

Frequently Asked Questions: Employee Background Checks

written by vickyp | November 27, 2013



Credit Checks

Is an employer allowed to perform a credit check on an employee or prospective employee?

An employer may perform a credit check on an employee or prospective employee if the employer intends to use the information for employment purposes. Such purposes include considering new hires, granting promotions, reassigning employment duties or determining whether to retain someone as an employee.

When should the employer perform the credit check?

For prospective employees, the credit check should be completed only after a conditional offer of employment has been made in writing. The main reason being that non-financial information about the candidate may be discovered through the credit check process; if the information concerns protected grounds of discrimination and a decision is made not to hire the employee, the employer could become exposed to liability.

For current employees, we recommend completing a credit check only when a decision has otherwise been made in respect of promoting or retaining the employee.

Is an employer required to give notice that a credit check will be performed?

Before conducting a credit check, the *Consumer Reporting Act* requires an employer to give written notice to the applicant or employee that a credit check will be performed. If the applicant or employee asks, the employer must inform him or her of the name and address of the consumer reporting agency supplying the report. All such written communication must be in the format prescribed by the legislation.¹

Can an employer decline to hire a prospective employee or deny a promotion to an existing employee based on the results of a credit check?

Yes, but if this happens, the employer must notify the employee of the reason for his or her rejection and, upon request of the applicant or employee made within sixty (60) days after the notice is given, provide him or her with the source of the information and the address of the consumer reporting agency.

Can an employer perform a credit check in regards to any job?

In Ontario, an employer may perform a credit check on any employee or prospective employee, for any job. There is no prohibition in the *Ontario Human Rights Code* (the "Code") on declining to hire a candidate based on the results of that person's credit history.

What are the consequences for violating the Consumer Reporting Act?

If any director or officer of your business knowingly violates the *Consumer Reporting Act*, he or she may be liable for a fine of up to \$25,000 and/or a maximum jail sentence of one (1) year. Alternatively, your business may be liable for a fine of up to \$100,000.

Drug and Alcohol Testing

Can an employer perform drug/alcohol tests on an employee or prospective employee?

Drug and alcohol testing is discriminatory unless proven otherwise. Drug and alcohol abuse is considered a disability under the Code. However, employers are permitted to implement a discriminatory rule if it is "reasonably necessary" to achieve work-related objectives. For a rule to be reasonably necessary it must meet the following three-part justification test:

- 1.The employer has adopted the rule for a purpose that is rationally connected to the performance of the job;
- 2.The employer adopted the particular rule in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- 3.The rule is reasonably necessary to accomplish that legitimate work-related purpose.

[the "Justification Test"]

To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees with drug and alcohol abuse problems without imposing undue hardship upon the employer.

When can a business perform a drug/alcohol test on an employee or prospective employee?

Pre-employment drug and alcohol testing should only be done after a conditional offer of employment has been made and should be limited to determining an individual's ability to perform the essential duties of the job. If testing will be an ongoing

requirement of the job, the employer should notify applicants of this at the time an offer of employment is made.

The employer must be able to demonstrate that pre-employment testing provides an effective assessment of the applicant. Recent court decisions indicate that this will almost never be the case for drug testing, and is very difficult to justify in respect of alcohol testing.

On-the-job testing should be administered only when employers can show that the testing is reasonably necessary to ensure job safety and performance. Random drug testing is likely an unjustifiable intrusion into the rights of an employee as it only measures whether drugs are in the body and not the level of impairment. Random alcohol testing is supported by the Ontario Human Rights Commission, but is only acceptable in "safety-sensitive positions, especially where the supervision of staff is minimal or non-existent."²

Post-incident testing may be justifiable where reasonable cause exists to suspect that drug/alcohol abuse caused a workplace accident or dangerous behaviour. The Justification Test above must always be met for any type of drug/alcohol test to be permissible.

Who can be subjected to a drug/alcohol test?

