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# A Global Guide to Background Checks



Americas | Asia | EMEA

## Introduction

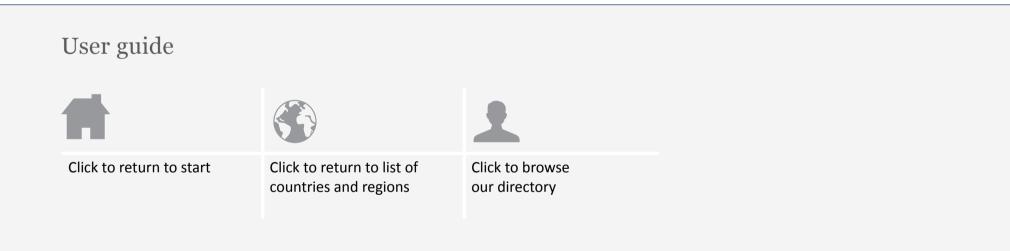
Background checks have become a critical part of the recruitment process in many countries. Employers with a global presence often seek to harmonize recruitment policies across different jurisdictions but addressing the various restrictions and regulations around background checks can be challenging.

A Global Guide to Background Checks provides an overview of both the legal and practical issues relating to background checks in 50 key countries. Our largest guide to date, 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 new 'at-a-glance' traffic lights for each region, highlighting whether background checks are standard practice, unusual or prohibited in a particular jurisdiction.

We hope you find **A Global Guide to Background Checks** useful. It has been made possible with the input from lawyers across Mayer Brown's global office network and partner law firms in other jurisdictions.

Duncan Abate | Maureen Gorman | Philippa James | Nicholas Robertson | Guido Zeppenfeld

Firm Practice Leaders, Employment & Benefits Group Mayer Brown



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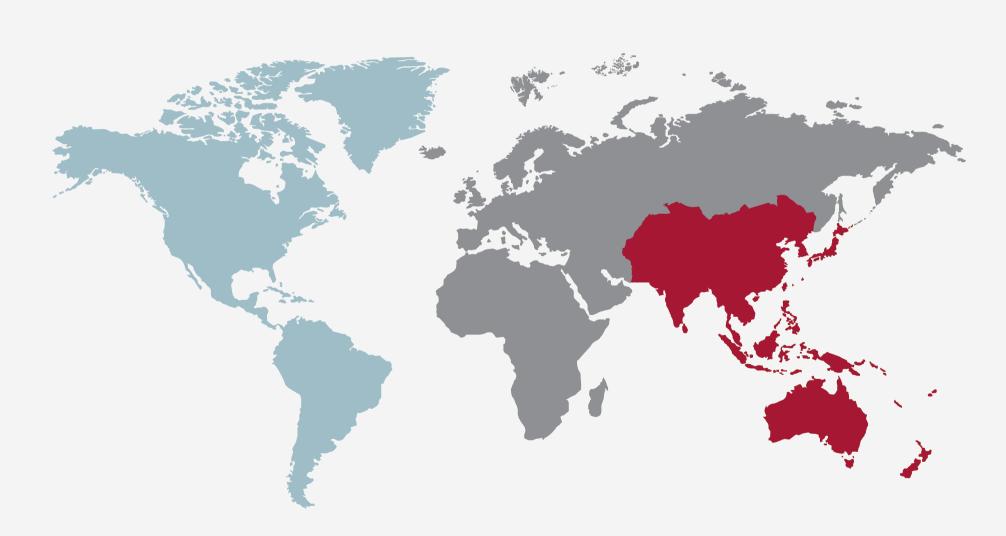












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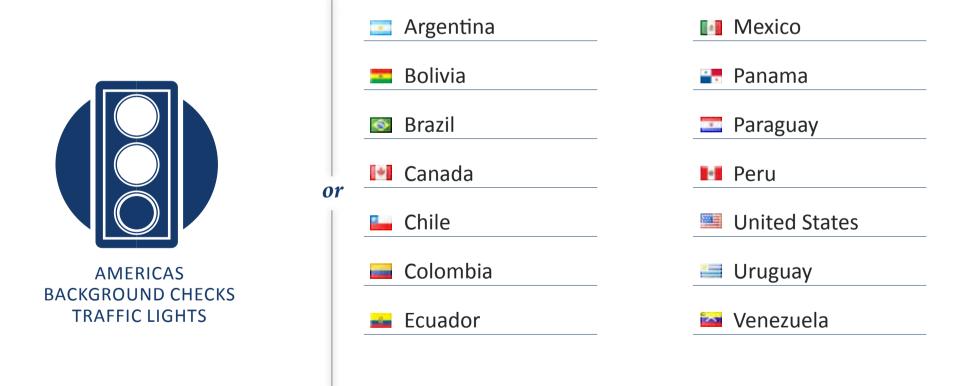




## Contents Selected: AMERICAS



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AMERICAS BACKGROUND CHECKS TRAFFIC LIGHTS	📕 Argentina	📘 Bolivia	🦉 Brazil	SELECT A COUNTRY/JURISDICTION										
				🚺 Canada	📘 Chile	📘 Colombia	📘 Ecuador	📑 Mexico	Panama	📑 Paraguay	📮 Peru	📊 United States	📗 Uruguay	្ Venezuela
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														

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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#### **OVERVIEW**

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

Yes, it is considered standard practice for employers in Argentina to carry out background checks in relation to applicants. However, due to data protection regulations, some of these checks are subject to the express consent of applicants.

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

The most common background checks carried out by employers in Argentina relate to health, education, family background and past employment checks. If an applicant is a foreign national, employers also typically check that the applicant has the necessary work authorizations and appropriate permissions to work in Argentina.



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#### **BACKGROUND CHECKS ON APPLICANTS**

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

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

In Argentina, employers are permitted to carry out checks in relation to education and past employment records, criminal records, credit/finances, health, social media/internet search, fingerprinting, handwriting and drug and alcohol testing.

• Handwriting

• Political views

• Union membership

Although health checks are mandatory in Argentina, other checks might require the consent of the applicant and/or other conditions to be satisfied in order to be lawfully carried out. Please see questions 5 and 6 for further information.

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

Background checks in relation to union membership and political views checks are not permissible in Argentina.

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

Checks in relation to education and past employment records, criminal records, health, fingerprinting, handwriting and drug and alcohol testing are only permissible if certain conditions are satisfied. Please see question 6 below.

No conditions apply to credit/financial and social media 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?

Under data protection regulations, an employer should always obtain an applicant's consent in relation to all of the background checks mentioned in the response to question 5 (except credit/financial and social media checks).

In general terms, such checks should be proportionate and relevant in relation to the position for which the candidate is applying. If they are not proportionate or relevant, there is a risk that discrimination claims will be brought against the employer.

Certain conditions apply to the following checks mentioned in response to question 5:

#### Educational and past employment records

This information is generally provided directly by applicants. If such information is included within a database, the employer should ensure that its data protection obligations are fulfilled.













#### Criminal records

Checking an applicant's criminal records could be considered discriminatory if, as a result of such a check, the applicant is not offered the position. Therefore, criminal records checks should be restricted to candidates who apply for sensitive roles where such background checks are reasonably expected. For instance, a criminal records certificate is usually required for candidates who apply for sensitions within the financial sector.

#### Health checks/medical screening

Health checks are mandatory in Argentina. However, legislation confirms that HIV and Chagas-Massa disease tests cannot be included within these checks.

#### Fingerprinting

Although there is no legal obstacle to requiring applicants to provide their fingerprints, this practice is very rare in Argentina. Fingerprints should therefore only be collected when necessary (e.g., when an individual applies for a position at a bank or financial institution).

#### Handwriting

Handwriting checks are very common, especially as part of psychometric tests, which are generally requested together with health/ medical screening checks. However, unlike health checks, psychometric tests are not mandatory in most cases.

#### Drug and alcohol testing

These checks should only be performed in limited circumstances, for example, in relation to positions where the employee could seriously harm himself/herself or others if he or she rendered services under the influence of drugs or alcohol. Typical examples are those of drivers or machinery operators. This check should only be requested when absolutely necessary (e.g., in connection with security issues) and is only likely to apply in a minority of cases.

### 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?

As prescribed by Argentine data protection regulations and legislation against discrimination, employers should not use the information provided by applicants for purposes other than those which led to the creation of the database or the purposes communicated to or authorized by the applicants at the time that their personal information was submitted. The personal information provided by applicants or employees should not be used in a discriminatory matter.

#### **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 common practice in Argentina that no formal offers of employment are made (especially in writing) until after all background checks are conducted. Depending on the circumstances, the withdrawal of an offer based on information arising from background checks could be interpreted as discriminatory behavior.

#### 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)?

Argentine legislation requires employers to repeat health checks periodically in certain cases, for example, when employees are exposed to certain health risks in the workplace. If a periodic health test is not mandatory, an employer is permitted to determine if/ when the tests should be repeated.

This also applies to all types of permissible background checks. However, if the background checks produce negative results, sanctions can only be applied in relation to infringements that cause actual, rather than potential, damage to the employer.

#### **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 relation to employees with an Argentine passport, employers are only required to check that applicants have obtained their Unique Key for Labour Identification ("CUIL"), which enables the employer to register the employment contract with the relevant labour/social security agencies and make salary payments.

If employees are foreign nationals, they should also provide all necessary documentation in order to confirm that they have been granted either a temporary residence permit or a permanent residence authorization. Resident status is proved by means of an Argentine ID Card issued by the National Register of Persons.

#### 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?

In general terms, background checks may differ in different sectors. For example, a criminal records certificate is usually required for candidates who apply for senior management positions within the financial sector.











#### **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 fact that background checks are conducted by a third party vendor does not have any impact on the checks that can be carried out. However, the third party vendor should always comply with all relevant data protection obligations (please see question 17).

#### **DATA PROCESSING**

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

There are certain data protection restrictions, limitations and conditions that should be considered when receiving personal data from applicants or when a database is created during the recruitment or selection process. These issues are regulated by Law No. 25,326 (Protection of Personal Information).

Employers should take the following steps:

- (a) Not ask candidates to reveal sensitive data (e.g., any personal data that reveals racial or ethnic origin, political opinions, religious convictions, philosophical or moral beliefs, union membership and data concerning the health or sex life).
- (b) Form an official "database" in order to collect, treat, process, file, organize or access the information provided by candidates.
- (c) Register as a database holder with the "National Direction of Personal Information Protection".
- (d) Inform the above-mentioned government agency of the following: (i) the person or company responsible for the database; (ii) characteristics of the database; (iii) purpose of the database; (iv) the nature of the data required; (v) the amount of people registered; (vi) the data protection methods used; and (vii) the data retention period.
- (e) Request applicants' prior consent in order to include their personal information in the database, unless it constitutes public information.
- (f) Clearly inform applicants of the following: (i) the purpose of the data required and its beneficiaries; (ii) the existence of a database, together with the identity and address of the person or company responsible for it; (iii) whether the information required is "compulsory" or "optional" and the consequences of providing or denying such information; and (iv) the applicant's ability to exercise his or her rights in order to access, rectify or remove the information submitted.
- (g) Enforce all necessary measures in order to ensure the security and confidentiality of the personal data submitted.
- (h) Only transfer the data submitted when relying on prior consent provided by the applicants, who should also be informed about the purpose of the transfer. An exception applies if the transfer of information is required by authorized government agencies or for public health reasons. In these circumstances, the data could be transferred without prior consent.











(i) Not transfer personal data submitted in Argentina to any other country or international organization which does not provide appropriate protection levels. However, data could be transferred internationally when required by international law authorities or for public health reasons.

#### SANCTIONS/ENFORCEMENT

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

- Labour Contract Law (Law No. 20,744), Section 73
- Data Protection Law (Law No. 25,326)
- Discrimination Act (Law No. 23,592)
- Resolution No. 37/2010 on Health Exams issued by the SRT
- Argentine Migrations Policy (Law No. 25,871)
- Criminal Records Register Act (Law No. 22,117)

## 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 could be brought against the potential employer. If such claims are based on discriminatory behavior, legislation provides that the wrongdoers could be forced to cease their behavior. If breaches are related to data protection issues, fines could be imposed on the database holder, as regulated by data protection legislation.

The relevant inspection body may apply any of the following sanctions: warnings, suspensions, fines of one thousand pesos (AR\$1,000) to one hundred thousand pesos (AR\$100,000), and/or closure or cancellation of the database (as provided by section 31 of Law No. 25,326).

Contributed by: Joaquin E. Zappa, J.P. O'Farrell Abogados













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#### **OVERVIEW**

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

Yes, it is standard practice for employers to carry out background checks in relation to applicants. However, the scope for employers undertaking such checks is limited. Background checks are subject to the applicant's consent and, where a criminal background certificate is required, the applicant must obtain it himself/herself.

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

The most common background checks in Bolivia relate to education and past employment records and, in specific cases, confirmation that the applicant has appropriate permission/visa to work in Bolivia and criminal records checks with the applicant's consent. Checks may vary depending on the nature of the job/activity.













#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening

Social media/internet search

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 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 question 5).

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

• Handwriting

• Political views

• Union membership

Criminal records checks, credit/financial 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 referred to in the response to question 5, the employer should obtain consent from the applicant for data protection purposes and to minimize the risk of discrimination. However, a decision to employ an applicant cannot entirely be based on one of the following:

- Health checks/medical screening (this may vary according to the type of activities involved)
- Credit/financial checks
- Social media/internet search
- Union membership

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Political views

An applicant should be given the opportunity to make representations if any of the above checks produce discrepancies when compared with the information they have provided.











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

#### Criminal records

Criminal records checks are rarely required for all employees but, in multinational companies, it has become more common recently in relation to permanent employment contracts. Where a criminal background certificate is required, this is issued by the Judicial Registry of Criminal Background (*"Registro Judicial Antecedentes Penales - REJAP"*).

#### Credit/financial checks

This requirement is mostly applied to foreign nationals in accordance with the type of permit/visa they apply for in order to work in Bolivia (e.g., they may be required to demonstrate a good credit record/financial solvency).

#### Health checks/medical screening

It is generally unlawful to ask about the health of a job applicant before offering him or her a job. Health checks are only permitted if there is an occupational requirement to justify one. In Bolivia, for example, it is mandatory for a public hospital to run a preliminary general health check once an applicant has been offered a position and will become an employee. The aim of this preliminary check is to assess the health of the applicant on joining the company, as social security will be responsible for providing social benefits to employees who are prevented from working due to their health.

#### 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.

#### 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 Law 045 (e.g., race, sexual orientation, age, nationality, religion, political views, finances or health, etc.) on an application form or before a job offer has been made, since this could constitute discrimination. Depending on the type of job, these questions should be asked as part of an equality monitoring form.

Applicants should only be asked to complete a health questionnaire after a job offer has been made and health checks are only permitted if there is an occupational requirement to justify one (please see question 6).

#### **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.

In Bolivia, as noted in question 6, when an employee is hired, the employer is obliged to run medical tests in order to obtain an "Entrance Health Certificate" to establish whether social benefits apply to the employee. This applies to all types of employers and is a standard health check.

#### **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 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 he or she has the right to work in Bolivia. 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.

#### 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, individuals who are regulated can be required to disclose spent convictions (i.e., if they have ever been imprisoned for a rendered judgement).

#### **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.

#### 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 further processing of their information;
- (c) take appropriate technical and organizational steps to protect personal data from unauthorized disclosure, damage or destruction;
- (d) produce a code of conduct for all staff processing individuals' personal information; and
- (e) 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: Criminal Procedural Code (Art, 440 442), 1999; Law 045, Supreme Decree 0213, 2009
- Ability to work in Bolivia: Labor Law 1942; Immigration Law 370, 2013
- Data Protection: Political Constitution 2009; Law 027, 2010

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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?

In terms of discrimination, the employer would be subject to sanctions determined by the Ministry of Labor. Furthermore, if the applicant is subject to discrimination due to the background checks, this may lead to criminal sanctions (between three and seven years' imprisonment).

If information is obtained without the consent of the applicant, he or she may initiate a privacy action under the terms of the Political Constitution and Law 027. Individuals or legal entities, who have been unlawfully refused the right to access, obtain, correct or delete personal data, are entitled to bring this claim. The personal data must have been recorded in computer files or databases, and must affect one or several fundamental rights to personal and family privacy, image, honor and reputation.

A valid claim for privacy protection must meet three requirements. First, the plaintiffs must show that their rights were and/or are being violated. Secondly, the claim must be brought against the entity which owns or controls the data, in which case the claim must be filed as a last remedy to restore the violated rights. In other words, plaintiffs must use all other remedies available for the protection of privacy before filing the constitutional claim with the court. Thirdly, in order to comply with the statute of limitations, the plaintiff must file the claim within six months of the violation.

The affected individuals or legal entities cannot bring the claim if they freely and expressly consented to the infringement of their privacy, or if the consequences of the breach have ceased.

Contributed by: Carlos Pinto, FERRERE

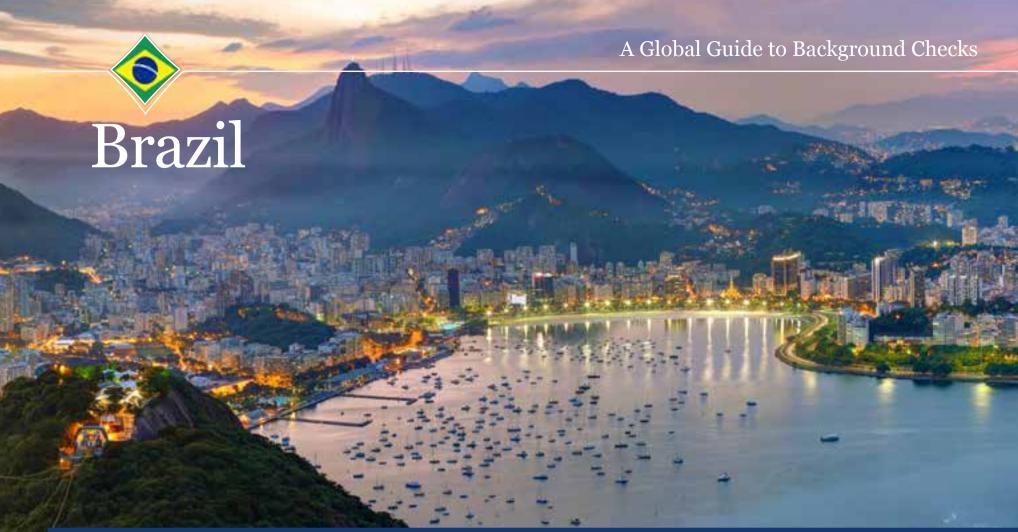


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#### **OVERVIEW**

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

Yes, it is standard practice in Brazil for employers to carry out checks on applicants. However, limitations apply to the scope of background checks.

Although legislation does not expressly prohibit background checks, the principles of the Brazilian Constitution may apply as discrimination during the recruitment process is unlawful.

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

The most common background checks in Brazil are education and past employment checks.



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## Brazil

#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records • Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search Drug and alcohol testing

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

Education and past employment records, credit/financial checks, social media/internet search, fingerprinting and handwriting.

• Handwriting

• Political views

• Union membership

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

Although Brazilian legislation does not expressly prohibit all background checks, the legal system does prohibit discrimination during the recruitment process. Depending on the circumstances, background checks may, therefore, be considered discriminatory. Checks related to union membership, political views and drug and alcohol testing are usually not permitted.

Please see question 6 for further information.

#### 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 and health checks/medical screening.

#### 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 above, the Brazilian legal system prohibits discrimination during the recruitment process.

Although there is no legislation that prohibits criminal records checks, general legal principles and case law provide that such a check represents a violation of an individual's right to privacy and also constitutes a discriminatory act. However, an exception applies in relation to the recruitment of surveillance personnel at financial organizations, who are required not to have a criminal record. In this limited instance, criminal records checks are therefore permitted.

