

## LEGAL UPDATE – APRIL 22, 2012

### DATABASE REGISTRAR DIRECTIVE: PRE-EMPLOYMENT ACTIVITIES INVOLVING PLACEMENT INSTITUTES

It is common for Israeli companies to refer job applicants to external testing and evaluation companies and utilize the test reports generated by such entities in the context of pre-employment evaluation activities. These evaluations involve collection and generation of applicants' personal information, including, at times, psychological or health data. Israel's data protection authority (the "Database Registrar") recently published Directive 2-2012 titled "Application of the Protection of the Privacy Law on Employment Placement Proceedings and the Activities of Placement Institutes (the "Directive") applicable to the collection and use of personal data provided by job applicants to companies providing pre-employment evaluation and screening services ("Placement Institutes") and to the test results generated by such entities.

While the Directive, which becomes effective in May 2012, does not have the status of binding law, it indicates how the Database Registrar will interpret the applicable law in the context of exercising its authority. This interpretation imposes substantive obligations on employers with regard to collection and use of applicants' data in the context of pre-hiring activities. The Directive also provides insight into the Registrar's interpretation of privacy laws generally, including the definition of informed consent under the Protection of Privacy Law- 1981 ("Privacy Law").

Companies are advised to consider the Directive in the context of their pre-employment activities and their collection, use and retention of personal data relating to job applicants.

#### Directive Highlights

##### **Status of Potential Employer and Placement Institute**

For purposes of the Privacy Law, the Placement Institute acts solely as a "holder" of applicants' personal data, while the potential employer is the "owner" of such data.<sup>1</sup> This is due to the fact that the job applicant would not have provided personal information to the Placement Institute but for the desire to secure employment by the potential employer. This imposes an obligation on the potential employer to register the relevant database held by the Placement Institute where such registration is required under the Privacy Law, as well as other obligations of owners under the Privacy Law.<sup>2</sup> Similarly, applicable labor law protections will apply. The Registrar views the potential employer-Placement Institute relationship as an outsourcing relationship that is subject to Directive 2-2011 "Use of Outsourcing for Data Processing" (the "Outsourcing Directive").<sup>3</sup>

---

<sup>1</sup> The Privacy Law defines "database holder" as "one who has a database in his possession on a permanent basis and is permitted to use it" (Privacy Law Section 3). "Database owner" is not defined in the Privacy Law, but the Directive refers to the owner of a data as one for whose needs and purposes information was collected, and who holds the legal capacity to determine the purposes for which information is used.

<sup>2</sup> Section 8 of the Privacy Law obligates database owners to register databases meeting any one of the following criteria: (i) the database contains data about more than 10,000 people; (ii) the database contains sensitive data; (iii) the database contains data about natural persons not provided by them, on their behalf or with their consent; (iv) the database belongs to a public body; or (v) the database is used for direct mail. In practice, the employer could contractually obligate the Placement Institute to file and maintain a database registration which identifies the employer as database owner and identifies the Placement Institute as database holder. Alternatively, the employer could register the database and identify itself as the database owner and identify the Placement Institute as a database holder.

<sup>3</sup> Database Registrar Directive 2-2011 "Use of Outsourcing for Data Processing" imposes substantive requirements regarding the inter-company agreement to be entered between the potential employer and the Placement Institute, including with regard to database access, assurance of legal compliance, data security policy and audits.