Any employee may be subjected to a drug/alcohol test, however, drug and alcohol testing that has no demonstrable relationship to job safety and performance has been found to be a violation of employee rights.

Can you decline to hire a prospective employee or terminate an employee based on the results of the drug/alcohol test?

There is a duty imposed on employers to accommodate an employee's disability to the point of undue hardship. Workplace policies that involve an automatic loss of employment for positive drug or alcohol tests are a violation of the Code. Consequences for a positive test must be individually tailored to an employee's circumstances.

There are duties imposed on both the employee seeking accommodation and on the employer to work together to find the appropriate level of accommodation.

If an employee refuses reasonable accommodation and is unable to perform the necessary duties of his or her job, then disciplinary steps can be taken. Before termination, the employer must provide support to enable the employee to undertake a rehabilitation program (up to the point of undue hardship).

Medical Examinations

Can an employer require an employee or prospective employee to undergo a medical examination?

The employer should advise prospective employees of any specific and genuine medically related requirements of a position at an early stage of the recruitment process. Pre-employment medical assessments should only be requested after a conditional offer of employment has been made and should be limited to determining an individual's ability to perform the essential duties of the job. In order for a request to be made, the Justification Test described above must be met.

Requests for an employee's medical information can also be made to existing employees

to determine their ability to fulfill essential functions of his or her job.

Can an employer decline to hire a prospective employee or terminate an employee based on the results of the medical examination?

If an employee is unable to perform the essential duties of his or her job, then an employer is not obligated to continue his or her employment. However, before an employee is determined incapable, the employer must consider options for accommodation.

An employer is not required to accommodate an applicant's disability if accommodation would cause the employer undue hardship. Both the employee and the employer have obligations to communicate with one another to form and accept reasonable offers of accommodation.

Employee duties regarding accommodation include, but are not limited to:

- Requesting accommodation;
- Explaining why accommodation is required;
- Answering questions or providing information about relevant restrictions or limitations;
- Co-operating with any experts whose assistance is required;
- Meeting agreed-upon performance and job standards once accommodation is provided; and
- Working with the employer on an ongoing basis to manage the accommodation process.

Employer's duties regarding accommodation include, but are not limited to:

- Keeping all medical information about the employee confidential;
- Paying for the costs of medical information, tests, and documentation;
- Not being wilfully blind to an employee's accommodation needs that may arise from a disability; and
- Accommodating an employee's needs that are known to them.

What type of medical information can an employer request? An employer is not entitled to medical information that discloses a disability or medical condition. The employer is only entitled to information regarding restrictions on the applicant's or employee's ability to perform the essential duties of the job.

Criminal Background Check

When can an employer request a criminal background check?

Under the Code, an employer cannot discriminate on the basis of a criminal record. Criminal background checks should only be requested of individuals where it is a reasonable and *bona fide* requirement because of the nature of the job being applied for.

An employer who wants to conduct a criminal background check must meet the requirements of the Justification Test above. A request for a criminal background check should only be made after the employer has decided to offer a candidate the job, conditional on a satisfactory outcome of the background check.

Can an employer decline to hire a prospective employee or terminate an

employee based on the results of the criminal background check?

A decision not to hire someone based solely on the fact that he or she has a criminal record is discriminatory under the Code. However, an employer would not be discriminating if it makes the decision regarding employment based on a record of offence that closely relates to an important quality of the job.

For example, it may be reasonable for an employer to decline to hire someone for an accounting role if the person has been convicted of fraud. Likewise, it may be reasonable for a retail store operator to decline to hire someone who had been convicted of shoplifting.

If a person has received a pardon for the crime which they committed, an employer cannot refuse to hire that person because of that crime.

Footnotes

¹ *Consumer Reporting Act*, RSO 1990, Chapter c 33 at s 10(6)

² Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing*, (December 2009) p 8. Retrieved from http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_drug_and_alcohol_testing.pdf

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