In relation to health checks/medical screening, Brazilian legislation does not prohibit this type of background check (although there is specific legislation (Law No. 9.029/95) which expressly prohibits employers from requiring applicants to undergo medical tests related to pregnancy or sterilization). The refusal to hire an employee due to a health condition is considered to be a discriminatory practice, which is prohibited by the Brazilian Constitution. However, health checks can be permitted if there is an occupational requirement (e.g., the role requires an element of physical activity).

#### 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.











## Brazil

#### **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. A health check can be permitted if there is an occupational requirement (e.g., the role requires an element of physical activity).

#### 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, subject to the principles outlined in the response to question 6.

#### **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 the individual's 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 he or she has the right to work in Brazil.

#### 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.

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## Brazil

#### **OUTSOURCING BACKGROUND CHECKS**

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

Brazilian legislation does not prohibit an employer from outsourcing background checks to a third party vendor.

### 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 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. Information should be kept confidential.

#### **DATA PROCESSING**

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

Employers should 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.

#### SANCTIONS/ENFORCEMENT

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

- Brazilian Constitution, Article 3, IV
- Brazilian Constitution, Article 5, X
- Brazilian Constitution, Article 7, XXXI
- Law No. 9.029/95

## 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 material or moral damages (e.g., damages for pain and suffering) could be brought against the employer.

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#### **OVERVIEW**

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

Yes, employers in Canada regularly carry out background checks on applicants. However, personal information collected about applicants should be restricted to that which is relevant to the proposed employment. Most checks are subject to the prior written consent of the applicant, and should be conducted only after a conditional offer of employment has been made (preferably in writing).

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

The most common background checks in Canada are confirmation that the individual is legally entitled to work in Canada, confirmation of past employment and (to a lesser extent) criminal record checks.













#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- \_ ....

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

Subject to the applicant's consent, reasonableness and other conditions (please see question 6), an employer may conduct the following searches:

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

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

While the law is currently unsettled, pre-employment drug testing is generally prohibited. There may be some limited scope for alcohol testing prior to employment in safety-sensitive positions.

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

Subject to conditions (please see question 6), an employer may conduct all of the above checks.



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## Union membership

Political views

• Fingerprinting

• Handwriting

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?

Some provinces require employers to obtain the applicant's prior written consent before conducting a background check. Even where this is not required by law, securing prior written consent is always a best practice.

All checks undertaken must be reasonable and appropriate in light of the nature of the proposed employment. While an employer is not prohibited from conducting checks that disclose information concerning prohibited grounds of discrimination, the employer should be cautious as an applicant could claim that an adverse employment decision was unlawfully based on a discriminatory consideration.

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

#### Criminal records

In most Canadian jurisdictions an employer may not discriminate based on an individual's criminal record. However, the definition of criminal record and the circumstances where a criminal record check is permitted vary from province to province. In Ontario, for example, an employer may discriminate based on conviction for an offense under the Criminal Code as long as a pardon has not been granted, but may not refuse to employ a person based on conviction for a provincial offense unless the record of non-conviction for the provincial offence is a *bona fide* occupational requirement of the job. In British Columbia, an employer may not refuse to employ a person because the person has been convicted of any criminal or summary conviction offense that is unrelated to the intended employment of the individual.

#### Credit/financial checks

In Alberta, British Columbia, Quebec and the federal jurisdiction (including the three Territories), privacy legislation prohibits credit/ financial checks unless there is a reasonable connection between the individual's financial background and the proposed employment. For example, a credit check would not have a reasonable connection to employment as a receptionist, but would be relevant to employment as a financial advisor.

#### Health checks/medical screening

Health checks/medical screening should occur only after a conditional offer has been made, preferably in writing. The employer must be able to demonstrate that the pre-employment testing provides an effective assessment of the applicant's ability to perform the essential duties of the job. If the applicant or employee requests reasonable adjustments to the workplace to enable him or her to perform the essential duties of the job, the employer is required to provide such accommodation unless it is impossible to do so without causing undue hardship.

#### Fingerprinting

Pre-employment fingerprinting and fingerprinting during employment is very uncommon in Canada, except in connection with a criminal record background check. Caution should be exercised as fingerprinting is considered to be a significant invasion of privacy.

#### Union membership and political views

Employers are prohibited from denying employment to or otherwise discriminating against a person because the person was or is a member of a trade union. Some Canadian jurisdictions also prohibit discrimination based on political views or beliefs. Employers therefore should be extremely cautious about collecting this type of data. It should not be used to influence whether an offer is made, as this could potentially be discriminatory.













#### Drug and alcohol testing

Pre-employment drug and alcohol testing is a form of health check/medical screening subject to the restrictions stated above. It is widely held that because pre-employment drug testing can measure only current impairment and not on-the-job impairment, it is generally prohibited. There is more scope for pre-employment alcohol testing if the individual is being considered for a safety-sensitive position.

#### Social media/internet searches

Information gathered by an employer through social media/internet searches may relate to a prohibited ground of discrimination. For example, an employer could learn that an applicant has children, is gay or practices a particular religion. If an adverse employment decision is made, the employer could face an allegation that the decision was discriminatory based on the prohibited ground. In addition, some jurisdictions limit the collection of personal information by a prospective employer to information that is relevant to the proposed employment. This further limits the type of information that an employer can obtain through social media/internet searches.

#### Handwriting

Canadian workplace laws are silent on the use of handwriting as a selection tool. However, handwriting analysis is considered to be privacy-sensitive and may not provide relevant information. Employers should balance the potential benefit of handwriting analysis with the risk of collecting information that is not reasonably related to the proposed employment.

### 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 be used only where relevant to the particular role. If, in the course of conducting a background check, an employer learns that an applicant is a member of a protected class, the non-discrimination statutes prohibit the employer from using that information as a basis for refusing to hire 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?

Yes. As best practice, employers should not collect information that relates to a prohibited ground of discrimination until after a conditional offer of employment has been made, preferably in writing.











#### **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 prior written consent should, and in some provinces must, be obtained. Employees should be notified of the background check requirement before beginning employment. Checks should be reasonable and appropriate to the employee's role. Once employment has begun, drug and alcohol testing may occur where there are reasonable grounds to suspect on-the-job impairment.

#### **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 required by law to request each new employee's Social Insurance Number ("SIN") within three days after the day on which the employment begins, and maintain a record of the SIN. The employer must ensure that an employee with a SIN beginning with the number "9" has a valid immigration document entitling the employee to work in Canada.

#### 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 vary from sector to sector based on what is reasonable and appropriate for the type of employment proposed. For example, employees in the financial services sector are generally subject to credit record checks, while such a search may be inappropriate for employees in other sectors.

#### **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 applicant should be so notified. If the third party is outside Canada, processing of personal information should only be undertaken if the employer is satisfied that the third party will provide protection for personal information comparable to the level of protection required by applicable Canadian law.











#### DATA PROCESSING

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

Yes. An employer should process personal information only for the purposes collected and as necessary for pre-employment screening. The confidentiality of personal information should be maintained and only relevant departments/employees should be given access to the data. Individuals should be made aware of their right to receive a copy of personal information maintained about them by the employer, rectify or update the information, and request deletion of the data where it is inaccurate, outdated or irrelevant. Personal information should not be retained longer than necessary for the purposes for which it was collected. The employer should take appropriate steps to protect personal data from unauthorized disclosure.

#### SANCTIONS/ENFORCEMENT

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

#### British Columbia

Human Rights Code, RSBC 1996, c 210 Personal Information Protection Act, SBC 2003, c 63

#### <u>Alberta</u>

Alberta Human Rights Act, RSA 2000, c A-25.5 Personal Information Protection Act, SA 2003, c P-6.5

#### **Saskatchewan**

The Saskatchewan Human Rights Code, SS 1979, c S-24.1

#### <u>Manitoba</u>

The Human Rights Code, CCSM c H175

#### <u>Ontario</u>

Human Rights Code, RSO 1990, c H.19

#### <u>Quebec</u>

Charter of Human Rights and Freedoms, CQLR c C-12 An Act respecting the Protection of Personal Information in the Private Sector, CQLR c P-39.1

#### New Brunswick

Human Rights Act, RSNB 2011, c 171

#### Nova Scotia

Human Rights Act, RSNS 1989, c 214

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#### Prince Edward Island

Human Rights Act, RSPEI 1988, c H-12

#### Newfoundland and Labrador

Human Rights Act, 2010, SNL 2010, c H-13.1

#### <u>Nunavut</u>

Human Rights Act, SNu 2003, c 12 Personal Information Protection and Electronic Documents Act, SC 2000, c 5

#### Northwest Territories

Human Rights Act, SNWT 2002, c 18 Personal Information Protection and Electronic Documents Act, SC 2000, c 5

#### <u>Yukon</u>

Human Rights Act, RSY 2012, c.116 Personal Information Protection and Electronic Documents Act, SC 2000, c 5

#### <u>Federal</u>

Canadian Human Rights Act, RSC 1985, c H-6 Personal Information Protection and Electronic Documents Act, SC 2000, c 5

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

An individual claiming unlawful discrimination based on a pre-employment background check would make a complaint to the appropriate government human rights commission or tribunal. The commission or tribunal would investigate the complaint. If the complaint is referred to a hearing and the employer is found to have acted unlawfully, the employer could be required to pay damages to the individual for actual financial losses as well as general damages for loss of dignity and self-respect.

A claim alleging breach of an individual's privacy rights would be made through a complaint to the appropriate government privacy commission. A finding that the employer has breached a job applicant's privacy rights could result in an award for damages to compensate for financial losses and loss of dignity and self-respect. Fines can also be imposed up to CAD\$100,000 in some jurisdictions for serious violations.

#### Contributed by: Paul Boniferro & Margaret Gavins, McCarthy Tétrault LLP

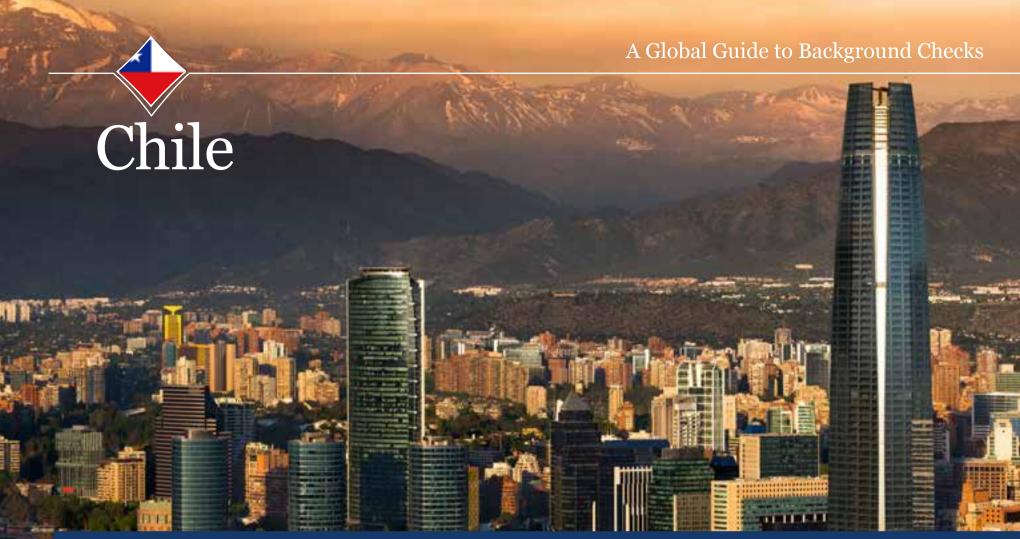


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#### **OVERVIEW**

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

It is standard practice in Chile for employers to carry out background checks on applicants. However, background checks have to be reasonably justified in relation to the position offered. Employers can therefore carry out background checks on applicants, but this may be subject not only to the applicant's consent but also to the condition that the job requires the relevant check. Employers 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 Chile are education and past employment checks, confirmation that the applicant has appropriate permission to work in Chile and, in particular cases, criminal records checks.



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#### **BACKGROUND CHECKS ON APPLICANTS**

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

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

All of the above checks (except union membership and political views) require the applicant's consent and other conditions to be satisfied (please see question 6).

• Handwriting

• Political views

• Union membership

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

Background checks on union membership and political views are not permitted and such checks would be considered discriminatory.

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

All of the above, except union membership 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?

In relation to all of the background checks above, with the exception of union membership and political views, which cannot be carried out, 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. An applicant should be given the opportunity to make representations if any of the checks produce discrepancies with the information he or she has provided.

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

#### Criminal records

Criminal records checks are not usually required for all employees. However, they may be requested when an employer has a business involving the care of children.

#### Credit, commercial, banking or financial checks

Where the candidate will be handling money or similar documents, financial, economical, banking or commercial information can be requested by the employer (e.g., this may be relevant to the positions of accountants, general managers, finance managers, etc.).

#### Health checks/medical screening

It is generally unlawful to ask about the health of an applicant for a job either before the job offer is made or after if it is accepted.

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Health checks are only permitted if there is an occupational requirement to justify one. For example, in the mining industry, an applicant will be required to obtain a medical authorization if the mine is over a certain altitude.

#### 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 Chile. Fingerprinting must be approached with caution because it could easily be argued by the candidate that refusal to consent to the fingerprinting gave rise to discrimination and/or the employer's decision not to recruit the candidate. In this sense, special consideration must be given to the justification for fingerprinting and whether it is necessary and proportionate. Taking fingerprints is not only very uncommon in Chile but there is also no case law on this matter.

#### 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 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).

#### Handwriting

It is not uncommon for candidates to undergo psychometric tests that include handwriting analysis. This is not prohibited.

### 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?

No. Employers should not ask for details which relate to protected characteristics under Article 2 of the Labour Code (e.g., age, nationality, sexual orientation, religion, etc.) on an application form or before a job offer has been made or during the employment relationship.













In addition, when occupational requirements justify health checks, applicants can be asked to complete a health questionnaire and undergo medical tests. For example, in the mining industry, an applicant will be required to obtain a medical authorization if the mine is over a certain altitude.

#### 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, such as work permits issued by the Immigration and Foreign Department and/or the corresponding visa when applying abroad at a Chilean Consulate. In this respect, 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 he or she has the right to work in Chile. Once the employer has satisfied itself of the validity of the original 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 five years after employment has ceased.

#### 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, individuals who are regulated can be required to disclose credit/financial, economic, commercial or monetary information.

#### **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 third party vendor has to observe the data protection obligations and constitutional rights which relate to the person's data.

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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 for longer than is necessary for the purposes consented to;
- (d) take appropriate technical and organizational steps to protect personal data from unauthorised disclosure, damage or destruction;
- (e) produce a code of conduct for all staff processing individuals' personal information;
- (f) undertake periodic audit reviews to check compliance with data protection measures; and
- (g) obtain written consent from the applicant.

#### SANCTIONS/ENFORCEMENT

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

- Data Protection Law No. 19,628
- Article 19 N° 1, 2, 4 and N° 16, paragraph 3 of the Chilean Constitution
- Article 2 and 184 of the Chilean Labour Code
- Article 7 of Law No. 19,779 which sets regulations on HIV and creates social benefit for catastrophic diseases

## 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. Claims on moral and other damages can be presented before the courts.

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#### **OVERVIEW**

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

Yes, employers in Colombia regularly carry out background checks on applicants. However, limitations do apply to the scope of background checks. All 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 Colombia are criminal records checks, past employment checks, education checks, financial records checks and drug tests. All of them require the applicant's consent in order to be performed.



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## Colombia

#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Political views

• Handwriting

• Union membership

Social media/internet search
 Drug and alcohol testing

#### 3. Which of the above background checks are employers <u>permitted</u> to carry out on applicants?

All of the above, subject to applicable conditions, including the applicant's prior, express and informed consent. Please see questions 5 and 6.

#### 4. Which of the above background checks are employers <u>not permitted</u> to carry out on applicants?

According to Colombian law, health checks aimed at verifying the pregnancy status of an applicant and background checks carried out to verify an applicant's political views are expressly prohibited.

Although there is no express prohibition on an employer checking the union membership of an applicant, it is not recommended as it could constitute a violation of the right of association. 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.

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

All of the above (except health checks, union membership and political views, as outlined in 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?

In relation to all of the above background checks, for personal data protection purposes, the employer shall obtain prior, express and informed consent from the applicant before processing any information. This consent should be obtained prior to the information being collected or, at the very latest, at the point at which the information/data is collected and reviewed. At the same time, the employer should inform the applicant which personal data will be collected and the specific purposes for which the data will be processed. The background checks shall be limited to the personal data that is pertinent and adequate for the purposes for which it is collected. An applicant should be given the opportunity to see the information collected in the background checks and rectify or update any of the information if the checks produce discrepancies with the information he or she has provided.

In addition, some of the background checks above may involve processing personal data considered to be sensitive under Colombian law: (i) health checks/medical screening; (ii) fingerprinting; (iii) handwriting; (iv) union membership; (v) political views; and (vi) drug and alcohol testing. The processing of this data is prohibited as a general rule, unless the applicant has explicitly authorized it. The employer must (i) inform the applicant that, given the fact that the data is sensitive, he or she is not obliged to authorize its processing; and (ii) explicitly inform the applicant which information required by the employer falls within the sensitive personal data category. Under Colombian law, an employer's decision whether or not to make a job offer cannot depend exclusively on the fact that the applicant authorizes the processing or discloses his or her sensitive personal data.

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## Colombia

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

#### Criminal records

The government previously used to issue criminal certificates to employees during the hiring process. However, this document is no longer provided and employers cannot currently require applicants to provide such a certificate. However, employers may verify the criminal records of an applicant through the National Police website, using the applicant's identity card number. Employers cannot refuse to offer an applicant a job based on his or her criminal records which are stored in the criminal system files.

#### Credit/financial checks

Employers can carry out credit/financial checks with the applicant's consent. Such results cannot be used to decide whether or not to make a job offer.

#### 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. As mentioned, requiring an applicant to undergo a pregnancy test is expressly prohibited, unless the applicant will perform hazardous duties (e.g., working with x-rays and/or chemical substances).

#### 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.

#### 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 personal data collected should only be used where relevant to the particular purposes and should not be processed or used in a discriminatory way.

As mentioned in the response to question 6, the decision as to whether or not to make a job offer cannot depend exclusively on the fact that the applicant authorizes the processing or discloses his or her sensitive personal data. If an employer makes a job offer to an applicant, it cannot later withdraw the offer based on the results of the background checks regarding sensitive data. This would be considered discriminatory, and the applicant could bring a claim against the employer. Based on the assessment of sensitive data, the employer could not refrain from hiring an applicant who has otherwise complied with all requirements.

Under Colombian law, the employer should assess each applicant based on his or her quality of experience, profession and occupation and should disregard protected characteristics under discrimination legislation and sensitive personal data.











# Colombia

#### **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?

According to Law 13 of 1972, applicants cannot be required to include data in job application forms or letters regarding (i) their marital status; (ii) the number of children they have; (iii) their religion; or (iv) the political party to which they belong except, in the latter case, in relation to jobs or positions where it is essential to take such information into account.

In addition, when hiring a new employee, the employer must require an employee to undergo a medical test to determine his or her general state of health. The employer, however, is not entitled to require an applicant/employee to undergo HIV/AIDS or pregnancy tests as a condition 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)?

Legislation is silent on the issue of background checks during employment. However, based on the assessment of sensitive data, the employer cannot terminate an employee's employment on the grounds of drug/alcohol use, unless he or she has attended work under the influence of drugs or alcohol or has used drugs while providing services or at 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?

When hiring foreign nationals, the duration of the assignment must be assessed, together with the need for the particular individual (e.g., whether he or she has specific knowledge/skills which cannot be provided by others in Colombia).

If the applicant is a foreign individual, he or she has to request a work visa. The type of visa depends on the nationality of the applicant. In these cases, the employer acts as a sponsor and the documents required vary depending on the type of visa required.

