

A Regional Guide to Background Checks

EMEA



SCROLL DOWN



Introduction

Background checks have become a critical part of the recruitment process in many countries. Employers with a global presence often seek to harmonize recruitment policies across different jurisdictions but addressing the various restrictions and regulations around background checks can be challenging.

This publication provides an overview of both the legal and practical issues relating to background checks in 19 key countries. It covers a wide range of background checks, from criminal record checks through to drug and alcohol testing, and identifies the applicable conditions, restrictions and sanctions in each country. It also incorporates 'at-a-glance' traffic lights, highlighting whether background checks are standard practice, unusual or prohibited in a particular jurisdiction.

We hope you find this publication useful. It has been compiled by lawyers from a major international law firm, as well as partner law firms based in other jurisdictions.

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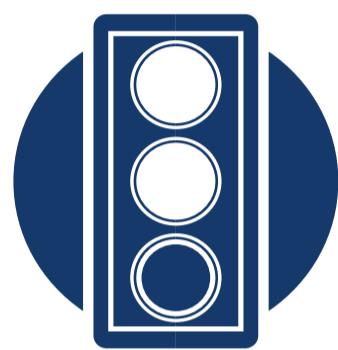


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Education and past employment records	Green	Green	Green	Yellow	Green	Yellow	Green	Green	Green	Green	Green	Green	Yellow	Yellow	Green	Yellow	Yellow	Yellow	Green
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Social media/internet search	Yellow	Green	Green	Yellow	Yellow	Green	Yellow	Yellow	Green	Yellow	Yellow	Yellow	Yellow	Yellow	Green	Yellow	Green	Yellow	Yellow
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Handwriting	Yellow	Red	Yellow	Red	Red	Red	Red	Yellow	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Yellow
Union membership	Red	Red	Yellow	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
Political views	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
Drug and alcohol testing	Yellow	Yellow	Yellow	Green	Yellow	Red	Yellow	Yellow	Yellow	Red	Red	Red	Red	Red	Red	Yellow	Red	Yellow	Red



Background check is prohibited and/or permitted only in extremely limited circumstances



Background check is unusual and/or permitted only in limited circumstances



Background check is standard practice



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Belgium



Contributed by: **Van Olmen & Wynant**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, it is standard practice in Belgium to carry out particular background checks in relation to applicants.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Belgium relate to education and past employment records, criminal records for certain occupations and, in relation to employment with an international dimension, confirmation that the applicant has the appropriate permission to work in Belgium. Other background checks are less common.



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Belgium

BACKGROUND CHECKS ON APPLICANTS

- *Education and past employment records*
- *Criminal records*
- *Credit/financial checks*
- *Health checks/medical screening*
- *Social media/internet search*
- *Fingerprinting*
- *Handwriting*
- *Union membership*
- *Political views*
- *Drug and alcohol testing*

3. Which of the above background checks are employers permitted to carry out on applicants?

In principle, all of the above checks are permitted, subject to the conditions detailed in question 6.

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above checks are expressly prohibited, but please see questions 5 and 6.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All of the background checks require some conditions to be fulfilled, except for education and past employment records.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to all of the background checks listed above, it should be noted that, in principle, this kind of information can only be requested if it is relevant to the nature and requirements of the job. This “relevance criterion” should be interpreted strictly.

In that sense, even the least controversial background check (education and past employment records) can be problematic in certain situations. For instance, a consequence of some diploma requirements may be that fewer people from a particular ethnic origin will pass the selection process, as some groups of people often have fewer educational opportunities than others. Such indirect discrimination is only justified if the diploma requirements serve a legitimate aim and if the criteria used are really necessary and appropriate to achieve this legitimate aim.

It is worth noting that applicants have a statutory obligation to cooperate in good faith during the selection process. An applicant is not only bound to answer the employer's relevant questions, but should also provide the employer with all relevant information that he might be expected to know, and which would be important to the employer. Where the information provided is relevant to the application procedure, the employer could terminate the employment contract for cause if the applicant provides fake information (e.g., false education records).

There are also specific points to note in relation to particular checks:

Education and past employment records

Sometimes employers ask applicants to provide contact details of former employers and request permission to contact them to evaluate previous work experience. If an applicant does not give consent, the employer should respect this refusal.



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Employers should refrain from making inquiries that do not relate to genuinely legitimate interests of the company or the nature of the job.

Criminal records

Applicants may be asked to provide their criminal records when they apply for a job which requires a clean criminal record history (e.g., surveillance staff).

Criminal record checks are not standard for other professions although, in practice, the Belgian Commission for the Protection of Privacy is of the opinion that employers may request such information when it is relevant to the job (e.g., for roles which entail regular contact with money). If the applicant provides this information voluntarily, the employer can consult the document, but cannot keep a copy of it.

However, given the obligation to cooperate, the applicant should provide information regarding his or her criminal background to the employer, where it is relevant to the nature of the job.

Credit/financial checks

Anti-discrimination legislation prohibits any discrimination based on personal wealth. To avoid this criterion being discriminatory, it would have to constitute an essential and determining professional requirement due to the nature of the professional activity or the conditions for its performance. The objective would need to be legitimate and the requirement would need to be proportionate. It is unlikely that all of these conditions will be met in a given situation.

Health checks/medical screening

The Royal Decree of 28 May 2003, which covers the supervision of employees' health, stipulates that an employer must require a medical test from all applicants for roles involving safety, vigilance, the handling of, or direct contact with, food substances, or the driving of motorized engines, cranes or hoists when this driving could endanger the security and safety of other workers. This kind of testing can only be carried out by the "Prevention advisor – Company doctor" after a job offer has been made.

This type of background check cannot be carried out for other professions. The obligation of the applicant to cooperate and provide any relevant information does of course remain important in relation to medical information.

Biological tests, medical testing, or the verbal gathering of information with a view to obtaining medical information on the state of health or information on the genetic inheritance of an applicant, may not be carried out for any reasons other than those that are directly linked to the existing abilities and specific characteristics of the post being offered.

A specific information procedure has to be followed prior to any medical examination. The employer needs to notify the individual about the data that will be processed/reviewed, which test will be performed and why it will be carried out.

Social media/internet searches

The relevance criterion referred to above remains important in relation to social media/internet searches. Applicants will be able to claim their "right to privacy" if confronted with information extracted from the internet. However, this will often be an invalid argument where applicants have put the information online themselves. It is prudent to assess whether an applicant intended to make certain information public (e.g., this can be assumed from information on LinkedIn, but not always from information on Facebook).

Collecting such data on company computers or taking screenshots of information on the internet is only allowed if it serves certain purposes, since this will constitute data processing (please see question 17).



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Handwriting and fingerprinting

This is not explicitly prohibited by Belgian legislation. However, in practice, there are few situations where it could genuinely be considered directly relevant to the role or application process.

Union membership

Apart from in relation to employment with “union membership” oriented associations (i.e., a trade union), there will be very few instances where an employer could lawfully base its decision on personal information of this kind.

Political views

Apart from in relation to employment with “belief-oriented” enterprises (i.e., political groups or companies which take a controversial stance in certain ethical debates) there will be very few instances where an employer could lawfully base its decision on personal information of this kind.

Drug and alcohol testing

Such tests are only allowed where relevant to the nature of the job. Please see the response in connection with health checks/medical screening.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used where relevant to the nature of the job and should not be used in a discriminatory way.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Yes. Please see question 6 in relation to health checks/medical screening and drug and alcohol testing.



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BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment, but will need to be appropriate, necessary, proportionate and justified by reference to the nature of the job. However, if a background check was not relevant during the application period, it is unlikely that it will be relevant during employment.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Once the decision to hire is made, an employer who wishes to employ an applicant from outside the European Economic Area (EEA) (i.e., a non-EEA citizen) will have to obtain a “work permit” for the applicant. The applicant needs to possess a “work card B.” Both permits are requested at the same time by the employer.

Negotiations are currently underway in relation to the creation of a “single permit” which would grant a non-EEA citizen the right to live and work in Belgium with one card.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

It is more common and more relevant for an employer to check an applicant’s criminal background in the financial sector, given the duties and responsibilities of the roles in this sector. This is not necessarily limited to senior roles in the financial sector. Criminal record checks could also be justified at lower levels where employers come into contact with client money (e.g., bank clerks).

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes. However, the background checks performed by a third party should not, under any circumstances, go further than the restrictions and obligations by which the employer is bound.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Any third party which is conducting background checks on behalf of an employer is bound by the same obligations and restrictions as the employer.



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If a third party vendor is entrusted with the processing, the employer must:

- ensure sufficient safeguards in respect to the technical and organizational measures for the intended processing;
- ensure compliance with these measures, in particular by contractual provisions;
- set out the third party's liability towards the employer in that contract; and
- agree with the third party that it shall only act on behalf of the controller and that it is bound by the same duties as the employer.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Depending on the nature of the information that needs to be processed, there are situations in which consent by the employee (or applicant) is: (1) not required; (2) required; or (3) only permitted in exceptional circumstances.

(1) In principle, employees do not need to give their consent to the processing of their personal data where:

- the processing is necessary for the performance of a contract to which they are party; or
- the processing is necessary for compliance with an obligation to which the controller is subject under or by virtue of an act, decree or ordinance.

(2) Where this is not the case, consent of the employee is required before the employer can process the employee's personal data.

(3) The processing of the following personal data is, in principle, prohibited since it is considered "sensitive data":

- racial or ethnic origin
- political opinions
- religious or philosophical beliefs
- trade union membership
- sexual orientation
- health-related personal data
- personal data relating to litigation that has been submitted to courts and tribunals as well as to administrative judicial bodies, relating to suspicions, prosecutions or convictions in matters of crime, administrative sanctions or security measures

Under Article 27 of the Royal Decree of 13 February 2001, any consent given for the processing of sensitive data is prohibited because it is assumed that it is given by the applicant or employee under pressure from the future or current employer. Exceptions for the processing of sensitive data apply only in limited circumstances (e.g., for the protection of the legitimate interests of the company or to comply with employment law regulations), as set out in the law of 8 December 1992 on the protection of privacy in relation to the processing of personal data. However, these exceptions should be interpreted strictly.



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Furthermore, the employer should ensure that the following information is provided to the applicant:

- the name and address of the entity which will process his or her personal information;
- the purposes of the processing; and
- the applicant's right to access and rectify his or her personal data.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Collective bargaining agreement No. 38 of 6 December 1983 on the recruitment and selection of employees
- The law of 8 December 1992 and the Royal Decree of 13 February 2001 on the protection of privacy in relation to the processing of personal data
- The general anti-discrimination law of 10 May 2007, the law of 10 May 2007 on discrimination between men and women; the law of 3 July 1981 aimed at the punishment of acts characterized by racist or xenophobic motives
- The Royal Decree of 28 May 2003 on the supervision of employees' health
- Law of 28 January 2003 on medical tests within the framework of labor relations

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

When the information gathered via background checks is used in a discriminatory way, compensation is payable on a flat rate basis (six months' gross wages) or an indemnity for the actual damage suffered can be claimed from the potential employer based on the general anti-discrimination law of 10 May 2007.

Privacy legislation imposes fines of EUR100 to EUR100,000 for employers who violate the provisions referred to in question 17.

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Czech Republic



Contributed by: **Havel, Holásek & Partners**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

It is standard practice to carry out basic background checks in the Czech Republic. Some limitations apply, which may have an impact on the scope of background checks, including the need to obtain the consent of the applicant and/or other conditions. Employers therefore often need to assess whether background checks are appropriate and proportionate in the circumstances, and consider the implications of data protection and discrimination legislation.

2. What types of background checks do employers typically carry out on applicants?

Employers typically carry out basic background checks which include checking entitlement to work and appropriate work permits, education and past employment records, and carrying out a social media/internet search.



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Czech Republic

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Employers are permitted to check education and past employment records and carry out social media/internet searches without substantive limitations, insofar as the checks (or the information obtained via such checks) closely relate to performing the relevant job.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Employers are not permitted to carry out checks relating to union membership, political views, fingerprinting and handwriting (which, if used for the purpose of handwriting analysis, would constitute impermissible medical screening).

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Criminal records checks, credit/financial checks, health checks/medical screening and drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Criminal records

The applicant's consent is required for a criminal records check. This check should only be requested where the need to protect the employer's business, customers or clients makes it appropriate and proportionate.

Credit/financial checks

The applicant's consent is required for a credit/financial check. This check should only be requested where the need to protect the employer's business, customers or clients makes it appropriate and proportionate.

Health checks/medical screening

It is generally unlawful to ask about the health of an applicant before making a job offer. Health checks are only permitted if there is an occupational requirement to justify one. A pre-employment health check is the only mandatory check. For any other health check or medical screening, the applicant's consent is required.



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Czech Republic

Drug and alcohol testing

Drug and alcohol testing is very unusual. Any testing of the candidate would have to be performed with the candidate's consent. Please see question 11 in connection with such testing of employees.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

An employer should use the information only for its own purposes and in connection with the prospective employment of the candidate. Personal data may not be made accessible to third parties. The checks undertaken must be appropriate and proportionate; they must not be discriminatory; and/or violate the fundamental principle of equal treatment and privacy.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

In the case of mandatory pre-employment entry health checks, they can only be carried out after the decision is made to offer employment and the applicant has accepted the offer.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment but will need to be appropriate, necessary, proportionate and justified by reference to the employee's role. Periodic medical checks need to be carried out every one to six years depending on the category of the worker (for example, administrative employees only require a medical check every six years, however, "workers" will require more frequent checks). Drug and alcohol testing may be undertaken in the course of the employment relationship if it is suspected that the employee is under the influence.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The employer is under an obligation to ensure that it does not enable illegal work to be performed, and should therefore check an applicant's or employee's work permit and residence permit.



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Czech Republic

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

The background checks that are carried out as market practice may vary from sector to sector. For example, if an employee's job involves handling money, the employer may carry out a greater level of background checks, but they must be proportionate.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Where an employer proposes to use a third party to carry out background checks on its behalf, the notice to the applicant should make it clear that the employer will use a third party to carry out this processing on its behalf.

If the third party vendor is outside the European Economic Area (EEA), processing of personal data should only be undertaken in countries or territories with adequate levels of protection for the rights of individuals in relation to the processing of personal data or where the data exporter is satisfied that appropriate controls are in place. The employer should consider entering into EU Model Contract Clauses with the relevant entity processing personal data outside the EEA.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) only process personal information for the purposes collected and as necessary for the pre-employment screening, treating all personal information as confidential and ensuring that appropriate restrictions exist within the business to ensure only relevant departments/individuals can access the data;
- (b) ensure individuals are aware of, and can exercise, their right to receive a copy of the personal information collected with respect to them, rectify or update the information, request deletion of the data where it is inaccurate, outdated or irrelevant and opt-out/revoke authorization to further processing of their information;
- (c) not retain the personal information for longer than necessary for the purposes consented to;



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(d) take appropriate technical and organizational steps to protect personal data from unauthorized disclosure, damage or destruction; and

(e) inform all staff processing individuals' personal information about the proper handling of such information.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Act No. 262/2006 Coll., the Labour Code, as amended
- Act No. 435/2004 Coll., the Employment Act, as amended
- Act No. 198/2009 Coll., the Discrimination Act, as amended
- Act No. 101/2000 Coll., the Data Protection Act, as amended
- Act No. 251/2005 Coll., on Labour Inspection, as amended
- Act No. 89/2012 Coll., the Civil Code
- Act No. 40/2009 Coll., the Criminal Code, as amended

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

- Sanctions up to CZK10 million from the Office for Personal Data Protection
- Sanctions up to CZK1 million from the Czech Employment Authority
- Criminal sanctions (up to eight years' imprisonment) for serious violations of privacy rules (misuse of processed personal data)

Contributed by: Petra Sochorová & Richard Otevřel, Havel, Holásek & Partners



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BACKGROUND CHECKS
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Denmark



Contributed by: Kromann Reumert

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

It is common in Denmark for employers to carry out background checks on applicants. However, background checks are subject to a number of limitations, including the principle of proportionality.

2. What types of background checks do employers typically carry out on applicants?

Most employers will check past employment records (references) and education, and may also conduct internet searches on applicants in order to see what information is publicly available. Depending on the role, some employers may also require an applicant to have a clean criminal record. Special rules apply in this respect.



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Denmark

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

As a starting point, all of the above background checks are permitted. However, all of these are subject to basic data processing principles. Please see question 17.

Certain background checks are also subject to the applicant's consent and further conditions might apply. Please see question 6.

Even if an employer is permitted to carry out background checks, its use of the information obtained must comply with relevant legislation. Please see question 7.

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above background checks are expressly prohibited but please see questions 5 and 6.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Background checks involving information on criminal records, credit/financial checks, health checks/medical screening, union membership, political views as well as drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to the checks highlighted in the answer to question 5, all of these, as a rule, require explicit consent from the applicant.

Further, the following restrictions apply to specific background checks:

Criminal records

Employers will require an applicant's consent to obtain information on criminal records and this may only be requested where the need to protect the employer's business, customers or clients makes it appropriate and necessary.

Health checks/medical screenings

Employers will require an applicant's consent in relation to carrying out health checks or medical screenings. These may only be requested if there is an occupational requirement to justify such checks under applicable data protection law. The Danish Act on Use of Health Information, etc. on the Labour Market prescribes that an employer may only ask (during the application process as well as



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during employment) for health information with the purpose of clarifying whether the applicant/employee suffers from a disease or has had symptoms of a disease which will materially affect the applicant's/employee's ability to work.

Union membership

Union membership information may be processed where it is necessary for the employer's compliance with labour law obligations, for example, the obligation to report to the tax authorities regarding any payments made to unions or other specific rights which may arise in the employment contract or in a collective agreement. In these circumstances, consent is not necessary. In all other circumstances, employers would need to obtain the applicant's consent. Employers should generally be very cautious about collecting and processing this type of information, as the processing must be justified and not be excessive.

Political views

In Denmark, it is highly unusual to collect and process information on political views in relation to background checks and the applicant/employee is protected against discrimination on the grounds of his or her political views. Consent would be required and the processing would need to be proportionate and have a justified purpose.

Drug and alcohol testing

Drug and alcohol testing can be carried out but only in limited circumstances; for example, where such testing can be justified on the basis of the particular occupation and/or could give rise to health and safety considerations as well as serious damage to the employer's business. Drug and alcohol testing requires consent.

Social media/internet searches

There must be a justifiable reason for conducting social media/internet searches. Such searches should only involve publicly available information, which is relevant under the particular circumstances. Thus, the search should not involve information or communication that is not publicly available or otherwise restricted by the applicant. Further, the search should not include sensitive data (such as the types of data listed above, as well as information on an applicant's sex life, serious social problems or other purely private matters (for instance, divorce)).

Credit/financial checks

Credit/financial checks may only be conducted in relation to applicants applying for a function involving an exceptional position of trust/authority.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Any use of the information obtained during the background checks mentioned above must comply with the Danish Act against Discrimination on the Labour Market, etc. Under this Act, the employer may not, directly or indirectly, discriminate against an individual upon application, during employment, or in connection with changing/terminating employment. The Act covers discrimination on the grounds of race, ethnic origin, disability, age, political belief, etc. Thus, information on health (which may be categorized as a disability), union membership and political views obtained during background checks should not be used by the employer in a discriminatory manner when making the decision as to whether or not to employ the applicant, during employment or in connection with changing/terminating employment.



