FTR Now

New Background Check Policies Squeezing Employers

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Late last year, the Royal Canadian Mounted Police ("RCMP") issued a directive to agencies that facilitate national criminal background checks. The directive outlines significant changes to the process governing the dissemination of criminal record information, and the process by which such agencies may conduct name-based criminal record verifications. In this *FTR Now*, we discuss these changes and the impact they have on employers seeking criminal reference checks relating to prospective employees.

BACKGROUND ON THE ISSUE

Until recently, employers in Canada could engage a background check agency or the Canadian Police Information Centre ("CPIC"), a national database administered by the RCMP containing a range of information useful to law enforcement, to provide criminal record checks on prospective employees. CPIC is maintained primarily for law enforcement purposes, and is both populated and queried by "CPIC agencies" (local police forces and other government agencies) that are authorized to access the database in accordance with its policies.

Employers engaging in background checks would be notified whether the prospective employee had a criminal record (including records about hybrid and indictable offences). If so, the employer was provided with the details of the criminal record. This allowed employers to assess the seriousness of the criminal record and to decide whether or not to hire the individual.

THE DIRECTIVE AND INTERIM POLICY

In December of 2009, the RCMP issued an interim policy entitled "Dissemination of Criminal Record Information" and a new FAQ explaining aspects of the interim policy. These communications address a number of compliance-related matters, two of which are having a particular impact on employers: (1) the matter of commercial service provider involvement in the conducting of vulnerable sector checks, and (2) the question of the information that may be provided in response to searches based only on name and date of birth.

(1) VULNERABLE SECTOR CHECKS MUST BE PROVIDED DIRECTLY

With respect to vulnerable sector checks, the directive specifies that these checks (and checks involving records protected by the *Youth Criminal Justice Act*) must not be provided through commercial services providers. The FAQ explains the process that police forces must follow in releasing results:

> The results can only be first released to the applicant by the police. If a record exists, it must be confirmed by the submission of fingerprints. If the record is confirmed or there is no record and the applicant chooses to divulge the results to the organization, the police agency may only release the information to the organization with the prior written consent by that individual.

The RCMP has also specified that vulnerable sector checks can only be performed for positions inside Canada.

(2) INFORMATION PROVIDED TO EMPLOYERS: CLEAR OR "NOT CLEAR"?

Under the interim policy, employers will now only receive a statement that indicates whether a prospective employee's criminal record check is either "clear" or "not clear"—but it will give no details on why the individual's criminal record check was "not clear."

However, a "not clear" result does not always indicate that the prospective employee has a criminal record. Because CPIC only uses name and date of birth in its searches, a result of "not clear" will be reported to the employer to avoid disclosing private information about the wrong individual, where two individuals share the same name and date of birth. In those cases, determining the existence of a criminal record and its details (if there is one) in respect of an employee requires the prospective employee to verify his or her identity by physically going to a local police station and getting fingerprinted. The prospective employee must also provide the police with written consent to allow the results to be sent directly to the employer.

The local police station will use the fingerprints to perform the more detailed criminal record check—a process that takes an average of 120 days, but sometimes much longer. This delay is problematic for many employers because criminal record checks are often only performed once an employee has been given a conditional offer of employment.

Given this change in policy, there is currently no expeditious process available to employers for verifying a criminal record.

IMPACT ON EMPLOYERS

The interim policy significantly impacts the services available to employers in Canada. In particular, the 120-day time frame for a verified check raises operational concerns for employers who must decide whether the organization can bear the risk of hiring a good but unverified applicant (whether on a full-time or interim, conditional basis)—or whether they can afford not to, and risk losing the applicant to a competitor.

In addition, employers in some jurisdictions, including Ontario, are prohibited from discriminating against employees or prospective employees on the basis of a "record of offences" under applicable human rights legislation. Employers may therefore have to determine whether the duty to accommodate arises in respect of a person, and if so, how fulfilling that duty may constrain the company's ability to fill a position with another candidate. This will be difficult to determine without the full information provided by the verified check.

Employer reliance on "local indices checks" (sometimes also referred to as "police checks") is likely to increase, though conducting multiple local searches of non-standard databases may take time and raise questions about coverage since these checks are comprised of a check of police files and occurrence reports within a locale, and not necessarily an entire province. There are also human rights compliance risks associated with local indices checks given the scope of information they can reveal, which can include information on provincial offences convictions, charges and miscellaneous "occurrences."

Please contact your regular Hicks Morley lawyer to discuss the impact these changes may have on your organization's hiring and employment procedures.

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