#### 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.

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# Colombia

#### **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 and depend on the company concerned.

#### **OUTSOURCING BACKGROUND CHECKS**

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

Insofar as outsourcing background checks requires the employer to share personal data with a third party vendor, the applicant's prior, express and informed authorization of the transfer of data to the third party vendor would be required.

## 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?

When outsourcing background checks to a third party vendor, in addition to obtaining the applicant's prior, express and informed authorization as indicated in question 15, the employer should:

- (a) ensure that the information provided to the third party vendor is true, complete, exact, up-to-date, verifiable and understandable;
- (b) communicate to the third party vendor all the issues relating to the applicant's personal data and adopt any measure necessary to keep the provided data up-to-date;
- (c) only provide the third party vendor with the data for which the applicant's authorization has been obtained;
- (d) require the third party vendor to comply with applicable security and privacy conditions; and
- (e) inform the third party vendor if the applicant/employee has brought a claim related to the processing of his or her personal data.

#### **DATA PROCESSING**

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

An employer should:

- (a) use and process personal data exclusively for the purposes authorized by the applicant and only where relevant for the hiring process;
- (b) be able to demonstrate that all the personal data and, specifically, the sensitive personal data required from the applicant relates to a lawful purpose and function of the employer, and that there is a solid justification for the employer to seek such purpose and function;
- (c) store the information only as long as it is useful for the authorized purpose for which it was collected, pursuant to the applicant's consent; and
- (d) refrain from processing or using the applicant's personal data in a discriminatory way.











# Colombia

#### SANCTIONS/ENFORCEMENT

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

- Articles 15 and 20 of the Colombian Constitution
- Law 1581 of 2012
- Decree 1377 of 2013
- Law 1266 of 2008

## 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 carried out unlawfully, the Superintendence of Industry and Commerce may impose the following sanctions, following a claim raised by the affected applicant or an investigation:

- (a) fines for an amount equivalent to up to 2,000 times the minimum monthly legal wage (for 2015, COP\$1,288,700,000, approximately USD\$ 532,560);
- (b) suspension of activities related to the processing of personal data, for up to six months;
- (c) temporary suspension of the activities related to the processing of personal data (which may lead to the temporary closure of the business if the employer continues to fail to comply with its legal obligations after the suspension ends); and
- (d) immediate and definite closure of the operations that involve the processing of personal data.

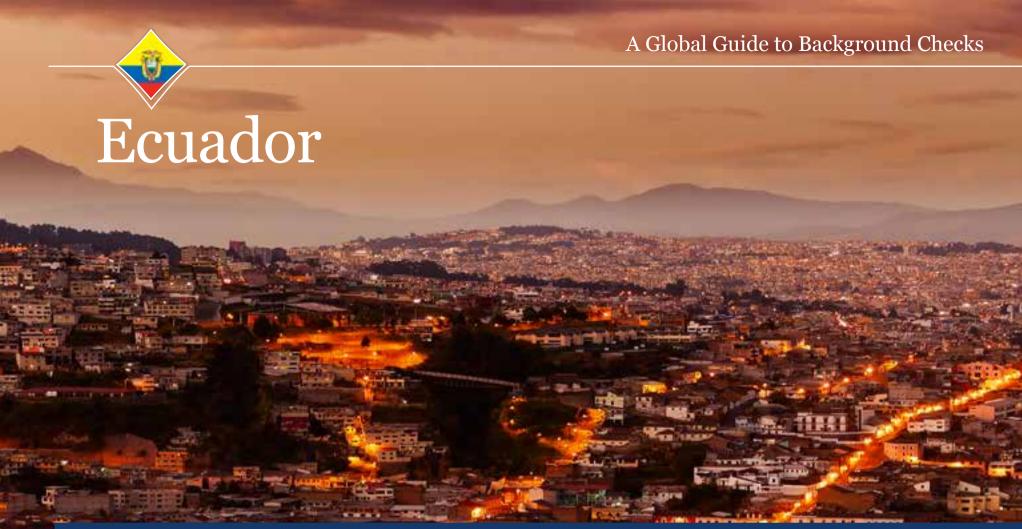
#### Contributed by: Catalina Santos, Brigard & Urrutia Abogados











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#### **OVERVIEW**

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

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

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

Employers typically confirm education and past employment records, check court records and carry out medical screening.



 $MAY E R \boldsymbol{\cdot} B R O W N$ 











## Ecuador

#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- 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?

Health checks/medical screening, social media/internet search, education and past employment records and handwriting. Employers are also permitted to check court records (on the internet).

• Handwriting

• Union membership

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

Political views, criminal records, credit/financial checks, fingerprinting, union membership and drug and alcohol testing. However, please see question 5 as some of these checks may be permitted if the applicant's consent is obtained.

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

The following checks are only permissible if the applicant provides his or her consent: criminal records, credit/financial checks, fingerprinting, union membership 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?

The applicants must sign a document to confirm their consent to the checks referred to in question 5.

### 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?

If an applicant is able to prove that he or she was not hired for a reason arising from information contained in a background check, he or she could claim discrimination.

#### **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.











## Ecuador

#### 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.

#### **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 an ID card for Ecuadorians. For foreign nationals, a passport should be provided.

#### 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.

#### **OUTSOURCING BACKGROUND CHECKS**

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

No.

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?

Not applicable.











## Ecuador

#### DATA PROCESSING

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

Information should be kept confidential.

#### SANCTIONS/ENFORCEMENT

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

- Ley de Acceso a la Información y Ley del Sistema Nacional de Datos Públicos, (Access Information Act and Public Data National System Act)
- Ecuador Constitution

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

The applicant or employee may bring a claim for discrimination. The compensation is established by the judge.

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#### **OVERVIEW**

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

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

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

Employers typically carry out checks relating to education and past employment records, criminal records, medical tests and drug and alcohol testing.



 $MAY E R \boldsymbol{\cdot} B R O W N$ 









# Mexico

#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Fingerprinting

Handwriting

Political views

- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

#### Drug and alcohol testing

• Union membership

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

There are no restrictions on an employer's ability to conduct background checks. However, employment discrimination laws may affect an employer's ability to use the information gathered from a particular check in making hiring decisions.

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

Although not listed above, an employer is not permitted to require an applicant to undergo a pregnancy test. Article 133, Section XIV of the Federal Labour Law prohibits employers from requiring applicants to take a pregnancy test.

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

Employers are permitted to carry out any background check other than pregnancy tests. Any information gathered, however, must be handled in accordance with federal privacy laws.

### 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 should, as a matter of best practice, secure the applicant's consent to their intended use of the information gathered, in order to minimize the risk of liability under federal privacy laws.

## 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?

Yes, as the decision not to employ an individual based on a result of a background check could constitute discrimination. For example, in the course of conducting a permissible background check on an applicant, an employer might learn that the applicant is of a certain age or has a physical disability (that would not affect the applicant's ability to perform the job). Because employers are prohibited from discriminating on the basis of age or disability, the employer could not use that information as the basis to refuse employment.

#### **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.











## Mexico

#### 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.

#### **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 must verify that the applicant is a Mexican citizen or, if the applicant is a foreign national, that he or she has a Temporary or Permanent Resident Visa entitling him or her to work in Mexico.

In Mexico, an individual must also be at least 15 years of age before he or she is legally permitted to work. Persons under the age of 16, however, are permitted to work only with parental approval or the approval of the Conciliation and Arbitration Labour Board. Employers must verify an applicant's age by asking for a birth certificate or other official identification and, if the applicant is under 16, the employer must also verify that the applicant has parental or Labour Board approval to work. Certain limited exceptions to these age and approval requirements apply in particular circumstances.

Furthermore, if an applicant is under 18 years old, the employer must (a) verify that the employee has completed mandatory basic education (the equivalent of completing High School in the United States) and (b) obtain a medical certificate from the applicant certifying that he or she is in good health.

#### 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. For example, applicants/employees in the financial services sector are required to pass a credit check. Pilots must pass a medical examination.

#### **OUTSOURCING BACKGROUND CHECKS**

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

Yes.

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# Mexico

## 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. All of the same checks may be carried out and all of the same data protection obligations apply. The only difference is that the vendor must inform the applicant of the purpose of the check and the intended use of the information gathered.

#### **DATA PROCESSING**

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

Mexican privacy laws require employers to have, and inform applicants about, a privacy notice that addresses:

- The scope of personal data to be processed
- The purposes of data processing
- Any applicable data transfers to third parties

Each employee is required to provide their written consent to the local privacy notice to support any data processing activities. If consent is withheld, the data cannot be processed or transferred to any third parties.

#### SANCTIONS/ENFORCEMENT

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

- Article 133, Section XIV of the Federal Labour Law prohibits employers from conducting pregnancy tests. There are no other restrictions on an employer's ability to conduct background checks.
- The Law for the Protection of Personal Data in Possession of Particulars imposes restrictions on the handling of information gathered during a background check.
- The Law of Preventing and Eliminating Discrimination.

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

If an employer requires an applicant/employee to undergo a pregnancy test, it could be liable to pay between 50 and 2,500 times the daily minimum wage in Mexico (a maximum penalty of approximately USD\$11,500).

Violations of data privacy laws are punishable by three months' to five years' imprisonment, and can give rise to fines ranging from 100 to 320,000 times the daily minimum wage in Mexico, per article 64, section IV of the Law for the Protection of Personal Data in Possession of Particulars.

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#### Contributed by: Aleman Cordero Galindo & Lee

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#### **OVERVIEW**

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

Yes. It is customary for employers in Panama to undertake background checks on applicants.

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

The most common checks relate to education and past employment verifications, health/medical screenings, drug testing and criminal records.











## Panama

#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- 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?

The law specifically allows a potential employer to require an applicant to undergo drug testing and psychiatric evaluation as well as provide details of their criminal record. There is no law prohibiting checks on education and past employment, social media and internet searches, or handwriting.

• Handwriting

• Union membership

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

The following checks are not permitted by law: credit/financial checks, union membership and political views.

Fingerprints may be obtained from applicants in order to keep on record a precise identification of the employee. However, it is not possible for employers to undertake fingerprinting checks, as the only database containing fingerprints belongs to the Civil Registry, and the Department of Judicial Investigations ("DIJ") of the National Police is the only other entity that has access to that database.

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

None of the checks outlined in the responses to questions 2 and 3 are subject to the applicant's consent or any other restriction or limitation.

## 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?

Not applicable.

## 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?

No.

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## Panama

#### 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.

#### 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?

Foreign nationals require a work permit, issued by the Ministry of Labor, in order to work in Panama. This permit must be requested by the applicant after having obtained an offer of employment by the potential employer. The permit will allow the applicant to work specifically for that 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?

No.

#### **SECTORS**

#### 14. Do background checks differ in different sectors?

No.

#### **OUTSOURCING BACKGROUND CHECKS**

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

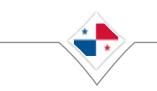
Yes, since this is not specifically prohibited by law.











## Panama

## 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?

There are no restrictions as to how employers may process the information received from applicants, provided that such information is used solely for the purpose of deciding whether or not to employ the applicant.

#### SANCTIONS/ENFORCEMENT

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

- Article 18, Law No. 69 of 2007, as amended by Law No. 14 of 2010
- Article 138, Section 12, Labor Code
- Article 19, Constitution of the Republic
- Article 126, Labor Code

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

There are no criminal or administrative sanctions against employers who carry out background checks unlawfully. Article 3 of Law No. 11 of 2005 provides for a fine ranging from USD\$500 to USD\$1,000 for employers who have unlawfully discriminated against applicants or employees in the workplace.

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#### **OVERVIEW**

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

Yes, employers in Paraguay regularly carry out background checks in relation to applicants.

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

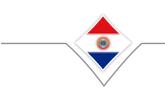
The most common background checks in Paraguay relate to education, past employment and criminal records checks.











## Paraguay

#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Fingerprinting

• Handwriting

Political views

• Union membership

- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
   Drug and alcohol testing

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

All of the above.

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

None of the above, but please see question 5.

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

Criminal records, health checks 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?

The applicant would need to consent to the following checks:

- Health checks/medical screening (note that it is prohibited to ask an applicant to undergo an HIV test)
- Criminal records checks
- Drug and alcohol testing

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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?

There are no express limitations. However, the information obtained should not be used in a discriminatory way. There is no express regulation relating to discrimination and background checks. However, the Constitution and Labour Code establish that no discrimination shall be permitted against workers for reasons of race, sex, age, religion, social status or political or union preference.

It should be noted, however, that an employer is not required to provide its reasons for not hiring a candidate.













## Paraguay

#### **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, in relation to health checks. Medical tests are not mandatory background checks. However, it is mandatory for all employees to undergo a medical test once they are hired.

#### 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)?

Yes, in relation to health checks. As noted in question 10, medical tests are not mandatory background checks. However, it is mandatory for all employers to carry out health checks on their employees once a year (if the activity performed is not dangerous), or every six months (if it is dangerous). Once the individual is hired, any other check will depend on the employer's internal policy (e.g., drug and alcohol testing on employees is more usual).

#### **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 documents to establish the individual's eligibility to undertake the work on offer. For example, this includes a copy of the individual's ID to verify his or her age. Foreign nationals should also provide the employer with their residence 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?

No.

#### **SECTORS**

#### 14. Do background checks differ in different sectors?

No.

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## Paraguay

#### **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.

#### **DATA PROCESSING**

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

No, there are no restrictions or limitations regarding the processing of information collected from background checks.

#### SANCTIONS/ENFORCEMENT

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

- Labour Code, Law No. 213/93
- Decree No. 14390/92 Technical General Guidelines on workplace safety and health
- Resolution No. 730/09 from the Ministry of Labour
- Criminal/Judicial records: Resolution (Acordada) No. 473/07 from the Supreme Court of Justice
- Ability to work in Paraguay: Law No. 978/96 Immigration Law
- Law No. 1682/01 on private information

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

Employers requiring applicants to undergo an HIV test will be subject to a penalty of up to 30 times the daily minimum wage (approximately USD\$420) for each applicant.

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#### **OVERVIEW**

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

Yes, employers in Peru frequently carry out background checks on applicants. However, some procedures entail the provision of documents by the applicant (for example, criminal records are only provided to the applicant in person when presenting his or her National Identity Card). Similarly, it is usually difficult to obtain an individual's credit history, as banks only provide this information if it has been authorized by the applicant.

If the information can be obtained lawfully, there is no restriction on employers undertaking background checks on applicants.

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

The most common background checks are education and past employment checks and criminal records checks.



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#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening

• Handwriting

• Political views

• Union membership

• Social media/internet search • Drug and alcohol testing

#### 3. Which of the above background checks are employers <u>permitted</u> to carry out on applicants?

Criminal records, credit/financial checks, health checks/medical screening and drug and alcohol testing (please see questions 5 and 6 in relation to the conditions that apply).

Background checks may be carried out using information already available to the public. For example, employers are permitted to carry out social media/internet searches on applicants.

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

Fingerprinting, handwriting, union membership and political views.

Employers are also not permitted to check an applicant's sexual orientation or require an applicant to undergo an HIV test.

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

Criminal records, 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?

In the case of criminal records, the information is only handed to the applicant in person when presenting his or her National Identity Card. In relation to the other background checks referred to in question 5, the employer should obtain consent from the applicant.

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

#### Health checks/medical screening

Health checks are only permitted if there is an occupational requirement to justify one. All results must be kept confidential. This does not include an HIV test (as noted above, employers are not permitted to require applicants or employees to undergo such testing).

#### Drug and alcohol testing

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Drug and alcohol testing is permitted if necessary for the job (e.g., a mine worker or pilot). The employee's consent should be obtained. All results must be kept confidential.











#### Credit/financial checks

It is usually difficult for employers to obtain an individual's credit history. It may be required for positions in the financial sector. The individual's consent should be 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?

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?

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.

#### **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 national must have a work visa to work in Peru.

There are two ways to obtain a work visa: (i) change of visa (if the person entered Peru with a tourist visa); or (ii) application for a work visa. In both cases, an employment agreement duly approved by the labor authority must exist. The immigration authority can require Interpol to provide information about an individual's criminal record.











#### 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.

#### **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?

For background checks carried out based on information already available to the public, the third party vendor would only need to access public information.

Information (personal data) provided by applicants/employees can only be processed with prior consent that must be given freely, expressly and unequivocally.

Employers must inform applicants that they will use a third party to carry out processing on their behalf. Also, the holder of the personal information database shall adopt technical, organizational and legal means to ensure its safety and avoid its alteration, loss, treatment or unauthorized access.

#### **DATA PROCESSING**

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

Yes, employers must consider the implications of data protection. Personal data must be processed in accordance with the guiding principles provided by the law which includes processing the data for a particular purpose, after obtaining the consent of the applicant.

Such consent may be provided verbally or in writing in relation to personal data but must be provided in writing only in connection with sensitive data. Sensitive data attracts greater protection because it is highly personal. The consent required for sensitive data may be provided by written signature, digital signature or other authentication mechanism (e.g., fingerprints).

#### SANCTIONS/ENFORCEMENT

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

The Personal Data Protection Law No. 29733.













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

In relation to data protection legislation, any act or omission that contravenes or fails to comply with the provisions of the law will constitute a punishable offense. The administrative fine may be the result of a minor, serious or very serious offense (the amount of the fine would be between approximately USD\$675 and USD\$134,895). The owner of the data is also entitled to file an action to obtain compensation for damages and losses.

For example, a minor offense would be processing personal data without the consent of its owner, or preventing the owner of the personal data from exercising his or her rights. A serious offense would be processing the personal data without complying with the guiding principles established by the legislation, not complying with the obligation of confidentiality, or systematically preventing the owner of the personal data from exercising his or her rights. A very serious offense would be processing the personal data without complying with the guiding principles established by legislation and infringing the owner's fundamental rights; creating, modifying, cancelling or maintaining a database without complying with the legislation; or providing false/incomplete information to the Personal Data Protection Authority.

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#### **OVERVIEW**

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

It is very common in the U.S. for employers to carry out some form of background check in relation to applicants.

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

The types of background checks that employers typically carry out depend largely on the type of employer and the type of job. For example, in many lower-paying jobs, an employer might choose low-cost options like calling references, Google searches, and reviews of certain social media related to the applicant. Where the applicant will be involved in a higher level position or one that involves access to money (for example, cashiers, bookkeepers, or higher level sales positions), the employer will often run a background check that includes a credit report. In safety-sensitive or other high-risk employment situations, drug and alcohol screening tests may be performed. Consent by the applicant is required for most of these checks, and importantly, the laws in many U.S. jurisdictions limit the kinds of test results that can be relied upon in making adverse employment decisions. For example, prior criminal arrests, and in some cases even prior convictions, are not necessarily a proper basis for not hiring an applicant.

It is common practice in the U.S. for employers to undertake pre-hire background checks through reporting agencies.













#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Fingerprinting

• Handwriting

• Political views

• Union membership

- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search 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 conditions/limitations. Please see question 6.

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

In addition to the various limitations on the background checks outlined in guestion 6, an employer may not seek information regarding an applicant's genetic tests or family medical history.

#### 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 listed above are subject to conditions/limitations. 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?

#### **General conditions**

Conditions that must be satisfied generally in the U.S. include the following:

- Employers must apply the same standards to everyone, regardless of their race, national origin, sex, religion, disability, genetic information (including family medical history) or age. Additionally, some states explicitly prohibit discrimination with respect to political affiliation or other characteristics.
- Employers are required to provide certain notices and disclosures to applicants and employees as a condition of obtaining records or information from companies engaged in the business of compiling background information ("Consumer Reporting Agencies"), as discussed further below.
- In some states, such as California, employers are required to satisfy certain notice conditions, whether the employer obtains the background records or information from a Consumer Reporting Agency or through some other means.
- Reports provided by consumer reporting agencies may not include certain kinds of information, thus limiting what information employers using a Consumer Reporting Agency may consider, as discussed further below.











