

How To 'Get Away' With Global Criminal Background Checks

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The world is shrinking and technology surrounds us, however employees are still the heart of a business. Naturally, employers put great care into selecting their workforce worldwide. This often means a desire to know as much about a candidate as possible before issuing an offer of employment. In most countries, however, local laws restrict the ability to access, collect or use an applicant's personal information, particularly with regard to criminal history information. Such local legal requirements often compete with a business need for standardized practices and uniformity, leaving human resources professionals and in-house counsel asking the same question: How do we develop a process to conduct criminal background checks worldwide? Although there is no simple answer, this article explains the various general approaches to designing criminal background checks for an international workforce and sets forth best practices that are applicable worldwide.

Approaches to Criminal Backgrounds Checks for an International Workforce

There is no single "global" approach to criminal background checks. Instead, companies must, to some degree, tailor criminal background checks to local requirements, based on factors such as their industry, business needs, risk tolerance and global footprint. Tailoring is necessary to achieve legal compliance and ensure that, practically, the relevant information is accessible. For U.S. multinationals that are not able to develop a customized process for every country where applicants are located, at a minimum, they should be prepared to manage three different types of criminal background checks worldwide: (1) "U.S.-style" criminal history checks, (2) applicant-requested criminal history/good standing certificate checks and (3) global check and representation solution. None of these approaches are without limitations, and in most cases applicant notice and/or consent will be necessary, among other requirements, however understanding when and where to use which type of check is the first step to

properly obtaining a candidate's criminal history information.

"U.S.-Style" Criminal History Checks

On one end of the spectrum is the "U.S.-style" criminal history check. Most U.S. human resources professionals are familiar with this process. It typically involves engaging a third-party reporting agency to conduct the background check, and to ensure compliance with applicable notice and consent requirements. The result is a comprehensive background check that includes criminal history information collected from a range of sources (e.g., local and state police, correctional agencies, country enforcement, federal resources, specialty agencies and global databases).

U.S.-style criminal history checks are still subject to federal, state and local laws that prevent discrimination on the basis of criminal history, and laws that regulate the use and disclosure of such information. However, this broad and comprehensive background check is possible because most criminal history information is publicly available (subject to exceptions, such as information on minors and sealed or expunged records), allowing a third-party reporting agency to obtain a fairly complete profile of a candidate's criminal history, or verification of none.

A few countries outside of the U.S., such as Australia and Canada, will tolerate U.S.-style criminal history checks. In Australia, for example, this type of check is permissible if it is: (1) directly relevant to the position, (2) the company obtains the applicant's consent and (3) "spent" records are excluded. Upon proof of the applicant's consent, the Australian Federal Police can provide the company or the third-party agency with details of the applicant's criminal history from its own records, and information regarding certain violations from the relevant state or territory police. It is also possible to obtain a National Police Certificate that will include a check of all records held in all Australian jurisdictions. In Canada, formal criminal records checks are conducted by the Royal Canadian Mounted Police and require that the applicant's fingerprints be submitted, before the Canadian Police Information Centre will release the applicant's criminal records. This process can take up to 120 days, and is generally handled by a third-party agency, as such agencies typically have an agreement in place with the Canadian Police Information Centre and can therefore expedite the process.

There are still other countries that permit some variation of the U.S.-style criminal history check, with which global background check vendors are often familiar. The United Kingdom, for example, permits a Disclosure and Barring Service check. The DBS check can be administered at three different levels of scrutiny, with job position as the key factor in determining which level of access is permissible. Although such checks are administered through a government "umbrella" body (e.g., a county or borough council), it is recommended to apply through a third-party agency, who can navigate the process.

Applicant Requested Criminal History/Good Standing Certificate

In many jurisdictions, accessing a national database of criminal history information is not an option. Such jurisdictions either do not have a comprehensive national system for collecting and maintaining criminal history information, or the information maintained in such a system cannot be accessed by private companies, often due to data privacy and human rights laws and constitutional privacy protections. As such, companies must work with their third-party agency to develop a "middle of the road" approach by requesting that the candidate obtain and provide a copy of his or her criminal history information.

