

How to Conduct Criminal Record Checks



A blanket refusal to hire somebody because he has a criminal record is a form of illegal discrimination. But employers may also have a legitimate interest in not wanting to hire individuals that have committed certain crimes for particular positions. For example, a record of conviction for a tax evasion might be legitimate grounds for disqualifying an applicant seeking a sensitive financial position like comptroller. The problem, of course, is that most people don't list their criminal convictions on their resume or mention them in the job interview. To uncover these things you generally have to conduct a criminal record check. But when you do a criminal record check, you bring into play a host of liability risks, including under human rights, privacy and criminal records laws. This article will explain the legal restrictions and how to comply with them.

What Is a Criminal Record Check?

1. Name Search. An applicant's name and date of birth are used to search for criminal records in a data bank maintained by the Canadian Police Information Centre (CPIC) in an Identification Data Bank. You can do this search through the local police in your province who run a search through the CPIC. That search will reveal any records related to that name.

2. Fingerprint Search. A higher level search is done through the Civil Fingerprinting Services through the Royal Canadian Mounted Police (RCMP). You can also get a *certified* criminal background check from the RCMP, which checks the worker's fingerprints against a database of crimes and charges in the entire country.

This search takes longer but is more definitive than a name search. If a name search turns up convictions linked to your applicant's name, you may still need to confirm those convictions with a fingerprint search. Or, if the applicant's name is very common, you may need to do a finger print search to ensure the

right individual's record is searched. For example, a fingerprint search was recognized as reasonable and appropriate by a federal court when an individual's name was "fairly common" and cross-checking records using his date of birth wasn't sufficient [*Cho v. Royal Canadian Mounted Police*].

3. Vulnerable Sector Check. Organizations that provide services to children, nursing home residents, the disabled or other vulnerable individuals can request a vulnerable sector check on prospective employees or volunteers. This check is in addition to a criminal record check and searches for police contact, i.e. any negative contact with police that didn't result in criminal conviction such as being arrested and released without being charged or being suspect in a case, criminal convictions and pardons relating to crimes of a sexual nature.

Why Perform a Criminal Record Check

There are several legitimate reasons to request a criminal record check on a prospective employee:

Law Requires Check: Some provinces, such as Saskatchewan, Nova Scotia and Ontario, require criminal background checks of provincial or educational workers. In BC, the *Criminal Records Review Act* requires a criminal records check for anyone who works with children or has unsupervised access to children such as:

- Members of governing bodies including teachers, doctors, nurses, dentists, chiropractors, optometrists and physical and massage therapists;
- Students registered in a post-secondary institution who work with children;
- Individuals who work with children including independent school teachers, licensed child care providers, child care providers who don't require a licence but are registered with the province's Child Care Resource and Referral program and volunteers in child care facilities and after school programs;
- 12-year old or older residents at child care facilities; and
- School and hospital staff.

Insider Says: Recent changes to that Act now require checking for pardons, conditional discharges, charges diverted to alternative measures and offences outside of Canada, as well as rechecking covered individuals at least once every five years.

Relevant to Applicant's Ability to Do Job: As MB's new guidance on pre-employment screenings indicates, some convictions or charges may be relevant to an applicant's ability to perform the job you seek to fill. For example, you may want to require criminal record checks when filling the following types of jobs:

Positions of trust: For example, workers who are entrusted with large amounts of cash or are granted access to secure systems, data, or facilities.

Positions that involve international travel: You'll need to do criminal checks before filling positions that require international travel to countries like the U.S. that restrict travel by foreign persons with criminal records.

Highly sensitive positions: Even if not expressly required by law, criminal checks are just about a must for positions involving contact with children or other vulnerable persons.

Provide Safer Workplace: Individuals who have been convicted of a violent or dangerous offence might pose a risk to co-workers or visitors to your site.

