

# EMPLOYEE CRIMINAL RECORD CHECKS



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Employers perform criminal record checks on current and prospective employees because of the nature of the employment, the vulnerability of customers or clients, or because of contractual or other industry requirements. Unlike many other jurisdictions in Canada, Alberta's human rights legislation does not prohibit discrimination on the basis of an employee's criminal record.

When implementing a criminal record check policy, an employer must collect, use, and disclose the information in compliance with the applicable privacy laws, such as the *Personal Information Protection Act*. It is advisable that the check should be conducted with the consent of the prospective employee; the police authority in question will likely require such consent in any event.

The collection of criminal record information may be excessive where a policy is implemented too broadly, such as where record checks are conducted automatically regardless of the nature of the position. For instance, it may be acceptable to require financial advisers to undergo criminal record checks to determine if they have been convicted of theft or fraud, but it may not be acceptable to require a criminal record check for personnel who will not have access to funds or sensitive information.

In the unionized context, reasonableness and consistency with the collective agreement will also be relevant considerations. For example, in *Diageo Canada and CAW-Canada, Local 2098*, an arbitrator recently upheld the existence of an employer's criminal background check program enacted in response to the United States Customs-Trade Partnership Against Terrorism Program ("C-TPAT"). The employer wanted to ensure the fast movement of its goods across the border and thus implemented a criminal background check policy in order to ensure its good standing under the C-TPAT program. The Arbitrator agreed that it was reasonable for the employer to want to achieve and maintain a top-tier status under the program and thus to adopt a criminal background check program for employees in sensitive positions.

## The Criminal Record Check Process

Employers conduct basic criminal record checks or a vulnerable sector checks by submitting a request to a police agency or to a third-party screening provider. The agency or provider then conduct a search using a national database administered by the Royal Canadian Mounted Police ("RCMP"). In November 2009, the RCMP issued a revised policy, which has been causing some disruption in the processing of these checks.

The RCMP policy indicates that in response to a criminal record check, employers will only be told that the check either did not return any results or that the search "could not be completed", but will not be provided further information regarding the reasoning that the check could not be completed. This initial RCMP criminal record check proceeds only on the basis of the name and date of birth of the individual and no further information will be released until the individual attends at a police station and is fingerprinted in order to confirm their identity. Third-party screening providers will no longer be provided with the more detailed information without the completion of the fingerprinting process.

Further results will take on average 120 days, but may in some instances take even longer. For some organizations that rely on criminal record checks to meet contractual obligations or to protect vulnerable clients or customers, this time delay may be problematic.

Some employers may also rely on record checks with local police forces, sometimes referred to as "local indices checks". These police checks involve review of the files lodged with local police forces and will not have the comprehensive geographic scope of a criminal record check. Nevertheless, local checks will often contain more information than merely the existence of criminal records, including the existence of occurrence reports or investigation reports. Because of the broad scope of the information being reviewed, some local police forces may

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have policies that prevent the release of information directly to employers where there is concern that a blanket consent will not cover the release of specific information about a prospective employee, such as the existence of previous criminal investigations not leading to criminal charges but potentially relevant to the proposed type of employment.

**What Should Employers Do?**

- Implement a criminal record check policy that is appropriate in scope;
- Get the necessary consent from employees and prospective employees;
- Take appropriate steps to check with national and local police forces to obtain relevant records. Ensure that managers and others involved in the hiring process are familiar with police record check processes;
- If third-party screening service providers will be used, confirm with these providers how they will modify their practices to comply with changes in RCMP policy;
- Assess the results of criminal record checks in relation to the prospective employee’s suitability for the position;
- Where a criminal record check “could not be completed”, ask a prospective employee directly about the report and the details of his or her criminal record. Weigh the need to hire without delay against any risk, and implement necessary controls;
- Consider extending the time for the hiring process to allow for sufficient time to complete criminal record checks. ▲

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