

LABOUR AND EMPLOYMENT

LABOUR AND EMPLOYMENT CRIMINAL BACKGROUND CHECKS

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In an increasingly competitive business environment, it is perhaps more important than ever for employers to exercise prudence and caution in hiring and maintaining their workforce. Background checks, including criminal record, credit history, driving record and resume/reference confirmation, have become important parts of the hiring process. Background checks can be made by the employer directly or by a specialized consultant.

Police Record Checks

Depending upon the nature of a company's business, police record checks would be appropriate, if not essential. An incident involving an employee with a prior criminal background, where a check was not completed, could very well have been avoided, including the inconvenience and training cost of an inappropriate hire. In addition, if the incident becomes known to a client/customer or the public, it could damage client/customer trust and be damaging to the reputation of the business.

New Legislation Governing Police Record Checks

On December 1, 2015, the Ontario government passed Bill 113 the *Police Record Checks Reform Act, 2015* (the "Act"). While not yet in force, the new Act will have significant implications in the way in which criminal record checks will be conducted and the information that will be available to employers.

The Act is Ontario's first comprehensive set of standards governing how police record checks are to be conducted in Ontario. It governs the type of information that can be disclosed to employers by police in response to record check inquiries, as well as how that information may be used and disclosed by employers. It is intended to remove barriers to employment, education and volunteer activities. Most significantly, in most cases, the Act prohibits the disclosure of non-conviction and non-criminal records.

The Act creates and authorizes three types of police record checks: (a) criminal record checks; (b) criminal record and judicial matters checks; and (c) vulnerable sector checks, each of which can be requested in writing by an employer in accordance with section 7 of the Act.

1. Criminal Record Checks

In response to a request for a criminal record check, the Act permits the disclosure of every criminal offence of which the individual has been convicted and for which a pardon has not been granted and every finding of guilt under the *Youth Criminal Justice Act* (Canada). The Act prohibits the disclosure of any court orders made against the individual or a criminal offence for which there is an outstanding charge or warrant for arrest.

2. Criminal Record and Judicial Matters Check

If more information than what is permitted under the Criminal Record Check is required, the employer may request a Criminal Record and Judicial Matters Check. This type of record check allows for slightly more disclosure. The Act permits the disclosure of not only every criminal offence to which the individual has been convicted and for which a pardon has not been granted and every finding of guilt under the *Youth Criminal Justice Act* (Canada), but also of any court orders made against the individual and criminal offences for which a charge or warrant for arrest is outstanding. The disclosure of any criminal offence for which the individual has been charged that resulted in a finding of not criminally responsible on account of mental disorder is, however, prohibited.

3. Vulnerable Sector Checks

Vulnerable sector checks, which are carried out where an individual is in a position of trust or authority over vulnerable persons, like children or the elderly, permit the most disclosure. In addition to the disclosure permitted under a criminal record and judicial matters check, the Act extends the permitted disclosure under a vulnerable sector check to include charges where the individual was found not criminally responsible on account of mental disorder. The Act allows for the disclosure of other non-conviction information in exceptional circumstances where the criteria for "exceptional disclosure", as prescribed by subsection 10(2) of the Act, is satisfied. Such criteria include the nature of the incident, when the incident occurred, and whether the incident involved a vulnerable person.

Review and Consent Protocol

Section 12 of the Act now requires that the individual to whom the requested information pertains have an opportunity to review the information and then consent to its disclosure. If the individual believes that non-conviction information is inappropriately included in any of the above record checks, he/she may request reconsideration of the disclosure under section 10(4) of the Act.

The new legislation will limit the information that an organization will receive in response to a police record check. Employers will only obtain information from police record checks where an individual consents to such disclosure. Importantly, employers that willfully contravene the Act will be guilty of an offence and liable to a fine of not more than \$5,000.

Ontario Human Rights Code

The Ontario Human Rights Code ("Code") has provided certain protections for individuals in the employment context and remains relevant in the context of police record checks. The Code provides that a person cannot be discriminated against on certain prohibited grounds including "record of offences", which is defined as convictions for an offence in respect of a Provincial enactment or for a Criminal

Code offence for which a pardon has been granted. Employers should note that disclosure of the latter is prohibited under the new Act. In accordance with the Code, an employer cannot make a hiring decision or an employment decision affected by a "record of offences". Like the other prohibited grounds of discrimination, employers must be careful not to be seen to rely on a prohibited ground of discrimination with regard to information obtained through background checks or through the interview process. The adverse consequences of "contravening" the Code can be significant financially and potentially in terms of reputation.

Mechanics of a Criminal Background Check

Employers should be aware that criminal background checks could take up to several months to complete. Where more than one person is identified with the same name and birth date, fingerprinting may be required in order to obtain results. The details of the process are readily available with employment related agencies that specialize in administering the background check process for employers and can, in some circumstances, expedite the process.

Best Practices

The best time to request a criminal background check on an employee is during the hiring process. As a best practice, employers should request consent to conduct a police record check prior to hire and make an acceptable result a pre-condition of employment.

Conclusion

It is important for companies to have a considered and comprehensive policy on background checks. Organizations must take care to understand the provisions under the new Act, update their policies on criminal record checks in particular and background checks in general to adapt to the new requirements, and current customary practice and to retrain staff responsible for conducting background checks, including criminal record checks.

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