Example: A painting company hired a new crew member to paint apartments in a large building without realizing that he had been convicted of multiple crimes, including theft and assault. Sure enough, the painter broke into the bedroom of a woman in the apartment building and when she began to scream beat her with the butt end of a rifle. Later, after spending 12 years in jail for attempted murder, he was hired by a second-hand store. Again, the employer didn't check his background. His past would only come to light after the employee put a knife to the throat of a co-worker and tried to force her to open the company safe [*R. v. Karl Rodney Rowlee*].

How to Conduct a Criminal Record Check

Privacy laws like the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) and their provincial equivalents ban companies from accessing the criminal records of existing or prospective employees without consent. So if you want to find out about an individual's criminal history, you must notify the person and get her consent to the record check. A simple way to provide notification and get consent is to tell the person to go to a local police station and fill out a criminal information request form listing the following information:

- Full name;
- Previous names (e.g., maiden name);
- Current address;
- Prior addresses within the past five years;
- Date and place of birth;
- Gender;
- Name of employer requiring the background check; and
- Consent for background check and release of information to employer.

The police station will run the individual's name through Canada's national database and its local files and send back a report that lists each offence for which she was convicted. The review process can take anywhere from a few days to a few weeks, and most police stations will forward the information directly to you, as long as the individual consents when requesting the information.

When a fingerprint check is required, the individual must request a certified criminal record check from the RCMP. As noted above, this check is much more accurate because it doesn't rely on names given by the applicant but it can take much longer to get the results back.

Record check required under the *Criminal Records Review Act* in BC must be ordered through the province's Government's Criminal Record Review Program. The employer still has to get the employee or applicant's check even if the check is mandatory under the Act. Individuals who dispute the findings of the check may have to submit to a fingerprint search to allow for further checking.

The federal *Criminal Records Act* sets forth a form for the employee's consent to a search performed with regard to employment involving vulnerable persons or children. That consent must include an acknowledgement by the individual that he is authorizing a search of criminal records for any conviction, even one pardoned, of any sexual offense listed in the Act.

Insider Says: Workers aren't required to tell you about offences for which they've been pardoned. Nevertheless, the federal *Criminal Records Act* allows employers to obtain information about these offences if the worker will have access to vulnerable persons, such as children.

Create Policy to Avoid Discrimination Risks

As noted above, in most of Canada, it's against the law to fire, refuse to hire or otherwise unfavourably treat a person just because he has a criminal background. But criminal record checks can also lead to discrimination against others if you use race, religion, and other grounds protected in the law as a criterion for determining who to check. Thus, for example, it would be illegal to require applicants to submit to a check just because they're Muslim. Of course, that doesn't mean that Muslims and others protected by the discrimination law are exempt from checks. As long as your checking policy is based on legitimate criteria associated with the position rather than the personal characteristics of the individuals seeking or holding it, you'll be okay.

Bottom Line: Adopt a policy on criminal record checks that, among other things, explains what positions require checks. You can adapt the Model Policy on page x. Like our Model Policy, your policy should also:

- Require a clear criminal record check for specific positions upon the start of employment;
- Allow for a conditional term of employment before receipt of the results of a criminal record check; and
- Include a statement that unsatisfactory criminal record check results could result in demotion or termination.

Conclusion

In addition to being time-consuming, criminal record checks require a lot of fancy legal footwork. That's why, at least for most employers, the criminal record check is not an integral part of the screening and hiring process. But there are times when checking an individual's background for crimes becomes not only relevant to the applicant's qualifications for the position but perhaps even required by law. As an HR director, the best way you can protect your company is to:

- Identify which positions require criminal record checking;
- Ensure that the company adopts and implements a policy to ensure checks are carried out consistently on the basis of positions rather than characteristics of applicants seeking or holding them; and
- Make sure that procedures are in place for notifying applicants of checks and securing their consent to checks.

There's one more significant challenge: ensuring that you make proper use of the results of criminal record checks once you receive them. The *Insider* will show you how to do that next month.

Show Your Lawyer

Cho v. Royal Canadian Mounted Police, 2007 FC 1032 (CanLII), Oct. 5, 2007

R. v. Karl Rodney Rowlee, [1998] O.J. No. 5508, Jan. 15, 1998