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Labour & Employment Law

Background checks — uncovering ominous pasts

Can an employer refuse to hire a person who has been convicted of fraud or a violent criminal offence? Can an organization perform reference checks on prospective employees? The answers to these questions are not as simple as they seem.

Background checks provide valuable information about prospective employees, including information about employment history, academic credentials and certification, credit history, references and criminal convictions. Learning about a candidate's past performance and character can prevent costly hiring mistakes. However, before collecting personal information, employers should be aware of laws applicable to conducting background checks and restricting how such information may be used.

The most common issues that arise in respect of background checks include: (1) privacy laws; (2) human rights laws; and (3) consumer reporting laws.

Privacy laws

Background checks are subject to provincial privacy legislation in Alberta, B.C. and Quebec as well as the *Personal Informa-*



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tion Protection and Electronic Documents Act (PIPEDA), which applies to commercial activities of provincially-regulated organizations in provinces that do not have privacy legislation as well as commercial and employment-related activities of federally regulated organizations.

Among other obligations, under PIPEDA and the provincial Acts, organizations must:

- Obtain consent to collection, use or disclosure of personal information (or provide notice under some provincial Acts);
- Limit collection, use and dis-

closure of personal information to that which is necessary and reasonable in the circumstances (for example, organizations cannot perform drivers' checks if the position does not involve driving); and

■ Ensure accuracy and security of information.

Although some provinces such as Ontario have not enacted private-sector privacy legislation applicable to employment matters, organizations in those jurisdictions should still be aware of privacy laws and practical considerations affecting background checks. For example, the organization may:

■ Need to obtain information from an organization that is subject to PIPEDA or the provincial Acts, or which has a policy of requiring consent to disclosure of personal information;

■ Require information from public bodies, such as school boards or police services boards, which are subject to public sector privacy legislation such as the *Municipal Freedom of Information and Protection of Privacy Act* (Ontario);

■ Use an independent service provider to conduct the back-

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An oddity in Labour & Employment Law

Employees sue over secret bathroom cameras

Have you ever wondered if you were being watched in the bathroom? Sixteen employees have sued Duane Reade, the pharmaceutical giant, for allegedly placing video cameras in their washrooms to watch workers.

Employees claim that surveillance cameras were hidden in the ducts of the company's New York City warehouse bathrooms to spy on workers, and managers threatened to fire anyone who complained about the cameras. Sixteen employees decided to fight back and filed a US\$110 million dollar lawsuit, according to NYdailynews.com.

Company managers say they simply wanted to make sure that company merchandise wasn't being tampered with. — *Anum Lateef*

DREAMSTIME.COM

Employment class action gets thumbs down

As employment class actions become increasingly frequent, counsel must continue to assess whether a class proceeding is a workable solution to adjudicate the claims of multiple plaintiffs.

In *Kafka v. Allstate Insurance Co. of Canada*, [2011] O.J. No. 1683, the Ontario Superior Court of Justice drew attention to the plaintiffs' onus to demonstrate a commonality of issues among class members and denied the plaintiff's motion to certify. In doing so, the court suggested that class actions are not likely to be the appropriate route for constructive dismissal cases as the law of constructive dismissal requires an individualized inquiry as to whether the reasonable alternate employment offer was sufficient for any particular employee. This requires an analysis of several factors such as earnings, bonuses, benefits, pensions, age, education, training, location of workplace and a comparison between the old and new job.

The facts

In *Kafka*, the representative plaintiffs were former agent-employees of the defendant, Allstate Insurance Company of



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Canada. As a result of changing market conditions, Allstate made a decision to revise its business model, making changes to its distribution and compensation systems. Under the original model, agents of Allstate were located in dispersed neighbourhoods and operated, managed and controlled their offices as if virtually their own. Agents represented Allstate in their neighbourhoods and were encouraged to invest their own time to foster relationships and build a book of business. Agents would receive commissions from new customers as well as renewals.

As the insurance industry became increasingly competitive, Allstate responded by reviewing its business model to determine how to best respond to the market conditions. It determined that fewer, but more centralized and consolidated offices, corporately managed

and staffed, would provide their customers with better access to insurance products. As a result, Allstate decided to close the neighbourhood offices and transfer all existing agents to one of their newly consolidated offices. Agents would be assigned to one of several new positions that Allstate created.

On July 24, 2007, Allstate sent a letter to the neighbourhood offices advising agents of the implementation of a new product distribution and compensation system which would be phased in over a 24-month period. Allstate offered to meet with the agents and discuss the impact of any of the changes. The letter included a description of what their future roles would be, the remuneration provided and the consolidated office they would be assigned to.

Under the new model, there were four positions: agency manager, business development agent, relationship development agent and customer care agent. Generally, agency managers had the potential to receive the highest salaries and were responsible for managing all aspects of the

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Employers should only ask for strictly necessary information

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ground checks, which may be subject to PIPEDA for its commercial activities.

In all of the above situations, applicants' consent may be required to complete the relevant background checks even if the potential employer is not subject to PIPEDA or the provincial Acts.

In at least one Ontario case, an individual attempted to establish a tort claim against an employer on the basis of an unauthorized credit check. Whether individuals have common law privacy rights is still unsettled law in Canada.

Human rights laws

Human rights legislation across Canada prohibits discrimination in employment on

the basis of certain characteristics. In particular, some statutes prohibit discrimination on the basis of one or more of the following:

- conviction of an offence under a provincial enactment (for example, certain driving offences);

- conviction of an offence (including a criminal offence) that is unrelated to the employment or intended employment of the individual;

- conviction of any offence for which a pardon has been granted and not revoked.

Background checks may also reveal information that could be linked to other prohibited grounds of discrimination. For instance, reference checks may reveal that an applicant has a disability and some background checks may require a person's birth date (which reveals age). By collecting such information,

employers become vulnerable to accusations that their hiring decisions were influenced by unlawful considerations.

To reduce the risk of human rights claims, employers should perform background checks only after providing a conditional offer of employment. Such offer should be clear that it can be revoked if the employer is not completely satisfied with the outcome of the background checks. To avoid misunderstandings, employers should also tell applicants why the information is being collected and how it will be used.

Consumer reporting laws

Consumer reporting legislation in most provinces impacts an employer's ability to obtain consumer and/or credit reports on job applicants (consumer reports). The scope of such legislation varies, but can cover areas such as information about an individual's employment history, education or professional qualifications.

Although consumer reporting legislation generally permits employers to obtain consumer reports, each statute requires the individual's express consent and/or imposes specific notice requirements prior to obtaining such information.

Some consumer reporting legislation also requires notification if a benefit is denied on the basis of a consumer report. Therefore, for example, if an applicant is not hired on the basis of a negative reference, the person may be entitled to notice of that fact, as well as his or her right to request further information on the negative reference.

Despite the complicated legal framework surrounding background checks, most employers would agree that they are worthwhile. In most cases, potential liability can be avoided by: (i) limiting inquiries to information that is strictly necessary to assess an applicant's suitability for a position; (ii) obtaining express consent to reasonable background checks; and (iii) taking appropriate steps to ensure the accuracy and security of any information obtained. ■

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