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It is worth noting that a shared burden of proof applies under this Act. Thus, if an applicant is being discriminated against on the basis of grounds governed by the Act, and the applicant proves factual circumstances indicating that the applicant has been discriminated against, it is for the employer to prove that no discrimination has taken place. Depending on the circumstances, it may in practice be quite difficult for the employer to lift the burden of proof.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

All background checks are in principle permitted in Denmark provided that they are carried out in accordance with the Danish Act on Processing of Personal Data and the information obtained is used in accordance with the Danish Act against Discrimination on the Labour Market, etc. The most common checks carried out are those listed in question 2.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Yes. From a data protection perspective, a number of the background checks may be regarded as extensive data processing, especially processing of sensitive data, if the information is requested prior to the employer making an offer of employment. It does not make any difference under the Danish Act against Discrimination on the Labour Market, etc. whether the background checks are carried out before or after the decision to make an offer of employment, as this Act applies during the application process as well as during the employment. However, it might have an impact on the employer's ability to lift the burden of proof (referred to in question 7) if being met with a claim of compensation pursuant to the Danish Act against Discrimination on the Labour Market, etc.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment but such checks must be necessary and proportionate. There must be justifiable reasons for these checks and checks on an ongoing basis may only take place if they can be justified by certain occupational requirements. Please also see question 7.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

A foreign applicant/employee must have a residence and work permit in order to reside and work in Denmark if the applicant/employee is a citizen of a country outside the Nordic countries/European Union (EU) or European Economic Area (EEA). An employer must check the applicant/employee's residence permit, which will show whether the applicant/employee is entitled to work in Denmark. The employer is responsible for ensuring that the applicant/employee has a valid residence and work permit.



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Although it is not required by law, the Danish Immigration Service recommends that employers ensure that an employee holds a valid residence and work permit by referring to the following (non-exhaustive) guidelines:

- Is the holder of the residence permit identical to the person on the residence permit?
- Is the residence permit Danish?
- Is the residence permit valid (i.e., it has not expired)?
- What kind of residence permit does the employee have and does it entitle him or her to take up work for the employer in question (as some residence permits are linked to a specific employer)?

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

Generally no, but from a Danish data protection point of view, certain checks can be regarded as too extensive, taking into account the limited number of working hours. When carrying out background checks, employers cannot treat part-time employees and/or time-limited employees differently when compared to comparable full-time employees, unless there are reasonable and objective grounds for such different treatment.

SECTORS

14. Do background checks differ in different sectors?

The background checks may be more extensive in, for example, the financial sector in order to comply with the “fit and proper” requirement for the employment of management/board members employed in companies covered by the Danish Financial Business Act. Generally, however, the scope of background checks does not vary much from sector to sector. Variations are more likely to be based on the seniority of the relevant position (for example, a background search would normally be more extensive if an applicant is applying for a management position).

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Where an employer uses a third party vendor to carry out background checks on its behalf, such processing must be governed by a written data processor agreement. This agreement must stipulate that:

- (a) the processor (the vendor) may only act on instructions from the controller (the employer); and
- (b) appropriate technical and organizational security measures must be implemented in order to protect data against accidental, unlawful or unauthorized destruction, loss, alteration, disclosure, abuse or other processing contrary to the data protection legislation.



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If the third party vendor is established outside the EU/EEA, the processing by such processor requires an adequate level of data protection, which can be obtained by, for instance, EU Model Contract Clauses or Safe Harbor certification (the US only) (although please note the effectiveness of Safe Harbor is now doubtful following a recent ECJ decision). Otherwise, the transfer of data requires explicit consent from the applicant, which only will be valid if the applicant has been informed of the potential risks of the transfer.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

As a starting point, as mentioned in question 3, all of the above background checks are permitted. However, all of these are subject to the following basic data processing principles:

- (a) the data must be processed in accordance with good practice for data processing (e.g., fair and legitimate processing, the principle of proportionality, etc.);
- (b) the data must only be collected for specified, explicit and legitimate purposes;
- (c) the data must be adequate, relevant and not excessive in relation to these purposes;
- (d) no inaccurate or misleading data may be processed; and
- (e) the data may only be kept as long as it is necessary for the purposes for which the data is processed.

Further, the employer has an obligation to inform applicants of the purposes for which the data is intended and applicants must be provided with any further information that is necessary, with regard to the specific circumstances, to enable the applicants to safeguard their interests. Such supplementary information can include (i) the categories of recipients, if data is disclosed; and (ii) information on whether the checks are mandatory and the consequences of failure to participate as well as other relevant information.

It is also recommended that the applicants be informed of how they can exercise their right to receive a copy of the personal data collected on them as well as the right to rectify, update and delete the data.

Further, the Danish Data Protection Agency has stated that the following requirements are applicable to the administration of personnel:

- (a) written internal guidelines on how the data is protected and how the Agency's requirements are implemented in practice;
- (b) access to the data must be limited to the persons that need to process the data, and the number of these persons must be very limited;
- (c) the employees handling the data must be instructed and trained in relation to how the data must be processed and protected;
- (d) manual data, for example, data in manual binders, must be kept in secured premises when not in use and damaged or otherwise destroyed when no longer necessary;



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- (e) electronic devices used for data processing must be password-protected and only authorized personnel may obtain such passwords, which may not be disclosed to unauthorized persons or kept in a way these persons can gain access;
- (f) periodic control of issued passwords must take place every six months;
- (g) unsuccessful access attempts must be logged and blocking must take place after a certain number of subsequent attempts;
- (h) USB-sticks or similar must be protected by passwords and encryption;
- (i) electronic devices with access to the internet must be protected by firewall and antivirus programs;
- (j) encryption must be used where sensitive data and the civil registration number (CPR-number) can be submitted by standard forms via websites or by e-mail;
- (k) necessary measures must be taken to ensure that the data is not accessible to unauthorized persons in relation to repairs or service of the electronic devices as well as sale or destruction of these; and
- (l) use of data processors must comply with the data protection legislation (e.g., the requirements set out in question 16).

Finally, it is highly recommended that the employer undertakes periodic audit reviews of compliance with the data protection measures and requests that such reviews are conducted by any third party vendors that process data on behalf of the employer as well. The use of cloud solutions is subject to more strict requirements.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- The Danish Act on Processing of Personal Data (Act No. 429 of 31 May 2000)
- The Danish Act against Discrimination on the Labour Market, etc. (Act No. 1349 of 16 December 2008)
- The Danish Act on Use of Health Information, etc. on the Labour Market

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted contrary to data protection legislation, the Danish Data Protection Agency is authorized to issue a fine. The fines may vary but the level has so far been rather moderate and, at present, it would not be expected that the fine would exceed DKK25,000. There is, however, a general European tendency towards raising the level of fines and this could also have an impact in Denmark, even before the new European Data Protection Regulation comes into force (which is not expected before the beginning of 2016).

Further, the applicant or the employee can claim compensation for any damage caused by the processing of data in non-compliance with data protection legislation. At present, the courts have on a few occasions awarded individuals such compensation. However, this has still not exceeded DKK25,000. It is worth noting that the Danish Data Protection Agency publishes all cases online, so employers should also consider the potential reputational damage.



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An applicant/employee may also be entitled to compensation if information obtained during background checks is used in a discriminatory manner, contrary to the Danish Act against Discrimination on the Labour Market, etc. This would require the applicant to file a complaint against the employer in the “Danish Tribunal of Equal Treatment” or the Danish courts. The compensation level for an applicant in these circumstances is normally up to approximately DKK25,000.

Contravention of the Danish Act on Use of Health Information, etc. on the Labour Market may be punished by imposing a fine on the employer, while the applicant/employee may be entitled to compensation.

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BACKGROUND CHECKS
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Egypt



Contributed by: **Shalakany Law Office**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, it is standard practice for employers in Egypt to carry out background checks on applicants.

2. What types of background checks do employers typically carry out on applicants?

Employers typically carry out background checks in relation to education, past employment records, criminal records, and also undertake internet searches.



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Egypt

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Employers are permitted to carry out checks regarding education and past employment records, health checks, criminal records and social media/internet searches.

Fingerprinting, handwriting, criminal records, credit/financial checks and health checks (which may include drug and alcohol testing) will be subject to the applicant's consent (please see questions 5 and 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

Employers are not entitled to conduct any checks in relation to political views and union membership.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Fingerprinting, handwriting, criminal records, credit/financial checks and health checks (which may include drug and alcohol testing).

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Employers will require an applicant's consent to carry out the checks highlighted in the response to question 5. Credit/financial checks are very uncommon in Egypt but could, in theory, be carried out if the applicant's consent is obtained.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

No.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Yes. The employer is permitted to check whether an employee has completed his military service or whether he is exempted from this requirement.



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Egypt

9. Are there restrictions or limitations on the scope of these checks?

No.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Employers may potentially carry out any of the checks, including health checks, before an offer of employment is made, provided that the applicant's consent is obtained, where required.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

No.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employers should request a copy of the applicant's national ID, to confirm his or her identity and that he or she is an Egyptian citizen. If the applicant is not an Egyptian citizen, he or she should present his or her passport and may only work if the employer successfully applies for a work permit for the applicant.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

No. Background checks are subject to the employer's discretion, so may vary generally from employer to employer, irrespective of the relevant sector.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.



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Egypt

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No. Third party vendors would be covered by the obligations highlighted in question 17.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Employers may not divulge personal information regarding applicants or employees without their consent, except to service providers (e.g., third party vendors as highlighted in questions 15 and 16) who must also respect the confidentiality of the information.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

The Egyptian Constitution, Banking Law and Labour Law.

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

In most cases, the sanction will be a payment of damages, based on a civil action by the employee.

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BACKGROUND CHECKS
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Finland



Contributed by: **Dittmar & Indrenius**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

In general, the use of background checks varies and depends significantly on the area of business. Finnish data protection legislation, especially the Act on Privacy in Working Life (759/2004) and the Personal Data Act (523/1999), sets out strict requirements regarding background checks and data processing related to them. In practice, the strict legislative framework also limits how often background checks are carried out.

In addition to the general provisions on background checks, the Act on Background Checks (726/2014) regulates certain types of background checks that can only be carried out by the relevant governmental authorities.

2. What types of background checks do employers typically carry out on applicants?

The most typical background checks relate to information on education and past employment records. Usually the information for these checks is collected directly from the applicant.



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However, the use and types of background checks vary since the nature of the work often defines what can be deemed lawful in light of applicable Finnish legislation. A brief overview of this legislative framework is outlined below (this is not an exhaustive presentation of all applicable legislation).

In general, there are two matters of particular significance when carrying out background checks:

First, the information collected must be directly necessary for the applicant's employment relationship. Such data must be related to managing the rights and obligations of the parties involved, with the benefits provided by the employer for the employee, or which arise from the special nature of the work concerned ("*the necessity requirement*"). The assessment of whether information is necessary is performed on a case-by-case basis, taking into account the actual duties of each individual employee.

Secondly, the employer is permitted to collect personal data relating to an applicant primarily only from the applicant. In order to collect personal data from another source, the employer must obtain the applicant's prior consent. According to Finnish law, the consent must be a "*voluntary, detailed and conscious expression of will*." Hence, the applicant must be aware of what he or she is consenting to when giving consent. Additionally, the consent must be given in an unambiguous manner.

There are limited exceptions to the consent requirement. These exceptions apply to situations where an applicant does not give his or her consent or it is impossible to ask for consent in the particular circumstances. However, these exceptions should only be applied after careful consideration. The necessity requirement described above cannot be deviated from even with the applicant's consent.

In all situations where information concerning an applicant has been collected from a source other than the applicant (including collecting information without the applicant's consent), the employer must notify the applicant of this information before it is used in making decisions concerning the applicant.

When processing personal data, especially when collecting personal data from sources other than the applicant, the employer, or company working for it, is obliged to ensure that no erroneous, incomplete or obsolete data is processed ("*the accuracy requirement*"). It is also important to note that, as a general rule, applicants are, at all times, allowed to access all the information held about themselves, regardless of how or when this information is collected and what sources are used.

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Fingerprinting
- Criminal records
- Handwriting
- Credit/financial checks
- Union membership
- Health checks/medical screening
- Political views
- Social media/internet search
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Not applicable. The evaluation of whether a background check is permissible is ultimately carried out on a case-by-case basis in light of the actual duties undertaken by each individual employee. Please see question 2 for the general requirements and question 6 for information on different types of background checks.



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4. Which of the above background checks are employers not permitted to carry out on applicants?

Not applicable. Please see question 3.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

As mentioned in question 2, all background checks must meet the relatively strict general requirements in order to be lawful. Hence, all of the background checks mentioned above must comply with, among others, the necessity requirement. In addition, some types of information are subject to their own, detailed provisions which generally set out even stricter requirements.

Please see question 6 for more detailed conditions on different types of background checks.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

As a rule, the collection of personal data during recruitment is governed by the cooperative procedure referred to in the Act on Cooperation with Undertakings (334/2007). The employer is obliged to inform employees of the principles and methods for recruiting and of information which is collected during the recruitment through the cooperative procedure. Therefore, if an employer intends to begin to carry out background checks on applicants, it must complete the cooperation procedure before any final decisions on the matter are made.

In addition to the data protection-related information provided below, an employer must always observe, among other matters, the applicable provisions of labor law. These may have an impact on the background check process, including limiting how the information gathered during a background check may be used when making decisions affecting applicants.

The following points should be noted in relation to particular checks:

Education and past employment records

The information on education and past employment records is usually collected directly from the applicant. For example, the applicant may be asked to present his or her education certificates and references. If the employer wishes to confirm the information from third party sources, the requirements listed in question 2 must be met.

Criminal records

Criminal record checks may only be carried out if the specific criteria set out in the Act on Background Checks (726/2014) and the Criminal Records Act (770/1993) are met (for example, if the applicant is to handle government documents subject to a security clearance). However, in certain situations, employers may even be obliged to check applicants' criminal records (for example, if the applicant will be working with children). Criminal record-related background checks are always performed by public authorities. No publicly accessible criminal record database exists. According to the Criminal Records Act, even an applicant himself/herself is not entitled to obtain a criminal record extract in order to present it to a prospective employer. If the employer intends to check applicants' criminal records, applicants should be notified of this in advance via the job advertisement.

Credit/financial checks

According to the Act on the Protection of Privacy in Working Life, credit/financial checks can only be carried out if the relevant work requires a high level of employee trustworthiness and reliability and meets the other conditions set out in the Act. Additionally, financial checks can only be carried out on the applicant(s) chosen for hire. Hence, checking the financial information of all applicants is not permitted.



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Health checks/medical screening

There are no explicit statutory prohibitions against requiring an applicant to undergo a medical examination, provided that such information is directly necessary for the employment relationship. However, the employer only has the right to process an applicant's health data if the applicant provides such information himself/herself or, if it is from another source, with the applicant's written consent.

Social media/internet searches

Under Finnish law, the source of the background check information is primarily irrelevant. Therefore, background checks carried out using unofficial information sources, such as the internet and other media, are governed by the same regulations as background checks based on more official sources (e.g., carried out by public authorities). Hence, the requirements set out in the response to question 2 above apply. In particular, the necessity and accuracy requirements should be observed.

Union membership and political views

As a starting point, both union membership and political views are considered sensitive data which is subject to special provisions. In general, collecting and processing such data is prohibited. However, certain exceptions apply. For instance, an employer may be allowed to process information on union membership if this is necessary, for example, in order to determine the employee's salary or benefits. General employment legislation, especially the Non-Discrimination Act (1325/2014), must be observed when collecting and processing such sensitive data.

Drug and alcohol testing

In limited situations, an employer has the right to require an applicant to provide a drug test certificate. An employer can only request such a certificate from the applicant(s) chosen for hire and if carrying out the work under the influence of drugs or while addicted to drugs could significantly affect the safety or quality of the work. Hence, drug screening is generally limited to certain types of jobs. The employer must, in connection with the job application procedure and prior to signing the employment contract, notify the applicant that the nature of the job is such that the employer intends to require a drug test. There are no express provisions on alcohol testing.

Fingerprinting and handwriting

In theory, biometric identifiers such as these may be collected from applicants if the general data processing requirements are met. However, such background checks are quite rare.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The use of the information must be in line with both general and specific labor law provisions and other applicable provisions. For example, under the Finnish Criminal Act, work discrimination is a crime. Therefore, discrimination based on information collected during background checks is strictly prohibited.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

In addition to the background checks described above, Finnish data protection legislation includes provisions on aptitude tests. Aptitude tests can be used in order to evaluate an applicant's suitability for a certain position. Such tests are subject to limitations set out in the relevant provisions.



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9. Are there restrictions or limitations on the scope of these checks?

Please see question 2 on general requirements for all background checks.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

In general, the same conditions referred to in question 2 must be met regardless of the timing of background checks. However, some limitations apply. For example, as described in question 6, financial checks and drug testing can only be carried out on applicants that are chosen for hire (i.e., after the decision to make an offer of employment).

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

In general, the same conditions referred to in question 2 must be met regardless of whether background checks are carried out on applicants or existing employees. For example, a change in an employee's duties may entitle the employer to carry out new background checks. Financial checks, for instance, can be carried out if an employee's duties change during the employment relationship and the new duties meet the applicable prerequisites.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

An employer must confirm that a foreign employee has an employee residence permit or that he or she does not need such a permit.

In order to apply for such a permit, the employer must already have made the decision to employ the applicant, i.e., the applicant needs to have a job waiting. Employees coming from outside the European Union or European Economic Area must usually have a permit. Certain limitations apply to employee residence permits.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

Generally, the type or duration of employment relationship (i.e., full-time/part-time/permanent/fixed term) does not affect background checks. However, certain limitations may apply to individual situations (for example, depending on the nature of the role).

SECTORS

14. Do background checks differ in different sectors?

Yes. As described in response to question 2, the use and types of background checks vary since the nature of the work in many respects defines what can be deemed lawful in light of applicable Finnish legislation.



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Therefore, the sectors significantly affect what is deemed necessary in light of the employment relationship. Please see question 6 for detailed information on the different types of checks and, for example, the special requirements for carrying out financial checks.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes. However, the outsourcing of the processing of personal data is subject to prerequisites that must be met before the processing (including carrying out background checks) commences. For example, in order to be lawful, the Finnish Data Protection Authority must be notified that the processing of personal data is to be outsourced to a third party. In addition, outsourcing is subject to the cooperative procedure referred to in question 6.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No, outsourcing does not generally have an impact on the checks that can be carried out or the obligations related to them. Please see question 2 for general requirements and question 6 for specific information on carrying out background checks.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

In general, Finnish law sets exceptionally strict specific rules on employee data privacy and personal data processing in general. These rules limit how information gathered for one purpose can later be used for another purpose. As a result, information collected for, and during, background checks is also subject to these strict rules, in addition to the rules described in question 2.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

The Personal Data Act, Act on Privacy in Working Life and Act on Background Checks are the most relevant individual acts regulating background checks. However, labor law must also always be considered. Additionally, other legislation may apply to an individual case.

Please see questions 2 and 6 for more detailed information on the legislation regarding background checks.

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

The unlawful processing of personal data may result in a fine or imprisonment of up to one year. The amount of the fine depends on, among other matters, the income of the person found guilty. Therefore, no maximum amounts are expressly set out. Liability for damages may also apply. There are currently no administrative sanctions.

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France



Contributed by: **Mayer Brown**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, employers in France regularly carry out background checks on applicants. Backgrounds checks are subject to the following limitations:

- The purpose of such checks must be to assess the applicant's ability to fulfill the job. Any information sought must have a direct link with the job or skills required.
- Employees' representatives should be informed about the recruitment and assessment methods.
- Applicants should be informed in advance that a check will be performed, how it will be performed and that they can access the data and request any rectification or deletions.



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France

- Employers must comply with French data protection rules and prior filing of the data processing with the French Data Protection Authority ("CNIL").

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in France relate to education, previous employment and work permits.

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records*
- Criminal records*
- Credit/financial checks*
- Health checks/medical screening*
- Social media/internet search*
- Fingerprinting*
- Handwriting*
- Union membership*
- Political views*
- Drug and alcohol testing*

3. Which of the above background checks are employers permitted to carry out on applicants?

Education and past employment records and social media/internet searches (to the extent that they relate to professional skill assessments).

