



SACHRA: WEBINAR

Warren Beech & Melanie Hart

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CURBING ABUSE OF SICK LEAVE

➤ Section 23(1) of the BCEA:

“An employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee’s absence on account of sickness or injury.”

RULE 16 HPCSA: CHECKLIST

	YES	NO
Is the certificate an original document?		
Name, address and qualification of practitioner clearly stated.		
Practice/registration number clearly recorded.		
Name of patient (employee) recorded.		
Does the certificate state the employee was unable to perform his/her normal duties as a result of illness (or an injury)?		
Is the certificate issued based on the practitioner's medical examination of the patient and his professional opinion? (i.e. the certificate should not state that the practitioner "was informed by the patient")		

RULE 16 HPCSA: CHECKLIST cont.

	YES	NO
Is the practitioner's name and initials recorded?		
Is the certificate signed by the practitioner and is the signature clear?		
Has the certificate been backdated to a date(s) prior to the medical examination?		
If the certificate has been backdated, does the certificate record that the practitioner was informed that the patient was ill on the prior dates?		
Is there supporting evidence why, in the practitioner's professional opinion, the patient was unable to perform his/her duties during the backdated period?		

POPIA EMPLOYMENT IMPLICATIONS

INTRODUCTION

- Constitutional right to privacy
- POPIA also aims to balance the right to privacy against other rights
- POPIA allows and provides conditions for the lawful processing of *'personal information'*
- Employers have an obligation to comply with the conditions imposed by POPIA when processing personal information

WHAT IS PERSONAL INFORMATION?

What is personal information?

Most information collected from an employee will be personal information, includes, *inter alia* –

- Race
- Age
- Gender
- Sex
- Pregnancy status
- Nationality etc.



CONDITIONS FOR LAWFUL PROCESSING

- The term 'processing' is widely defined in POPIA

- Conditions for lawful processing:
 1. Accountability
 2. Processing limitation
 3. Purpose specification
 4. Further processing limitation
 5. Information quality
 6. Openness
 7. Security safeguards
 8. Data subject participation



PRINCIPLE #1: ACCOUNTABILITY

- An employer must ensure compliance with the eight conditions in POPIA
- Employer remains responsible for compliance even if the employer has entrusted the data processing to an employee or a 3rd party



PRINCIPLE #2: PROCESSING LIMITATION

- **POPIA imposes a limitation on how the processing must be carried out, must be:**
 - Lawful
 - Reasonable

- **An employer may only process personal information if there is a sufficient justification for such processing including:**
 - Where the employee gives full consent to the processing
 - Processing is necessary to conclude or perform an employment contract
 - If imposed by law
 - If it protects a legitimate interest of the employee, e.g. medical history

PRINCIPLE #2: PROCESSING LIMITATION cont.

- Consent can be express or implied
- Employers would bear onus
- Secure consent from:
 - applicant for employment
 - new employee
 - existing employee

PRINCIPLE #3: PURPOSE SPECIFICATION

➤ Collection of information must be:

- For a specific purpose which relates to an activity of the responsible party
- With the data subject being aware of the purpose of the collection
- Retained for no longer than required to achieve purpose

PRINCIPLE #3: PURPOSE SPECIFICATION

➤ Implications (Job applicants)

1. Only secure information relevant to the position
2. Customize adverts, application forms and interview questions (not “**one size fits all**”)
3. Ensure that application forms inform applicants that the employer will enquire into, for example, academic qualifications, and will retain records
4. Develop record retention policy

PRINCIPLE #4: FURTHER PROCESSING LIMITATION

- Information may not be processed further in a way that is incompatible with the initial purpose for which it was collected

- **Implications**
 1. If you want to use the information for another purpose, you must inform the applicant or employee and get his/her consent, unless the information is available publicly

 2. Develop internal safeguards to prevent information being processed in a way contrary to the purpose for which it was collected

PRINCIPLE #5: INFORMATION QUALITY

➤ Employers must take reasonably practicable steps to ensure that the information is complete, accurate, not misleading and up to date

➤ **Implications**

1. Conduct audit to assess what information is retained
2. Request that employees confirm that information held is complete, accurate and up to date and
3. Develop information security practices that facilitate accuracy checks on information and restrict access to ensure that integrity of information is maintained

PRINCIPLE #6: OPENNESS

➤ Employees must be aware, *inter alia*, of the following:

- What personal information is being collected
- The name and address of the responsible party
- The purpose for which the information is being collected
- Who will have access to the information



PRINCIPLE #7: SECURITY SAFEGUARDS

- Employers must ensure that personal information is safeguarded against loss, destruction or unlawful access

- **Implications**
 1. Secure employees' consent to retention of records
 2. Ensure that employees who have access to employee records are reliable
 3. Install appropriate security measures

PRINCIPLE #8: EMPLOYEE PARTICIPATION

- An employee can request confirmation as to whether the employer holds information about him/her, and a description of the personal information held
- Employers must advise the employee that information may be corrected, on request
- **Implications**
 1. Provide each employee with a copy of the information held relating to him/her, where reasonably practicable, and afford the employee the opportunity to submit requests for correction
 2. Develop procedure on reporting and handling requests for corrections