#### Fair Credit Reporting Act

In the U.S. generally, if the background check is conducted by obtaining a report from a Consumer Reporting Agency, the Fair Credit Reporting Act requires that the employer comply with at least the following conditions (state laws may impose additional notice requirements):

#### Before initiating background checks

Before the background check is initiated, the employer must:

- Provide the applicant with a written background check disclosure, which must contain certain specific information in a separate (stand-alone), clear and conspicuous document, including that the employer might use information in a background check for decisions related to the applicant's employment and a brief description of the nature of the consumer report being obtained.
- Obtain written permission from the applicant.
- Certify to the company from which the employer is obtaining the report that the employer:
- o Has notified the applicant and received his or her permission to get a background report.
- o Has complied with all of the requirements of the Fair Credit Reporting Act.
- o Will not discriminate against the applicant or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

An employer who uses an "investigative consumer report," which is a report based on personal interviews concerning the applicant's character, general reputation, personal characteristics and lifestyle, must meet additional requirements, including providing the applicant with a written disclosure no later than three days after the date on which the report was first requested:

- Stating that an investigative consumer report, including information as to the individual's character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made or was made; and
- Advising the applicant that he or she has the right to request additional disclosures regarding the nature and scope of the report upon request within a reasonable period of time after the receipt by him or her of the disclosure.

A copy of the Federal Trade Commission's publication "A Summary of Your Rights Under the Fair Credit Reporting Act" must also be provided.

#### Before taking adverse action

Before deciding to take adverse action against an applicant based on information obtained from a Consumer Reporting Agency (for example, not hiring), the employer must give the applicant:

- a notice that includes a copy of the report the employer relied on; and
- a copy of the publication "A Summary of Your Rights Under the Fair Credit Reporting Act."

If an investigative consumer report is procured and the applicant makes a written request for additional information regarding the nature and scope of the report, the employer must make a complete and accurate disclosure of the nature and scope of the













investigation requested in writing no later than five days after the date on which the request for such disclosure was received or the report was first requested, whichever is later.

#### After taking adverse action

The employer should wait at least five business days after sending the pre-adverse action letter to take any adverse action against the applicant. After taking adverse action, the employer must inform the applicant within three business days of taking such action (orally, in writing or electronically) of all of the following:

- That adverse action has been taken against the individual based in whole or in part on information in the consumer report.
- The name, address and telephone number of the Consumer Reporting Agency that supplied the report.
- That the Consumer Reporting Agency that supplied the report did not make the decision to take the adverse action and cannot give the individual the specific reasons for it.
- That the applicant has a right, upon providing proper identification, to dispute the accuracy or completeness of the report with the Consumer Reporting Agency.
- That the applicant has the right to receive a free copy of his or her consumer report from the Consumer Reporting Agency within 60 days, free of charge.

#### Additional notice/disclosure requirements imposed by some states

Some states have notice/disclosure requirements that apply regardless of how the employer obtains the records/information, which may be more stringent than the requirements above. For example, in California, an employer that compiles information from the public record, irrespective of how that information is obtained, must:

- provide a copy of the related public record to the applicant within seven days after receipt of the information, <u>unless</u> the employer provided a box on the application form that was checked by the applicant, by which the applicant waived his or her rights to a copy of the public record; <u>or</u>
- provide the applicant with a copy of the public record, regardless of whether he or she has waived his or her rights, if the employer takes adverse action as a result of the information it has compiled.

#### Content of reports provided by Consumer Reporting Agencies

In the U.S., reports provided by Consumer Reporting Agencies may not contain (and thus employers receiving such reports may not consider):

- The name, address and telephone number of any provider of medical information that has notified the agency of its status, <u>unless</u> such name, address and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products or devices to a person other than the applicant.
- Medical information, unless:
- o the information to be furnished is relevant to "process or effect the employment"; and
- o the applicant provides specific written consent for the furnishing of the information that describes in clear and conspicuous language the use for which the information will be furnished.













- Unless the report is being considered for the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal, USD\$75,000 or more, the report may not include:
  - o Bankruptcies that, from the date of entry of the order for relief or the date of adjudication, predate the report by more than ten years.
  - o Civil suits, civil judgments, and records of arrest that, from date of entry, predate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.
  - o Paid tax liens which, from date of payment, predate the report by more than seven years.
  - o Accounts placed for collection or charged to profit and loss which predate the report by more than seven years.
- o Any other adverse item of information, other than records of convictions of crimes which predate the report by more than seven years.
- Health checks/medical screenings (see below).
- Criminal (including arrest) records (see below).
- Credit reports (see below).
- Social media (see below).

Conditions relating to particular checks

#### Criminal (including arrest) records

In most U.S. jurisdictions, criminal records may be considered by employers as long as the consideration does not amount to discrimination based on race, color, religion, sex or national origin, as analyzed under the disparate treatment and disparate impact frameworks.

However, some states in the U.S. greatly limit the extent to which an employer may consider criminal records. For example:

- In Pennsylvania, an employer may consider felony and misdemeanor convictions only to the extent that such convictions relate to the applicant's suitability for employment.
- In New York, an employer may not take adverse action based on an applicant's previous criminal convictions unless the conviction is directly related to the employment sought or granting employment would involve an unreasonable risk. An employer also may not even inquire about an arrest or criminal accusation that was terminated or ended in the applicant's favor.
- In California, employers may not inquire about information concerning an applicant's arrest or detention that did not result in a conviction; referral to, and/or participation in a pre-trial or post-trial diversion program; a conviction that has been judicially dismissed or ordered sealed; and petty marijuana offenses after two years from the date of conviction. Employers also may not use, for employment decisions, sex offender information supplied online by the Department of Justice.
- In Illinois, an employer may not inquire into an applicant's criminal record or history until after the applicant has been determined to be qualified for the position and notified that he or she has been selected for an interview or made a conditional offer of employment. An employer can never consider the fact of an arrest or a criminal record that has been expunged, sealed or impounded in making employment decisions.

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#### Credit reports

Some states in the U.S. have further restrictions on credit reports. For example:

- In California, an employer may only use an applicant's credit report when the applicant is being considered for certain managerial and governmental positions, or certain positions with access to sensitive information or large sums of money.
- In Illinois, an applicant's credit history or report can only be used when a satisfactory credit history is an established bona fide occupational requirement of a particular position.

#### Health checks/medical screening

In most U.S. jurisdictions, private employers cannot request medical information or conduct medical examinations on applicants before extending a contingent or conditional job offer. Once a conditional offer is made, employers may solicit medical information and examinations only if the process is the same for all incoming employees within the same job category. Employers may only withdraw a conditional offer on the basis of medical information when the withdrawal is job-related and consistent with business necessity. Except in extremely limited situations, employers may not obtain information on an applicant's genetic tests (e.g., to determine a predisposition to diseases like cancer or conditions like cystic fibrosis) or family medical history.

#### Social media

Employers generally may obtain background information regarding applicants through internet searches, including social networking websites such as Facebook, LinkedIn and MySpace, without triggering Fair Credit Reporting Act and state background check rules, provided the employer accesses the internet websites directly (i.e., without using a third party). However, employers who learn information about an applicant's marital status, political beliefs, religion or sexual orientation or other protected characteristics from such websites cannot make adverse employment decisions based on that knowledge. In addition, employers should be aware that certain public websites prohibit employers from using the information listed on their sites in making employment decisions. For example, in California, employers may not rely on the Megan's Law public database (that lists registered sex offenders) in making employment decisions, though they may obtain that information from another permissible source. Additionally, in some states, including California and Illinois, an employer may not request or require an applicant (or an employee) to provide a password or other related account information to gain access to the person's personal profile on a social networking website.

#### Fingerprints

In the U.S., employers generally may collect applicants' and employees' fingerprints. However, some states regulate or prohibit employee fingerprinting. For example:

- In New York, an employer may not require an applicant or employee to be fingerprinted as a condition of employment or continuing employment with the exception of those employers that are required by law to obtain fingerprints, such as state or municipal governments, legally incorporated hospitals supported by public funds or private endowments, medical colleges associated with such hospitals, and private proprietary hospitals.
- In Illinois, a private employer who collects biometric information, including fingerprints, may only do so if it develops a public, written policy establishing a retention schedule and guidelines for destroying the information. Before capturing the biometric information, the employer must: (i) inform the applicant or employee in writing that the information is being collected and stored, and of the purpose and length of term for which it is collected and stored; and (ii) obtain a written release executed by the applicant or employee. An employer may only disclose biometric information if: (i) the applicant or employee consents; (ii) the disclosure completes a financial transaction requested or authorized by the applicant or employee; (iii) the disclosure is required by state or federal law or municipal ordinance; or (iv) the disclosure is required pursuant to a warrant or subpoena.













• In California, an employer who requires an applicant or employee to be fingerprinted as a condition of employment or continuing employment may not furnish those fingerprints to any other employer or third person if they could be used to the detriment of the applicant or employee.

#### Handwriting

In the U.S., employers generally may use handwriting samples from applicants or employees. However, employers are prohibited from considering a sample to the extent that such consideration constitutes discrimination on the basis of disability under the Americans with Disabilities Act. To the extent that handwriting samples may be used in conjunction with a criminal background check, regulations pertaining to the use of criminal records apply.

#### Union membership

In the U.S., employers are not expressly prohibited from inquiring about an applicant or employee's union membership. However, an employer may not discriminate on the basis of union membership so as to encourage or discourage membership.

#### Political affiliation

In the U.S., employers are not explicitly prohibited from inquiring about an employee or applicant's political affiliation. However, some U.S. jurisdictions, such as the state of Wisconsin and the District of Columbia, explicitly prohibit an employer from discriminating on the basis of political affiliation.

#### Drug and alcohol tests

In most U.S. jurisdictions, employers can test or inquire about an applicant's illegal use of drugs (controlled substances) after making a conditional offer of employment. The same is true for alcohol testing, but the employer may not elicit information regarding an applicant's medical history, condition, or disability (including alcoholism). Drug and alcohol tests require the consent of applicants and employees. Employers can also test employees for drug or alcohol use based on "reasonable suspicion" or following an accident, without consent, as well as randomly for safety-sensitive positions.

Drug and alcohol test results generally do not qualify as consumer reports under FCRA when a drug lab provides the results directly to the employer. However, when an intermediary reports the results of a test done by a lab, FCRA may be implicated depending on whether the intermediary qualifies as a Consumer Reporting Agency that regularly engages in the practice of assembling and evaluating information on consumers for the purpose of furnishing consumer reports to third parties. For example, if an intermediary provides only logistical services (such as arranging for a lab test, collecting and forwarding samples to the lab, and transmitting lab results), it would likely not be a Consumer Reporting Agency making a consumer report (unless that is indisputably the general nature of the intermediary's business). On the other hand, if the intermediary retains copies of tests performed by drug labs and regularly sells the information to third parties for a fee, it likely qualifies as a Consumer Reporting Agency under FCRA.

## 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?

In the U.S., employers can conduct additional types of background checks, including:













- Checking prior Workers' Compensation claims or occupational injuries.
- Physical fitness and agility drills in certain kinds of employment, though applicants are entitled to reasonable accommodation/ adjustments for disability in any physical tests.
- "Investigative Consumer Reports," which are defined as "a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information."
- Polygraph tests.

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

#### Prior Workers' Compensation claims or occupational injuries

In most U.S. jurisdictions, an employer may ask questions about an applicant's prior Workers' Compensation claims or occupational injuries after making a conditional offer of employment, but before employment has begun, as long as the employer asks the same questions of all entering employees in the same job category. However, some states in the U.S., including Illinois, absolutely prohibit employers from inquiring about prior claims.

#### Investigative Consumer Reports

In most U.S. jurisdictions, Investigative Consumer Reports (i.e., those containing information obtained through interviews) provided by Consumer Reporting Agencies may not include (and thus employers receiving such a report may not consider) the following information:

- Information that is a matter of public record and that relates to an arrest, indictment, conviction, civil judicial action, tax lien or outstanding judgment, unless the Consumer Reporting Agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished.
- Information that is adverse to the interests of the applicant (or employee), unless:
- o the Consumer Reporting Agency has followed reasonable procedures to obtain confirmation of the information from an additional source that has independent and direct knowledge of the information; or
- o the person interviewed is the best possible source of the information.

#### Polygraph tests

In the U.S., private employers generally may not require, request, suggest, or cause employees or applicants to submit to polygraph tests. However, these rules do not apply when the employer is the U.S. government or any state or local government. Additionally, private employers may use polygraph tests on prospective employees for security services positions, for positions that provide access to controlled substances, for ongoing investigations involving loss and injury to the employer's business, for FBI contractors, or for federal contractors engaged in national security intelligence or counter intelligence functions. Many states in the U.S. also regulate the use of polygraph tests. For example:

• In California, except where federal, state, and local governments are employers, an employer may not require an applicant or employee to submit to a polygraph test.











- In Illinois, unless the area is directly related to employment, a pre-employment or periodic employment polygraph examination may not include questions regarding: (i) religious belief or affiliations; (ii) beliefs or opinions regarding racial matters; (iii) political beliefs or affiliations; (iv) beliefs, affiliations or lawful activities regarding union or labor organizations; or (v) sexual preferences or activity.
- In New York, an employer may not require, request, suggest, permit, or use a polygraph test for employment purposes.
- In Pennsylvania, an employer may not require an employee or applicant to submit to a polygraph test, except for individuals in public law enforcement or who have access to narcotics or dangerous drugs.

#### 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. In most U.S. jurisdictions, private employers cannot request medical information or conduct medical examinations, including drug and alcohol tests, before extending a contingent or conditional job offer. Only after extending a conditional offer may employers solicit medical information and examinations, subject to a number of restrictions discussed in the responses to question 6.

In some U.S. jurisdictions, an employer cannot request a criminal record or history before the applicant has been selected for an interview or made a conditional offer of employment as discussed in response to question 6.

#### **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)?

Generally, the rules described herein apply equally to employees and applicants, though additional need must be demonstrated to perform background checks on existing employees (e.g., change of position implicating new criteria, suspicious behavior).

For health checks and medical screenings, private employers in most U.S. jurisdictions may solicit medical information and exams from existing employees only when the information sought is job related and a matter of business necessity; that is, when a medical condition would render the employee incapable of performing essential job functions or pose a direct threat to safety. For example, periodic medical exams are allowed for positions affecting public safety, such as firefighters, police officers and airline pilots.

Under no circumstances may employers make employment decisions based on an employee's genetic tests or family medical history.

#### **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 in the U.S. can only employ those who are legally entitled to work: U.S. citizens or foreign citizens who have the necessary authorization. Employers must verify the identity and eligibility of anyone to be hired and certify that they have done so by completing the Employment Eligibility Form I-9. To demonstrate identity and eligibility, employees must provide documentation such as passports, resident alien ("green") cards, driver's licenses and birth certificates. But employers generally cannot require that new hires provide any one particular type of documentation, since doing so may amount to discrimination.

In addition, U.S. laws limit the types of jobs that children may occupy, and they establish minimum ages for most workers. In most U.S. jurisdictions, including California, Florida, Illinois, New York, Pennsylvania and Texas, children under the age of 14 are generally











not permitted to work. In many states, minors aged 14 to 17 are restricted from working overtime hours, late at night or in hazardous occupations. Some states place further restrictions on minors working while school is in session.

#### 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?

The rules described herein are generally applicable to full-time, part-time and contingent employees, unless otherwise indicated.

#### SECTORS

#### 14. Do background checks differ in different sectors?

Except as otherwise noted, the rules described herein generally apply to all employers, irrespective of sector or industry. However, certain regulated industries may have more stringent regulations as to what background checks must be performed and how employers must carry out such checks. For example, FDIC-affiliated financial institutions may not hire individuals with criminal convictions involving dishonesty, breach of trust or money laundering, and, as a result, must conduct criminal background checks on prospective employees.

#### **OUTSOURCING BACKGROUND CHECKS**

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

As discussed above, in the U.S., employers are generally permitted to conduct background checks by obtaining a report from a Consumer Reporting Agency provided that the conditions outlined in response to question 6 are met.

### 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. In the U.S., obtaining a report from a Consumer Reporting Agency implicates the conditions discussed in response to question 6.

#### **DATA PROCESSING**

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

#### Recordkeeping

In the U.S., employers must retain background checks and related application information for one year after any decision not to hire an applicant. Employers must retain such materials on hired employees throughout their employment and at least one year after separation, except that:

- Longer retention periods apply to certain employers, including educational institutions, state and local governments, and certain federal contractors.
- Longer retention periods apply if the applicant or employee files a charge of discrimination and the records are still in the employer's control.











Although the governing authorities set these shorter retention time limits, employers would be well advised to retain records for longer periods of time, since some of the statutes of limitations for certain kinds of claims are longer than those time periods.

#### Record disposal

After recordkeeping requirements are satisfied, an employer may dispose of background reports, but only in a secure manner.

#### Health checks/medical screening

All medical information obtained by employers in the U.S. must be kept confidential to managers, supervisors, safety personnel and government investigators. Such information must be maintained separately from an employee's nonmedical personnel file and in a separate form.

#### State and federal data breach notification laws

Some states in the U.S. have amended their data breach notification laws to require that companies maintain sensitive or personal information in a "reasonably secure manner," and Congress is currently considering national legislation on the same topic.

#### SANCTIONS/ENFORCEMENT

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

Several statutes and regulations govern employer background checks, including:

- Arrest and conviction records: Title VII of the Civil Rights Act of 1964; Cal. Lab. Code § 432.7; Cal. Lab. Code § 432.8; Cal. Pen. Code § 290.46(k)(2); 775 ILCS 5/2-103; Job Opportunities for Qualified Applicants Act, 820 ILCS 75/15; N.Y. Correct. Law § 752; N.Y. Exec. Law § 296 (15), (16); 18 Pa.C.S. § 9125
- Credit/financial checks: Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785.13; Cal. Lab. Code § 1024.5; 820 ILCS 70/10
- Health checks/medical screening: Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.; Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff, et seq.; Cal. Lab. Code § 132a
- Social media: Cal. Lab. Code § 980; 820 ILCS 55/10(a)
- Record disposal: 16 CFR Part 682
- Recordkeeping: 29 CFR Part 1602
- Records/information obtained from consumer reporting agencies, including but not limited to education and employment records, credit and financial records, and social media: Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.; Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785.13(a)(6); Investigative Consumer Reporting Agencies Act, Cal. Civ. Code § 1786.18(a)(7); Cal. Civ. Code § 1786.53
- Political affiliation: D.C. Code § 2-1402.11; Wis. Stat. Ann. § 111.321
- Polygraph tests: Employee Polygraph Protection Act, 29 U.S.C. §§ 2002, 2006; Cal. Lab. Code § 432.2; 225 ILCS 430/14.1; N.Y. Lab. Law §§ 733-739; 18 Pa.C.S. § 7321













- Fingerprinting: Cal. Lab. Code § 1051; Biometric Information Privacy Act, 740 ILCS 14/1 et seq.; N.Y. Lab. Law § 201-a.
- Union membership: National Labor Relations Board Act, 29 U.S.C. § 151 et seq.
- Sector requirements: 12 U.S.C. § 1829

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

Violation of most of the relevant statutes/regulations can expose the employer to liability for fines and penalties, injunctive relief, monetary and nonmonetary damages, punitive damages, attorneys' fees and costs and even criminal liability. Additionally, in some circumstances, an aggrieved individual may seek reinstatement, promotion and back pay.

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# **OVERVIEW**

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

Yes, it is standard practice in Uruguay for employers to carry out background checks.

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

In Uruguay, it is common to check prior employment, education or personal references before hiring an employee. Note that the employer must guarantee the candidate's confidentiality regarding the information/documentation reviewed during the screening process and assure that it will not be disclosed for different purposes.



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# **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
   Union membership
- Health checks/medical screening
- Social media/internet search
   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 handwriting (although handwriting checks are extremely rare in Uruguay).