4. Which of the above background checks are employers not permitted to carry out on applicants?

Credit/financial checks, fingerprinting, union membership and political views.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Criminal records, health checks/medical screening, handwriting and drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to undertaking the background checks mentioned in question 5, the employer should obtain the applicant's prior consent. Moreover, the checks undertaken must be appropriate and proportionate to the relevant role and must not discriminate against the applicant or discourage people from applying.

An applicant should be permitted to make observations on checks made by the employer when results of checks do not correspond to the information provided by the applicant.



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France

There are also specific conditions to satisfy in relation to particular checks:

Criminal records

Such checks should only be requested from applicants for specific jobs (e.g., in banks, for employees involved in fund handling, security jobs, jobs involving contact with children, etc.). In these circumstances, a copy of an extract of the criminal record (called the “extract number 3”) may be required from the applicant. Note that the employer cannot request a copy of criminal records directly from public authorities.

Health checks/medical screening

Employers cannot ask about the health of an applicant before offering him or her a job. A health check is only permitted if there is an occupational requirement to justify one. However, during the mandatory medical examination (conducted for all new employees upon commencement of a job), the occupational doctor may collect medical information to assess whether the applicant can carry out the job.

Handwriting

Although employers may use scientifically tested methods to assess the applicant’s skills for the job, it is not common practice in France to assess an applicant’s handwriting. Tests are limited to the assessment of the applicant’s capacity to hold the position and should not assess his or her personality. Any method which is not scientifically tested cannot be used. The applicant must be informed that such tests will be carried out.

Drug and alcohol testing

These tests can only be carried out in specific circumstances, for instance, for jobs in which using drugs or alcohol could give rise to health and safety considerations (for example, where an employee drives or operates machinery). The European Court of Human Rights has ruled that an employer can use drug and alcohol testing, provided that these tests do not constitute an excessive infringement upon an employee’s private life and that it is justified by imperative reasons of security (ECHR, 7 November 2002 No. 58341/00).

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information arising from background checks must only be used to assess the applicant’s professional ability and must be directly and necessarily linked to the work to be performed (and not to his or her private life). Discrimination is prohibited.

These cumulative requirements apply to any methodology used during the recruitment process (for example, tests, questionnaires, software, etc.) but also to the individual interviews.

Collection of data relating to private life is in principle prohibited. This includes an applicant’s previous addresses, national ID number, military situation, marital status, housing conditions and credit situation. Such data can only be collected if this is duly justified by the specific nature of the job concerned.



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It is also prohibited to collect sensitive data. Sensitive data refers to ethnic origin, sexual life, political and philosophical opinions, beliefs, religion, health and union membership.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

It is standard practice to ask an applicant whether he or she is bound by a non-compete obligation under a current or past employment contract.

9. Are there restrictions or limitations on the scope of these checks?

No.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No. However, once the applicant is hired the employer may:

- request information about the employee's family (e.g., number of children) in order to grant company benefits such as travel benefits, etc.; and
- collect fingerprints for the control of access to the office. This is limited to specific security requirements and subject to the express authorization of the Data Protection Authority.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks can be carried out during employment by an employer, provided that they comply with the conditions outlined above.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employers who intend to hire a foreign applicant must, during the hiring process, verify with the relevant government authorities the validity of the entitlement of the applicant to work in France.



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When the foreign applicant is registered with the French Employment Agency (“Pôle emploi”) as a jobseeker, the employer is exempted from this requirement, since the verification will have already been undertaken by the French Employment Agency during the registration process.

During the hiring process, the employer must also verify the employee's nationality, since the employer has an obligation to declare any hiring to the French Social Security Authorities and is responsible for several formalities regarding the hiring, such as recording the hiring in the staff register, organizing the mandatory medical examination mentioned above and registering the new employee in the mandatory supplementary pension schemes.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No. The only difference relates to part-time employees and the duty that an employer has to check that a part-time employee does not have another salaried position which leads him or her to work more than the maximum daily and weekly limits (Article L.8261-2 of the French Labour Code).

SECTORS

14. Do background checks differ in different sectors?

Yes. The background checks that are carried out depend on the company's activity. For example, applicants may be required to disclose their criminal record (“extract number 3”) when applying for a job in the financial services sector (involving the handling of money) or for a job involving working with children.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

If background checks are outsourced to a third party, the same checks may be carried out, subject to the same limitations.

In addition, the employer must inform the employees' representatives of the hiring of a third party and also of the methods used by the third party. The same information must be provided to the applicants.

In relation to the processing of personal data, the employer is likely to be considered to be the data controller and the third party to be the data processor. Consequently, all filings with the CNIL should be made by the employer and not the third party. The employer should ensure that appropriate security measures are taken to protect personal data and that the third party complies with the requirements outlined above. Where personal information is processed outside the European Economic Area (EEA), the employer



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should ensure that personal data is transferred to countries providing an adequate level of protection, or if a US entity is concerned, it has adhered to the Safe Harbor principles (although please note the effectiveness of Safe Harbor is now doubtful following a recent ECJ decision) or the entity has signed EU Model Contract Clauses or is subject to Binding Corporate Rules. The employer should also declare such transfer outside the EEA to the CNIL, and inform applicants.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Yes. An employer should:

- (a) inform the employees' representatives of the recruitment and assessment methods;
- (b) inform the CNIL (by making a "standard" or "simplified declaration") of the data processing methods being used;
- (c) take any necessary measures to ensure the security and confidentiality of the information processed;
- (d) expressly inform the applicant of the recruitment and assessment methods used;
- (e) ensure that individuals are duly informed of and are allowed to exercise their right to access all the information concerning them, correct, complete, update or clarify this information, ask for the removal of data that is inaccurate, outdated or irrelevant and revoke the authorization given to process information; and
- (f) not keep data for longer than two years after the last contact between the applicant and the employer.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Data Protection Act No. 78-17 of 6 January 1978 amended by Law No. 2004-801 of 6 August 2004
- CNIL (French Data Protection Authority) recommendation No. 02-017 of 21 March 2002 on data collecting and processing in the context of recruitment processes
- Article 8 of the European Convention on Human Rights
- Article 9 of the French Civil Code on the right to private life
- Article L.1121-1 of the French Labour Code on the proportionate character of limitations to individual rights and individual and collective liberties
- Articles L.1132-1 to L.1132-4 of the French Labour Code on non-discrimination principles



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- Articles L.1142-1 to L.1142-6 of the French Labour Code on equal treatment
- Articles L.1221-6 to L.1221-9 of the French Labour Code on recruitment processes
- Articles 225-2 (sanctions for discrimination) and 226-16 (sanctions for breach of Data Protection Act) of the French Criminal Code

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted unlawfully, damages or an injunctive order to delete information may be ordered by the judge.

Discrimination is punishable by a maximum of three years' imprisonment and a fine of up to EUR45,000.

Where an employer has failed to comply with personal data protection rules, the CNIL may either issue a warning, order a fine of up to EUR150,000 (EUR300,000 in case of repeated breach), order publication of the decision, issue an injunctive order or withdraw a prior authorization.

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BACKGROUND CHECKS
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Germany



Contributed by: Mayer Brown LLP

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Employers carry out background checks in Germany. Whether checks are standard or not will depend upon the type of background check and how it is carried out (please see question 2).

2. What types of background checks do employers typically carry out on applicants?

Requests regarding education and past employment constitute the most common background checks. Depending upon the nature of the role, criminal records, financial and medical checks are sometimes relevant. Online pre-employment screenings have gained increasing importance, but still remain controversial.



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Germany

BACKGROUND CHECKS ON APPLICANTS

- *Education and past employment records*
- *Criminal records*
- *Credit/financial checks*
- *Health checks/medical screening*
- *Social media/internet search*
- *Fingerprinting*
- *Handwriting*
- *Union membership*
- *Political views*
- *Drug and alcohol testing*

3. Which of the above background checks are employers permitted to carry out on applicants?

The permissibility of background checks is very restricted (please see questions 5 and 6 below).

4. Which of the above background checks are employers not permitted to carry out on applicants?

Questions/checks regarding union membership and political views are not permitted.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

The permissibility of background checks is very restricted and various conditions apply (please see question 6 below).

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In general, the ability of employers to carry out background checks which disclose an applicant's personal data is very restricted. In particular, the applicant's personal data may only be requested/obtained if it is necessary for the decision to appoint an applicant (i.e., if the employer has a reasonable, justified and equitable interest). Provided that this is the case, and to the extent that the information is provided directly by the applicant (e.g., during an interview), the following questions/requests for documents will usually be permitted.

If, however, certain questions are not permitted (as outlined further below), the applicant is entitled to answer such questions incorrectly, with the consequence that the employment relationship (if the applicant is subsequently employed) cannot be terminated for such reason. However, employers may under certain circumstances have a right to rescission for fraudulent misrepresentation.

Education and past employment records

Questions regarding qualifications, occupational experience and type/duration of prior jobs are permitted, provided that the job position requires a particular qualification.

Criminal records

Requests for criminal records and information regarding investigation proceedings are only permitted to the extent that these could be relevant for the role.



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Credit/financial checks

Questions regarding the applicant's financial situation are only permitted if the job requires a particular position of trust (e.g., the applicant would need to handle significant amounts of money/assets or there is a potential risk of corruption).

Health checks /medical screening

- Questions regarding severe disability (where the impairment of participation in social life has been determined to have a degree of disability of at least 50 on the decimal scale under the German Social Code IX) are not permitted, unless the absence of disability constitutes a substantial and decisive occupational requirement.
- Questions regarding illness are permitted to the extent that such illness could permanently or periodically affect the applicant's suitability for the job and to the extent they are not discriminatory on the grounds of disability.
- Questions regarding infectious diseases are permitted to the extent that colleagues or customers could be endangered (for example, a question regarding HIV for employees in the healthcare profession).
- Health checks and medical screenings require an applicant's voluntary cooperation and are permitted to the extent that checks/screenings only provide information about the applicant's current medical fitness for the job. Employers will not be notified of individual medical findings.

Social media/internet searches

To the extent that data is publicly accessible, i.e., no registration or user profile is necessary in order to view/collect data (e.g., Google, Yahoo, etc.), research should be permitted, unless it is obvious to the employer that the collection of such data would result in a breach of the applicant's personal/privacy rights. Such a breach would be assumed if data is gained from purely social-oriented networks.

Fingerprinting

Employers are not permitted to collect applicants' fingerprints (as it would not appear to constitute a substantial and decisive job requirement).

Handwriting

Obtaining an expert opinion on graphology requires an applicant's prior explicit consent and is not a common background check in Germany.

Union membership and political views

Questions/checks regarding union membership and political views are not permitted, i.e., the applicant has the right to answer incorrectly.

Drug and alcohol testing

Drug and alcohol testing is permitted subject to the applicant's voluntary cooperation and only to the extent that the absence of addiction constitutes a substantial and decisive job requirement.



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In addition to the above, and if the collected personal data forms part of a personnel questionnaire or if respective interview questions become standardized, employers may require the consent of a works council.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Collected data may only be used to the extent necessary for the decision to appoint an applicant. The use of an applicant's personal data is only permitted up until the employer decides to make the job offer. As of an applicant's rejection, access to data has to be blocked until it is clear that no legal action will be taken; thereafter data must be destroyed, deleted or returned to the applicant.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Some questions/checks that are not permitted during the application process may be permitted during employment (e.g., questions regarding severe disability are permitted prior to dismissals if the employee has been employed for more than six months).

However, in the absence of clear legal provisions, opinions as to which checks are allowed and, if so, under which circumstances are divergent. Such checks should therefore be considered on a case-by-case basis. In addition, possible consultation/co-determination rights of the works council should be observed.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

In summary, citizens of the European Union (excluding Croatia), European Economic Area or Switzerland are entitled to freedom of movement and have unrestricted access to the German labor market. Citizens of other countries need a residence title, which permits them to work. In order to obtain such residence title a number of general and detailed preconditions have to be met. These may include, among others, providing a passport, demonstrating a secure livelihood during the applicant's/employee's intended stay, and



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proving that there are no valid grounds for deportation. The purpose of an employee's intended stay and training, as well as specific qualifications, determine the appropriate residence title.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Background checks differ in different sectors in very limited cases, for example, financial checks may apply in the banking industry (please see question 6).

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes, subject to the employee's explicit prior consent, but only to the extent permitted under German employment law (please see question 6).

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Please see question 7.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

In conjunction with the relevant case law, the following legislation applies:

- German basic law (*Grundgesetz*)
- German Act on Equal Treatment (AGG)
- German Act on Data Protection (BDSG)



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Germany

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

The applicant is entitled to answer prohibited questions incorrectly and – if employed – must not be dismissed on the basis of such an incorrect answer. In cases where background checks are discriminatory, employers may face claims for damages. Breaches of data protection rules can lead to a fine or, under certain circumstances, constitute a criminal offense, which can be punished by imprisonment or penalties.

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BACKGROUND CHECKS
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Greece



Contributed by: M. & P. Bernitsas Law Offices

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Employers in Greece frequently carry out background checks in relation to applicants. However, limitations apply to the scope of background checks. In particular, the processing of personal data concerning applicants is permissible only where it is necessary to achieve the objective in question. The amount of information about a potential employee that an employer may collect varies depending on the nature of the position. Where information will be sought from third parties, applicants should be informed that this will take place and their consent should also be obtained.

2. What types of background checks do employers typically carry out on applicants?

The most typical background checks in Greece are education and past employment checks.



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Greece

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Whether a background check is permitted will depend on the nature of the role and, in most circumstances, whether certain conditions are satisfied (please see question 6).

For the selection of applicants, the collection of personal data should be restricted to data which is absolutely necessary in order to evaluate whether candidates are capable/suitable for a particular position. For instance, criminal records may only be collected and processed where the nature of the information is directly related to the particular position, such as where applicants would be involved in handling money or teaching children. Health data may similarly only be directly collected from the candidate.

4. Which of the above background checks are employers not permitted to carry out on applicants?

There is no explicit legal prohibition in relation to any of the above background checks, but this is subject to questions 5 and 6.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Education and past employment records (where not provided by the employee), criminal records checks, credit/financial checks, health checks/medical screening, fingerprinting, handwriting, union membership, political views, drug and alcohol testing as well as social media/internet searches.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to all of the background checks referred to in response to question 5, the employer should inform and obtain explicit consent from the applicant in advance, in accordance with data protection requirements. In particular, the applicant should be informed of the reason for the collection and processing, sources of information, the nature of the data as well as the consequences, in the event that consent is not provided.

The following points are also noted in relation to particular checks:

Education and past employment records

The requirement to inform and obtain consent would apply where information relating to education is to be requested from third parties rather than from the applicant in person.



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Criminal records

This information may only be directly provided by the applicant while the request for such information would need to be absolutely necessary for the particular position (for example, where the role involves handling money or teaching children).

Credit/financial checks

These are permissible if it is necessary to ensure that a candidate is creditworthy and are directly requested by the employee or by the employer where specifically authorised by the candidate employee to perform the check (through Tiresias Bank Information Systems S.A.).

Health checks/medical screening

Health information may only be collected directly from the applicant where this is absolutely necessary, for instance, to evaluate the suitability of an applicant for a particular position (e.g., health checks for employees working in nurseries, restaurants, hotels or for drivers and pilots) or to comply with requirements related to health and safety in the workplace.

Fingerprinting

There are a number of decisions of the Greek Data Protection Authority on biometrics which justify fingerprinting only where necessary for particular safety requirements in the workplace and where there is no other means of achieving this objective. Fingerprinting should therefore be treated with caution as it may not be considered to be necessary and proportionate. This type of background check would, in most circumstances, be regarded as unjustifiable. The Data Protection Authority would also need to be notified of the processing of this data.

Handwriting

Handwriting analysis as part of a background check is not covered by Greek legislation but would most likely be considered as contrary to the principle of proportionality. This would not be the case where handwriting is part of the employee's work and a sample is provided in order to determine whether the employee has the required handwriting skills.

Union membership and political views

Under Greek data protection legislation, information relating to union membership and political views constitutes sensitive personal data and would normally require a license in order to be processed. Employers should avoid collecting this type of information which in any event should not influence their decision as to whether an offer of employment is made.

Drug and alcohol testing

Similar requirements would apply as set out above for health checks/medical screening, notably that the test results should be provided by the applicant directly and justified by the nature of the particular position.

Social media/internet searches

Employers must comply with general data protection principles as to whether or not the information obtained from social media sites is accurate and whether it is proportionate to use it for recruitment purposes. Job applicants should be provided with the opportunity to comment on the accuracy of any information obtained from social media/internet searches.



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7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information arising from a background check should be necessary for the particular position and should not be used in a manner that could be considered to be discriminatory.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Another background check that would typically be conducted in Greece would be obtaining confirmation that the employee has fulfilled or been released from military service obligations.

9. Are there restrictions or limitations on the scope of these checks?

This military certificate should be limited to confirming that the employee has fulfilled or is released from military service obligations. It should not include other personal information related to the psychological or physical health of an individual on completion of military service.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No, the relevant decision of the Data Protection Authority treats applicants and employees in a similar manner.

Health checks/medical screening can be required before a job offer is made, where it is justified by the nature of the position to be held by the applicant.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

The law does not make any distinction in Greece but, for both applicants and employees, background checks should be appropriate, necessary, proportionate and justified by reference to the relevant position and the employer's obligation to comply with applicable regulations (such as health and safety in the workplace).

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Citizens of the European Union (EU) are free to work in Greece. The employment of non-EU citizens is restricted by the requirement for them to have a residence permit, which should incorporate the right to work in Greece. Employers should therefore check that the applicant can lawfully reside and work in Greece.



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Greece

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

The background checks that are conducted vary from sector to sector and also depend on the position involved. For example, certain categories of employees should obtain/possess a relevant qualification from the competent regulator, such as the Bank of Greece or Hellenic Capital Market Commission, as applicable.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Background checks could be outsourced to a third party vendor pursuant to a written agreement which should provide that the processor is acting under the employer's instructions. The Greek Data Protection Authority should be notified of such arrangements. Where the processor is situated outside the EU, there should be a procedure in place to legitimize the transfer of personal data, such as EU Model Contract Clauses or Safe Harbor Certificate where transfers are to the United States (although please note that the effectiveness of Safe Harbor is now doubtful following a recent ECJ decision).

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) collect data fairly and lawfully;
- (b) only process data for the purposes that have been notified;
- (c) ensure that data is accurate and kept up to date;
- (d) keep data only for as long as is required in relation to the purposes for which it is collected and processed;
- (e) select, for the purposes of processing, individuals with relevant professional qualifications that provide adequate guarantees in respect of technical knowledge and personal integrity for maintaining confidentiality;
- (f) take appropriate organizational and technical measures for data security and protection against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access and against all other unlawful forms of processing;



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- (g) ensure that the assignment is in writing, if processing takes place on behalf of the controller by a person not dependent upon the controller;
- (h) comply with the right to be informed, right of access and right to object;
- (i) comply with its obligations towards the Data Protection Authority (notification, licensing requirements); and
- (j) be informed of relevant Decisions, Instructions and Recommendations issued by the Data Protection Authority.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Law 2472/1997 on the protection of individuals with regard to the processing of personal data, as amended and in force. This legislation implements Directive 95/46/EC into Greek law
- Directive 115/2001 of the Hellenic Data Protection Authority relating to the protection of personal data of employees
- Article 9A of the Greek Constitution as well as Article 8 of the European Convention on Human Rights
- Law 3304/2005 on the implementation of the principle of equal treatment irrespective of race or national origin, religion or other beliefs, disability, age or sexual orientation. The legislation transposes Directive 2000/78/EC into Greek law
- Hellenic Data Protection Authority Decisions 245/9, 9/2003, 50/2007 and 56/2009 concerning biometrics as well as Decisions 1620/2000 and 49/2006 in relation to military service certificates

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted unlawfully or without due regard to applicable restrictions, an action for damages can be brought by the individual concerned against the employer or potential employer.

In addition, the Data Protection Authority may impose an administrative sanction on the employer consisting of a warning, imposition of a fine of up to EUR150,000 while, for more serious breaches, the employer's license to operate may be temporarily or permanently revoked.

