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When is it OK to get a criminal record check?

Human rights and privacy legislation imposes limits on background checks

QUESTION: Can an employer require an employee to undergo a criminal record check if the employee may be placed in a role in which certain convictions could call into question the worker's ability to do the job safely?

ANSWER: In each province, human rights and privacy legislation imposes certain limits on the use of criminal background checks in employment screening. As such, the answer to this question depends on the jurisdiction in which the employer operates.

In Ontario, an employer can require an applicant to undergo a criminal background check as a condition of employment.

An employer can also decide not to hire an applicant if that check reveals the applicant has a criminal background.

The only exception to this is with respect to provincial offences (such as driving offences under the Highway Traffic Act) and offences for which the applicant has been pardoned.

In these cases, if an employer does not want to hire an applicant because the record indicates he has been convicted of a provincial offence or has been pardoned, the employer will need to demonstrate it's a legitimate requirement of the position and it would be impossible to hire someone with this type of record without resulting in undue hardship on the employer.

In British Columbia, Prince Edward Island and Quebec, provincial human rights legislation puts some restrictions on an employer's ability to screen candidates based on a criminal record. It is generally discriminatory (and a violation of the human rights legislation) to decide against hiring an applicant because of a criminal record.

The only exception to this is if the



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offence on that record is related or connected to the prospective employment.

In British Columbia, Quebec and Alberta, another consideration is privacy legislation. In these provinces, an employer must also be

Employers need to be able to establish a connection between the requirements of the job and the offence for which it wishes to screen.

able to demonstrate requesting personal information from an applicant about his criminal background is reasonable in light of the position at issue.

Again, in order to satisfy this test an employer will need to be able to establish a connection between the requirements of the job and the offence for which the employer wishes to screen.

What does this all mean from a safety perspective? In the provinces noted above where there are certain restrictions on the use of criminal records, an employer will need to demonstrate there is a link between an employee's criminal record and the safety concerns at issue.

As such, if an employer decides not to hire an applicant because of a

criminal record, the employer should be prepared to defend its reasoning. In order to do that, an employer will want to take an objective look at the position and responsibilities of the successful candidate.

The employer will then want to consider what offences may make the candidate unable to successfully perform those responsibilities, or may call into question the ability to safely perform those responsibilities.

For example, an employer may decide a successful applicant for a driving position must not have a record for dangerous driving. There is a clear and reasonable link between the responsibilities of the position and the record. However, this same link would not likely be established if the employer did not want to hire a driver who had been convicted of sexual assault. In the latter case, the employer may have greater difficulty establishing how that type of a conviction is connected or related to the responsibilities of the position at issue.

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