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India's Data Protection Law 2018: Future Road Ahead

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With the submission of SriKrishna Committee report on Data Protection, the final countdown for India's own Data Protection Regime has finally begun. A detailed legal framework on Data Protection is to be implemented in the coming days.

Purpose of Data Protection Bill 2018- To protect the autonomy of individuals in relation with their personal data, to specify where the flow and usage of personal data is appropriate, to create a relationship of trust between persons and entities processing their personal data, to specify the rights of individuals whose personal data are processed, to create a framework for implementing organizational and technical measures in processing personal data, to lay down norms for cross-border transfer of personal data, to ensure the accountability of entities processing personal data, to provide remedies for unauthorized and harmful processing, and to establish a Data Protection Authority for overseeing processing activities.

The Key Highlights of Data Protection Bill 2018 are as following:

- 1. The term **Data** means and includes a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by humans or by automated means;*
- 2. **Personal Data** means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, or any combination of such features, or any combination of such features with any other information. **The Sensitive Personal Data** as it existed under SDPI Rules has been expanded to include **passwords; financial data; health data; official identifier; sex life; sexual orientation; biometric data; genetic data; transgender status; intersex status; caste or tribe; religious or political belief or affiliation;***
- 3. **Application of the Data Protection Law-** Applies to both **government and private entities**. The applicability of the law will extend to data fiduciaries or data processors not present within the territory of India, if they carry out processing of personal data in connection with (i) any business carried on in India, (ii) systematic offering of good and services to data principals in India, or (iii) any activity which involves of data principals within the territory of India ;*
- 4. **Data Fiduciary** means any person including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing personal data;*
- 5. **Data Processor** means any person, including the State, a company, any juristic entity or any individual who processes personal data on behalf of a data fiduciary, but does not include an employee of the data fiduciary;*
- 6. **Processing** means any form of processing of personal data that analyses or predicts aspects concerning the behavior, attributes or interest of a data principal;*

7. **Grounds for Processing Personal Data-** includes (a) **consent**, (b) **functions of state**, (c) **compliance with law or order of court/tribunal**, (d) **for prompt action incase of emergencies**, (e) **purposes related to employment** and (f) **reasonable purposes of the data fiduciary**;

8. **Grounds for Processing Sensitive Personal Data-** includes (a) **explicit consent**, (b) **functions of state**, (c) **compliance with law or order of court/tribunal**, (d) **for prompt action in case of emergencies for passwords, financial data, health data, official identifiers, genetic data and biometric data**;

9. **Personal and Sensitive Personal Data of Children:** Processing of personal and sensitive personal data of children by data fiduciaries should be done in a manner that protects and advances the rights and best interests of the child. Data fiduciaries are required to **establish mechanisms for age verification and parental consent**. Fiduciaries that operate commercial websites or online services directed at children or process large volume of children personal data would be classified as guardian data fiduciaries and barred from certain processing operations;

10. **Transparency and Accountability** measures includes- (a) Privacy by design, (b) data protection impact assessment, (c) record keeping, (d) appointing a data protection officer, and (e) data audits. Practices inscribed in (b) to (e) are to be carried about by data fiduciaries which can be classified as “significant data fiduciaries” by the Data Protection Authority. Technology companies including but not limited to BFSI processing huge amounts of personal data will have to register as data fiduciaries and undergo government audits;

11. **Transfer of Personal Data Outside India-** There is a restriction on cross border data flows. There is a **mandate to store one serving copy of all personal data within the territory of India**. Also, the Government is empowered to classify any sensitive personal data as **critical personal data and mandate its storage and processing exclusively within India**. Any cross border transfer of data is made subject to standard contractual clauses or inter group schemes that have been approved by the Data protection Authority, prescribed that transfer to a particular country, or to a sector within a country or to a particular international organization is permissible by the Central Government, transfers permissible due to a situation of necessity, consent with respect to personal data and explicit consent with respect to sensitive personal data. However, would not be applicable or extend to critical personal data. This will impact and put a **check on technology service providers, credit scoring, insurance, lending & financial companies, etc. which forces 'take it or leave it' contracts from customers**. This provision is to deal with non-negotiable contracts, wherein the data controller uses its market power to force people to give up personal data. And, now only the data which is necessary for the service or product being provided;

12. **Penalties-** range from **2-4% of the world wide's turnover, or fines between ₹ 5 crores and ₹ 15 crores, whichever is higher**. There are certain offences which punishable with imprisonment.

13. **Data Protection Authority** to be established by Government of India and a data protection fund to be set up through proceeds from the penalties and the fines;

14. **Overriding Effect** – The provisions of this law shall have an **overriding effect to the extent that such provisions are inconsistent with any other law for the time being in force or any instrument having effect by virtue of any such law**. Existing Acts, such as Right to Information, Aadhaar and Information Technology will have to be amended.

For any clarification, please feel free to connect with us at admin@equicorplegal.com / 08448824659.



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