUESTION

Admittedly, consent is a cure-all for disclosure issues. But the question that needs to be considered is what happens if (or perhaps more appropriately when) an employee refuses consent.

Will employees be removed from pension and benefits plans as a result? That option may, of course, not even be viable. Pension legislation, collective agreements and general employment law may prevent an employer from exercising such an option.

Add to all of this an important final concern, which is the interplay between different privacy regimes in the provinces and the one at the federal level. This could create significant compliance problems for employers.

In my view, privacy legislation needs to be rethought in the context of the employee-employer relationship. Courts have long held that the employment relationship is a special one. In the context of pension and benefits matters, such a conclusion is self-evident. When viewed from this perspective, legislators should consider whether it would be wiser to have a special privacy regime specifically for pension and benefits. **BC**

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