### **Scope of Permitted Use; Consent.**

- The Placement Institute may use or process applicant data only for purposes of rendering services to the “owner” of the data- i.e.- the specific employer for whose benefit the applicant provided the data. Data collected for the benefit of one employer may not be disclosed to or used for the benefit of another potential employer, and the Placement Institute must maintain separate databases for different employers. Where databases are maintained for more than five employers, the Placement Institute must appoint a data security officer as required under the Privacy Law.
- Use of data by Placement Institutes for purposes other than furthering consideration by the referring employer (for example, use by other potential employers) requires separate express informed data subject consent. Where such consent is given, the Placement Institute qualifies as the database “owner” and bears responsibility for database registration as required under the Privacy Law. The Placement institute must ensure that such consent is given freely.
- Any use of data by the potential employer other than for purposes of evaluating the applicant’s candidacy for employment requires express data subject consent. Access to such data shall be granted to the potential employer's employees only on a need-to-know basis.
- While the consents referred to above are necessary for the uses referred to above, consent alone is not sufficient to support any and all use of applicant data. Even where the applicant has consented to use of data, use of such data must meet “proportionality” and “legitimate purpose tests.” This means that such data may be used only for a legitimate business purpose, the information must be relevant to the achievement of such legitimate purpose, such purpose must not be achievable by means other than collection of the information, and the benefits derived from retention and processing of personal information must exceed the attendant invasion of the applicant’s privacy.
- Even if an applicant consents that a Placement Institute disclose personal data to all future potential employers, such consent is not sufficient to sanction such uses, since such uses do not meet the proportionality test described above. However, a Placement Institute may obtain an applicant’s express informed consent to retain data for future use, even before the data subject takes the test, and release such data to other potential employers upon receipt of applicant consent to each subsequent release on a case by case basis. The employee must be notified that consent may be withdrawn at any time.
- To ensure that consent to subsequent disclosures is provided freely, such consent may only be provided after the initial employer referring the applicant to the Placement Institute informed the applicant of whether he is hired or not. In any event, it is prohibited to solicit consent for use of the data on the day tests are administered.

### **Data Inspection and Correction**

Placement Institutes and prospective employers must allow applicants undergoing evaluations to review test scores, results and reports transmitted to employers in the form in which they are received by employers (other than data exempt from disclosure pursuant to Section 13 of the Privacy Law, test questions or other Placement Institute or employer trade secrets). Such results must be provided for viewing on the Placement Institute's or prospective employer's premises within thirty days of request, without charge. Applicants' right of inspection may not be waived, and any purported waiver is void. Prior to the Directive, applicants generally did not have access to this data, and in this respect the Directive implements a substantial change to standard practice.

### **Data Retention/Destruction**

Any data gathered in excess of that which is necessary to the employment evaluation process must be destroyed and the Placement Institute may not deliver it to the potential employer. The Placement

Institute and the employer must destroy or fully anonymize applicant data once evaluation activities have been completed.

### **Informed Consent**

The Directive acknowledges that under the Privacy Law, “consent” means informed consent, which may be express or implied. However, the Directive states that as a rule, it is preferable to obtain the applicant's express consent.

### **Proportionality, Proper Purpose**

The Directive also notes that information requested from job applicants and the tests to which they are subjected must be consistent with proportionality and proper purpose principles.

## Practical Recommendations

Employers are urged to take note of the restrictions on use of applicant data set forth in the Directive, as well as the database registration obligations imposed on employers under the Directive. In addition, employers are urged to take the following practical measures:

1. Contract only with reputable Placement Agencies that are familiar and compliant with privacy laws and regulations.
2. Enter into comprehensive agreements with Placement Agencies pursuant to which Placement Agencies agree to abide by their obligations under the Privacy Law, regulations and the Directive. Among other things, these agreements can obligate Placement Agencies to obtain appropriate applicant consents, and file and maintain database registrations as applicable.<sup>4</sup> Among other matters, the agreement should stipulate that applicant information will be collected only in accordance with the Law for Equal Opportunity in the Workplace and applicable regulations (which regulates what factors and information may be considered in the context of hiring and promotion decisions) and other employment laws. Such agreements must also meet the requirements of the Outsourcing Directive.
3. Establish an audit procedure to ensure the Placement Agencies' compliance with obligations under applicable privacy laws.
4. The Employer should create a list of employees who will have access rights to the results of the placement tests, on a need-to-know basis.
5. Since the employer may itself face liability if the Placement Agency does not abide by its contractual obligations, the employer should consider itself obtaining appropriate consents from applicants, consistent with the law, sufficient to support use the collection of and use of applicant data in a manner consistent with Israeli privacy and employment laws.
6. Ensure that the arrangement with the Placement Agency satisfies the requirements of the Outsourcing Directive.

The full text of the Directive is available at:

<http://www.justice.gov.il/NR/ronlyres/3448EE51-A5AB-4B7A-937B-FD04D88408B2/33962/22012.pdf>

Please feel free to contact Yoheved Novogroder ([yohevedn@arnon.co.il](mailto:yohevedn@arnon.co.il)) or Shira Lahat ([shiral@arnon.co.il](mailto:shiral@arnon.co.il)) with any questions regarding the Directive or data privacy issues arising in the context of pre-hiring or employment activities.

---

<sup>4</sup> As mentioned above, these registrations can identify the employer as database owner and identify the Placement Agency as the database holder.