Criminal offenses may also be committed in relation to background checks, for example, failure to notify the Data Protection Authority of the processing of data (for instance, where processing is carried out by third parties or where data is transferred by the employer outside the EU/EEA) or failure to obtain a license to process sensitive data, where required.

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EMEA
BACKGROUND CHECKS
TRAFFIC LIGHTS



Hungary



Contributed by: **Bán, S. Szabó & Partners**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, employers in Hungary regularly carry out background checks on applicants. However, limitations do apply to the scope of background checks. Many checks are subject to the consent of the applicant and/or other conditions. Employers therefore often need to assess whether background checks are appropriate and proportionate in the circumstances and consider the implications of data protection and discrimination legislation.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Hungary are education and past employment checks. In relation to foreign nationals, employers will also require confirmation that the applicant has a valid residence and work permit to work in Hungary.



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Hungary

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above background checks are permitted in Hungary, subject to the applicant's consent and other conditions (please see question 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above checks are expressly prohibited, but please see questions 5 and 6.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Criminal record checks, credit/financial checks, health checks/medical screening, social media/internet search, fingerprinting, handwriting, union membership, political views and drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

As a general rule, the Labor Code provides that an employer and applicant/employee must notify each other about all facts, data, circumstances and any changes that are essential to establish employment and to exercise their respective employment rights and obligations. The applicant's/employee's privacy rights may be restricted only if this is required for the purpose of employment and it is proportionate to such purpose. The applicant or employee must be informed about the method, conditions and expected duration of such restriction. The applicant or employee may not waive his or her privacy rights. An employer may only request from the applicant or employee data and declarations which do not violate the applicant's or employee's privacy rights and which are essential for the establishment, performance and termination of the employment. Furthermore, an aptitude test may only be taken if it is provided for by legal regulation. Finally, the employer may carry out checks on an applicant or employee only in relation to his or her behavior in connection with his or her employment. The applicant's or employee's private life may not be checked.

Based on the above rules, any background check will be lawful if it does not violate the privacy of the applicant and it is essential to the decision to recruit.



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There are also specific points to note in relation to particular checks:

Criminal records

Criminal checks are not usually required for all applicants and should only be requested where the employer's legitimate interests require such a check to be carried out. The nature of the position or the applicable sector-specific regulations are decisive as to whether requesting criminal records from an applicant is lawful. For example, a criminal record check could be lawful in relation to positions of trust (e.g., an executive employee) or where the law requires the applicant to have a clean criminal record (e.g., an executive of a financial institution).

Credit/financial checks

Credit and financial checks are unusual in Hungary, so any check in this regard may only be possible if there is a justifiable reason for it and this information is required in relation to the decision to hire.

Health checks/medical screening

It is generally unlawful to ask about the health of a job applicant before making a job offer. Health checks are only permitted if there is an occupational requirement to justify one. For some positions, a health check by a doctor is a legal requirement before starting work.

Social media/internet searches

Collecting any information from social media is lawful and permitted only if such information is necessary for the role. Employers should therefore have proper and justifiable cause to collect such information.

Fingerprinting

Taking fingerprints is very uncommon in Hungary. Given employees' privacy rights, the collection of fingerprints could only be lawful if the employer has a legitimate and reasonable interest in obtaining this data (e.g., security systems require fingerprints) and the employee consents. Special consideration must be given to the justification as to why fingerprinting is necessary and whether it is proportionate.

Handwriting

This is an unusual background check, so it is legal and permitted only if there is a legitimate reason to obtain this information and it is connected to the employment.

Union membership and political views

Under the Data Protection Act, this type of data qualifies as sensitive data, and therefore collecting and processing such data requires the written consent of the employee. This information is generally not connected to employment, so asking and processing such data could be unlawful and might result in discrimination.



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Drug and alcohol testing

As a general requirement, the employee must be suitable to perform the work and the employer must provide safe work conditions. An employer may therefore lawfully ask an employee to undergo drug and alcohol testing before starting, and during, employment. The employee's consent to such testing is required. If the employee refuses to participate in such testing, the employer may take disciplinary action against the employee.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Employers can only use information arising from background checks in connection with the recruitment process/decision to hire. Collecting and using any other data/information not connected to the employment is unlawful. The information should not be used in a discriminatory way.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Yes. Drug and alcohol testing cannot be carried out before a job offer has been made (unless the individual voluntarily consents to it). However, employers can lawfully require new employees, and existing employees, to undergo drug and alcohol testing (both before employment commences and during employment).

Applicants should only be required to undergo health checks and medical screening after a job offer has been made and health checks are only permitted if there is an occupational requirement to justify one.



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BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment, but will need to be appropriate, necessary, proportionate and justified by reference to the employee's role. By way of example, alcohol tests during employment could be lawful to ensure that the employee is in a suitable condition to work. However, checking the political views of an employee is likely to be unlawful.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employees must certify their identity and their education by providing the originals of their identity cards and education certificates/diplomas. The employer must make copies of these documents and retain them during the employment period and for the period of time required by the applicable social security regulations following termination of employment. If the employee is a foreign citizen, he or she must certify with original documents that he or she has a valid work and residence permit to work in Hungary.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Background checks can be different in various sectors. For example, in the financial sector, more stringent background checks are permitted in relation to executives (for example, criminal record checks, details of previous work and past experience).

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.



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16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Where an employer proposes to use a third party data processor to carry out background checks on its behalf, the employer has to notify employees prior to the data transfer by indicating the name of the third party data processor, and the purpose and duration of the data transfer.

If the third party data processor is located in another country (out of the European Economic Area) the data may be transferred to the data processor only if the employee expressly consents to it, or the general requirements of the data processing are met (i.e., there is a legitimate interest for the data processing), and the adequate level of data protection is fulfilled by the data processor. The Safe Harbor certificate of the third party data processor or entering into EU Model Clauses with the relevant entity could provide an adequate level of protection (although please note that the effectiveness of Safe Harbour is now doubtful following a recent ECJ decision).

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) only process personal information for the purposes collected and as necessary for the establishment of the employment;
- (b) disclose to employees whether the data provision is voluntary or based on legal regulation;
- (c) not retain the personal information for longer than is necessary for the purposes consented to;
- (d) ensure that employees receive appropriate information about the details of the data processing, as well as their rights to get information about the data processing;
- (e) notify employees if the data is being transferred to a third party;
- (f) take appropriate technical and organizational steps to protect the personal data from unauthorized disclosure, damage or destruction;
- (g) produce a code of conduct for all staff processing individuals' personal information; and
- (h) undertake periodic audit reviews to check compliance with data protection measures.



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SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- General employment considerations: Act I of 2012 on the Labor Code
- Data protection considerations: Act CXII of 2011 on the Information Self Determination Right and Freedom of Information
- Financial sector: Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises
- Non-discrimination: Act CXXV of 2013 on Equal Treatment

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If data protection rules are breached, the data protection commissioner may impose a fine on the employer, subject to a maximum of HUF10 million (around EUR33,000), or, in the case of a breach of the non-discrimination rules, the equal treatment authority may impose a fine of up to HUF6 million (around EUR20,000).

Contributed by: Péter Szemán, Bán, S. Szabó & Partners



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BACKGROUND CHECKS
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Iceland



Contributed by: **LOGOS Legal Services**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, background checks are standard practice in Iceland, but they are generally based on information provided by applicants and/or are subject to the applicants' consent or other conditions. The scope and depth of background checks usually vary in relation to the type of employment and the responsibilities of the prospective employee.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Iceland relate to past employment, education, and/or specific qualifications and criminal records checks.



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Iceland

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the background check types listed above are permitted *per se* but are subject to clear consent from the applicant and other limitations/conditions. Please see questions 6 and 7.

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above background checks are expressly prohibited by Icelandic law. However, they are subject to consent and other limitations and/or conditions. Please see questions 6 and 7.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

The following background checks would always be subject to applicants' consent and/or other conditions: criminal records checks, credit/financial checks, health checks, fingerprinting, handwriting, union membership, political views and drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Icelandic law generally does not address background checks but rather the personal information potentially obtained from such checks. As stated above, information on the applicant's background is usually provided by the applicant.

Information obtained from all types of background checks listed in the response to question 5 is likely to constitute "sensitive data" under the Data Protection Act No. 77/2000 and should be handled and processed accordingly. Clear individual consent is therefore necessary for data protection purposes, unless the handling/processing is strictly limited to information already published or made known by the individual.

In relation to all of the above background checks, it is important that all the information an applicant is asked to provide with respect to a job application is appropriate and in line with the job in question and does not discriminate or discourage people from applying for the job. There must be a justifiable reason for each and every check and why an applicant is being asked to provide such information.

Requesting specific sensitive data in relation to a job application can in certain circumstances be justified and/or necessary and in some cases required by law. As an example, the Child Protection Act No. 80/2002 provides that a statement from the Penal Registry, and information as to whether the person concerned has been sentenced for certain violations of the General Penal Code, shall be obtained for all persons applying for a job involving children. Information from the Penal Registry on the criminal history of individuals is generally only given to the individuals themselves, but may be given to third parties if clear signed consent is given by an individual.



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7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Iceland has ratified the European Convention on Human Rights (ECHR). The Human Rights Chapter of the Constitution of the Republic of Iceland, No. 33/1944, was enacted in conformity with the ECHR, and includes provisions on the right to private life, equality before law and the right to enjoy human rights irrespective of sex, religion, opinion, origin, race, color, property, birth or other status.

The Gender Equality Act No. 10/2008 also prohibits employers from discriminating on the basis of sex when hiring (as well as other aspects of an employer/employee relationship).

Employers should therefore take note of the importance of privacy and equality when handling or collecting personal information. Background checks should generally aim to obtain information relevant to the type of job and duties to ensure proportionality and legitimacy. Discrimination on the grounds of the above characteristics should be avoided at all times.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Applicants may be asked to provide proof of qualifications to drive specific motor vehicles, e.g., forklifts, lorries etc., depending on the job type and duties.

It is also standard practice to check the applicant's expert knowledge, as well as to ask for references from former employers/co-workers.

9. Are there restrictions or limitations on the scope of these checks?

No. Information on motor vehicle qualifications and/or other specific qualifications necessary for the relevant job are usually provided by the applicant. Applicants usually disclose in their applications which of their former employers/co-workers may be contacted for references.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Regular and limited checks by the employer on whether current employees still qualify for their positions are likely to be justifiable and in accordance with Icelandic law, as well as the requirement for limited storage of such information, given it is necessary and appropriate.



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The storing and processing of sensitive data on employees arising from background checks performed on a regular basis would have to comply with data protection provisions and the Data Protection Authority may need to be notified. Handling of general personal information on employees as a normal part of employer operations is not subject to a similar duty of notification.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The access of foreign workers into the labor market in Iceland is governed by different rules depending on whether the workers are citizens of the European Economic Area (EEA) or coming from a non-EEA country. Workers that are EEA citizens do not need a work permit but workers from non-EEA countries do require a work permit.

As legislation provides that it is prohibited to employ foreign workers without a work permit, where necessary, the legislation imposes an obligation on an employer to check the status of prospective or current employees. To do so, employers must ask applicants/employees to provide identification with information on citizenship.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Background checks may vary from sector to sector and also in relation to the responsibilities of the job in question.

For example, in the aviation sector, there are certain obligations to check the backgrounds, especially the criminal records, of pilots, cabin crew and other staff with responsibilities in their aviation operations.

As noted previously, background checks must always be appropriate and proportionate to the relevant sector and job in question and should not discriminate in any way or discourage people from applying.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes. Employers must, however, verify that the third party is able to carry out the requisite security measures, conduct internal audits and in other ways ensure compliance with the Data Protection Act.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

If an employer proposes to use a third party to carry out background checks, it is important that the vendor is in a country that provides an adequate level of personal data protection. This is generally the case in countries within the EEA. A vendor in a country outside the EEA should only be used if the country provides an adequate level of protection for the rights of individuals in relation to the processing of personal information as in the EEA.



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If personal data, general or sensitive, is obtained from such checks, and the employer determines the purposes of the handling or processing of personal data, the equipment that is used, the method of the processing and other usage of the data, then the employer is responsible for outsourced checks and handling of data complying with the Data Protection Act.

If a third party is used to carry out background checks, the applicant should be clearly notified of this in advance.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Information obtained from background checks should be processed with a specific aim, and in an appropriate and proportionate manner in relation to achieving that aim. Please see questions 6 and 7.

Electronic processing of personal data must generally be disclosed to the Data Protection Authority in a timely manner and using a form intended for that purpose provided by the Authority. Processing of sensitive data is subject to clear individual consent, unless strictly limited to information already published or made known by the individual. If personal data is obtained from sources other than the prospective employee, the employer has a duty to inform the data subject of the personal data collection.

If certain processing of general or sensitive personal data is likely to present specific risks to the rights and freedoms of data subjects, the Data Protection Authority can require a special processing permit, following an examination and approval of the Authority.

Employers should aim at storing personal information on employees for a limited period of time and only when necessary, since they are obliged to erase personal data when an objective reason for storage ceases to exist.

Regular audits of internal procedures and other methods on handling, storing and erasing existing personal information on employees is therefore recommended to ensure compliance with data protection laws and other legislation outlined in this chapter and listed in question 18.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Data Protection Act No. 77/2000
- Gender Equality Act No. 10/2008
- Foreigner's Right to Work Act No. 97/2002
- Child Protection Act No. 80/2002
- Constitution of the Republic of Iceland No. 33/1944
- Law enacting the European Convention of Human Rights No. 62/1994



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Iceland

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

The Data Protection Authority can order a cessation of handling or processing of personal data. It can additionally impose daily fines in cases of violation of certain provisions, of up to ISK100,000 per day.

Infringements of the provisions of the Data Protection Act and related regulations are punishable by means of fines or a prison term of up to three years. The same punishment applies if instructions by the Data Protection Authority are not observed.

Orders of cessation and the imposition of daily fines are likely to be undertaken by the Data Protection Authority. More severe and punishable violations, possibly resulting in formal fines or a prison sentence, are likely to be reported to the police.

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Israel



Contributed by: **Goldfarb Seligman & Co**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, employers in Israel regularly carry out background checks on applicants which vary mainly according to the employer's needs and the requirements of the job.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Israel are reference checks, education and past employment checks.



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BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Education and past employment record checks are permitted (subject to the General Conditions as defined in question 6). However, most of the other background checks may only be permitted subject to their relevancy to the requirements of the job and additional conditions as further detailed in questions 5 and 6.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Obtaining or requesting information from criminal records, either directly or indirectly, is not permitted (please see question 6).

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All permitted background checks are subject to the General Conditions (as defined in question 6).

The following background checks are subject to additional conditions and restrictions as further explained in question 6: criminal records, credit/financial checks, health checks/medical screening, social media/internet search, fingerprinting, handwriting, union membership, political views and drugs and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

The following conditions must be met in respect of all permitted background checks (“General Conditions”): (i) the applicant’s informed consent must be obtained as a pre-condition; (ii) all checks must be conducted for a legitimate purpose; (iii) the checks must be relevant to the role the applicant is applying for; (iv) the employer must be able to establish that the purpose for conducting the checks could not have been fulfilled without conducting them; and (v) the degree to which the applicant’s privacy is invaded must be proportionate to the legitimate interests of the employer in conducting the checks.

In addition, and subject to the General Conditions, there are also specific points to note in relation to particular checks:

Criminal records

Access to criminal records is restricted to a limited list of public officials authorized under the Criminal Register and Rehabilitation of Offenders Law, 5741-1981. Except for such authorized access, obtaining or requesting information from criminal records, either directly or indirectly, is not permitted. However, subject to compliance with the General Conditions, an employer may request information regarding convictions and outstanding criminal investigations directly from an applicant (which may not include criminal records). Such requests should be limited to a list of specific offenses relevant to the applicant’s future role. The following information



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may not be requested: investigations that were terminated; and deleted convictions or convictions that have become outdated by the statute of limitations.

Credit/financial checks

Credit or financial background checks are highly unusual in Israel. It may be difficult for employers to justify conducting such checks in compliance with the General Conditions. However, in certain sectors, for example in the civil service, under certain circumstances, employees are required by law to provide affidavits regarding their assets, liabilities and income.

Health checks/medical screening

In accordance with Israeli law, employers are prohibited from discriminating against job applicants in the hiring process on the grounds of their health conditions and disabilities. However, health checks/medical screenings are permitted if there is an occupational requirement that can be used to justify them, as long as such checks are appropriate and proportionate to the prospective role of the applicant. Under certain circumstances, the law requires employers to conduct health checks and/or the applicant to disclose his or her health condition (e.g., the employment of young people is contingent upon the existence of a medical examination and medical approval).

It should be emphasized that employers in Israel are not allowed to ask applicants for their military profile and may not make any use of applicants' military profiles during the recruitment process. The foregoing limitations regarding military profiles do not apply to the General Security Service and to the Institute for Intelligence and Special Assignments. "Military profile" is the numerical symbol used by the Israel Defence Forces to indicate a person's medical suitability for service in various units and positions in the Israel Defence Forces.

Social media/internet searches

There is no explicit prohibition under Israeli law on employers conducting social media or internet searches, provided that such searches are limited to publicly available information. However, under certain circumstances, such searches may be deemed not to comply with the General Conditions due to the high risk that, during such searches, an employer will be exposed to irrelevant and disproportionate information. It should be noted that it is explicitly prohibited to spy on individuals in a manner likely to harass them without their consent.

Fingerprinting

There is no explicit prohibition under Israeli law on employers taking fingerprints as part of background checks. Taking fingerprints is controversial in Israel and there is currently an ongoing appeal on this issue over the Regional Labour Court decision (C.D. 49718-11-152 (Tel Aviv) New Histadrut v. Municipality Kalansua (23.2.2014)) regarding the employer's authority to force an employee to use a biometric attendance clock. Taking fingerprints is very uncommon in Israel and it is unlikely that fingerprinting background checks for applicants generally will meet the General Conditions.

Handwriting

There is no explicit prohibition under Israeli law on employers using handwriting checks. However, under certain circumstances, handwriting checks may be deemed an invasion of an applicant's right to privacy. An employer may potentially learn about an applicant's character, physical disabilities and other private matters through handwriting checks. There is ambiguous case law regarding use of handwriting background checks as a tool for screening by employers (see L.C.H. 129-3/97 Plotkin v. Eizenberg Brothers Ltd. PD L (33) 481, 534 (1999)).



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Union membership

There is no explicit prohibition under Israeli law on employers conducting background checks regarding the union membership of applicants. However, this test may be deemed irrelevant to an applicant's prospective role with the employer and therefore may fail to comply with the General Conditions and/or may discriminate against the applicant and would therefore not be permitted.

Political views

Under Israeli law, employers are prohibited from discriminating against applicants on the grounds of their political views.

Drug and alcohol testing

These tests may be carried out but only in limited circumstances; for instance, where working under the influence of drugs or alcohol could give rise to health and safety considerations. However, in certain sectors, employers are required by law to carry out tests relating to the use of drugs and alcohol (e.g., rehabilitation institutions). Drugs and alcohol testing for job applicants is very uncommon in Israel.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used where relevant to the particular role the applicant is applying for and should not be used in a discriminatory manner. Employers are required to act in good faith and in the customary manner when exercising their rights and performing their obligations in respect of the employment relationship, including during the recruiting process.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

It is easier to establish that an applicant's consent was provided willingly if the consent was provided after the employer decided to make an offer of employment. In addition, an applicant would have a stronger discrimination claim in the event that, after an offer is made, it appears that the applicant did not get the job due to the results of the employer's background checks (e.g., health, political opinion, etc.).



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BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Employers may carry out background checks during employment. However, whether they are carried out during the recruitment process or during employment, the background checks have to meet all applicable conditions and restrictions as detailed above.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Foreign nationals are required to present an employer with a valid approval to work in Israel. A valid work permit must be retained for the duration of the individual's employment.