• Handwriting

Political views

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

- Criminal records
- Credit/financial checks
- Social media/internet search
- Fingerprinting
- Union membership
- Political views
- Drug and alcohol testing

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• Health checks/medical screening (however, in order to be able to work, applicants/employees in Uruguay must provide the employer with a "health card", approved by the Ministry of Health)

Health-related data, and information related to political affiliation, sexual orientation, religious belief, race or ethnic origin cannot be requested or collected, according to data protection legislation. Furthermore, employers are prohibited from requiring applicants to undergo a pregnancy test or requiring a medical certificate stating that the individual is not pregnant, as a requirement during the candidate's selection process, hiring, promotion or continuation in the job. Moreover, requiring any type of statement from an applicant to declare that she is not pregnant is also prohibited.











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

Although background screening is not regulated, the principle in Uruguay is that employers may generally request any type of information from applicants, subject to the exceptions mentioned above. 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?

Based on general principles, employers should be cautious about the type of information they request in relation to background checks so that such requests are not considered a violation of an applicant's right to privacy. Privacy implies the right to prevent third parties from obtaining knowledge of personal behavior, preferences or information over which the individual wishes to maintain exclusive control.

The information requested by employers must therefore reflect a justified reason i.e., there must be a direct relationship with the job offered or the minimum qualifications required for performing the job. The applicant, in principle, can only be asked to provide data which is relevant to enabling the employer to evaluate whether the applicant is capable of properly performing the job sought.

From the list of background checks which employers are not permitted to carry out, outlined in question 4, there may be an exception related to the social media/internet search if the candidate grants his or her prior, free, express and informed consent to such research by the employer. Such consent must be documented in any available form.

# 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?

As explained above, the information requested by employers must reflect a justified reason and there must be a direct relationship with the job offered or the minimum qualifications required for performing the job. The applicant, in principle, can only be asked to provide data which is relevant to enabling the employer to evaluate whether the applicant is capable of properly performing the job sought.

# **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)?

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?

In relation to employing foreign nationals, the employer should require the applicant to provide his or her Uruguayan ID or any other document proving he or she has the appropriate status to work in Uruguay.

# 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?

Sales employees are subject to a special regime, "Viajantes y Vendedores de Plaza," which requires them to be registered with the Labor Ministry and comply with certain requirements. They must submit a criminal background certificate in order to be authorized to work under such regime. Note that the certificate is requested by the relevant agency in Uruguay and is sent directly to the Labor Ministry.

# 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. However, it is considered good practice to ensure that the third party vendor signs a confidentiality clause regarding the information they may process and have access to during the provision of services.

# **DATA PROCESSING**

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

Yes. Employers shall only use the information collected from background checks for the purpose for which it was collected. Once the information is no longer relevant for such purpose, and unless there is a legal obligation to maintain it, employers should destroy the information.

# SANCTIONS/ENFORCEMENT

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

Background checks are not regulated in Uruguay. However, Law No. 18,331 on Personal Data Protection and Habeas Data Action establishes some restrictions, in particular related to criminal and credit checks and health issues.

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

A potential risk arises for employers who request information during the recruitment process which is not directly related to the job. If employers request such information and candidates refuse to provide it, they could bring a claim against the employer if they consider that they have been subject to detrimental treatment based on their right to privacy.

Furthermore, if the employer collects information that it is prohibited (for example, health-related information or criminal or credit checks records) and the data subject (candidate) is aware that the employer has collected such information, the candidate could file a claim before the Data Protection Authority. Collecting and processing sensitive data is considered a very serious breach of Law No. 18,331 which can be penalized with fines of up to approximately USD\$60,000. Where the harm to an individual's privacy is significant and the data controller/employer has previous infringements, the Data Protection Authority could potentially suspend the employer's database for up to five business days or even request the closure of the same.

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# Contributed by: Rodner Martínez & Asociados

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# **OVERVIEW**

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

Yes, it is standard practice in Venezuela to carry out background checks on applicants. However, there are limitations on the type and scope of the background checks carried out. In most cases, the applicant must consent to the background check. It is also possible that legislation in Venezuela will prohibit the employer from requesting certain data. In these circumstances, such information could only be provided to the employer if it is provided voluntarily by the applicant.

Notwithstanding the above, employers may ask for information in the form of a questionnaire and pose the questions in an indirect form. For example, it is unlawful to require an applicant to undergo a health check that could diagnose HIV. However, employers may ask the applicant if he or she has suffered a chronic disease. Similarly, employers may not ask if the applicant is affiliated to a political party, but they may ask if he or she regularly exercises his or her voting rights.

Employers must consider the circumstances and the profile or characteristics that they look for in an applicant carefully, in order to minimize the risk of discrimination claims.











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

The most common background checks in Venezuela relate to education and past employment records, in order to verify the truth and accuracy of the information provided and to ensure that the applicant is qualified for the job.

# **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 <u>permitted</u> to carry out on applicants?

Most of the above background checks are permitted, except for: (i) health checks/medical screening; (ii) union membership; and (iii) political views (as specified in question 4). Conditions apply to certain permitted background checks (please see questions 5 and 6).

### 4. Which of the above background checks are employers <u>not permitted</u> to carry out on applicants?

Health checks/medical screening, union membership and political views.

It is generally unlawful to ask about the health of a job applicant before offering him or her a job. Moreover, employers cannot require female applicants to undergo medical screenings in order to determine whether they are pregnant, nor can employers require any applicant to undergo a health check that could diagnose HIV.

It is also unlawful for employers to require any applicant to abstain from joining a labor union, political party or exercising his or her rights in relation to such union and/or political party.

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

Criminal records, credit/financial checks, fingerprinting, 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?

The applicant's consent will be necessary in order to obtain criminal records, credit/financial records, fingerprinting, handwriting and drug and alcohol testing. The checks must be appropriate and the information obtained in the process shall not be used in a discriminatory way.

The applicant is entitled to access his or her personal data and information contained in public and private records. The applicant's consent is required for third parties, including the employer, to use their personal data. In the case of erroneous or inaccurate data











or information which adversely affects the applicant, he or she should be given the opportunity to update such information, make representations and corrections.

Additional conditions apply in relation to particular checks:

### Criminal records

According to the Labor and Workers Organic Act (*Ley Orgánica del Trabajo, las Trabajadoras y los Trabajadores* ("LOTTT")), no individual should be subjected to discrimination in the workplace because he or she has a criminal record. Since this is a sensitive issue, in practice, employers do not require applicants to disclose their criminal records. However, in the financial, securities market and insurance sectors, those who wish to work as directors, legal representatives, executives, treasurers and managers of banks, brokers, financial advisors, stock exchanges and insurance companies, will be required to disclose such information.

### Credit/financial records

According to the Banking Act (*Ley de Instituciones del Sector Bancario*), financial institutions are prohibited from disclosing the credit and financial information of their clients to third parties, unless the client authorizes this in writing. Such authorization may be revoked at any time. If the employer wishes to obtain such information, the employer must have the applicant's consent. Alternatively, the applicant may ask the financial institution for the records and he or she can forward them to the employer.

#### Fingerprinting

Venezuelan law does not prevent the collection of fingerprints, however, fingerprinting is very uncommon in Venezuela. Employers would be required to justify the collection of fingerprints.

#### Handwriting

Handwriting analysis is uncommon in Venezuela.

#### Drug and alcohol testing

Drug and alcohol tests cannot be carried out on applicants. Such tests are generally conducted on transportation workers and those who operate machinery, since their diminished capacity due to drug and alcohol use could give rise to health and safety considerations.

# 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 through background checks should not be used in a discriminatory way when making a decision as to whether or not to offer a job to the applicant.

# **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?

Yes. Employers cannot require applicants to undergo health checks/medical screenings before a job offer has been made and accepted. However, once the employee starts working, medical examinations are carried out in order to determine whether any medical condition may be aggravated during employment. Medical screenings should be carried out on a regular basis (e.g., when the employee starts working, before and after vacations, before a promotion and upon termination).

Drug and alcohol tests can only be carried out on employees (not applicants). The employee's consent is necessary and these tests can only be carried out in cases where the employee's diminished capacity due to drug and alcohol use could give rise to health and safety considerations.

# 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)?

Except for the comments made in response to question 10, Venezuelan law does not differ in relation to background checks being carried out on existing employees as opposed to applicants, either on an ad hoc basis or on an ongoing basis. Before carrying out background checks, the employer must obtain consent from the employee. It is also advisable to explain to the employee the justification for the performance of ongoing background checks.

## **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?

If the applicant or employee is not a Venezuelan individual, he or she must have a valid: (i) working permit; and (ii) a working visa or evidence of legal residence in the country. If the employee is to carry out professional responsibilities subject to legal license, such as lawyers, doctors and engineers, among others, evidence of their professional association registration could be requested. The employer must check the validity of original documents and maintain copies in the employee's file.

# 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. For example, in the financial, securities market and insurance sectors, those who wish to work as directors, legal representatives, executives, treasurers and managers of banks, brokers, financial advisors, stock exchanges and insurance companies, will be required to disclose their criminal records.

# **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 employers outsource the carrying out of background checks to a third party, they should inform applicants and obtain their consent. The applicant's consent and other conditions specified in response to question 6 apply both to the employer and to the third party carrying out the process on its behalf. If the information is to be held and administered by a third party, the standard of care in relation to preserving confidentiality should be no less than that provided by Venezuelan law.

# **DATA PROCESSING**

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

It is advisable that the applicant consents to the use of his or her personal data. The general rule is that private information cannot be disclosed to third parties without the consent of the owner of the information. The management of data by the employer is permitted under Venezuelan law, provided it is used for legitimate purposes. However, when transferring data to third parties, it is advisable to obtain the consent of the applicant. The applicant can reject a request for his or her consent. If consent is granted, the applicant may also revoke it at any time, in which case the transfer of information must immediately be suspended.

# SANCTIONS/ENFORCEMENT

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

- Constitution of the Bolivarian Republic of Venezuela 2009
- LOTTT 2012
- Regulations of the Labor Act 2006
- Prevention and Conditions of the Work Environment Organic Act 2005 ("LOPCYMAT")
- Organic Act on the Right of Women to a Life Free of Violence 2014
- Promotion and Protection of Equality of Persons with HIV and their Relatives 2014











- Banking Act 2014
- Securities Market Act 2010
- Rules regarding the Authorization and Registration of Brokers and Financial Advisors ("Resolution 224 of the National Securities Superintendency") 2008
- Insurance Activity Act 2010
- Rules regarding the Procedure for Issuance of Visas 2000

# 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 could be brought. In relation to pregnancy medical screenings and membership of a labor union, the employer may be subject to fines ranging from 120 to 360 "Tax Units." Fines may range from 100 to 1,000 Tax Units if the violation relates to HIV medical checks. Currently, a Tax Unit is equivalent to VEF150.

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# A Global Guide to Background Checks

# Contents Selected: EMEA



STEP 2 – View Traffic Lights *or* Select a Country/Jurisdiction

or



Belgium
旨 Czech Republic
💶 Denmark
<b>Egypt</b>
🖶 Finland
France
Germany
🔄 Greece
Hungary

Hungary
 Iceland

述 Israel
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Netherlands
i Poland
Russia
ጆ South Africa
드 Spain
🖾 Turkey
🚟 United Kingdom

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EMEA BACKGROUND CHECKS TRAFFIC LIGHTS	🚆 Belgium	🚺 Czech Republic	📅 Denmark	🚺 Egypt	🕌 Finland	SELECT A COUNTRY/JURISDICTION													E
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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																			

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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## **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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# **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
   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 <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Handwriting

Political views

• Union membership

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" <u>after</u> 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

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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).











## 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.











# **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.











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

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- 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.











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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# **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.











# **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Fingerprinting

• Handwriting

Political views

• Union membership

- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
   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 <u>only if certain</u> <u>conditions are satisfied</u> (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

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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.











## 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**

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# 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.











# 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;











- (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)

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# **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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# **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
- Political views

• Handwriting

Drug and alcohol testing

• Union membership

# 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 <u>only if certain</u> <u>conditions are satisfied</u> (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.











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.











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.











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
- (I) 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.











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.

Contributed by: Tina Brøgger Sørensen, Kromann Reumert

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## **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
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Political views

• Union membership

• Handwriting

Social media/internet search
 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 <u>only if certain</u> <u>conditions are satisfied</u> (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.













## 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.













# 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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### **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.











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
   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.











### 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 <u>only if certain</u> <u>conditions are satisfied</u> (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.











#### 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.











### 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.











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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### **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.

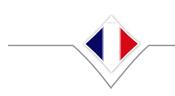


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• Employers must comply with French data protection rules and prior filing of the data processing with the French Data Protection Authority ("CNIL").

### 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
   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?

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 <u>only if certain</u> <u>conditions are satisfied</u> (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.

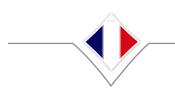
An applicant should be permitted to make observations on checks made by the employer when results of checks do not correspond to the information provided by the applicant.











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.

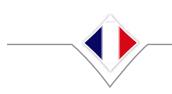
Collection of data relating to private life is in principle prohibited. This includes an applicant's previous addresses, national ID number, military situation, marital status, housing conditions and credit situation. Such data can only be collected if this is duly justified by the specific nature of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











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**

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

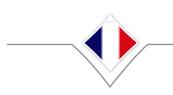
Employers who intend to hire a foreign applicant must, during the hiring process, verify with the relevant government authorities the validity of the entitlement of the applicant to work in France.











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.

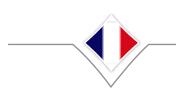
In relation to the processing of personal data, the employer is likely to be considered to be the data controller and the third party to be the data processor. Consequently, all filings with the CNIL should be made by the employer and not the third party. The employer should ensure that appropriate security 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











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?

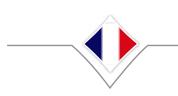
- Data Protection Act No. 78-17 of 6 January 1978 amended by Law No. 2004-801 of 6 August 2004
- CNIL (French Data Protection Authority) recommendation No. 02-017 of 21 March 2002 on data collecting and processing in the context of recruitment processes
- Article 8 of the European Convention on Human 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











- 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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### **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.













### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Political views

• Handwriting

• Union membership

Social media/internet search
 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 <u>only if certain</u> <u>conditions are satisfied</u> (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

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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.











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**

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### 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











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)











### 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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### **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.











### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- 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?

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).

• Handwriting

• Union membership

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 <u>only if certain</u> <u>conditions are satisfied</u> (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.











#### 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

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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.











### 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**

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### 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.











### 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;













(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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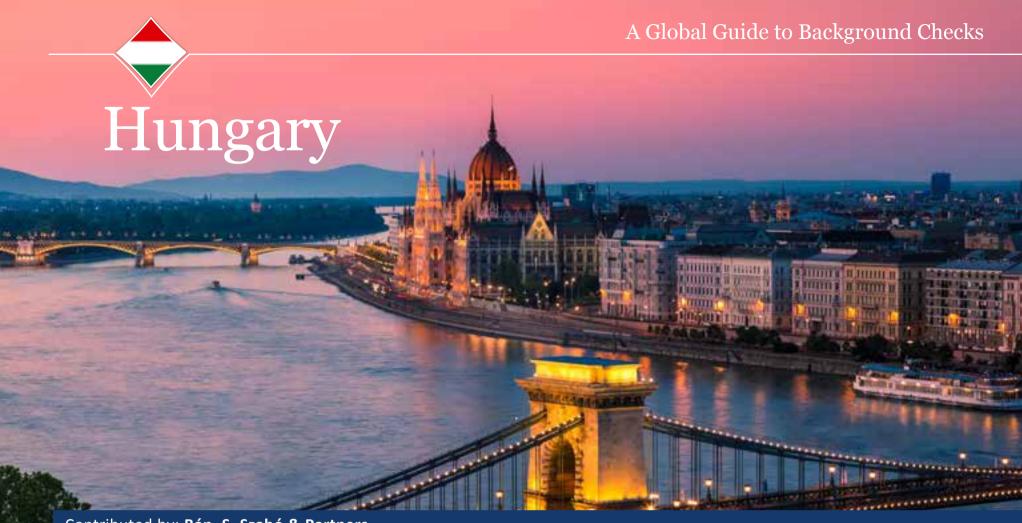
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### **OVERVIEW**

### 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.











### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
   Handwriting
- Credit/financial checks
   Union membership
- Health checks/medical screening
- Social media/internet search
   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).

Political views

### 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 <u>only if certain</u> <u>conditions are satisfied</u> (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 privace 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.











### 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.











### 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.











### 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).

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### **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.











# Iceland

### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
   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.

• Handwriting

• Political views

• Union membership

### 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 <u>only if certain</u> <u>conditions are satisfied</u> (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.











# Iceland

### 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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## Iceland

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.











## Iceland

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











## 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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#### **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.



 $MAY E R \boldsymbol{\cdot} B R O W N$ 









#### **BACKGROUND CHECKS ON APPLICANTS**

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

#### 3. Which of the above background checks are employers <u>permitted</u> 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.

• Handwriting

• Political views

• Union membership

#### 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 <u>only if certain</u> <u>conditions are satisfied</u> (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











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)).











#### 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.).











#### **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.













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











### 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.

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#### **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 sectorspecific 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.











• Criminal records

• Credit/financial checks

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.

Handwriting

• Union membership

#### BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records Fingerprinting

- Health checks/medical screening
   Political views
- Social media/internet search
   Drug and alcohol testing

#### 3. Which of the above background checks are employers <u>permitted</u> 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 <u>only if certain</u> <u>conditions are satisfied</u> (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

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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.











#### 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.











## 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.











#### 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;













(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.

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#### **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.











#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
   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

• Political views

• Union membership

#### Fingerprinting, handwriting, union membership

Please see question 6.

### 5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (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











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













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.











#### 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.











#### **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.

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#### **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.











#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
  Criminal records
  Credit/financial checks
  Fingerprinting
  Handwriting
  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?

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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#### 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 <u>only if certain</u> <u>conditions are satisfied</u> (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.











## 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 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.











#### **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**

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### 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.











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.

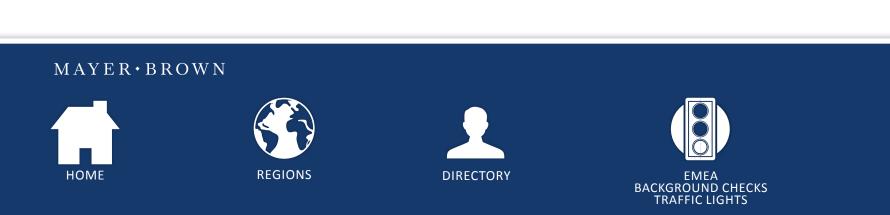
#### **OUTSOURCING BACKGROUND CHECKS**

#### 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.





#### 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











## 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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#### **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.











#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Political views

• Union membership

• Handwriting

Social media/internet search
 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 <u>only if certain</u> <u>conditions are satisfied</u> (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











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.











#### 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.











#### 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.











## 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.











## 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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#### **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.











#### 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.

• Handwriting

• Political views

• Union membership

#### **BACKGROUND CHECKS ON APPLICANTS**

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

#### 3. Which of the above background checks are employers <u>permitted</u> 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 <u>only if certain</u> <u>conditions are satisfied</u> (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;













- 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.











#### 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.











#### 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.











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.











#### 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).

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#### **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.











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.

• Handwriting

• Union membership

#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- 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 <u>only if certain</u> <u>conditions are satisfied</u> (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











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.













#### 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.











#### 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.













#### **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;











(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.











#### 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
- Heath 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:











- 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.