This process varies by jurisdiction, but in general many allow individuals to request or apply for some

variation of a "certificate of good standing" from the local or national authorities. The certificate verifies a clean criminal record, or indicates an individual's criminal history, in varying levels of detail. Typically, once a company has a serious candidate, they can ask him or her to request a certificate from the appropriate authorities to certify that the candidate does not have any criminal convictions. The candidate must apply directly (i.e., the company, even through a third-party agency, cannot request this information on behalf of the individual). This of course, requires the candidate to consent to the process.

In Germany, for example, criminal background checks may be conducted by requesting that the candidate obtain and present an official police record (Polizeiliches Führungszeugnis). In Malaysia, the company may ask the candidate to request a certificate of good conduct from the Malaysian Ministry of Foreign Affairs to certify that the candidate does not have any criminal convictions in Malaysia, and it may also be possible for the company to make inquiries on an anonymous basis with the Royal Malaysia Police. In Switzerland, the company may request that the candidate apply directly for a criminal records check with the federal authorities who manage the central criminal record. In Peru, companies often ask the candidate to submit a certificate of police history, which shows an individual's arrest and investigation records, and if further information is desired, companies may also request that the candidate provide a certificate of criminal record, which shows an individual's conviction record, if any.

Most of these countries also require some nexus between the criminal history check and the job in question. Further, the company should generally reimburse all related fees and costs, and must consider timing for when to make the request (typically pre-offer), the local requirements for maintaining or discarding such information, and restrictions on the use of such information.

Global Check and Representation Solution

Finally, in certain jurisdictions, checks into an applicant's criminal background history (including the above "Applicant Requested Criminal History/Good Standing Certificate") are either prohibited by law, or not possible as a matter of practice.

Although there is no per se ban on criminal background checks in France, pursuant to the French Labor Code, information requested by the employer during the application process must have a "direct and necessary link" to the candidate's qualifications. Criminal checks will only be permissible when justified by the nature of the position. As a result, criminal history checks are possible only for positions with direct access to sensitive financial information, and most positions within a company (even financial positions) would most likely not be considered sensitive enough to warrant a criminal history check.

In Singapore, although a company can typically ask the candidate to apply for a certificate of clearance from the Singapore Police Force, the Singapore Police Force requires an individual to produce documentary proof from a relevant consulate, government authority or educational institution stating that the production of the certificate of clearance is required for a specific purpose. It is unlikely that the Singapore Police Force will grant such a certificate for the purposes of satisfying an employer's background checks. Similarly, in Hong Kong, generally a certificate of no criminal conviction will be issued only in cases related to immigration or adoption.

An employer has a couple alternatives in these types of circumstances. First, it can still rely on information collected by its third-party agency through Interpol, a global public safety organization that facilitates international cooperation and coordination among law enforcement agencies. Second, often an employer can simply ask the candidate to voluntarily disclose criminal history information. Even

though the employer may not be able to confirm the representations, the simple act of asking can serve a psychological purpose. Further, in some countries, false statements or misrepresentations in the hiring process amount to cause for termination, allowing the company to take appropriate action down the road, if in fact a candidate is not truthful in his/her disclosures.

Global Best Practices

Although local laws on criminal background checks may vary dramatically from country to country, there are a few universal best practices that apply almost everywhere.

Companies should not discriminate solely on the basis of a candidate's criminal history. A per se policy against hiring applicants with prior convictions is unlawful in many countries, including in the U.S. As such, companies need to be careful in relying solely on criminal history information to make employment decisions.

The position should justify a criminal history check. A blanket practice of adopting criminal history checks for every position within a company will be a red flag in many jurisdictions that require a criminal history check to be reasonably related to the job. Companies should take the time to consider whether positions actually require a criminal history check.

The job application form can be a hidden snare when it comes to criminal history questions. Although this article did not address ban-the-box laws that prohibit employers in a number of U.S. states and cities, and some non-U.S. countries, from asking about criminal convictions on job applications, companies should ensure that their local employment applications do not violate these laws.

Unfortunately, however, there is no easy "getaway" here, but there are more than slim pickings. Done with an eye to local law, employers can often obtain useful background information on prospective employees that will help them evaluate such candidates.

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