An employer who wishes to employ a young employee is required to hold a valid medical certificate for him or her, together with his or her identity card and additional documents.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

The background checks that are carried out as market practice will vary from sector to sector. Moreover, specific requirements apply to certain sectors. For example, in the industry sector, employers are authorized to request that the applicant provide a medical certificate confirming that the employment does not endanger the applicant or other factory employees.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Yes. The employer is required to enter into an outsourcing agreement with the third party vendor, which is required to comply with the following guidelines of the Israeli Law, Information and Technology Authority ("ILITA"): Guidelines on the Application of the Protection of Privacy Law on Employee Screening Procedures and Institutions (Guideline 2/2012) dated 28 February 2012 ("Screening Guidelines") and Guidelines on the Use of Outsourcing Services of Processing Personal Information (Guideline 2/2011) dated 10 June 2012.



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The foregoing guidelines include, *inter alia*, factors to be taken into consideration when deciding to use outsourcing services, and specific provisions to be included within the data transfer agreement and data security requirements. They also require that the third party vendor's processing rights be limited solely to processing conducted on behalf of the employer and not for other employers or other purposes.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Yes. ILITA's Screening Guidelines set forth restrictions and obligations on how employers process such data.

The Screening Guidelines provide, *inter alia*, that employers are required to use the information only for the purpose for which it was provided by the applicant; use of information for additional purposes requires the employer to obtain the applicant's explicit consent, after the applicant receives the employer's decision in respect of his or her employment; the employer is required to limit access to the information to a list of authorized personnel on a need-to-know basis; and the employer is required to retain the information only for the period of time required to fulfill the purpose for which it was provided (however, in the event that the applicant is accepted for work, the employer may retain background check data that is relevant to the applicant's employment with the company).

The employer's processing is also subject to the general requirements and restrictions of Israeli privacy laws, including limitations with respect to obtaining applicable consents, database registration, limitations on transfers of data abroad, and the access and review rights of data subjects.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

The main relevant laws are as follows:

- Basic Law: Human Dignity and Liberty
- Privacy Protection Law (PPL), 5741-1981
- Criminal Register and Rehabilitation of Offenders Law, 5741-1981
- Equal Opportunities in Employment Law, 5748-1988
- Equal Rights for Persons with Disabilities Law, 5748-1988
- The Genetic Information Law, 5761-2000
- Youth Labour Law, 5713-1953
- Employment Service Law, 5719-1959
- The Screening Guidelines



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BACKGROUND CHECKS
TRAFFIC LIGHTS



Israel

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

From a privacy law perspective, the possible sanctions are as follows: civil and criminal sanctions, including administrative fines, one to five years' imprisonment and statutory damages to be paid to data subjects under civil proceedings without the need for them to prove actual damages. The current draft bill for the 12th Amendment of the PPL provides ILITA with the ability to conduct criminal investigations and to impose monetary sanctions of up to NIS3.2 million. The draft bill has passed its first reading, but has yet to pass the approval of the Knesset Constitution, Law and Justice Committee; thereafter it would also need to pass the second and third readings in order to become binding legislation.

In relation to equality in the workplace, the possible sanctions are civil and criminal sanctions (fines and even imprisonment). As part of the civil sanctions, the court may award monetary compensation, including compensation without proof of damage and compensation for non-pecuniary damage. It should be noted, however, that labor courts have only awarded damages for mental distress in extreme cases. The court may issue a restraining order or a mandatory order if it concludes that compensation alone will not suffice; however, this is rarely issued.

Contributed by: Revital Shprung-Levy & Gal Dayan-Sion, Goldfarb Seligman & Co



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BACKGROUND CHECKS
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Italy



Contributed by: Studio Tributario e Legale Associato Quorum

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

No, employers in Italy do not generally carry out background checks on applicants unless, for example, they are subject to sector-specific regulation.

Many limitations apply to the scope of background checks and many checks are subject to the consent of the applicant and/or other conditions. Employers must also consider the strict limitations provided by data protection legislation and avoid any possible discrimination which is also prohibited during the recruitment process.

2. What types of background checks do employers typically carry out on applicants?

Employers can fully examine statements made by applicants about their educational background. Upon request, schools and universities are entitled to provide an applicant's assessments (possibly in electronic form) to the employer. This generally also applies to inquiries made by former employers.



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Employers may also ask applicants to provide documents relating to previous nationwide convictions and pending proceedings before the court in the potential employer's district.

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Employers are permitted to check education and past employment records. The other background checks could be subject to the applicant's consent or could be permitted if strictly necessary to assess compliance with the role offered and the purpose for which the employee is being hired. Please see questions 5 and 6.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Any background check/question regarding the opinions of applicants and any data treatment or pre-selection based upon personal opinions, political or union affiliation, religious beliefs, sex, sexual orientation, marital status, family or pregnancy, age, disability, race, ethnic origin, color, national origin, parentage, linguistic group, health status and potential litigation against former employers is not permitted, unless any of the above are relevant for the role (for example, a certain number of disabled workers must be hired mandatorily; therefore, while recruiting for the above purpose, an employer can specify that the selection is restricted to disabled people).

Please see questions 5 and 6 in relation to particular checks.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Criminal record checks, health checks/medical screening, fingerprinting, handwriting, drug and alcohol testing and political views.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Criminal records checks

Criminal record checks are not usually required for all applicants and should only be requested where the need to protect the employer's business, customers or clients makes it appropriate, or where they are prescribed by legislation.



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Credit/financial checks

Credit/financial checks should be avoided unless required by the role.

Health checks/medical screening

It is generally unlawful to ask about the health of a job applicant before making a job offer. Health checks are only permitted if there is an occupational requirement to justify it.

Social media/internet searches

Any media searches undertaken should be necessary, proportionate and transparent. If there is no justifiable reason for conducting media searches, they should not be carried out.

Fingerprinting

There is no law preventing the collection of fingerprints. However, great care must be taken by employers to ensure that they do not risk breaching the data protection regime in Italy. Fingerprinting has recently been used in some sectors in Italy (e.g., the banking sector) for biometric purposes. Special consideration must be given to the justification as to why fingerprinting is necessary and whether it is proportionate. Taking fingerprints is very uncommon in Italy and proceeding with this could involve preliminary notification to the Italian Data Protection Authority.

Union membership and political views

Employers should be extremely cautious about collecting this type of data from applicants. It should not be used to influence whether an offer is made as this could potentially be discriminatory. It may be possible to request information about political views if the employer is a political entity and political views are directly relevant to the role.

Drug and alcohol testing

Drug and alcohol tests can be carried out, but only in limited circumstances; for instance, where working under the influence of drugs or alcohol could give rise to health and safety considerations (for example, where staff drive or operate machinery) or seriously damage the employer's business. The applicant would need to consent to the test. This test should only be carried out during employment if justified, necessary and proportionate and with consent unless otherwise prescribed by legislation (for example, in some sectors, the employee's consent is not needed).

Handwriting

Handwriting constitutes personal data and therefore employers must take care to ensure they comply with the data protection regime in Italy if undertaking handwriting checks.



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7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used where relevant to the particular role and should not be used in a discriminatory way.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Yes, as stated in question 6, health checks cannot be conducted before an offer of employment has been made.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

No.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The employer must request, and the individual must provide, certain original documents to establish their eligibility to undertake the work on offer. The documents that are required depend on whether the person is subject to immigration control. The employer must check the validity of the original documents, check that the identity of the individual matches the documents and ensure that the individual has the right to work in Italy. Usually, a copy of these documents must be retained for the duration of the individual's employment and for a further ten years after employment has ceased. For certain categories of employees (usually foreign nationals), further checks will need to be carried out periodically depending on the role and the legislation.



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FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Background checks may vary from sector to sector, depending on the relevant legislation.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes, but any background check must comply with the Italian Data Protection Code and with the relevant legislation. The candidate must be provided with oral or written information under the Italian Data Protection Code, describing who will process his or her personal data and the purpose of the processing.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

The notice to the applicant should clearly indicate that the employer will use a third party to carry out this processing on its behalf. If the third party vendor is outside the European Economic Area (EEA), processing of personal information should only be undertaken in countries or territories with adequate levels of protection for the rights of individuals in relation to the processing of personal information or where the data exporter is satisfied that appropriate controls are in place or when allowed by the law (e.g., data protection law prescribed in Articles 42, 43, 44 and 45 of Legislative Decree No. 196/2003, which cover data transfers authorized outside the EU).

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer must:

- (a) only process personal information for the purposes collected and as necessary for the pre-employment screening, treating all personal information as confidential information and ensuring appropriate restrictions exist within the business to ensure only relevant departments/individuals can assess the data;
- (b) ensure individuals are aware of and can exercise their right to receive a copy of the personal information held about them, rectify or update the information, request deletion of the data where it is inaccurate, outdated or irrelevant and opt-out/revoke authorization to the further processing of their information;



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- (c) specify who will process the personal data, indicating which authorized categories of data could be lawfully processed;
- (d) not retain the personal information for longer than is necessary for the purposes allowed;
- (e) take appropriate technical and organizational steps to protect personal data from unauthorized disclosure, damage or destruction;
- (f) produce a code of conduct for all staff processing individuals' personal information; and
- (g) undertake periodic audit reviews to check compliance with data protection measures and provide periodical training.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Data Protection Act (Legislative Decree No. 196/2003)
- Legislative Decree No. 276/2003
- The European Convention on Human Rights

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted unlawfully, claims for damages or distress could be issued. The Data Protection Authority has the power to issue financial and administrative penalties and fines up to EUR300,000 (which could be increased by up to four times this amount if they prove ineffective on account of the offender's economic status) or to issue an enforcement notice or undertaking. Criminal offenses may be committed in relation to background checks if there are specific violations of criminal law.

Contributed by: Francesco D'Amora, Studio Tributario e Legale Associato Quorum



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BACKGROUND CHECKS
TRAFFIC LIGHTS



Netherlands



Contributed by: Loyens & Loeff

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, employers in the Netherlands generally carry out background checks on applicants. However, background checks on applicants and employees are restricted by the Data Protection Act (DPA). Generally, background checks cannot be based on an applicant's/employee's consent, and are usually only permitted if (i) the employer has a legitimate interest in carrying out such checks; (ii) the checks are necessary and proportionate; and (iii) the employer informs the applicant/employee that it intends to perform a background check.

In addition, an employer must consider discrimination legislation and the Medical Examinations Act. According to the Dutch NVP Recruitment Code (drafted by professional associations), employers may only ask applicants for details which are needed to assess their suitability for the position. This code is, however, merely advisory and is not legally binding.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in the Netherlands are education and past employment checks, social media/internet searches, criminal record checks and confirmation that employees are permitted to work in the Netherlands.



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BACKGROUND CHECKS
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Netherlands

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Most of the above checks are only permitted if certain conditions of the DPA are met (please see question 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

Political views

Employers should, in principle, not ask applicants or employees questions which may lead to discrimination on the grounds of one of protected characteristics under the Equal Treatment Act (e.g., political views, sexual orientation, religion, etc.). Moreover, the processing of such data in the context of a background check carried out by an employer is not likely to be permitted under the DPA (please see question 6).

Fingerprinting, handwriting, union membership

Please see question 6.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Education and past employment records, criminal records checks, credit/financial checks, social media/internet search, health checks/medical screening and drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Background checks on applicants or employees qualify as the processing of personal data and must comply with the DPA. Pursuant to the DPA, an employer may only process personal data if it has a statutory ground for justification. Grounds which are relevant for carrying out background checks are as follows:

- (a) The processing of personal data is necessary for the purposes of the legitimate interests pursued by the employer and the employer's interests outweigh the applicant's/employee's right to privacy. Where the employer can demonstrate it has a legitimate interest, which outweighs the applicant's/employee's right to privacy, it may process the personal data without the employee's consent. Generally, background checks are only permitted where certain risks exist within the various positions within the company and these risks cannot be prevented by other (less intrusive) means. The applicant/employee in principle must be adequately informed by the employer about the fact that its data is being processed and for what purpose. This information should in principle



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be communicated to the applicant/employee prior to the processing of personal information. There are some exemptions to the obligation to inform the applicant. However, not informing the applicant may trigger the obligation to request the Dutch Data Protection Authority to undertake a prior investigation with respect to the legitimacy of the processing prior to the background checks.

- (b) The applicant has unambiguously given his or her consent to processing personal data. However, in the Netherlands, an applicant's or employee's consent is generally not considered a valid ground for carrying out background checks as it is not considered freely given, in light of the unequal balance of power between employers and applicants/employees. Therefore, background checks must usually be based on the legitimate interest of the employer.

There are also specific points to note in relation to particular checks:

Education

Education checks are permitted provided that the employer can demonstrate that it has a legitimate interest in performing such checks.

Past employment records, credit/financial checks, social media/internet searches

Such checks are not permitted unless required by the nature of the job (e.g., certain financial or security positions). In these situations, it could be argued that the check concerned is necessary for the legitimate interests of the employer and that the employer's interest outweighs the applicant's right to privacy.

Fingerprinting and handwriting checks

Since handwriting checks or the collection of fingerprints for the purpose of a background check are unlikely to be necessary for upholding the legitimate interest of the employer and are likely to be considered excessive given the purposes for which they are performed/collected, it can be assumed that such checks are prohibited.

Criminal records

The processing of so-called sensitive personal data, such as data pertaining to an individual's race, health or criminal and unlawful behavior (criminal data), is generally prohibited, unless an exemption applies. For example, an employer may process criminal data on its own behalf in order to:

- (a) assess a data subject's request to make a decision concerning him or her or to provide a service to him or her; or
- (b) protect its interests insofar as they concern criminal acts that have been committed or are expected to be committed against the data controller or its employees.

In relation to the exemption under (a), it appears to be possible that employers may perform a criminal background check with respect to applicants as, by applying for a job, they are requesting the employer to make a decision concerning their suitability for that position. Carrying out a background check is, however, only allowed to the extent that this background information is of particular importance and relevant to assessing whether the applicant is suitable for the position. Carrying out a background check with respect to existing employees cannot be based on the exemption referred to under (a) but can only be carried out if the processing of criminal data falls within the scope of exemption referred to under (b). However, judicial data and criminal records for the purposes of hiring individuals can only be obtained by very limited categories of people (e.g., a Minister).

Furthermore, an employer may ask the applicant for a so-called certificate of good conduct (the Certificate). This Certificate is not considered criminal data for the purposes of the DPA and the processing of this information is therefore not prohibited. The Certificate



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is a statement by which the Dutch Minister of Security and Justice declares that the applicant did not commit any criminal offenses that are relevant to the performance of his or her duties. The certificate does not contain any other information. The employer may only request a Certificate if an investigation into the conduct of the applicant is necessary. For some professions, a Certificate is compulsory and the employer may request a Certificate on the ground that it needs to comply with a statutory obligation. The application for a Certificate is submitted by the individual and thus his or her cooperation is required. The Certificate will be issued if the individual has no criminal record. If the individual has a criminal record, the authorities will decide whether the offenses in question are relevant to the application. An employer may request a Certificate from both applicants and existing employees.

Political views and union membership

Processing personal data pertaining to an individual's political views or union membership is considered sensitive data and is in principle prohibited under the DPA. Although the DPA provides for general and specific exemptions to this prohibition, those exemptions are not likely to apply to processing of personal data pertaining to an individual's political views or union membership in the context of a background check carried out by an employer. It can therefore be assumed that such background checks are not permitted.

Health checks/medical screening

Under the Medical Examinations Act, it is not permitted to ask about the candidate's health and/or about absenteeism during his or her former employment. These questions may only be posed during a pre-appointment medical examination. The employer may, nevertheless, ask an applicant for details which are needed to assess suitability for the position. For example, if an applicant applies for a call center job, the employer may ask if he or she is able to look at a screen for a large part of the day. Pre-employment medical examinations may be carried out only if there are particular medical requirements in order to carry out the position, and only at the end of the selection procedure. For instance, a pre-employment medical examination may be permitted when there are risks involved for the employee's health or safety when performing his or her duty (e.g., if the job involves heavy lifting). Furthermore, the Medical Examinations Act stipulates that an employer must consult the Occupational Health Services about the legitimacy and the contents of the examination. Also, any advertisement for a post for which a medical examination is required must make it clear that this is part of the selection procedure.

Drug and alcohol testing

Drug and alcohol tests are considered medical tests and carrying out such tests on applicants therefore falls under the scope of the Medical Examinations Act. There will be very few situations in which an applicant can be tested for alcohol and drug use as matters which are not relevant for the objective of the pre-employment medical examination may not be examined.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used to assess whether the applicant is suitable to fulfill the position for which he or she is applying and should not be used in a discriminatory way.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.



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TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

It is generally prohibited to process sensitive personal data such as data pertaining to a person's health, unless an exemption to this prohibition applies. Health checks/medical screenings of existing employees are, for example, allowed if:

- (a) it is necessary for the reintegration of sick or incapacitated employees; or
- (b) if a collective labor agreement or any other regulations require this.

Drug and alcohol testing, for example, is allowed if it is necessary and in the public interest. For instance, a pilot, who pursuant to the Dutch Aviation Act cannot consume alcohol ten hours prior to flying, may be required to undergo alcohol testing. Overall, it can be assumed that drug and alcohol testing on existing employees can only be justified in exceptional cases.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

An employer is legally required to check if its employees are permitted to work in the Netherlands. The documents that are required depend on whether the person is a national of a member state of the European Union (EU) or other non-European country. The employer is required to store relevant information in its records. These documents must be retained for the duration of the individual's employment and for a period of four years after the termination of the employment agreement.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Background checks can vary from sector to sector. For example, in the financial services sector, persons who hold sensitive positions (i.e., requiring trust/integrity), are for instance required to disclose their credit history or to provide the company with a certificate of good conduct. For certain positions in the financial sector, the Dutch Central Bank will also carry out background checks before approving an appointment.



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OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Where background checks are outsourced to a third party vendor, the employer is required to inform the candidate/employee that it will use a third party to carry out the processing on its behalf. In principle, if the third party vendor is outside the EU, processing of personal data is only permitted if that country ensures an adequate level of protection. In the event the non-EU country does not ensure an adequate level of protection, the processing of personal data may also be permitted if parties have entered into the EU Model Clauses.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) only process personal data as far as the data is adequate, relevant and not excessive regarding the purposes for which it is collected, treat all personal information as confidential information and limit access to personal data to certain people within the organization;
- (b) not retain the personal information for longer than necessary for the purposes of the background check;
- (c) take appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access and all other unlawful forms of processing;
- (d) ensure that individuals can exercise their right to access their personal data and rectify or update the information, request deletion of the data where it is inaccurate, incomplete or irrelevant; and
- (e) report the data processing to the Dutch Data Protection Authority, unless it may rely on the exemption which applies to the processing of the personal data of applicants. It will depend on the type of background check whether an employer will be able to meet all the requirements of this exemption. For instance, it can generally be assumed that an employer cannot invoke this exemption in relation to internet searches on applicants. Background checks carried out during employment are not generally covered by an exemption and the Dutch Data Protection Authority must be notified.

Furthermore, a company regulation on background checks will have to be approved by the works council, provided that the company has a works council in place. This obligation does not apply if background checks are only performed in individual cases.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- The Data Protection Act 2001
- The Equal Treatment Act 1994



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- The Judicial Data and Criminal Records Act 2004

- The Medical Examinations Act 1998

- Article 8 of the European Convention on Human Rights

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted in violation of the DPA (or any other relevant legislation), the applicant/employee, for example, can claim damages or request an injunction. Furthermore, the Data Protection Authority can force compliance under forfeiture of an administrative penalty. In addition, the Data Protection Authority can impose a fine of EUR4,500 if the data controller has failed to notify the Data Protection Authority of its data processing activities. Finally, in certain situations, criminal enforcement measures can be imposed.

