

LABOR AND EMPLOYMENT

CRIMINAL BACKGROUND CHECKS

by Andrew J. Skinner

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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, whether criminal background or credit checks, motor vehicle record inquiries, resume confirmations or other similar formal inquiries, have become important parts of hiring policies.

Criminal Background Checks

Depending upon the nature of a company's business, criminal background checks could be advisable, if not essential. An unfortunate incident occurring with an employee which becomes known to clients or customers, particularly where a criminal background check may have disclosed potential risks, could be damaging. In certain contexts, contractors may insist on criminal background checks for the employees of the suppliers as a condition to winning a contract.

Privacy Law

While there is no legislation in Ontario which prohibits background checks or regulates them in a comprehensive way, an employer must exercise informed caution in developing a policy with respect to background checks. British Columbia, Alberta and Quebec each have privacy legislation which applies in the employment context, as does the Federal Government essentially with regard to federally regulated enterprise. In Ontario it would appear to be only a matter of time before Ontario tables its own privacy legislation that applies to the employment relationship. The Ontario Human Rights Code does provide some protection to an individual in the employment context and there is legislation in Ontario touching specific areas that involve some specific privacy protections. The recent Ontario Court of Appeal case *Jones v. Tsige* has created a new category of tort "intrusion upon seclusion" which is essentially an invasion of privacy. The trend toward more privacy protection in Ontario is clear.

Ontario Human Rights Code

The Ontario Human Rights Code provides that a person cannot be discriminated against on certain prohibited grounds such as race, ethnic origin, sex, age and marital status. In the context of criminal background checks, another prohibitive ground is "record of offences", which is defined as convictions for an offense in respect of a Provincial enactment or for a criminal code offense for which a pardon has been granted. Accordingly, an employer cannot make a hiring decision or an employment decision affected by "record of offences". Moreover, an employer must take care with questions asked in the hiring process. An employer would be restricted to asking, "Have you been convicted of an offense other than a Provincial offense or an offense for which a pardon has not been granted?" 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 "offending" the Human Rights Code can be significant.

Consent To Background Checks

It is essential to obtain the express consent of an employee to a background check. This is the case for both new hires and existing employees. Different factors are at play with regard to hiring new employees and background checks for existing employees. There are also differences in this area as between unionized and non-unionized employees.

Background Checks Pre-Employment

The best time to impose a criminal background check on an employee is at the time of hire. The new hire does not have the same acquired "contractual rights" and resulting protections as those of an existing employee. The best practice is, subject to the applicable Human Rights Code provisions, to conduct a criminal background check prior to hire and make acceptable results a pre-condition of employment.

Background Checks For Existing Employees

Under Canadian employment law, an employee is employed, subject to an express or implied contract of employment. It is not open for an employer to arbitrarily or unilaterally change a significant term or condition of the contract of employment without either the consent of the employee or prior written notice. If the employee refuses their consent, depending on circumstances, the employee could be, subject to constructive dismissal concerns, transferred to a position where a criminal background check is not required or say, be denied a promotion being offered where the new job category requires a background check. Essentially the written notice period would be equal to the notice that would be applicable in the wrongful dismissal context. In the written notice, the employee should be informed that from and after the end of the notice period, the terms of their employment will be amended to require consent to a background check and if it is not granted, their employment will be terminated.

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 would be required in order to obtain results. The details of the process are readily available with employment related agencies who specialize in administering the criminal background check process for employers.

Unionized Employees

Unlike non-unionized employees, the prevailing collective agreement is the employment contract for the unionized employee. There is case law to the effect that even if the collective agreement requires employees to provide consent, the privacy rights of an individual may, depending on the circumstances override the terms of the collective agreement which requires that a union member submit to a background check.

Formulating A Company Policy

It is important for companies to have a considered and comprehensive policy on background checks. In view of the evolving nature of privacy law and the direction it is heading, it would be prudent for companies to periodically review and re-evaluate their existing policy to keep abreast of changes in the law. The policy should be fair and balanced between the legitimate business concerns of the company and the respective privacy rights of new hires and existing employees and, of course, in compliance with prevailing law from time to time.

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