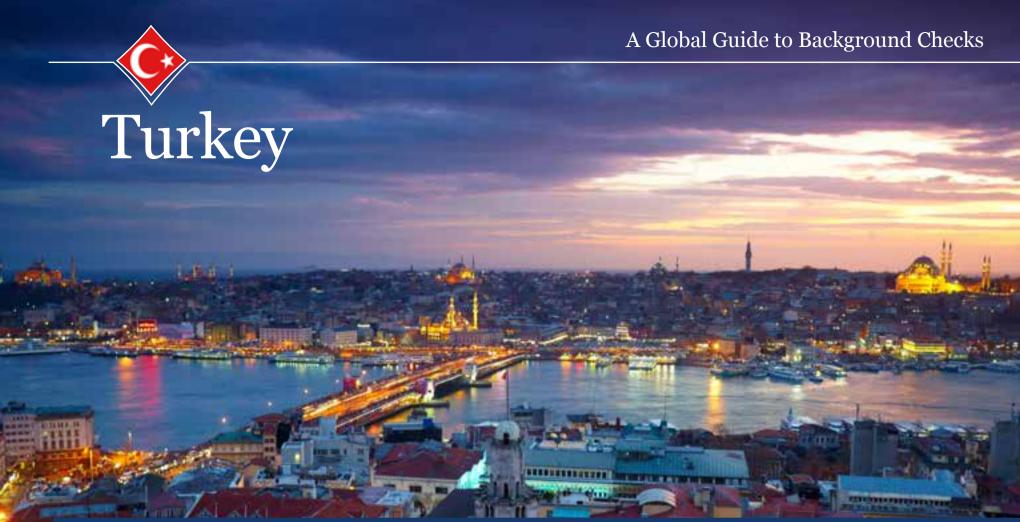
#### Contributed by: Xavier Pallarés López & Norman Heckh, Ramón y Cajal Abogados











Contributed by: DAB Law Firm

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#### **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.











#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search 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 <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

• Handwriting

• Political views

• Union membership

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.











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.











#### 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 Civilnal 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.











#### 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.













#### **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.

#### Contributed by: Irmak Dirik & Melis Buhan, DAB Law Firm









A Global Guide to Background Checks



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#### **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.











#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Fingerprinting

• Handwriting

• Union membership

- Criminal records
- Credit/financial checks
- 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?

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 <u>only if certain</u> <u>conditions are satisfied</u> (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

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

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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.











#### 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.











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.











## 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)











## 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.

Contributed by: Nicholas Robertson & Laura Pharez, Mayer Brown International LLP









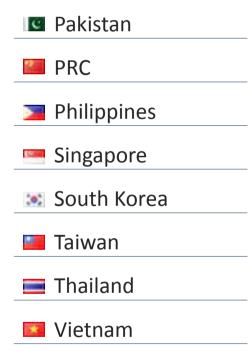




STEP 2 – View Traffic Lights *or* Select a Country/Jurisdiction



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or	🔤 India	
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					SELECT A COUNTRY/JURISDICTION												
ASIA BACKGROUND CHECKS <b>TRAFFIC LIGHTS</b>	🌋 Australia	🚆 Hong Kong	📙 India	Indonesia	🔹 Japan	Macau	👫 Malaysia	🕌 Myanmar	📑 New Zealand	🝙 Pakistan	PRC	🖌 Philippines	📕 Singapore	🐹 South Korea	📕 Taiwan	👖 Thailand	📕 Vietnam
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																	

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

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







REGIONS

Background check is standard practice



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#### **OVERVIEW**

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

Yes. Australian employers commonly carry out background checks on prospective employees. The acquisition and use of a job applicant's personal information is subject to federal privacy legislation, federal/state/territory anti-discrimination laws and legislation dealing with "spent convictions."

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

Employer background checks typically cover issues such as a job applicant's educational qualifications, previous employment, health/ medical condition, criminal record and even past online/social media activity.











# Australia

#### **BACKGROUND CHECKS ON APPLICANTS**

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

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

Any of the above types of background checks could be undertaken, subject to a range of statutory conditions/restrictions (please see question 6). In relation to some categories of information, the job applicant's consent would be required.

Background checks on union membership and political views, while theoretically permissible, could not be used to inform hiring decisions as this would breach applicable federal/state/territory anti-discrimination legislation.

• Handwriting

Political views

• Union membership

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

Some of the above types of checks have very little relevance in the Australian context (e.g., fingerprinting is only likely to arise in the context of a police background check).

Background checks that would involve requesting information from prospective employees about the following types of matters would breach specific prohibitions in federal anti-discrimination legislation:

- gender, sexual identity, marital status, etc.;
- age or age group; or
- disability including physical or mental disease, disorder or illness (unless relevant to the individual's ability to perform the inherent requirements of the position).

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

All of the background checks listed above.

## 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 in all of the above areas would involve the collection of "personal information" relating to a job applicant within the meaning of the Privacy Act 1988 (Cth) (the "Privacy Act"). An employer's collection and use of that information is subject to the restrictions imposed by the Privacy Act, which include the following:

• job applicants must be informed how their personal information will be collected from them and from third parties (e.g., referees);











# Australia

- personal information must only be collected where it is relevant to a person's application for a particular position;
- a job applicant's consent must be obtained for the collection of "sensitive information", e.g., information relating to union membership, criminal record, health/genetic information, racial/ethnic origin, political opinions/affiliations, religious beliefs, sexual preferences; and
- job applicants must be allowed access to their personal information upon request.

Further specific points should be noted in relation to the following background checks:

#### Criminal records

An employer can run a criminal record check on a job applicant through the official authorities (e.g., Australian Federal Police), or a private organization offering criminal record check services, if the individual consents. An employer's use of the information that comes back from a criminal record check is subject to spent convictions legislation (please see question 7).

#### Health checks/medical screening

Job applicants cannot be compelled to answer questions about their health or to undergo a medical examination as part of the recruitment process. One exception is legislation in the state of Queensland which allows employers to require a prospective employee to disclose a pre-existing injury or medical condition (Workers' Compensation and Rehabilitation Act 2003 (Qld)). Pursuant to the Workers' Compensation and Rehabilitation Act 2003 (Qld), a "pre-existing injury or medical condition" for an employment process means an injury or medical condition existing during the period of the employment process that a person suspects, or ought reasonably to suspect, would be aggravated by performing the duties which are the subject of the employment. Please see question 7 on the permitted use of any health information that a job applicant may voluntarily provide.

#### Social media/internet searches

Searches of a job applicant's publicly accessible social media presence, to identify any negative personal activities or behavior, are common. However, employers may not insist that a prospective employee provide his or her social network password in the recruitment process.

#### Union membership and political views

Employers should (and generally do) avoid asking prospective employees about their union affiliation or political views, as a decision not to employ an applicant on this basis would breach a range of federal, state and/or territory anti-discrimination laws.

#### Drug and alcohol testing

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Drug and alcohol testing tends to be more of an issue in the employment (rather than pre-employment) context (please see question 11).

## 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?

Generally, employers should only use information obtained through background checks to inform hiring decisions where the information is relevant to the particular role; and even then, care must be taken to ensure that the information is not used in a discriminatory manner.











For example, if a medical check is conducted to establish whether someone has a higher propensity to make workers' compensation claims (and a decision not to employ is made on that basis), this could provide evidence of unlawful discrimination on the grounds of disability or impairment.

In relation to criminal record checks, employers must not take into account spent convictions in assessing the character and fitness of a job applicant (and applicants are not required to disclose any spent convictions they may have). What constitutes a "spent conviction" varies between the applicable federal, state and territory statutes. Generally, convictions that are more than ten years old (or five years old for young offenders) – and carry low maximum jail terms (e.g., six months in New South Wales, Tasmania, Australian Capital Territory and Northern Territory; 30 months in Queensland and federally) – will be considered spent convictions. Several exclusions apply. For example, persons convicted of violence/sex offenses must disclose these when seeking employment involving children; and in certain occupations where there are licensing or other regulatory requirements, employers may ask about prior criminal activity and take that information into account in deciding whether to employ a person (e.g., teaching, nursing, policing, corrections, financial and legal services). Discrimination on the basis of an irrelevant criminal record is also unlawful under federal, Tasmanian and Northern Territory legislation.

#### **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?

The main difference is that a background check carried out after an offer has been made would remove any concern that information obtained through a background check (e.g., in relation to union membership or a medical condition) had resulted in a discriminatory decision against hiring the job 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)?

Unusually, privacy protections for employees are reduced once they commence employment due to the "employee records" exemption from the federal Privacy Act. Private sector employers covered by this legislation are not subject to its limits on the collection, use, storage and disclosure of any record of personal information relating to an employee's employment (e.g., information relating to terms and conditions of employment, engagement, discipline, termination, performance, conduct, union membership, etc.). In practice, however, employers generally implement processes to ensure the sensitive and confidential handling of such information.

Different arrangements for background checks during employment apply as follows:











- Health checks/medicals: At common law, employers may reasonably direct an employee to undergo a medical examination to determine the employee's fitness for duties. This issue is also often regulated by the terms of an applicable industrial award or enterprise agreement.
- Social media/internet activity: Employers may monitor employees' usage of work internet and email systems, subject to the possible application of the Privacy Act (because such information falls outside of the legislation's employee records exemption) and monitoring/surveillance laws that apply federally and in several states.
- Drug and alcohol testing: As with health checks, employers have the ability to insist that employees submit to drug and alcohol testing, through a combination of common law rules and award/agreement provisions.

#### **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 federal Department of Immigration and Border Protection provides the following information for employers:

- Australian citizens, Australian permanent residents and New Zealand citizens are legal workers and have unlimited permission to work in Australia. A single check confirming this at the time of employment is all that is required.
- Employers who believe their worker is a foreign national must carry out further checks to confirm that person has a visa with permission to work.
- The preferred method of checking visa details is to register for [the Department's] free, online system, Visa Entitlement Verification Online (VEVO). Alternatively, employers can ask their workers to send their visa details directly to them using VEVO Email.
- Employers do not need to register but will receive an email directly from a visa holder with his or her VEVO results. This can be used as evidence that the employer took steps to confirm permission to work.
- Employers found to have employed, referred or contracted a foreign national who does not have permission to work or is in breach of his or her visa conditions (an illegal worker) face penalties of up to AUD\$3,060 to AUD\$102,000 per illegal worker.

Source: <a href="https://www.immi.gov.au/About/Pages/managing-australias-borders/employing-legal-workers.aspx">https://www.immi.gov.au/About/Pages/managing-australias-borders/employing-legal-workers.aspx</a>

#### 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, in relation to criminal record checks and spent convictions legislation (please see question 7).











#### **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 handling of any personal information by a third party will be subject to the requirements and restrictions in the federal Privacy Act (please see question 6).

#### **DATA PROCESSING**

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

Yes. Such information must be handled in accordance with the Privacy Act (please see question 6).

#### SANCTIONS/ENFORCEMENT

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

- Privacy Act 1988 (Cth)
- Crimes Act 1914 (Cth), Part VIIC
- Criminal Records Act 1991 (NSW)
- Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)
- Spent Convictions Act 2011 (SA)
- Annulled Convictions Act 2003 (Tas)
- Spent Convictions Act 1988 (WA)
- Spent Convictions Act 2000 (ACT)
- Criminal Records (Spent Convictions) Act 1992 (NT)
- Disability Discrimination Act 1992 (Cth)
- Fair Work Act 2009 (Cth), Part 3-1

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• Legislation in each state and territory prohibiting discrimination on grounds of physical/mental disability or impairment and on the grounds of industrial activity, union membership, political belief/activity (e.g., Equal Opportunity Act 1995 (Vic))











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

- Privacy Act breaches: civil penalties of up to AUD\$340,000 for individuals and AUD\$1.7 million for organizations.
- Anti-discrimination law breaches: injunctions, compensation and/or (under the Fair Work Act 2009 (Cth)) civil penalties of up to AUD\$10,200 for individuals and AUD\$51,000 for corporations.

Contributed by: John Tuck, Corrs Chambers Westgarth

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#### **OVERVIEW**

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

Yes. Generally it is quite common in Hong Kong for employers to carry out background checks on applicants. While there is no specific legislation in Hong Kong governing the conduct of background checks, an employer should be mindful of the potential implications under the discrimination and personal data privacy legislation in Hong Kong when it conducts such checks. An employer will also require the consent of the applicant for most checks.

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

The most common background checks in Hong Kong are education and past employment records checks and checks to ensure that the applicants are "lawfully employable" in Hong Kong (in short, this means that the applicant has the right to work in Hong Kong). Some employers also make an employment offer conditional upon satisfactory pre-employment health checks.

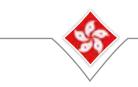


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#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search
   Drug and alcohol testing

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

An employer can conduct all of the above checks, subject to the applicant's consent and other conditions set out in question 5.

• Fingerprinting

• Handwriting

• Political views

• Union membership

#### 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, subject to the conditions set out in questions 5 and 6.

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

All of the above checks are subject to compliance with the Personal Data (Privacy) Ordinance ("PDPO") and should not be conducted in a way that amounts to unlawful discrimination.

Prior to conducting background checks, employers are required to inform the applicants of the purpose of the collection (e.g., by way of a personal information collection statement). An employer should take all reasonable steps to ensure that the personal data collected is accurate, protected against unauthorized access, and is not kept longer than is necessary. The applicant should have the opportunity to access his or her personal data and make corrections where applicable.

Information obtained from background checks often contains personal details of an applicant, which may include the protected attributes under the four anti-discrimination ordinances and the Employment Ordinance. These protected attributes are sex, marital status, pregnancy, disability, family status, race (which includes the color, descent or national or ethnic origin of an individual) and union membership. Employers should be cautious not to treat an applicant less favorably on the ground of any of these protected attributes.

It is good practice for an employer to obtain written consent from an applicant before any reference and background check is conducted.

## 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?

Apart from the compliance with the PDPO stated in the response to question 5, there are specific points to note for particular checks:











#### Criminal records

Third party criminal record checks are not available from police or courts, and there may be practical difficulties in obtaining this information. Certificates of No Criminal Conviction are issued to individuals for visa/emigration purposes only. While third parties (e.g., an employer) are not able to carry out criminal background checks on an individual, an employer may make it a condition of employment that the applicant demonstrates to the employer's satisfaction that he or she has no criminal history. This may involve the applicant lodging a Data Access Request ("DAR") under the PDPO with the Police Department to obtain any personal data held by the police in relation to the applicant's criminal history. Alternatively, the applicant may nominate the employer to be the "Relevant Person" for the purposes of lodging the DAR. Upon receipt of the DAR, the Police Department will be obliged to provide the documents containing the applicant's personal data which have been requested in the DAR (which may include any charge sheets, etc.). There will be a fee payable to obtain the documents under the DAR.

There are generally no restrictions on asking an individual about his or her criminal history. However, in relation to "spent" convictions, an employee is not obliged to disclose the existence of spent convictions, either voluntarily or in response to a direct question. There are exceptions to disclosure of spent convictions, such as for a licensed position in the financial services sector or in relation to becoming a lawyer, accountant or insurance broker. A conviction is "spent" where the individual's sentence did not exceed three months or the imposed fine did not exceed HK\$10,000, he or she did not commit any other offense in Hong Kong and a period of three years has elapsed without that individual being again convicted in Hong Kong of an offense. It is not a lawful or proper ground to dismiss or exclude an individual from any office, profession, occupation or employment or to prejudice him or her in any way in that office, profession, occupation or a failure to disclose that spent conviction.

#### Health checks/medical screening

Employers should comply with their obligations under the Disability Discrimination Ordinance ("DDO") and the PDPO in relation to the collection, handling and use of personal data. An employer should <u>not</u> obtain full details of the applicant's medical information (as not all of it may be relevant to the assessment of whether the applicant can perform the job for which he or she is applying). An employer should only seek to obtain such information as is necessary to determine whether the applicant can perform the inherent requirements of the position (and if the applicant is unable to perform those inherent requirements, what accommodation the employer can make for the applicant to assist him or her to perform the inherent requirements of the position).

#### Social media/internet checks

The collection of personal data by these checks must be necessary for, or directly related to, the purpose of employment. Information from social media sites often contains personal details which may reveal an applicant's protected attribute(s). Employers must be cautious not to treat an applicant less favorably on the ground of any of these protected attributes.

#### Fingerprinting

Fingerprints may fall within the definition of personal data under the PDPO. An employer must exercise caution when it takes fingerprinting from an applicant. It should also comply with the requirements under the PDPO. In this regard, the Office of the Privacy Commissioner for Personal Data (the "PCO") (the statutory body which oversees the enforcement of the PDPO) in Hong Kong has issued guidelines on the collection of fingerprint data to assist data users to comply with the PDPO. Taking fingerprints is uncommon in Hong Kong unless it is for a specific occupational requirement.

#### Union membership and political record checks

It is important to ensure that employment decisions are not influenced by the information collected by these checks, as it could potentially amount to unlawful discrimination. Under Part IVA of the Employment Ordinance, it is unlawful to discriminate against an individual on the ground of his or her trade union membership. It is also an offense to offer employment conditional upon the offeree not being a member of a trade union.













#### Drug and alcohol testing

An employer which requires job applicants to undergo drug and alcohol testing should be aware of the potential risks under DDO. While there is no case in Hong Kong that has determined that addiction to a drug amounts to a disability for the purposes of the DDO, there is a possibility that a Hong Kong court may come to this finding. An employer should only collect personal data that is directly related to assessing the suitability of the employee necessary for the specific position, and be careful not to discriminate on the basis of an applicant's disability.

### 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?

Information arising from background checks should be used for the purpose of screening the individual for a particular role, or the purposes communicated to the applicant when his or her personal data was first collected. Care must be taken not to use such information in a discriminatory way.

#### **OTHER BACKGROUND CHECKS**

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

Yes. Litigation searches are permitted. It is possible to conduct an electronic search (through a third party service provider) on the claims and proceedings in which a person is involved (whether as a plaintiff or a defendant).

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

The litigation search would only reveal that a person is a party to litigation but not the substantive details of the litigation.

#### 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. An employer will be subject to the same requirements and restrictions under the PDPO and the anti-discrimination law whether it conducts a background check before or after the decision to make an offer of employment is made. Where information relating to an applicant's protected attribute(s) is collected before the decision to make an offer of employment, an employer should ensure that the information is not used in a discriminatory way and should put in place internal policies to prevent the irrelevant materials from making their way through and influencing the decision maker. There is, however, no legislation which stops an employer from requiring an applicant to undergo a health check before a job offer is made. The key issue is the basis on which the decision to make (or not to make) a job offer 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)?

Checks may be carried out during employment and an employer will be subject to the same requirements and restrictions under the PDPO and the anti-discrimination law.











#### **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?

Under s17J(1) of the Immigration Ordinance (the "IO"), an employer must not enter into a contract of employment to employ any other person unless the employer first inspects:

- (a) the identity card of the other person, and, where the identity card held by the other person is not a permanent identity card as defined in the Registration of Persons Ordinance, then a valid travel document held by the person;
- (b) the official passport held by such other person;
- (c) if such other person is a claimant who has substantiated a claim under Part VIIC of the Immigration Ordinance, the Director of Immigration's permission; or
- (d) where the person is not the holder of an identity card and is not required to be registered under the Registration of Persons Ordinance:
  - a valid travel document;
  - a Vietnamese refugee card;
  - a certificate of exemption; or
  - any other approved document,

held by the person.

If an employer fails to inspect the identity document of a prospective employee as required under such section of the IO, the employer is guilty of an offense upon conviction and liable for a fine of up to HK\$150,000 and imprisonment for up to one year.

The IO also contains requirements on the keeping of records by an employer in relation to the identity card/travel document numbers of its employees.

#### 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. For example, applicants who are regulated by certain financial regulatory bodies (e.g., the Securities and Futures Commission) are likely to be subject to more stringent vetting.













#### **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 an employer opts to outsource the carrying out of background checks to a third party vendor, it must inform the applicants of this fact before conducting these checks. It must also take reasonable steps by contractual or other means to ensure that the third party vendor complies with the data protection principles under the PDPO.