Contributed by: Hermine Voûte, Loyens & Loeff



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BACKGROUND CHECKS
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Poland



Contributed by: **Sołtysiński Kawecki & Szlęzak**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

It is not standard practice in Poland for employers to carry out background checks in relation to applicants. If the employer would like to verify information provided by the employee or applicant, the employer should first require additional confirmation directly from the applicant. The Polish Data Protection Authority is of the opinion that employers have enough tools (e.g., the interview and reference letters) to verify applicants' qualifications and experience. If such confirmation is not provided by the applicant, the employer may check information using publicly available sources (but only within the scope of data that the employer may require under the law and by using proportionate tools). Employers therefore often need to assess whether background checks are appropriate and proportionate in the circumstances and consider the implications of data protection and discrimination legislation.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Poland are educational and past employment checks.



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BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

In general, none of the above is explicitly permitted by Polish law.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Employers are not permitted to carry out the following checks in relation to applicants: credit/financial checks, health checks/medical screening, fingerprinting, handwriting, union membership, political views and drug and alcohol testing.

The following information applies to these checks:

Credit/financial checks

Candidates are not required to give information about their financial status. There is, therefore, a very high risk that a background check concerning such information may be considered to be a discriminatory practice or an infringement of an applicant's privacy.

Recently, the Data Protection Authority, in one of its decisions concerning a bank's employees, stated that the bank was not authorized to collect personal data concerning the financial status of its employees. As a general rule, employees may be required by the employer to provide information about their financial status in cases where they wish to receive social benefits/services (provided by the Social Insurance Institution). If an employer has doubts about whether the information provided by an employee is genuine, the employer should, in the first instance, request the relevant documentation and then inform the police/prosecutor's office.

Health checks/medical screening

Candidates are not required to give information about their health status and therefore there is a very high risk that a background check concerning such information may be considered to be a discriminatory practice. Furthermore, pursuant to the Act on the Protection of Personal Data, data concerning health status is considered to be sensitive data. Such data may be collected and processed only in certain circumstances, e.g., following the data subject's written consent or to comply with legal requirements.

In relation to employees, an employer has an obligation to send an employee for a medical test before allowing him or her to start work. The scope of such medical tests depends on the profession. The employer would not receive any information about the employee's health status; only information stating whether the employee may be allowed to work. If an employer suspects that an employee who is on sick leave is not in fact sick, the employer should inform the Social Insurance Institution so they can carry out an inspection. Similarly, this does not authorize the employer to conduct a background check concerning the employee's health status. If an employer has doubts about whether sick leave, a health status certificate or disability is genuine, it should generally ask for confirmation from the institution which released the documents.



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Poland

Fingerprinting

There is no law permitting the collection of fingerprints from either applicants or employees. The Data Protection Authority and Polish administrative courts are of the opinion that an employer may not use a working time registration system based on the fingerprints of employees because exploitation of such data may infringe the privacy of employees and is inappropriate for the purpose of processing data. As a rule, employers may neither collect nor process such personal data of candidates and employees, nor can employers conduct background checks concerning this kind of data.

Handwriting

There is no law permitting the collection of samples of handwriting either at the stage of applying for a job or in employment. Even if the employer has samples of handwriting, e.g., forms filled manually are in employment records, the employer cannot use them freely, e.g., to commission handwriting analysis.

Union membership

There is no legal basis to collect data/information about union membership from job candidates. There is a high risk that conducting such a background check related to data concerning union membership will be considered to be a discriminatory practice or a violation of privacy. According to the Act on the Protection of Personal Data, data concerning union membership is considered to be sensitive data. Such data may be collected and processed only under certain circumstances, e.g., the data subject's written consent or provisions of law. As it is considered that employees are unable to provide their consent freely in an employment relationship, the processing of such data will only be allowed in limited circumstances when particular legislation (e.g., Trade Unions Act) indicates it may be permitted in order to fulfill the employer's obligations. Collecting data about union membership on that basis concerns only persons employed at a particular employer, not candidates for a job. In relation to employees, an employer is not authorized to conduct such a background check on its own and data concerning union membership may be collected only under certain circumstances and according to the procedure specified in law.

Political views

There is no legal basis to collect data concerning political views from job candidates. There is a high risk that conducting such a background check related to such data will be considered to be a discriminatory practice or a violation of privacy. According to the Act on the Protection of Personal Data, data concerning political views is considered to be sensitive data.

Drug and alcohol testing

There are no legal grounds for collecting information concerning drug or alcohol consumption from job candidates. There is a very high risk that a background check concerning such information may be considered to be discrimination or an infringement of an employee's privacy. Alcohol testing may be only carried out in certain circumstances and only in relation to employees (not candidates), e.g., if there is a reasonable suspicion that an employee came to work after consuming alcohol or drugs. The employee has to be informed about the circumstances which led to such testing and has to give his or her consent to be tested. Where the employee refuses to submit to the test, the test may be conducted by a police officer. There is no law specifically permitting drug tests.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Education and past employment records, criminal records and social media/internet search.



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6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Education and past employment records

The background checks in this area may be conducted only in relation to information about applicants that may be lawfully required during the recruitment process. The scope of such data is very limited and encompasses only name(s) and surname, names of parents, date of birth, place of residence (mailing address), education and employment record. Pursuant to provisions of the Labour Code, the employer cannot require and process the applicant's data if there is no obligation to provide/process data under mandatory provisions of law and to the extent it has not been provided voluntarily by the applicant. In that case, consent of the candidate is necessary for the processing of other data. However, the employer should be very careful when making requests for such consent because it may be considered to be a discriminatory practice. Further data may be required with respect to certain professions and only if it is provided by provisions of law (e.g., criminal record). If the employer decides to carry out the background check, it is advisable to use only public sources. Any attempts to contact former employers or co-workers without the applicant's consent in order to collect and process information about the employee/candidate may be considered to be an infringement of an employee's personal interests and privacy. The background check may be justified in exceptional cases, if the employer has serious and justified suspicions relating to a specific candidate that cannot be resolved by using other tools, e.g., by asking for documents that confirm certain information. Background checks in this area may therefore only be permitted in a limited number of cases.

Criminal records

Information about candidates' and employees' criminal records may be collected only in relation to certain professions, when the law clearly allows the employer to collect such information either directly from the database (i.e., National Criminal Register) or indirectly from employees. The scope of such professions is very limited and mostly concerns public sector positions, e.g., judges, local government employees, police officers, but also some private sector positions, e.g., airport security employees.

Social media/internet searches

Background checks via social media platforms or internet searches, limited to verifying education and employment history, may be allowed in certain cases. There will be no grounds to use such tools if the applicant has submitted documents (university diplomas, work certificates etc.), which confirm his or her education and employment history. Such background checks may be justified if the employer has serious and justified suspicions relating to a specific applicant, but it should not be treated as a standard procedure. Media checks may return negative information about the private life of the applicant which does not fall within the scope of Polish labour law. Collection of information on the applicant's private life may result in an infringement of the employee's personal interests and privacy. If such information will have a negative impact on the recruitment process, the employer may be accused of discrimination. However there may be some exceptions, e.g., where there are laws regarding specific professions which require the employee to have a "flawless character." In such cases, the employer may contact former employers or co-workers without the applicant's consent and check whether the applicant observes ethics and moral standards, and does not perform acts that are contrary to the public order.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used where relevant to the particular role and should not be used in a discriminatory way. Such information should be deleted after the purpose of its processing has been achieved.



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OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Based on provisions of the Labour Code, an employer may collect and process the personal data of employees listed in the provisions of law. The list of such data is broader than in the case of candidates as it also includes other personal data of an employee, i.e., names and surnames and dates of birth of children, if necessary to exercise special rights to which an employee is entitled pursuant to labour law, the "PESEL" (the identification number assigned to an employee by the Government Information Centre of the Common Electronic System of Population Register) and data specified in separate regulations that are necessary for keeping personal files. Additional data may be required in relation to certain professions and only if it is provided in order to comply with legal requirements.

It is not directly provided by legislation, but it may be argued that if, after hiring of an employee, the employer has serious doubts about the accuracy of information provided by the employee during the recruitment process or later, the employer may conduct the background check to the same extent and on the same basis which applies to background checks carried out during the recruitment process (e.g., it should first ask an employee for documentation). Such checks need to be appropriate, necessary, proportionate and justified by reference to the employee's role and its particular situation. If, taking into account the circumstances of the case, it is reasonable to ask an employee for the documents or other confirmation of data he or she provided, the employer should choose this option first. The background checks, however, cannot be treated as a standard procedure that may be carried out for all employees.

Please see questions 4, 5 and 6 in relation to specific checks and their application to candidates and employees.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employers may ask the applicant to present his or her identity documentation. If the applicant is a Polish citizen no further action needs to be taken. If the applicant is a citizen of the European Union (EU) or European Economic Area (EEA) member state, he or she is also entitled to work in Poland without any further permit or visa document.



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If the applicant is a citizen of a country other than an EU or EEA member state, he or she is usually required to have further documents allowing him or her to work and stay in Poland. In principle, if the employer decides to engage a foreign national, the employer is required to apply for a work permit. In addition, the employee needs to receive a visa, which is issued by the Polish consulate responsible for the foreign national's domicile abroad. The employer should take photocopies of documents confirming the right to work in Poland or the ID confirming eligibility to work due to nationality. If, however, an applicant is not employed, the copies of documents should be destroyed once the relevant recruitment procedure is terminated. If the applicant is employed, those documents should be kept for the duration of employment. It is good practice to keep them for up to three years afterwards, as the limitation period for employment-related claims is three years.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

The scope of background checks may be wider in relation to certain professions, where the employer may request from the candidate personal data other than the data provided in the Labour Code. The most common requirements that apply to certain professions are information about an applicant's criminal record and good reputation. These additional requirements apply mostly to positions in the public sector or to professions connected with safety, e.g., government officials, judges, persons employed in the public prosecutor's office, tax inspectors, persons with access to classified information, airport security employees, etc.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No. The general rules of processing data by a data processor will apply. The employer should conclude in writing a data processing agreement with the third party vendor. The parties should specify the scope and the purpose of data processing. However, if the third party service provider is outside the EEA, processing of personal data should only be undertaken in countries or territories with adequate levels of protection for the rights of individuals in relation to the processing of personal information or where the data exporter is satisfied that appropriate controls are in place. The employer should consider entering into EU Model Contract Clauses with the relevant entity processing personal information outside the EEA.



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DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) only process personal information for the purposes collected and as necessary for the pre-employment screening, treating all personal information as confidential information and ensuring appropriate restrictions exist within the business to ensure only relevant departments/individuals can access the data;
- (b) ensure individuals are aware of and can exercise their right to receive a copy of the personal information held about them, rectify or update the information, request deletion of the data where it is inaccurate, outdated or irrelevant and opt-out/revoke authorization to the further processing of their information;
- (c) not retain the personal information longer than is necessary for the purposes of verification of information; and
- (d) take appropriate technical and organisational steps to protect personal data on a general basis provided by the Act of 29 August 1997 on Personal Data Protection.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- The Polish Constitution dated 2 April 1997
- Article 8 of the European Convention on Human Rights
- Act of 26 June 1974 on The Labour Code
- Act of 24 May 2000 on National Criminal Records
- Act of 4 March 1994 on the Company Social Fund
- Act of 29 August 1997 on Personal Data Protection
- Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism
- Regulation of Health and Welfare Policy Minister dated 30 May 1996 concerning the performance of medical examinations on employees, the scope of preventive health care for employees and medical certificates issued for the purpose provided in the Labour Code
- Regulation of Work and Social Policy Minister dated 28 May 1996 concerning the scope of records kept by employers relating to employment relationship issues and maintaining personal files of employees



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19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

The Act of 29 August 1997 on Personal Data Protection does not specify financial sanctions for non-compliance with the requirements for lawful collection and processing the personal data. One possible sanction may be proceedings initiated by the Data Protection Authority to assess the case. As the outcome of such proceedings, the Data Protection Authority may issue a decision requiring the employer to rectify this non-compliance (in particular, to cease to process the data obtained through the background check and erase such data). If an employer does not comply with such a decision, the Data Protection Authority, under the general provisions on administrative enforcement proceedings, may impose enforcement fines up to approximately EUR12,000 per non-compliance but repeated fines cannot exceed approximately EUR50,000 in total. There may also be criminal sanctions, i.e., a fine, restriction of personal liberty or imprisonment for up to two years (three years if sensitive data is processed). However, in practice, criminal sanctions are very rare. Unlawful background checks may constitute an infringement of the personal interests/privacy of an employee and may lead to claims against the employer. However, the compensation usually awarded for the violation of employees' personal data is not high.

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Russia



Contributed by: Secretan Troyanov Schaer SA

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Employers in Russia carry out background checks on applicants although it is not deemed to be standard practice. Important limitations apply to the scope of background checks. Background checks are subject to the consent of the applicant and/or other conditions. Employers therefore need to assess whether background checks are appropriate and consider the implications under employment and data protection legislation.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Russia are past employment checks.



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BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above except those mentioned in question 4, subject to applicants' consent and other conditions (please see question 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

Employers can only process so-called special categories of personal data (the Russian equivalent of sensitive data) including information on race and ethnicity, political opinions, religious and philosophical views, health, intimate life and criminal records where employment law explicitly authorizes it.

Please see questions 5 and 6 for further information about such authorization and other conditions which may apply to particular checks.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Background checks relating to criminal records, health/medical information, union membership, political views and drug and alcohol testing can be processed only where the law authorizes the prospective employer to obtain such information.

In general, background checks require written consent because the data is not always obtained directly from the employee or job candidate. In the opinion of Roskomnadzor (Data Protection Authority), any processing of data on job candidates requires the data subject's consent except where data is communicated by a recruiting agency acting on behalf of the candidate or the candidate publishes his or her CV on the internet (i.e., makes it accessible to the general public). If the prospective employer receives a job application, for instance by email, it would first need to ascertain that the application was received from the individual concerned before processing any personal data.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to all of the background checks above, the employer should obtain consent from the applicant for data protection purposes. Key data protection issues to note are as follows:

- Opinions differ as to whether employment law applies prior to the signature of the employment contract. It appears nevertheless prudent to observe both the general data protection requirements and the data protection requirements specific to employment law.
- Employment law contains an exhaustive list of documents which can be required upon hiring (passport, labour booklet, pension



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insurance certificate, document on military service obligations, documents on education and training, in specific cases only documents on criminal records and pre-employment medical examinations, and employment-specific documents defined by special legislation). The prospective employer has no right to request additional documents. Consequently, the candidate has no obligation to submit additional documents, and the rejection of the candidate cannot be based on his or her refusal to submit such documents.

- Data must be obtained directly from the candidate. Where this is not possible the candidate must be informed and his or her written consent obtained. The employer must communicate the purpose of the proposed data collection, the prospective sources of the data, its character and how it will be obtained, and inform the candidate of the legal consequences of his or her refusal to consent to the data collection.
- Except where the law provides otherwise, only data relevant to evaluate the candidate's professional training, qualification and skills can be collected, and any rejection of the candidate must be based on such information (prohibition of discrimination).
- The rejected candidate can require that the employer give the reasons in writing. He or she can apply to the court if the reasons given are not related to his or her qualification for the job (professional qualities and skills).
- Most background check information would be protected by personal data law, which means that third party holders of such information cannot disclose it without the data subject's consent.

There are also specific points to note in relation to particular checks:

Education records

Information relating to education records is protected by data protection law. Universities and other educational bodies can only disclose such information with the data subject's consent. A special procedure applies to obtaining confirmation of the authenticity of diplomas, but only the diploma holder or an authorized representative can use it.

Past employment records

The labour booklet shows past employers, periods of previous employment and the reasons for its termination. The labour booklet must be submitted upon hiring and remains with the employer during employment. Past employers are bound by data protection law and can disclose information only with the data subject's consent.

Credit/financial checks

Such information is protected by privacy law and often also by banking secrecy laws, and its relevance to evaluating a job candidate's qualifications appears doubtful. Information from the bureaus of credit histories can be obtained with the data subject's consent. Information on debt collection (enforcement) is public (i.e., available on the internet). The same applies (to a certain extent) to information on litigation involving the individual.

Criminal records

Criminal records would be checked using the database of the Ministry of the Interior. Individuals can obtain a certificate confirming convictions and criminal investigations or the absence of such convictions/investigations. The certificate can be obtained only by the individual or his or her authorized representative. Under the law, the certificate can be requested from the job candidate only where the law so provides (in the private sector, this is mainly for "superior" management positions in the financial services industry which, under the law, can only be occupied by persons without a criminal record). In certain cases, individuals can be disqualified from a professional activity for specific administrative offenses. The register of disqualified individuals is public and must be checked where relevant.



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Health checks/medical screening

The law defines a list of cases where such information can/must be collected (e.g., harmful and dangerous work conditions, work linked with transport, professions in the food industry and food retail business, medical professions, work with children, teachers, work related to sources of increased danger, etc.). The collection of health information not relevant to evaluating an employee's ability to perform the job is illegal.

Social media/internet searches

The law does not prohibit such searches. Data published by individuals on the internet (generally accessible data) can be processed without the individual's consent.

Fingerprinting

There is no law preventing the collection of fingerprints. However, it may be difficult to justify the relevance of fingerprints to the decision whether or not to hire a candidate. Fingerprints are biometric data and their processing requires the written consent of the data subject.

Union membership

This data can be collected only in the cases where the law authorizes its collection. It is unlikely that the data can be collected during the hiring process. After hiring, the data can be processed in the interest of the employee, in particular to the extent necessary for the exercise of trade union rights.

Political views

The collection of data on political views is explicitly prohibited from the perspective of both data protection and discrimination rules.

Drug and alcohol testing

Please see health checks/medical screening above.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information can be used only if it has been lawfully obtained and is relevant to evaluating the prospective employee's professional suitability. The employer cannot take decisions exclusively on the basis of personal data obtained electronically or through automatic data processing.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

There are no other standard background checks in Russia. Sometimes checks are done using government databases (for instance, through informal contacts with police or similar agencies). However, this is not legal and, therefore, not recommended.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.



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TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

The law does not prohibit background checks during employment. However, the law is based on the idea that checks involving the use of personal data should always concern performance and/or compliance with the employee's duties, internal rules and the law. In most cases, such checks would be covered by employment law and would not require the employee's consent.

The use of monitoring devices is probably permitted where it is related to performance and security and provided the employees have been properly informed (including a warning not to use professional equipment for private purposes). Special procedures exist where the employer wishes to impose disciplinary sanctions including dismissal. The employee must have the opportunity to provide an explanation.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

In most cases, a work permit would need to be obtained by or through the employer. Procedures differ depending on the country of origin and the type of permit. During the application for the permit and/or the work visa, the employee would need to undergo certain medical examinations (AIDS test, tuberculosis, leprosy, sexually transmitted diseases). In certain cases, employees must pass an examination on their Russian language skills, knowledge of Russian history and Russian law. Medical insurance is also required. Compliance can be checked on the basis of the relevant documents, and employers must inform the migration authorities of any hiring.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No. The rules would be different for independent contractors to whom employment law does not apply.

SECTORS

14. Do background checks differ in different sectors?

Background checks differ from industry to industry, but not from a legal perspective. In certain industries (financial sector and others), the law sets specific requirements, e.g., a professional diploma, license or certificate, health certificate, etc. In those cases, individuals can perform the relevant duties only if they have the relevant diploma, license or certificate.



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Russia

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes. Certain background checks could be done by recruiting agencies.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

The transfer of employee information to a third party would require the employee's written consent and a confidentiality undertaking by the third party processing the data.

If the third party vendor is abroad, personal information should only be transmitted from Russia with the individual's written consent or to countries with adequate levels of protection for the rights of individuals in relation to the processing of personal information. This is considered to be the case for countries having ratified the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data of 28 January 1981 and for a list of countries offering adequate protection published by Roskomnadzor (Order 274 of 15 March 2013), which includes Australia, Argentina, Israel, Canada, Morocco, Malaysia, Mexico, Mongolia, New Zealand, Angola, Benin, Cape Verde, South Korea, Peru, Senegal, Tunisia and Chile, but not the United States. Russia does not offer alternative mechanisms such as Safe Harbor Rules, binding/standard/model contractual clauses or binding corporate rules.

