

Background Checks on Prospective Employees Limited by New Law to take Effect Later this Year

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A new Ontario law limiting the types of information that can be obtained by employers in police background checks of prospective employees is slated to take effect later this year.

The law, the *Police Record Checks Reform Act, 2015*, was passed by the Legislature and given Royal Assent last December.

Many organizations have had well-established practices of requiring potential employees and volunteers to provide police record checks when applying for certain types of positions. The purpose of these checks is to obtain information that will help the organization determine the suitability of the candidate, taking into account factors such as honesty, integrity and trustworthiness. However, the wide range of information that has been issued in response to these record checks has had the potential to be invasive to one's privacy and has also raised concerns of potentially discriminatory treatment.

For some time, privacy, human rights and employment laws have sought to limit how much personal information organizations could collect from applicants, volunteers and employees, as well as how the results could be used. This resulted in inconsistent and opaque principles struggling to govern how police record checks were conducted in Ontario and what type of information could be disclosed.

The new Act limits the types of information that can be released by police record checks and standardizes disclosure procedures. Once it comes into force, it will prevent organizations from requesting police record checks except in the specific manner the Act outlines.

Limited Disclosure

Previously, when potential employers carried out a police record check they could, in some cases, receive a wide variety of non-conviction information, such as records of suicide attempts,

mental health detentions, complaints where charges were never laid, withdrawn charges, and acquittals.

Civil rights and mental health organizations argued that the release of these forms of non-conviction records created barriers to education, employment, volunteering, and other opportunities.

The new Act now specifically prohibits disclosure of mental health records, non-conviction records, such as withdrawn or dismissed charges and acquittals, and records from police "carding" checks, except in limited circumstances.

The Act applies to the common purposes for which such checks generally are conducted, such as determining suitability in applications for employment, volunteering, licencing, education, holding office, and group membership. For these types of uses, the Act creates three categories of checks:

- criminal record checks;
- criminal record and judicial matters checks, and
- vulnerable sector checks.

In a standard criminal record check, only criminal convictions and findings of guilt under the *Youth Criminal Justice Act* may be disclosed. A criminal record and judicial matters check could disclose additional information such as conditional discharges for up to three years, absolute discharges for up to one year, and outstanding warrants.

For a vulnerable sector check, which is conducted when an individual is in a position of trust or authority over vulnerable persons like children or the elderly, certain additional non-conviction information may still be disclosed. However, such disclosure must satisfy the criteria for "exceptional disclosure", which require police to conduct a more in-depth review of the circumstances of the request and the relevance of the information.

Standardized Procedure

In addition to limiting categories of disclosure, the Act also describes how to request a police record check, how to respond, and the proper scope and manner of disclosure. For example, the Act specifies that a person or organization that receives information in response to a police record check shall not use or disclose it except for the purpose for which it was requested or as authorized by law.

Notably, the Act requires that the results of the check must first be disclosed to the individual who is the subject of the check. That person is then given an opportunity to review the results of the check before the information is released to the employer or voluntary organization that made the request. Under the legislation, a record will only be released to a third party after the person who is the subject of the check consents to its release. If the person believes, for example, that non-conviction information is unjustly included, there is a reconsideration process available.

Implications for Employers and Employees

When the Act takes effect, it is expected to have a significant impact on hiring practices.

Employers requesting criminal record checks will no longer be provided with information about mental health orders or non-conviction records, except in limited circumstances, and employees will have more control over the process of releasing information to a potential employer.

Employers are advised to familiarize themselves with this new law and prepare the new administrative and organizational required to be in compliance.

The willful contravention of certain provisions of the Act by a person or organization is an offence and can result in a fine of up to \$5,000 upon conviction. However, a prosecution will require the consent of the Minister of Community Safety and Correctional Services.

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