#### **DATA PROCESSING**

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

An employer should:

- (a) ensure the accuracy of the data collected and that it is not to be kept for longer than necessary;
- (b) not use the information collected for a purpose other than the purpose communicated to the applicant when his or her data was first collected (i.e., for pre-employment screening);
- (c) take all practicable steps to ensure the applicant's personal data is protected against unauthorized or accidental access, processing, erasure, loss or other use; and
- (d) before using the data, an employer should explicitly provide the applicant with details of his or her rights to request access to and corrections of that personal data, as well as the name and address of the person to whom such requests should be made.

#### SANCTIONS/ENFORCEMENT

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

- Employment Ordinance (Cap 57)
- Rehabilitation of Offenders Ordinance (Cap 297)
- Disability Discrimination Ordinance (Cap 487)
- Sex Discrimination Ordinance (Cap 480)
- Family Status Discrimination Ordinance (Cap 527)
- Race Discrimination Ordinance (Cap 602)
- Personal Data (Privacy) Ordinance (Cap 486)

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• Immigration Ordinance (Cap 115)

- Hong Kong Bill of Rights Ordinance (Cap 383)
- The Fit and Proper Guidelines issued by the Securities and Futures Commission

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

If an employer fails to comply with the data protection principles under the PDPO, the PCO may issue an enforcement notice requiring the employer to take remedial steps for its contravening acts or omissions. If the employer contravenes this enforcement notice, it commits an offense and is liable on first conviction to a fine of up to HK\$50,000 (and a daily fine of HK\$1,000 for a continuing offense) and to imprisonment for two years.

An applicant/employee may make a complaint to the Equal Opportunities Commission (the "EOC") if he or she feels aggrieved by the employer's decision on allegedly discriminatory grounds. The EOC has the power to conduct a formal investigation and to issue an enforcement notice. The individual may make a claim against the employer by way of civil proceedings. Depending on the nature of the breach, it may amount to an offense.

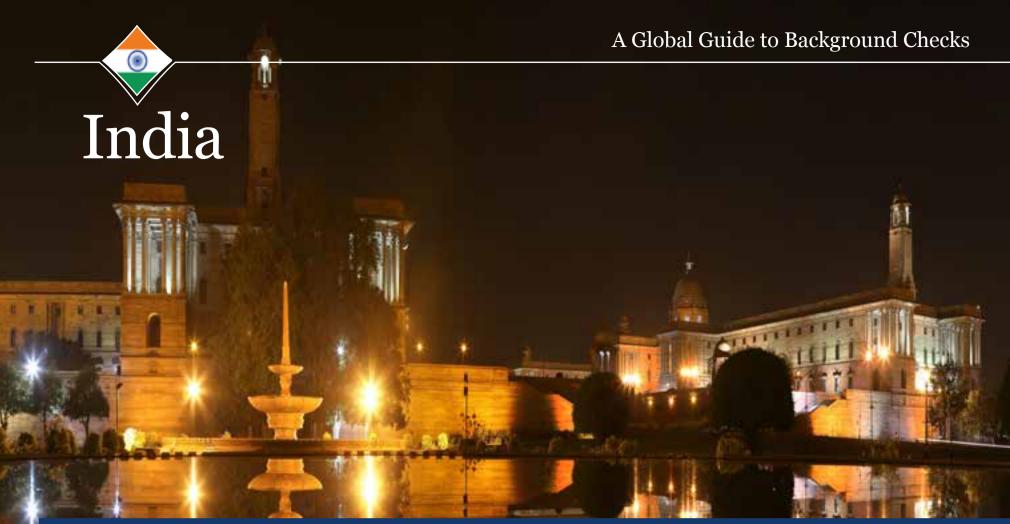
Contributed by: Duncan Abate & Hong Tran, Mayer Brown JSM











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#### **OVERVIEW**

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

Yes. Employers in India regularly carry out background checks on applicants. However, certain checks are subject to obtaining prior consent from the applicant from a data protection perspective.

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

The most common background checks in India are education and past employment checks.



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#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening

Political views

• Union membership

• Handwriting

Social media/internet search
 Drug and alcohol testing

#### 3. Which of the above background checks are employers <u>permitted</u> to carry out on applicants?

All of the above, subject to obtaining the applicant's prior informed consent and other conditions in relation to certain checks (please see questions 5 and 6).

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

None of these checks are expressly not permitted, but please see questions 5 and 6 for additional information.

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

Credit/financial checks, fingerprinting, health checks/medical screening and drug and alcohol testing, where such information is stored or intended to be stored in electronic media.

## 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 India, there is no law that specifically governs background checks. However, companies normally obtain employee consent prior to conducting the checks since obtaining consent helps companies access data (such as education records) in certain circumstances. Further, if the nature of the background check involves collecting sensitive personal data then the Information Technology Act 2000 (the "IT Act") and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the "Sensitive Personal Data Rules") could apply. Among other requirements, the IT Act and Sensitive Personal Data Rules require an individual's "informed consent" to be obtained before collecting any "sensitive personal data or information," if it is stored or intended to be stored in electronic media. Sensitive personal information or data in relation to an individual is defined to include personal information which consists of information relating to passwords; financial information such as bank account, credit or debit card or other payment instrument details; physical, physiological and mental health condition; sexual orientation; medical records and history; and biometric information. Thus, the applicant's prior informed consent would be required in relation to credit/financial checks, fingerprinting, health checks/medical screening, and drug and alcohol testing, where the data or information is stored or intended to be stored in electronic media.

For checks relating to education and past employment records, criminal records, social media/internet searches, handwriting, union membership, and political views, since conducting these checks would not involve collecting any sensitive personal data or information, there is no statutory requirement to obtain the individual's consent. However, as mentioned, companies normally still choose to obtain prior employee consent since obtaining consent could help companies to access data in certain circumstances. For example, certain universities may have a policy of sharing the education records of an individual only with the individual's consent.











Obtaining "informed consent" requires that the applicants are given notice of the data that is collected, the purpose of collection, the intended recipients of the information and the name and address of the third party agency which is collecting the information. Further, the applicant concerned must be clearly informed about the name and address of the third party agency collecting the information and the fact that such agency will have access to all sensitive personal data or information of the applicant provided during the course of the background checks.

### 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. While taking the decision on whether or not to employ an individual, there is no limitation on the employer as to how to use the information obtained from legally compliant background checks. However, it is important to ensure that the applicant is not denied employment on account of being a woman (except where the employment of women for that particular work is prohibited or restricted under law), since such discrimination is prohibited under the Equal Remuneration Act 1976.

#### **OTHER BACKGROUND CHECKS**

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

No. In addition to the education and past employment records, employers in India sometimes choose to undertake reference checks if the applicant has provided specific references.

#### 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?

As mentioned in the response to question 6, in order to collect any sensitive personal data or information stored or intended to be stored in electronic media, the employer would have to seek the employee's informed consent. If the employer can obtain such consent from the employee prior to making a decision on the offer of employment, there would not be any restriction on carrying out such checks.

Additionally, it is worth noting that occasionally employers may be <u>required</u> to carry out pre-employment background checks under specific local laws. For example, a few years ago in Pune, when there were reports of certain suspected terrorist activities, the authorities issued an order asking all employers to mandatorily conduct criminal record checks prior to hiring any employees.

Further, the provisions of the Industrial Employment (Standing Orders) Act, which is usually applicable to certain classes of establishments that employ more than 100 workmen, provide for model "standing orders" to be followed by the employer. A "workman" is defined under the Industrial Disputes Act 1947 as a person who is usually involved in manual, skilled, unskilled, technical, operational, clerical or supervisory work. This definition specifically excludes individuals who are (i) employed mainly in a supervisory capacity and drawing wages exceeding INR10,000 per month; or (ii) employed mainly in a managerial or administrative capacity. In some states, these model standing orders require employers to conduct pre-employment medical checks. However, there are no specific processes prescribed for conducting such checks.











#### **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)?

There are no restrictions in relation to carrying out different types of background checks on existing employees (such as the check being relevant to the type of job that the individual was hired to do). However, for existing employees, while the employer can undertake different types of background checks, the employer can normally only take disciplinary action against the employee if the information revealed by the background check is relevant to the individual's job or affects his or her 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?

The requirements for being legally entitled to work in India vary based on the nationality of the individual.

In relation to persons holding non-Indian passports, individuals who fall in the category of "Person of Indian Origin" (PIO) or "Overseas Indian Citizen" (OCI) are permitted to work in India without any additional requirements. However, other non-Indian passport-holders are required to have a valid employment visa in order to be legally entitled to work in India. In India, an employment visa is only granted to an individual in relation to a specific employer, on production of certain documents, including a letter from the prospective employer. An employment visa granted in respect of a particular employer cannot be used while working with any other employer in India. So, if the applicant requires an employment visa, the employer would have to assist the applicant in obtaining an employment visa.

#### 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. While employers in different sectors may place greater significance on some types of background checks than others, the restrictions in relation to consent requirements for the collection of data for conducting background checks apply uniformly across sectors.

#### **OUTSOURCING BACKGROUND CHECKS**

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

Yes. Employers are permitted to outsource the performance of background checks to a third party vendor, subject to data consent requirements being fulfilled (please see question 16).











### 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. In relation to background checks which involve the collection or processing of sensitive personal information (which requires specific consent from the individual), it is important to ensure that the individual consents to the transfer of such data to the vendor, or the collection, handling and processing of such data by the vendor.

#### **DATA PROCESSING**

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

Yes. Once the information is collected, there are additional processes that need to be followed in relation to storing, transferring and processing the sensitive personal data or information. The data collected must be used <u>only</u> for the purpose for which it was collected. Further, both the employer and any agency which is collecting information on behalf of the employer are required to keep the information secure by following reasonable security practices and procedures commensurate with the data in question, and also have a privacy policy in accordance with the provisions of the Sensitive Personal Data Rules. By way of example, it would be considered that reasonable security practices or procedures have been implemented when an entity has implemented security practices and standards and has a comprehensive documented information security program as well as information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information being protected. One example of such security measures is the International Standard IS/ISO/IEC 27001 on "Information Technology – Security Techniques – Information Security Management System – Requirements."

Additionally, under the Sensitive Personal Data Rules, the company is required to designate a Grievance Officer and publish his or her name and contact details on its website. The Grievance Officer is required to redress any grievances raised by the provider of the information with respect to processing information in a time bound manner. The Grievance Officer shall redress the grievance in an expeditious manner, and within one month from the date of receipt of the grievance.

#### SANCTIONS/ENFORCEMENT

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

As mentioned in the response to question 6, while there is no law that specifically governs background checks in India, if the nature of the background check involves collecting sensitive personal data which is stored or intended to be stored in electronic media, then the IT Act and the Sensitive Personal Data Rules could apply.

The only employment-related discrimination legislation applicable to private employers in India is the Equal Remuneration Act 1976, which prohibits gender-based discrimination. However, given that the results of the background checks would involve factors such as criminal records, employment history, etc., it is unlikely that any discrimination legislation would apply to decisions made based on these findings.

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

In the event that employee consent is not obtained for the collection/transfer of sensitive personal data or information, the employees concerned may take legal action against the employer for (i) failure to implement reasonable security practices in respect of their sensitive personal data or information; and (ii) failure to comply with the Sensitive Data Rules which have been prescribed under the IT Act. These offenses are punishable as follows:

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- Under section 43A of the IT Act, if the employer or the agency that conducts the background check fails to implement or maintain reasonable security practices in respect of sensitive personal data or information and causes wrongful loss to the employees concerned or wrongful gain to any person, it may be liable to pay damages by way of compensation to such employees.
- Further, under section 45 of the IT Act, it may also be liable to pay compensation not exceeding INR25,000 to employees affected or a penalty not exceeding INR25,000 for contravention of the Sensitive Data Rules (including failure to obtain consent of employees, unauthorized disclosure or transfer of sensitive personal data or information to third parties, etc.).

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#### **OVERVIEW**

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

Yes. Employers in Indonesia regularly carry out background checks on applicants. Background checks are not expressly regulated by Indonesian employment laws. Certain background checks are subject to the consent of the applicant in practice.

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

The most common background checks involve checks on an applicant's educational credentials, employment history and professional licenses which, in practice, are usually provided voluntarily by the applicant.



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#### **BACKGROUND CHECKS ON APPLICANTS**

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

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

All of the above. Certain checks are subject to the consent of the applicant in practice. Please see questions 5 and 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 <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

• Handwriting

• Political views

• Union membership

All of the above checks are permitted, subject to the applicant's consent.

## 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 above background checks, the employer must obtain the consent of the applicant for certain checks, as indicated. The checks undertaken must be appropriate and proportionate to the position being applied for and must not discriminate or discourage people from applying.

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

#### Criminal records

Employers may require prospective or existing employees to obtain a Statement of Good Behaviour, or *Surat Keterangan Catatan Kepolisian* ("SKCK"), from the local district office of the Indonesian National Police.

An SKCK is a letter issued by or on behalf of the Chief of Police in the district in which an individual is domiciled confirming that the individual named in the letter is of good behavior and not presently involved in any criminal investigation or proceedings. This statement from the Chief of Police is based on the information provided by the head of the village or sub-regency where the individual lives and a review of the local criminal record. An SKCK does not indicate whether an individual has a criminal record but confirms that the individual is not currently involved in criminal proceedings within that specific district only. Centralized/national criminal records are not available or searchable.

An SKCK is valid for six months and only relates to the specific police district where the individual is domiciled. Only the employee concerned may apply for and obtain an SKCK, but prospective employers are entitled to require a "clean" SKCK as a pre-condition to











hiring, and the employment agreement and related terms and conditions of employment may include an obligation for the employee to produce a valid, "clean" SKCK at any time.

#### Health checks/medical screening

Employers often require potential employees to undergo a health check-up. This is lawful and in fact is required by Law No. 1 of 1970 dated January 12, 1970 regarding Work Safety ("Work Safety Law"). Article 8 of the Work Safety Law provides broadly as follows:

"The manager is required to check the physical health, mental condition and physical ability of the employees to be employed or transferred in accordance with the nature of the work assigned to such workers."

Further, Minister of Manpower and Transmigration ("MOMT") Regulation No. Per.02/MEN/1980 dated March 13, 1980, regarding Employee Health Check-ups in Organizing Work Safety, elaborates on the type of health check-up to be conducted as referred to in the Work Safety Law. It provides for a complete physical examination, physical fitness, lung X-ray, routine lab tests and other necessary examinations. Based on this provision, an employer can require a potential employee to undergo a physical examination as a condition of employment. It is important that all potential employees be subject to the same conditions. The potential employee should give his or her written consent to the examination and to the release of the results to the employer. The employer can also require prior medical records be made available to the employer, on a non-discretionary basis and with the potential employee's written consent.

#### Credit/financial checks

Information of this kind is seldom used in the recruitment process in Indonesia. However, Bank Indonesia does issue comprehensive individual credit history reports, which will only be issued based on the request of financial institutions and the relevant individual requesting the information, as this information is considered confidential.

#### Fingerprinting and handwriting checks

There is no law preventing the collection of fingerprints and handwriting checks. However, great care must be taken by employers to ensure they do not infringe the personal privacy of employees, thus obtaining the potential employee's consent is advisable. Taking fingerprints and handwriting checks are uncommon in Indonesia.

#### Social media/internet checks

There is no prohibition on verifying information provided on public websites, such as news sources, Google searches or social network site searches. The only information that can be collected and retained by employers is information that can be accessed or obtained publicly, not private information.

#### Union membership and political views

Employers should be extremely cautious about collecting this type of information from applicants. In particular, 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 employees drive or operate machinery) or serious damage to the employer's business. The applicant would need to consent to the test. Drug and alcohol testing should only be carried out during employment if justified, necessary and proportionate, and with the consent of 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?

The information obtained should only be used where relevant to the particular role of the employee or potential employee and should not be used in a discriminatory manner.

#### **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)?

Checks may be carried out during employment, but must 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?

#### Prior employment

Requesting letters of recommendation from previous employers is common. Employers are legally obliged to furnish an Employment Statement at the request of any outgoing employee. This statement confirms the period of employment and job title but does not necessarily include a recommendation or an appraisal of the employee's job performance. The prospective employer may verify the information contained in the Employment Statement by contacting the previous employer directly. The previous employer may respond to such inquiries, but care must be taken by a former employer in issuing a broader letter of reference not to make statements that may be construed as defamatory, recognizing that defamation is a civil cause of action and a criminal offense.











#### Professional licenses

The employer may seek confirmation from the relevant licensing body to verify the validity of the license provided by the candidate.

#### Education history

Employers in Indonesia often request copies of an applicant's degrees or certificates that are certified as a true copy by the educational institution or by a public notary to verify authenticity. The prospective employer may verify the information contained therein by contacting the educational institution directly.

#### Permits

The employer must apply for the necessary permit to employ any expatriate. A work permit is always limited to a particular employer. It is not possible to transfer an existing work permit among employers.

#### 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. Apart from the appointment of Directors and Commissioners of companies, there are no specific rules requiring background checks for different sectors. Articles 93 and 110 of Indonesian company law require that an individual appointed as a Director or Commissioner must not have been convicted of a criminal offense that caused losses to the state during a period of five years prior to his or her nomination.

#### **OUTSOURCING BACKGROUND CHECKS**

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

There are no rules governing the use of background check service providers and such providers are rarely used (although corporate search houses exist). In any event, the employee's consent or involvement is required for the available background checks.

### 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**

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

Indonesia does not have a data protection authority or governmental agency that controls background checks. However, the prior written consent of the employee or candidate is necessary if the background check will involve personal data in an electronic format.











This consent must be in the Indonesian language or in a bilingual format. Such written consent may be in an electronic format.

In practice, employers in Indonesia regulate the data privacy of their employees by way of unilateral employee consents, employment agreements, company regulations and collective labor agreements. Such agreements permit the collection, retention, disclosure and use of the employee's personal data or other confidential information, including transmission within Indonesia or overseas to affiliates, services providers and government agencies. Such agreements and consents are justified by the freedom of contract principle under the Indonesian Civil Code.

#### SANCTIONS/ENFORCEMENT

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

There are no specific privacy or data protection requirements under Indonesian employment laws for employers who want to obtain criminal records, school records or employment or financial information of employees or potential employees. However, Indonesia has enacted various laws relating to data privacy in a number of areas. Indonesian legal scholars often refer to Article 28G of the 1945 Constitution as the rather vague basis for more specific data privacy legislation. The Article reads:

"Each person shall have the right to protection of their personal selves, families, respect, dignity and possessions under their control and shall have the right to security and protection from threat of fear for doing or for not doing something which constitutes a human right."

More specifically, Law No. 11 of 2008 regarding Electronic Information and Transactions prohibits the transmission or use of the personal data of an individual through electronic media without the consent of such individual.

Other relevant laws include:

- Law No. 13 of 2003 dated March 25, 2003 regarding Manpower ("Manpower Law")
- Law No. 39 of 1999 dated September 23, 1999 regarding Human Rights ("Human Rights Law")
- Law No. 40 of 2007 regarding Limited Liability Companies
- Law No. 29 of 2004 regarding Medical Practice
- Minister of Health Regulation No. 269 of 2008 regarding Medical Records
- Law No. 1 of 1970 regarding Work Safety ("Work Safety Law")

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

Any act that violates privacy or confidentiality will always give rise to a potential violation of Article 1365 of the Civil Code. Article 1365 of the Civil Code is a statutory tort provision and provides as follows: "Every unlawful action, that causes damage to another person, obliges the person whose fault causes such loss to compensate such loss."

The "law" that is referred to in this Article does not mean that a specific statute must be violated in order to invoke the Article. Rather, either an affirmative act that violates a reasonable standard of care or a failure to act that violates a reasonable standard of care that causes damage will result in a violation of this provision.











Further, Law No. 11 of 2008 regarding Electronic Information and Transactions ("Law No. 11") does not provide a specific sanction for violation of the obligation to obtain an individual's consent for the transmission or use of personal data through electronic media. However, Law No. 11 does provide that any person whose rights are infringed may file a claim for losses caused by such violation.