As from 1 September 2015, data relating to Russian citizens must be collected first through a database located in Russia.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) only process personal information for the purposes collected and as necessary for the pre-employment screening, treating all personal information as confidential information and ensuring appropriate restrictions exist within the business to ensure only relevant departments/individuals can assess the data;
- (b) ensure individuals are aware of and can exercise their right to receive a copy of the personal information held about them, rectify or update the information, request deletion of the data where it is inaccurate, outdated or irrelevant and opt-out/revoke authorization to the further processing of their information;
- (c) not retain the personal information for longer than is necessary for the purposes consented to (information on job applicants should normally be destroyed within 30 days from the rejection of the application);
- (d) take appropriate technical, legal and organizational steps to protect personal data from unauthorized disclosure, damage or destruction depending on the risk level and as per the relevant provisions of the data protection law and implementing legislation;
- (e) have internal regulations on data protection and data security in place (these are considered local normative acts under employment law and must be adopted in compliance with the procedures prescribed by employment law); and
- (f) undertake periodic audit reviews to check compliance with data protection measures.



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Russia

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Labour Code (Federal Law of 30.12.2001 No. 197-FZ); Federal Law of 27.07.2006 No. 152-FZ "On Personal Data"
- Criminal records checks: Article 65 of the Labour Code (Federal Law of 30.12.2001 No. 197-FZ); Article 10 of the Federal Law of 27.07.2006 No. 152-FZ "On Personal Data"; Administrative Regulations of the Ministry of Internal Affairs of 7 November 2011 No. 1121
- Medical screening: Article 65 of the Labour Code (Federal Law of 30.12.2001 No. 197-FZ); Article 10 of the Federal Law of 27.07.2006 No. 152-FZ "On Personal Data"
- Credit histories: Federal Law of 30 December 2004 No. 318 "On Credit Histories"
- Union membership: Article 86 of the Labour Code (Federal Law of 30.12.2001 No. 197-FZ)
- Political views: Article 86 of the Labour Code (Federal Law of 30.12.2001 No. 197-FZ)
- Ability to work in Russia: Federal Law of 25.07.2002 No. 115-FZ "On the Legal Situation of Foreign Citizens in the Russian Federation"
- Protection of the secrecy of private information: Article 152 and 152.2 of the Civil Code, Article 137 of the Criminal Code
- Article 8 of the European Convention on Human Rights

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted unlawfully, actions for damages or distress could be brought. Fines for breaches of data protection law range from RUR5,000 to RUR10,000 for the company and from RUR500 to RUR1,000 for the responsible company officer. Fines for breaches of employment law range from RUR30,000 to RUR50,000 for the company and from RUR1,000 to RUR5,000 for the responsible company officer. Individuals can file complaints with the public attorney's office, the labour inspection and/or Roskomnadzor (Data Protection Authority). Criminal offenses may be committed in relation to background checks. Both Roskomnadzor and the labour inspection can audit businesses.

Further amendments to data protection law are likely to be adopted. It is also likely that the fines will be substantially increased.

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South Africa



Contributed by: **Edward Nathan Sonnenbergs Inc.**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

It is common practice in South Africa for background checks to be performed in relation to job applications, subject to certain legislative requirements and restrictions.

Previously, South Africa did not have legislation dealing specifically and exclusively with data protection. Hence, to give effect to the Constitutional right to privacy, on 20 August 2013, the National Assembly passed the Protection of Personal Information Bill [B9D of 2009], which is largely based on the European Data Protection Directive and also has a Commonwealth influence. The Bill was signed into law by the President on 19 November 2013 and was gazetted as the Protection of Personal Information Act 4 of 2013 ("POPI") on 26 November 2013. POPI will come into force on a date to be determined by the President by proclamation in the Gazette. Certain provisions relating to the establishment of the Information Regulator ("Regulator") and the making of Regulations under POPI have, however, already come into force (on 11 April 2014).

Once POPI comes into force, certain requirements will have to be complied with when employers process the personal information of both job applicants and existing employees (discussed below), including when processing information as part of background checks.



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South Africa

2. What types of background checks do employers typically carry out on applicants?

Background checks will, depending on the position applied for, normally include checks in respect of *inter alia* educational qualifications, previous employment records and criminal records.

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above will be permitted, subject to restrictions imposed by applicable legislation.

Restrictions imposed in respect of POPI (to the extent that it is considered processing of personal information as defined in POPI) are discussed in question 6.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Please see question 3.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Please see question 6.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

The restrictions imposed by POPI relating to the processing of personal information will apply to the extent that the processing of such information falls within the ambit of POPI (such as the background checks listed above). Please see question 17 for further information on data processing requirements.

Conducting background checks relating to education/past employment records, credit/financial checks, and carrying out social media/internet searches will be regarded as the processing of personal information. This information can be processed with the applicant's consent; alternatively, it may be processed provided the employer can show that one of the justifications below applies thereby entitling it to conduct the background checks:

- processing is necessary to carry out actions for the conclusion or performance of a contract to which the applicant is party;
- processing complies with an obligation imposed by law on the employer;



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South Africa

- processing protects a legitimate interest of the applicant;
- processing is necessary for the proper performance of a public law duty by a public body; or
- processing is necessary for pursuing the legitimate interests of the employer of a third party to whom the information is supplied.

In relation to drug and alcohol testing, it is not entirely clear whether this would be considered “personal information” (in which case the testing may be conducted provided there is consent or one of the justifications above applies) or, alternatively, whether it would be considered “special personal information.” Personal information concerning the religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information of a data subject; or the criminal behavior of a data subject to the extent that such information relates to the alleged commission by a data subject of any offense; or any proceedings in respect of any offense allegedly committed by a data subject or the disposal of such proceedings, is considered to be “special personal information” under POPI. Fingerprinting and handwriting will fall under the definition of biometric information and are also considered to be special personal information.

Special personal information may be processed with the consent of the applicant. Alternatively, it may be processed provided the employer can show that one or more of the justifications below apply thereby entitling it to conduct the background checks:

- processing is necessary for the establishment, exercise or defense of a right or obligation in law;
- processing is necessary to comply with an obligation of international public law;
- processing is for historical, statistical or research purposes to the extent that:
 - (a) the purpose serves a public interest and the processing is necessary for the purpose concerned; or
 - (b) it appears to be impossible or would involve a disproportionate effort to ask for consent, and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of the applicant to a disproportionate extent; or
- information has deliberately been made public by the applicant.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The processing and use of personal information of job applicants is subject to the requirements set out in question 17.

In addition to the processing requirements of POPI, it should also be noted that job applicants are protected against any form of unfair discrimination in relation to an employer’s recruitment and selection processes in terms of the Employment Equity Act 55 of 1998 (“EEA”) and employers must therefore always guard against any direct and/or indirect form of unfair discrimination when dealing with job applicants.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.



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9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

No, the same processing requirements will apply to background checks conducted on existing employees.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The Immigration Act 13 of 2002 places a positive obligation on an employer to take reasonable steps to ascertain the immigration status of a job applicant.

An employer will have to check that the applicant or employee has the necessary work permit. Section 38(1) of the Immigration Act precludes any person from employing an illegal foreign national; a foreign national whose status does not authorize him or her to be employed by such person; or a foreign national on terms, conditions or in a capacity different from those contemplated in such status. Furthermore, section 38(2) places the obligation on an employer to make a good faith effort to ascertain that no illegal foreign national is employed by it or to ascertain the status or citizenship of those whom it employs.

If it is proven that a person was employed in violation of section 38(1), it shall be presumed that the employer knew at the time of the employment that such person was among those referred to in section 38(1) unless the employer proves that it employed such person in good faith; and complied with section 38(2), provided that a greater level of compliance shall be required of any employer who employs more than five employees or has been found guilty of a prior offense under this Act related to this section. If an illegal foreign national is found on any premises where a business is conducted, it shall be presumed that such foreign national was employed by the person who has control over such premises, unless *prima facie* evidence to the contrary is adduced.

An employer employing a foreign national shall retain the records relating to the employment for a period of two years after the termination of such employment and is required to report the termination of such employment and any breach by the foreign national related to his or her status.

The information obtained during this process and the processing thereof will be subject to the restrictions of POPI.



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FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

No, the restrictions imposed by POPI are not sector-specific.

In South Africa, certain financial institutions and the banking council are signatories to an agreement entitled “*Agreement to participate in essential database for the register of dismissed employees (RED)*.” The participating banks are required to enter the names of the employees who were dismissed by it for dishonesty-related offenses onto a database. When such an employee applies for a position at another participating bank, this participating bank has access to this database and can check whether the applicant’s name appears thereon. This will be considered personal information and will be subject to the provisions of POPI.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

In principle, it is possible to outsource this function to a third party service provider.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

If background checks are outsourced both the employer and the third party service provider will be subject to the above restrictions and requirements. The employer will have to ensure that the third party service provider complies with the requirements imposed by POPI, and the employer will also have to obtain the consent of the data subject to transfer any personal information to the third party service provider (in certain circumstances). It is recommended that an employer in such circumstances conclude a properly drafted agreement between it and the service provider with warranties and indemnities.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

POPI will apply to the automated or non-automated processing of personal information entered into a record in any form (provided that when the recorded personal information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof) by or for a responsible party who or which is domiciled in South Africa, or not domiciled in South Africa, unless the processing relates only to the forwarding of personal information through South Africa.

“Processing” is broadly defined in terms of POPI (intended to bring most processing transactions within its ambit) and “personal information” includes information relating to an identifiable, living, natural person, and (where applicable) an identifiable, existing “juristic” person (which is an entity or association of people that has an independent right of existence in law with concomitant rights and obligations), including the name, race, gender, marital status, address and identifying number of a person, symbol, email address, physical address, telephone number, location information, online identifier or other particular assignment to the person.



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Responsible parties (i.e., employers and/or recruitment agencies) must adhere to the eight processing conditions set out in Chapter 3 of POPI ("Processing Conditions"). The Processing Conditions include accountability, processing limitations, purpose specification, further processing limitation, information quality, openness, security safeguards and data subject participation.

Within the above context, POPI permits the processing of personal information (including background checks) to the extent that information is processed in a lawful and reasonable manner and only if, given the purpose for which it is processed, it is adequate, relevant and not excessive (subject to certain exclusions). Certain statutes impose legal obligations on employers to obtain information relating to employees and to retain the same for a certain period of time, such as the Basic Conditions of Employment Act 75 of 1997 and the EEA. In these instances, obtaining this information without consent would be lawful.

The personal information of a person may be processed if the data subject consents (and such consent must be "voluntary, specific and informed"). There are "exceptions" to having to obtain such consent, including where processing complies with an obligation imposed by law on a responsible party, or is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party or for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied. However, while there may be limited exceptions for when consent is not required, it is recommended that employers always obtain written consent from data subjects to ensure compliance with the provisions of POPI.

Other restrictions on the processing of personal information include the following:

- personal information must be obtained directly from the data subject (subject to certain exceptions);
- personal information must be collected for a specific, explicitly defined and lawful purpose relating to the functions or activities of the organization, of which the individual is (as a general rule) made aware;
- records of personal information may only be kept for as long as necessary for achieving the purpose for which the information was collected or subsequently processed (subject to certain exceptions) and a responsible party must destroy or delete a record of personal information in a manner that prevents its reconstruction in an intelligible form or de-identify it as soon as reasonably practicable after the responsible party is no longer authorized to retain the record;
- further processing of personal data must be compatible with the purpose of collection, unless the data subject has consented to such further processing;
- a responsible party must take reasonably practicable steps to ensure that personal information is complete, accurate, not misleading and updated where necessary in light of the purpose for which such information is collected;
- the organization must take reasonably practicable steps to ensure that the data subject is aware of the processing of the personal information (subject to certain requirements and exceptions); and
- the responsible party must secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organizational measures to prevent loss of, damage to, or unauthorized destruction of personal information; and unlawful access to or processing of personal information. The organization must have due regard to generally accepted information practices and procedures which may apply to it generally or may be required in terms of specific industry or professional rules and regulations.



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SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

In addition to POPI, there are also various other laws that protect privacy and personal information, including:

- The Consumer Protection Act 68 of 2008 (CPA)
- The National Credit Act 34 of 2005 (NCA)
- The Electronic Communications and Transactions Act 25 of 2002 (ECTA)
- The Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA)
- The Promotion of Access to Information Act (PAIA)

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If the processing of personal information as defined in POPI (including background checks) is not conducted in accordance with the conditions required by POPI, the sanctions which may be imposed on an employer are a fine of up to R10 million and/or imprisonment of up to twelve months (or both).

Contributed by: **Ross Alcock**, Edward Nathan Sonnenbergs Inc.



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EMEA
BACKGROUND CHECKS
TRAFFIC LIGHTS



Spain



Contributed by: Ramón y Cajal Abogados

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

It is not common in Spain to conduct background checks in relation to applicants. However, there has been an increase in the practice over recent years.

Background checks must be proportionate and adequate for the purposes of data processing in relation to the applicant.

2. What types of background checks do employers typically carry out on applicants?

Where background checks are carried out, the usual checks are based on information which may be gathered easily, such as through online searches, consultation of public registries, etc. Some employers check the education and professional profile of an applicant, as well as past employment records. Occasionally, applicants' former employers are interviewed and references are checked.



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In certain regulated sectors, such as banking or finance, it is not uncommon to conduct limited background checks for particular positions. For example, Anti-Money Laundering regulations require high ethical standards for the engagement of executives or agents and, in such instances, organizations in these sectors are required to check/process data which goes beyond the voluntary disclosure of the candidate.

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Fingerprinting
- Criminal records
- Handwriting
- Credit/financial checks
- Union membership
- Health checks/medical screening
- Political views
- Social media/internet search
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Spanish legislation does not provide for the conduct of background checks on applicants. This area is governed by Spanish data protection law and the candidates' right to privacy. Any information collected should have a direct and necessary link to the skills needed for the job and may also be subject to further conditions.

Please see question 6 for information about particular checks.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Under section 7 of the Act 15/1999, on the Protection of Personal Data (the Data Protection Act 1999), employers are not permitted to carry out criminal records checks on either applicants or employees.

This is, however, a controversial issue as, in certain sectors, it is common practice to request that applicants have a clean criminal record (for example, in the finance, energy and transport sectors). Further, certain regulations, such as the Anti-Money Laundering regulations, also impose a duty to collect such data.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All of the above checks, except for criminal record checks (please see question 4).

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

As mentioned, background checks are not standard practice in Spain. Except for criminal records checks, which are expressly not



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permitted (please see question 4), employers must have a clear argument for carrying out background checks (e.g., based on a contractual need, legitimate interest, the applicant's consent, etc.). Employers must also evaluate whether such background checks are proportionate, adequate, appropriate and not excessive.

There are specific points to note in relation to particular checks:

Health checks/medical screening

Such data attracts special protection as it is considered to be of a sensitive nature. Consequently, the processing of such data is subject to the express consent of the applicant. In addition, employers would require sound justification for collecting/processing such data.

Credit/financial checks

This type of data is not considered sensitive, but the proportionality principle applies and the checks must be justified for the role.

Education and past employment records

This type of data is not considered sensitive; however, as indicated above, the proportionality principle applies.

Social media/internet searches

Generally, no restriction applies in relation to social media/internet searches, provided that the information obtained relates to public sources, as defined by the Data Protection Act 1999:

"Those files which can be consulted by anyone, which are not subject to restrictive legislation, or which are subject only to payment of a consultation fee. Only the following shall be considered to be sources accessible to the public: the publicity register, telephone directories subject to the conditions laid down in the relevant regulations, and the lists of persons belonging to professional associations containing only data on the name, title, profession, activity, academic degree, address and an indication of his membership of the association. Newspapers, official gazettes and the media shall also be considered sources with public access."

Consequently, not all data which is found on the internet or social media can be processed without restrictions. The proportionality principle will also apply. Further, obtaining data from non-professional social networks might also be unlawful.

Fingerprinting and handwriting

The proportionality principle applies to background checks relating to fingerprinting and handwriting and must be justified for the role. Such checks are not common in Spain.

Union membership

Such data attracts special protection as it is considered to be of a sensitive nature. The processing of such data is therefore subject to the express consent of the applicant. In addition, the employer will need sound justification for collecting/processing such data.



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Political views

Such data attracts special protection as it is considered to be of a sensitive nature. Consequently, the processing of such data is subject to the express consent of the applicant. In addition, the employer will need sound justification for collecting/processing such data. Processing may be permitted, for example, where the applicant applies for a relevant position within a political party.

Drug and alcohol testing

If an employer can prove that drug and alcohol testing for a particular job is essential, this may be permitted (subject to the proportionality principle). In practice, if applicants are asked to undergo such testing and they refuse to do so, assuming the test is essential to determine their suitability for the job, their application for the job may be rejected.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Any discrimination based on the grounds of the information collected or used resulting in detriment to the applicant is not permitted.

Alongside these limitations, based on the provisions of the Spanish data protection law, the employer will be required to obtain the relevant data lawfully and the relevant principles on proportionality, legitimate interest and/or contractual need/justification will apply.

Where certain information has been obtained for a specific purpose, and is provided to the candidate, and thereafter is subsequently used for a different purpose which is incompatible with the previous aim, this could lead to a breach of data protection laws.

In addition, any data controller is required to inform data subjects about the mandatory or voluntary nature of queries raised and the consequences of the provision or non-provision of data. As an example, if a specific question within an application was marked as voluntary by the data controller and the candidate decided to leave it blank, if the data controller subsequently obtains the information from third parties or different sources and, on this basis, decides not to hire the applicant or dismiss the employee, this could be considered a breach of the data protection quality principle. Employers may therefore be subject to the relevant fine.

Please see questions 17 and 19 for further information on data processing and sanctions.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No. However, in relation to criminal records, where the processing of such data is prohibited by data protection laws, companies can and do nevertheless require this check to be carried out. It is recommended that the applicant is asked to show the document to the company, so it can verify this aspect of the recruitment process. If the outcome is positive, the company may continue the process. However, the company should not reflect that it has checked this information.

9. Are there restrictions or limitations on the scope of these checks?

Please see question 8.



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TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Prospective employees might be requested to undergo a health check before carrying out certain jobs (e.g., if they will be exposed to professional risks, especially dangerous activities, etc.) and this can be done before or after an offer of employment is made.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Employers are obliged by law to provide employees with an annual medical check. However, employees can freely accept or decline to undergo such checks, with the exception of jobs which expose employees to high professional risks or dangerous activities. In these circumstances, a health check is obligatory. The relevant medical results are communicated directly to the employee, while the employer is only informed of the suitability or unsuitability of the individual to perform the job.

For other background checks, since there is no specific legislation, no distinction is made. However, as a general rule, the proportionality principle and the legitimate interest will need to be assessed on a case-by-case basis.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employers should first check the work permits of non-EU applicants. In addition, any legal authorization, qualification or membership of a professional association should be verified if this is required to perform the job (e.g., lawyer, doctor, etc.).

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes, background checks vary from sector to sector. Certain regulated sectors, such as banking and finance, generally require more stringent checks due to the higher diligence required for its operations. Likewise, for specific positions within the private sector, public services or education, applicants are subject to more stringent checks.



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OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Although employers are permitted to outsource the carrying out of background checks to a third party, it is not necessary to inform applicants or employees of such outsourcing.

The requirements for such a contract are as follows:

- The contract must be in writing or in any other form which allows its performance and content to be assessed.
- It shall be expressly laid down that the processor shall process the data only in accordance with the instructions of the controller, shall not apply or use them for a purpose other than that set out in the said contract and shall not communicate them to other persons even for their preservation.
- The contract shall also set out the security measures referred to in Article 9 of the Spanish Data Protection Act 15/1999 and Royal Decree 1720/2007, which the processor is obliged to implement.
- Once the contractual service has been provided, the personal data must be destroyed or returned to the controller, including any documents containing the personal data.

If the third party is outside the European Economic Area (EEA), additional requirements may apply in the event of international transfers.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) register the relevant database files with the Spanish Data Protection Agency, referring to their use in carrying out the background checks for applicants or employees;
- (b) only collect information which is adequate, appropriate and non-excessive for the purposes of the processing. The personal data cannot be used for different purposes other than the purposes communicated to the applicant;
- (c) provide accurate information to data subjects regarding the processing of their personal data;



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- (d) in the case of applicants, obtain their prior consent to processing their personal data;
- (e) obtain authorization from the data subject when necessary;
- (f) implement appropriate security measures to protect the personal data from any destruction, loss, alteration, unauthorized disclosure or access;
- (g) ensure that data subjects can exercise their rights to access the information processed by the data controller, can modify their personal data when it is no longer updated or accurate, and can revoke their consent to the processing of their personal data.

The applicant has the right to object to the collection of data. A data subject may exercise this right in the following cases:

- (a) when his or her consent to the processing is not necessary, as a result of a legitimate and firm reason, referring to his or her specific personal situation, which justifies it, unless otherwise provided by law;
- (b) when the purpose is to carry out advertising and commercial research activities; or
- (c) when the purpose of the processing is to make a decision affecting the data subject intended to evaluate certain aspects relating to him or her, such as his or her performance at work, creditworthiness, reliability or behavior, and such decision is solely based on the automated processing of his personal data.

Data subjects may be subject to automated decisions, as described under (c) above, when such a decision:

- is made within the framework of the execution or implementation of a contract at the request of the data subject, whenever he or she is afforded the possibility of providing arguments that he or she may deem to be relevant, for the purpose of defending his or her right or interest. In such a case, the data controller shall inform the data subject in advance, clearly and precisely, that decisions may be adopted based on the parameters outlined above; or
- is authorized by law.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

As mentioned, there is no specific legislation in Spain concerning background checks. However, the Data Protection Act 1999, together with Royal Decree 1720/2007, of 21 December, which approves the Regulation implementing Act 15/1999, of 13 December, on Protection of Personal Data and the Spanish Constitution 1978, provide a statutory framework for conducting background checks on current or prospective employees.



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Additionally:

- Criminal record checks: Public Employee's Basic Statute (Law 7/2007), Law on the Assessment of the Suitability of Members of the Management Body and Key Function Holders in Credit Institutions (RD 256/2013), Regulation for the Prevention of Money Laundering and the Financing of Terrorism (RD 304/2014), among others
- Health checks/medical screenings: General Law of the Social Security (RD Law 1/1994), Prevention of Professional Hazards (Law 31/1995)
- Ability to work in Spain: Law 4/2000 on Rights, Freedoms and Social Integration of Foreigners in Spain, and its Development Regulation 2011
- Article 8 of the European Convention of Human Rights

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

The sanctions for breaches of the Data Protection Act 1999 that may be imposed on data controllers are as follows:

- EUR900 to EUR40,000 for minor breaches;
- EUR40,000 to EUR300,000 for serious breaches; and
- EUR300,000 to EUR600,000 for very serious breaches.

If background checks are conducted unlawfully, the Spanish Data Protection Agency has the power to issue the following financial sanctions:

- EUR40,000 for minor breaches due to the infringement of the information duty unless data has been obtained from third parties. In this case, the sanction would be considered to be of a serious nature.
- EUR300,000 for serious breaches:
 - o Processing personal data without the consent of the data subjects.
 - o Processing personal data or subsequently using it in violation of the principles and guarantees established by the principle of quality, and failing to respect the protection laid down by the implementing provisions, where this does not amount to a very serious infringement.
- EUR600,000 for very serious breaches:



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- o Trade union membership, religion and beliefs, racial origin, health or sex life and criminal records, to the extent it is not permitted by law.
- o For the transfer of personal data to countries which do not provide a comparable level of protection, without the authorization of the Director of the Spanish Data Protection Agency.
- o Failure to cease any illegitimate use of personal data processing operations when required to do so by the Director of the Spanish Data Protection Agency.

Additionally, if an employee can show evidence of some form of damage, he or she may claim compensation.

Contributed by: **Xavier Pallarés López & Norman Heckh**, Ramón y Cajal Abogados



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Turkey



Contributed by: **DAB Law Firm**

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Employers, especially large corporations, carry out background checks on applicants in Turkey but most background checks are not regulated under Turkish law. Employers do not need the applicant's consent to conduct background checks if information is commonly and publicly available. However, certain checks require the prior written consent of the applicant. Employers therefore need to comply with the appropriate procedures when carrying out background checks.

2. What types of background checks do employers typically carry out on applicants?

Employers usually carry out identity checks, health checks, criminal records checks, and prior employment and education verifications.



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Turkey

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above, subject to applicants' consent and other conditions (please see question 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above checks are expressly prohibited. However, please see question 5.

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Employers are not required to obtain applicants'/employees' prior written consent to check commonly and publicly available information. However, there are very few checks which are based only on publicly available information. An example of such information which may form the basis of background checks is social security numbers/identification details from social security records.

Background checks on education and past employment records, criminal records, credit/financial checks, health checks, fingerprinting, handwriting, union membership, political views and drug and alcohol testing are subject to the prior written consent of the applicant. There is no specific form for the written consent which should be provided by the applicants and, therefore, a simple signed letter giving consent to the checks mentioned above can be obtained from the applicants.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

The Labour Code (Law No. 4857) (published in the Official Gazette dated June 10, 2003 and numbered 25134), states the following: "Employers may keep a personnel file for each of their employees, in which they shall include, in addition to the identification details of the employee, all the documents and records that the employers are obliged to keep by law and present them to the authorized officials and offices as and when requested." It also provides that "employers are obliged to use the information they gain access to regarding employees with integrity and in line with the law and not to disclose any information, the confidentiality of which would be to the rightful benefit of the employee."

Moreover, pursuant to Article 419 of the Code of Obligations (Law No. 6098) (published in the Official Gazette dated February 4, 2011 and numbered 27836), the employer may only use the personal data of the employee in the event that such data is related to the predisposition of the employee to do the work or is required for the performance of the employment contract.



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Turkey

There are also specific points to note in relation to particular checks:

Education verification

There is no specific legislation regarding education verification; however, education verification requires the applicant's consent. The relevant authority will verify the applicant's educational background if the applicant provides such consent. Where the educational information is publicly available, no consent is required.

Past employment records

Where the applicant provides contact details for past employers/references, there is no need to obtain the applicant's consent. Apart from references made in a private capacity, anyone can make a prior employment verification check from publicly available information, such as the social security records of the applicant.

Criminal records

Employers may not conduct a criminal background check on a potential employee unless the potential employee grants a specific power of attorney. In practice, employers ask employees to submit criminal records during their employment since such records should be included in the personnel file of the relevant employee.

Credit/financial checks

Credit checks are not regulated under Turkish employment law. However, under the Banking Law, all customer information is strictly confidential and due to the lack of existing credit agencies in Turkey, other than those related to the banks and financial institutions, a credit check can be made from the banks and is therefore permissible. Written consent (in the form of a notarized proxy, if requested) from the applicant is required. Furthermore, when such information is obtained, this will constitute part of the personnel file of the employee and must be kept confidential.

Health checks

There is no specific legislation regarding health checks; however, health checks are subject to the prior written consent of the applicant/employee.

Social media/internet searches

There is no specific restriction regarding social media searches. However, there are different views on whether the use of social media for the purposes of eliminating applicants from a recruitment process is ethical. At present, since the way in which applicant-related information may be gathered may lead to a breach of privacy, employers are prohibited from undertaking such searches to find private and previously undisclosed information about the applicant.

Fingerprinting

There is no specific legislation regarding the collection of fingerprints from applicants and employees. However, further to Court of Appeal decisions, fingerprints are deemed to be personal data and collection of fingerprints from applicants/employees shall be considered to be a violation of privacy unless express prior written consent is provided and the employer acts in good faith.

Handwriting

There is no specific legislation regarding background checks on handwriting; however, such checks are subject to the prior written consent of the applicant/employee.



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Union membership and political views

There is no specific regulation regarding background checks on union membership and political views. There are, however, many protections against discrimination for employees who are trade union members. In this respect, the employer should not act in a discriminatory way towards such employees. Employers should also be very careful when collecting such information from applicants.

Drug and alcohol testing

There is no specific legislation regarding drug and alcohol testing unless a specific profession requires such testing. Such background checks are subject to the prior written consent of the applicant/employee. In addition, according to Article 25/II/d of the Turkish Labour Code, coming to work under the influence of alcohol or drugs or using alcohol or drugs in the workplace gives the employer an immediate right to terminate the employment contract.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

An employer is under an obligation to use information regarding applicants with integrity in compliance with the laws and not to disclose any confidential information. Moreover, employers should not use the information obtained in a discriminatory way.

In addition, the Turkish Constitution states that “everyone has the right to demand respect for his or her private life and family life. Privacy of individual and family life cannot be violated.” Furthermore, the Turkish Civil Code (Law No. 4721) (published in the Official Gazette dated December 8, 2001 and numbered 24607) sets out a number of provisions with respect to the protection of personal privacy. Pursuant to Articles 24 and 25 of the Turkish Civil Code, in particular, an individual whose personal rights are unjustly infringed may file a civil action against such infringement and/or may claim damages arising from such infringement. Additionally, the Turkish Criminal Code (Law No. 5237) (published in the Official Gazette dated October 12, 2004 and numbered 25611) provides protection with respect to the privacy of the individual.

According to Article 10 of the Turkish Constitution, everyone is equal before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such grounds. The principle of equality regulated under Article 5 of the Labour Code prohibits any kind of discrimination in employment relations on the basis of language, race, color, gender, disability, political opinion, philosophical belief, religion and sect, or similar reasons. Employers should, therefore, not commit any kind of discrimination on such grounds (against applicants or employees).

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Verifying professional qualifications is standard practice for some professions such as lawyers, doctors, pharmacists, etc. since these jobs require specific licenses. The employer should retain the relevant license of the employee in his or her personnel file.

9. Are there restrictions or limitations on the scope of these checks?

As stated above, employers are not required to obtain the applicant's written consent to check publicly available information in order to verify the professional qualifications of the employee. However, if such information is not publicly available, then the applicant's written consent is required.



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Turkey

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No, there is no particular background check which should not be carried out before an employer makes a job offer under Turkish laws.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

The conditions mentioned above for background checks do not differ if an employer wishes to carry out such checks on existing employees. Background checks during employment shall be reasonable and appropriate. Moreover, as stated above, the employer may only use the personal data of the employee in the event that such data is related to the predisposition of the employee to do the work or is required for the performance of the employment contract.

The employee is also bound by the information that is provided in the job application form and job interview; therefore the employee is under the obligation to give accurate information. However, if information contained in the personnel file or provided in the job application process is found to be incorrect, the employer shall be entitled to terminate the employment contract in accordance with Article 25/II of the Labour Code.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The employer should request documents from the applicant/employee regarding his or her identity data in order to determine his or her eligibility (including age, to determine whether he or she is legally entitled to work). Such data shall be kept in the personnel file of the employee.

In relation to foreign employees, the employer is obliged to obtain the appropriate residence permit and work permit for the employee in question. The employee's work permit depends on the employer, as the work permit is linked to the current employer of the employee. In this respect, the employer together with the employee is obliged to obtain the relevant permits for the employee. In relation to foreign applicants, the employer may ask applicants for the information and documents required to obtain the residence and work permit.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

Discrimination is not permitted where individuals are working under a definite/indefinite term or part/full-time contract. In this respect, there are no differences in the background checks that may be carried out.

In relation to contingent workers, the employer which registers the contingent workers on its payroll can carry out the background checks outlined above and there are no differences in the background checks that may be carried out. However, if these workers will be subcontracted to another employer, transferring that information to a third party could constitute a violation of the duty of confidentiality.



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Turkey

SECTORS

14. Do background checks differ in different sectors?

The background checks that are carried out as market practice will vary from sector to sector. There are mandatory background checks for some professions due to the nature of the job. As an example, drug and alcohol tests are required for pilots and drivers.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

The applicants'/employees' written consent is required when personal data is transferred to a third party vendor. Under the Labour Code, employers are bound by an obligation of confidentiality in respect of information provided by applicants/employees for their personnel file as explained above. In this respect, transferring such information to a third party could constitute a violation of that duty of confidentiality. Therefore, employers are required to obtain the written consent of the prospective employee before the transfer and processing of his or her data by a third party service provider.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

There are no specific regulations in terms of data protection in Turkey. Although no specific prohibition has been imposed on the type of data/documents that employers may keep and process in respect of their employees, it is recommended that the prior written consent of the employee to the retention and processing of the employee's data for employment purposes is obtained and that all the steps are taken to ensure that such data is not disclosed to third parties.

Although there is no specific legislation restricting an employer from transferring its employees' data to third parties, under the Labour Code, employers are bound by an obligation of confidentiality in respect of information provided by the employee for his or her personnel file. Transferring such information to a third party would constitute a violation of that duty of confidentiality. In practice it is therefore recommended that the employee's written consent be obtained for the transfer of information from his or her personnel file to third parties.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- The Constitution of the Republic of Turkey
- Turkish Labour Code (Law No. 4857) (published in the Official Gazette dated June 10, 2003 and numbered 25134)
- Turkish Code of Obligations (Law No. 6098) (published in the Official Gazette dated February 4, 2011 and numbered 27836)
- Turkish Criminal Code (Law No. 5237) (published in the Official Gazette dated October 12, 2004 and numbered 25611)



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- Turkish Civil Code (Law No. 4721) (published in the Official Gazette dated December 8, 2001 and numbered 24607)
- Banking Law (Law No. 5411) (published in the Official Gazette dated November 1, 2005 and numbered 25893)

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

Criminal (fines and imprisonment up to a term of four years) and civil sanctions are enforceable if background checks are conducted unlawfully.

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BACKGROUND CHECKS
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United Kingdom



Contributed by: Mayer Brown International LLP

OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, employers in the UK regularly carry out background checks on applicants. However, limitations do apply to the scope of background checks. Many checks are subject to the consent of the applicant and/or other conditions. Employers therefore often need to assess whether background checks are appropriate and proportionate in the circumstances and consider the implications of data protection and discrimination legislation on any checks that they wish to carry out.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in the UK are education and past employment checks, confirmation that the applicant has appropriate permission to work in the UK and criminal records checks.



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United Kingdom

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above, subject to applicants' consent and other conditions (please see question 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above checks are expressly prohibited (but please see question 5).

5. Which of the above background checks are employers permitted to carry out on applicants but only if certain conditions are satisfied (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Criminal records checks, health checks/medical screening, fingerprinting, handwriting, union membership, political views and drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to all of the background checks above, the employer should obtain consent from the applicant for data protection purposes. The checks undertaken must be appropriate and proportionate to the relevant role and must not discriminate or discourage people from applying. Applicants should be given the opportunity to make representations if any of the checks produce discrepancies compared to the information they have provided.

There are also specific points to note in relation to particular checks:

Criminal records qq

Criminal records checks are not usually required for all applicants/employees and should only be requested where the need to protect the employer's business, customers or clients makes it appropriate. There are restrictions on who can be asked to disclose "spent" convictions (where an individual has a criminal conviction but does not re-offend during a specified rehabilitation period, his or her conviction will be considered "spent"). For example, in financial services, those who perform regulated roles can be asked to disclose spent convictions.

Health checks/medical screening

It is generally unlawful to ask about the health of a job applicant before offering a job. Health checks are only permitted if there is an occupational requirement to justify one.



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Social media/internet searches

Any media searches undertaken should be necessary, proportionate and transparent. If there is no justifiable reason for conducting media searches then they should not be done.

Fingerprinting

There is no law preventing the collection of fingerprints. However, great care must be taken by the employer to ensure it does not risk breaching the data protection regime in the UK. Fingerprinting is a controversial topic in the UK and must be approached with caution. Special consideration must be given to the justification as to why fingerprinting is necessary and whether it is proportionate. Taking fingerprints is very uncommon in the UK.

Union membership and political views

Employers should be extremely cautious about collecting this type of data from applicants. Trade union membership and political opinion constitute sensitive personal data under the UK data protection regime and specific conditions would apply to the processing of such information. Such information should not be used to influence whether an offer is made, as this could potentially be discriminatory.

Drug and alcohol testing

These tests can be carried out but only in limited circumstances, for instance, where working under the influence of drugs or alcohol could give rise to health and safety considerations (for example, where staff drive or operate machinery) or serious damage to the employer's business. The applicant would need to consent to the test. This test should only be carried out during employment if justified, necessary and proportionate and with consent (although an employer may make withholding consent a disciplinary matter).

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used where relevant to the particular role and should not be used in a discriminatory way.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Yes. Employers should not ask for details which relate to protected characteristics under the Equality Act 2010 (e.g., age, nationality, sexual orientation, religion, etc.) on an application form or before a job offer has been made. These questions should be asked as part of an equality monitoring form.



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Applicants should only be asked to complete a health questionnaire after a job offer has been made to them and health checks are only permitted if there is an occupational requirement to justify one.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment but will need to be appropriate, necessary, proportionate and justified by reference to the employee's role.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The employer must request, and the individual must provide, certain original documents to establish their eligibility to undertake the work on offer. The documents that are required depend on whether the person is subject to immigration control. The employer must check the validity of the original documents and satisfy itself that the individual is the person named in them and that they have the right to work in the UK. Once the employer has satisfied itself of the validity of the documents, it must make copies of the relevant pages of the original documents provided in a format that cannot later be altered. These documents must be retained for the duration of the individual's employment and for a further two years after employment has ceased. For certain categories of employees, further checks will need to be carried out every twelve months.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

The background checks that are carried out as market practice will vary from sector to sector. For example, in the financial services sector, those individuals who are regulated can be required to disclose spent convictions.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.



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United Kingdom

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Where an employer proposes to use a third party to carry out background checks on its behalf the notice to the applicant should make it clear that the employer will use a third party to carry out this processing on its behalf. If the third party vendor is outside the European Economic Area (EEA), processing of personal information should only be undertaken in countries or territories with adequate levels of protection for the rights of individuals in relation to the processing of personal information or where the data exporter is satisfied that appropriate controls are in place. The employer should consider entering into EU Model Contract Clauses with the relevant entity processing personal information outside the EEA.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) only process personal information for the purposes collected and as necessary for the pre-employment screening, treating all personal information as confidential information and ensuring appropriate restrictions exist within the business to ensure only relevant departments/individuals can assess the data;
- (b) ensure individuals are aware of and can exercise their right to receive a copy of the personal information held about them, rectify or update the information, request deletion of the data where it is inaccurate, outdated or irrelevant and opt-out/revoke authorization to the further processing of their information;
- (c) not retain the personal information for longer than is necessary for the purposes consented to;
- (d) take appropriate technical and organizational steps to protect personal data from unauthorized disclosure, damage or destruction;
- (e) produce a code of conduct for all staff processing individuals' personal information; and
- (f) undertake periodic audit reviews to check compliance with data protection measures.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Criminal records checks: Protection of Freedoms Act 2012, Rehabilitation of Offenders Act 1974, Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975
- Ability to work in the UK: Immigration, Asylum and Nationality Act 2006
- The Equality Act 2010
- Data Protection Act 1998
- Article 8 of the European Convention on Human Rights (and Human Rights Act 1998)



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United Kingdom

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted unlawfully, actions for damages or distress could be brought. The Information Commissioner has the power to issue financial penalties of up to GBP500,000 to data controllers for serious breaches of the Data Protection Act 1998 or to issue an enforcement notice or undertaking. Criminal offences may be committed in relation to background checks.

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The material is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice.

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