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#### **OVERVIEW**

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

Yes. It is standard practice in Japan for employers to carry out limited background checks. However, while some types of background checks are permitted and used, some types of background checks are only permitted in very limited circumstances. Employers must assess the need for the background check and weigh this against the risk of liability if the background check is challenged and compensation sought.

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

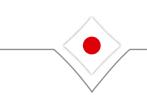
The background checks typically carried out in Japan are education and past employment checks and checks of publicly available information on social media or from an internet search.











#### **BACKGROUND CHECKS ON APPLICANTS**

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

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

All of the above are technically permitted, however many are subject to strict conditions and only permissible in very limited circumstances (please see questions 5 and 6).

• Handwriting

• Political views

• Union membership

#### 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 questions 5 and 6.

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

Criminal records, credit/financial checks, health checks/medical screening, fingerprinting, 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?

All types of background checks are subject to data protection and privacy conditions, and several types are only permissible in very limited circumstances.

All background checks collect Personal Information, as defined under Japanese privacy law. An Information Handler (including an employer) that collects Personal Information must disclose the Purpose of Use of the collected information in advance or soon after collection. An Information Handler that uses and retains Personal Information is obliged to protect and maintain the Personal Information.

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

#### Criminal records, union membership, political views, fingerprinting, drug and alcohol testing

It is generally accepted that the Japanese constitution guarantees individuals a Right to Privacy and that information in the above categories is sensitive information, in that its collection and processing without consent would violate an individual's Right to Privacy. As a general principle of law, it is not permissible to collect or process such information (including by way of a background check), unless there is a reasonable reason to do so and the individual consents to such collection and processing.

Additionally, various administrative guidelines specifically restrict an employer's right to acquire certain information about job applicants, including:

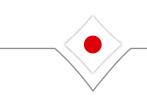
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- information regarding race, ethnicity, social status, family origin (*monchi*), legal domicile (*honseki*), place of birth or other information which might result in social discrimination;
- information regarding their political opinions or religious beliefs; and
- information about their membership of labor unions.

It is generally understood that criminal records, fingerprinting and drug and alcohol testing constitute "information which might result in social discrimination" and therefore their collection and use is restricted.

The guidelines provide an exception, whereby an employer may conduct such background checks where the information is essential in order for the employer to conduct its business. In such a case, the employer must obtain the information directly from the applicant and must expressly explain why the employer needs to know the information.

#### Health checks/medical screening

Administrative guidelines specifically prohibit employers from acquiring information about whether an employee (including an applicant):

- suffers from HIV/AIDS, Hepatitis B and other diseases which are not easily transmitted; or
- suffers from inherited conditions, such as color blindness.

Such information may only be collected where it is essential for deciding whether the individual is able to perform the job.

If an employer acquires health-related information from any third party, the employer must first obtain consent from the applicant/ employee and explain why the employer needs to know the information.

#### Credit/financial checks

Information about an applicant's credit/financial status could constitute sensitive information. Therefore, as a general principle of law, it is not permissible to collect or process information about credit/financial status (including by way of a background check), unless there is a reasonable reason to do so and the individual consents to such collection and processing.

### 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 prohibited from using or processing Personal Information about applicants or employees beyond the Purpose of Use as defined by the employer when the information was collected. Therefore, if the Purpose of Use for information collected via a background check was to determine a candidate's suitability for a job, it may only be used for that purpose.

The employer must obtain consent from the applicant or employee if the employer needs to use or process personal information outside that Purpose of Use, prior to such use or processing.

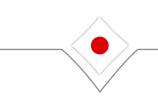
Employers are also generally prohibited from discriminating between job applicants on the grounds of sex or age.











#### **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?

The answer may change. Background checks are usually carried out in order to decide whether an offer of employment shall be made or not. Accordingly, after the decision to offer employment is made, in principle background checks are not permissible as they are no longer necessary.

#### 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 principles apply to carrying out background checks on employees. As outlined above, Personal Information from permissible background checks (e.g., education) may be collected at any time. Personal Information that is sensitive information (e.g., criminal record, alcohol and drug testing, medical screening) should only be collected if there is a reasonable reason for collection and the individual consents, otherwise such collection is a breach of the Right to Privacy.

#### **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 face criminal punishment (such as a fine or imprisonment) if their employees do not have the correct work permits. Therefore, an employer may request copies of a residence card or other evidence showing their work 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?

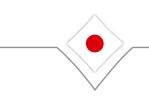
No.











#### **SECTORS**

#### 14. Do background checks differ in different sectors?

Restrictions on background checks do not generally differ by sector. However, as outlined above, certain background checks are only permissible in very limited circumstances. It may be that, in certain sectors or for certain types of positions, particular background checks will be permissible. For example, if an employer intends to hire a new staff member for its accounting department, information about his or her credit/financial status can be collected.

#### **OUTSOURCING BACKGROUND CHECKS**

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

Background checks of generally permissible Personal Information (e.g., education, work history, and social media and internet searches) may be outsourced to a third party under an outsourcing arrangement. In general, background checks of sensitive information may not be outsourced.

### 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 information collection or processing is outsourced, the employer is obliged to supervise the handling of the Personal Information by the service provider. Administrative guidelines suggest that the employer should (among other things):

• establish that the service provider has sufficient security measures to protect the information (e.g., a privacy policy, internal rules regarding information protection, employee training); and

• ensure that provisions regarding the proper handling of Personal Information are included in the outsourcing agreement.

#### DATA PROCESSING

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

For Personal Information collected from background checks, an employer is obliged to:

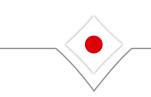
- (a) disclose the Purpose of Use of the collected information;
- (b) only use the information for that stated purpose unless the individual's consent is obtained;
- (c) amend or delete incorrect information if requested;
- (d) delete the information once the Purpose of Use is completed;
- (e) take appropriate steps to protect the security of the information; and
- (f) supervise all employees and service providers that handle the information.











#### SANCTIONS/ENFORCEMENT

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

- Personal Information Protection Act (Act No. 57 of 2003, as amended) (*kojinjoho hogo ho*) and its Ancillary Guidelines such as the Ministry of Health, Labor and Welfare Ancillary Guidelines regarding Health Information
- Article 13 of the Constitution of Japan (Nihon-koku kenpo)
- Employment Security Act (Act No. 141 of 1947, as amended) (shokugyo antei ho) (and Ancillary Guidelines)
- Worker Dispatch Act (Act No. 88 of 1985, as amended) (rodosha haken ho) (and Ancillary Guidelines)
- Civil Code of Japan (Act No. 89 of 1896, as amended) (minpo)

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

Under the Japanese Civil Code, if the Right to Privacy is infringed without justifiable grounds, an infringing party is required to compensate an infringed party for damages suffered.

Administrative agencies are authorized to impose administrative sanctions on employers which violate the Personal Information Protection Act and the Employment Security Act.

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#### **OVERVIEW**

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

Background checks are not specifically regulated under Macau law, but it is common practice for large corporations to conduct such enquiries when hiring. Smaller companies do not usually carry out such checks. However, background checks can only be executed if authorized by the applicant.

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

The most common background checks in Macau are education and past employment checks.











#### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Political views

• Handwriting

• Union membership

Social media/internet search
 Drug and alcohol testing

#### 3. Which of the above background checks are employers <u>permitted</u> to carry out on applicants?

Subject to the applicant's prior written consent and other conditions (see question 6), all of the above are permitted.

#### 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 all are subject to certain conditions.

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

All background checks in Macau are only permitted if certain conditions are satisfied.

## 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 background checks, the employer must obtain written and unequivocal consent (i.e., a written consent form) from the applicant for data protection purposes, and the checks can only be carried out if they are lawful, necessary, adequate, for a determinate purpose, and connected with the activity of the employer.

The documents supporting the collection of personal data (the written consent form) must contain information regarding: (i) the identity of the controller (the natural or legal person, public entity, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data) and of its representative, if any; (ii) the purposes of the processing; and (iii) other information such as the existence and conditions of the right of access and the right to rectify, provided they are necessary, taking account of the specific circumstances of collection of the data in order to guarantee the data subject that it will be processed fairly.

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

#### Health checks/medical screening

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Although Macau law does not specifically address this issue, the collection of information regarding the health status or pregnancy of an applicant is considered prohibited, except when it is absolutely necessary to assess the aptitude of the applicant for a particular job/role or when the performance of certain functions may affect the wellbeing of the applicant.











#### Drug and alcohol testing

Although Macau law does not specifically address this issue, drug and alcohol testing would, in principle, follow the same rationale as health checks and medical screening and, therefore, would only be allowed if absolutely necessary to assess the aptitude of the applicant for a particular job/role or when the performance of certain functions might affect the wellbeing of the applicant.

#### Union membership and political views

These checks can only be carried out as long as non-discrimination, and special security measures, are assured (e.g., control of access to the data, control of data support, control of data usage, etc.). Such checks also need to be authorized in advance by the Macau Data Protection Bureau.

#### Credit/financial checks

If an employer wants to check an applicant's credit/financial status, the employer must have written consent from the applicant and request prior authorization from the Macau Data Protection Bureau.

Further to the above, the applicant has the right to: (i) be informed about the data collected; (ii) access the data collected; (iii) object to the data collection at any time; (iv) not be subject to automatic individual decisions made in connection with the data collection; and (v) be compensated for any damages suffered in connection with the data collection.

Any data collected as a result of background checks can only be kept for the period of time necessary to achieve the purposes of the data collection.

### 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 from background checks can only be used for the purposes for which it was obtained and must 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?

No. The checks can be carried out at any time as long as the applicant consents to them.











#### 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 entitlement to work in Macau in circumstances where the applicant does not hold a Macau ID card is governed by the Macau Migration Authorities. It is not possible to hire and employ a non-resident worker in Macau without prior authorization from the Migration Authorities. To employ non-resident workers, employers must first obtain authorization to hire non-local workers (such authorization is subject to the non-availability of local workers to perform the same functions; is limited in time; needs to be previously authorized; cannot promote inequalities between local workers and non-resident workers, etc.). If such authorization is granted to the employer, the Migration Authorities will give permission to the non-resident prospective employee to stay in Macau as a worker and work for that 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?

No.

#### **SECTORS**

#### 14. Do background checks differ in different sectors?

Yes. Members of the board of directors and supervisory board of credit institutions, as well as the managers of branches, must register their respective appointments with the Macau Monetary Authority (AMCM) prior to commencing their duties. The application for registration includes a detailed professional curriculum and a certificate of the criminal record or equivalent document acceptable to AMCM, regarding the person or persons in question. Some insurance intermediaries' positions are also subject to prior authorization from AMCM based on, among other documents, detailed professional curriculum and a criminal record certificate.

#### **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 an employer uses a third party vendor to carry out background checks, the applicant must be informed, and the obligations established between the employer and the third party vendor must be governed by a written contract.











If the third party vendor is outside Macau, the processing of personal information should only be undertaken in countries or territories with an adequate level of protection for the rights of individuals in relation to the processing of personal information. The level of adequacy should be assessed by the Macau Data Protection Bureau before the transfer can take place.

#### **DATA PROCESSING**

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

The employer must ensure that the personal data collected from the background checks is:

- processed lawfully and with respect for the principle of good faith and with respect for privacy and for other fundamental rights, freedoms and guarantees enacted in the Basic Law of the Macao Special Administrative Region, the instruments of international law and the legislation in force;
- collected for specified, explicit, legitimate purposes and for purposes directly related to the activity of the controller; and not further processed in a way incompatible with those purposes;
- adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- accurate and, where necessary, kept up-to-date; adequate measures must be taken to ensure that data which is inaccurate or incomplete, having regard to the purposes for which it was collected or for which it is further processed, is erased or rectified; and
- kept in a form that permits identification of their subjects for no longer than is necessary for the purposes for which it was collected or for which it is further processed.

#### SANCTIONS/ENFORCEMENT

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

Macau Data Protection Law – Law 8/2005.

### 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, apart from the applicant's right to claim damages, the employer (depending on the rules violated) may be subject to the following sanctions: an administrative fine of up to MOP200,000; imprisonment for up to one year; or a monetary fine of up to 120 days (a day's fine is defined under Macau law as an amount ranging between MOP50 and MOP10,000, to be determined by the Court based on the offender's financial status and capability).

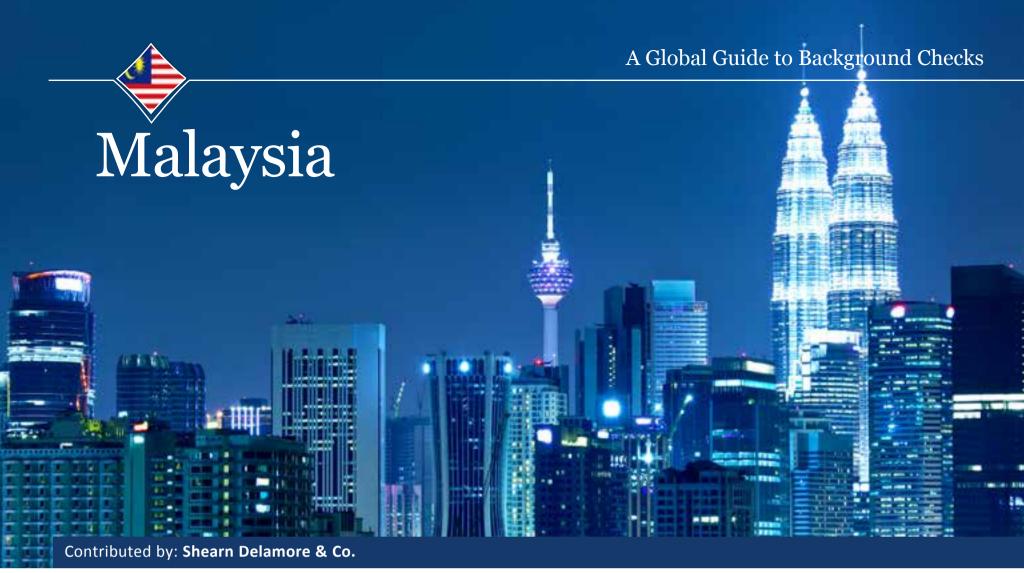
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#### **OVERVIEW**

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

Yes, it is standard practice in Malaysia for employers to carry out background checks on applicants. However, such checks are subject to the consent of the applicant and/or other conditions.

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

Background checks on education, past employment, whether the applicant is permitted to work in Malaysia and criminal records.











# Malaysia

# **BACKGROUND CHECKS ON APPLICANTS**

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

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

All of the above are permitted, 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?

None of the above are expressly prohibited, but please see question 5.

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

• Handwriting

• Political views

• Union membership

Pursuant to the Personal Data Protection Act 2010, an employer would require consent from the applicant before processing any personal data. Consent may be given orally, impliedly or explicitly.

The Act distinguishes general personal data from sensitive personal data. Sensitive personal data would require the applicant's explicit consent while other personal data may be consented to by any manner or form. From the background checks listed above, only information relating to the applicant's criminal records, health checks/medical screening and political views will be deemed sensitive personal data and therefore would require explicit consent from the applicant. The other background checks do not require explicit consent.

The Act, however, does not define "consent" or "explicit consent", nor does it prescribe any formalities in terms of the consent.

# 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 condition attached to background checks on the applicant's criminal records, health checks/medical screening and political views is explicit consent.

# 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 must be used in relation to the employment and cannot be excessive to that purpose.











# Malaysia

# **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?

Before a person commences employment, background checks can only be carried out in relation to information which is permitted under the Personal Data Protection Act 2010. This may include the checks as listed above, but may also include other information such as nationality, address, 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)?

Background checks may be carried out on employees, but this must be guided by the principle that they should not be carried out excessively or unnecessarily or be unrelated to the purpose for which the data is processed.

## **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 ensure the applicant has the requisite permits and/or passes to work in the country. Requirements differ according to the nature of the employment. Generally, foreign workers are either skilled or unskilled, and the Ministry of Human Resource issues guidelines from time to time pertaining to the entry of foreign employees.

# 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. The nature of the background check should be suited to the nature of the employment. For example, employers in the financial services would typically check for a potential employee's bad credit records or finance-related offenses.













# Malaysia

# **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?

Third parties are allowed to process personal data on behalf of employers, but this is subject to the processors offering guarantees of technical and organizational security measures in order to protect the loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction of personal data.

# DATA PROCESSING

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

An employer that collects information relating to an employee during the background check process must abide by several principles:

- Personal data can only be processed with consent. Sensitive personal data can be processed, but only with express consent. Processing of personal data cannot be for any unlawful purpose and must not be unnecessary or excessive.
- Personal data cannot be disclosed for any purpose other than the purpose for which it was collected.
- An employer shall, when processing personal data, take practical steps to protect the personal data from any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction.
- The personal data processed for any purpose shall not be kept longer than is necessary for the fulfillment of that purpose.
- An employer must take reasonable steps to ensure that the information is accurate, complete, not misleading and kept up-to-date by having regard to the purpose.
- The applicant shall be given access to his or her personal data and shall be able to correct that personal data where it is inaccurate, incomplete, misleading or not up-to-date.

# SANCTIONS/ENFORCEMENT

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

Personal Data Protection Act 2010.

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

An employer found to be in violation of the Personal Data Protection Act 2010 may be liable to a fine not exceeding MYR300,000 or to imprisonment for a term not exceeding two years or to both.

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# **OVERVIEW**

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

It is common for employers in Myanmar to conduct background checks on potential hires, although the level and extent of background checks may vary from employer to employer.

The method of recruitment may be a factor that affects the level and extent of background checks conducted. Employers may recruit employees through several avenues. They may submit an application to the relevant Township Labour Office, which will collate and provide a list of candidates meeting the specified requirements together with the supporting documents submitted by such candidates. Employers may also recruit employees through employment agencies, advertisements or known contacts.

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

Routine background checks include verification of personal particulars, education and employment history checks, criminal records checks and social media/internet searches.













# Myanmar

# **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- 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?

There are no laws expressly stipulating the type of background checks that employers are permitted to carry out on prospective hires. There are also no laws prohibiting or regulating the conduct of the above background checks as there are no specific cross-sector data protection laws or anti-discrimination laws. However, the checks that employers typically carry out are highlighted in question 2.

• Handwriting

• Union membership

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

As indicated in question 3, there are no laws prohibiting or regulating the conduct of the above background checks by employers on prospective hires.

Employers generally do not carry out the following checks: handwriting, union membership, political views and credit/financial checks.

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

None. However, not all of the above background checks are required by all employers as part of their standard background checks. Some employers may require certain background checks to be conducted if they need to verify certain information or particulars due to the nature of the position.

Depending on the requirements of the position, an employer may carry out health checks/medical screening. Drug and alcohol testing is generally not carried out, but may be required if an applicant has given the employer grounds to consider undertaking this check. Taking fingerprints is uncommon in Myanmar and is only required for certain positions (e.g., in certain government departments).

# 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?

Not applicable.

# 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?

There are currently no laws imposing such limitations. However, as Myanmar is a common law jurisdiction, there is a possibility that, in the future, Myanmar may recognize certain principles and obligations which exist under common law, although this is untested in Myanmar courts (for example, the tort of breach of confidence).











# Myanmar

# **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?

As there are generally no laws prohibiting or regulating the conduct of background checks by employers on prospective hires or existing employees, the above answers would not be affected by the timing of the background checks. It is, however, more common in Myanmar for background checks to be undertaken before 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)?

As indicated above, there are generally no laws on conducting background checks by employers on prospective hires or 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?

An employer needs to check the original identification document of a prospective hire to satisfy itself that he or she fulfills the minimum legal age to work.

If the prospective hire is a foreign national, the employer should also check that he or she has a valid business visa or stay permit to work in Myanmar.

In addition to the above, in practice, an employer will typically check certain original documents of a prospective hire to satisfy itself that he or she is qualified to apply for the position. Photocopies of such documents would be retained in the event that the employer decides to employ the prospective hire.

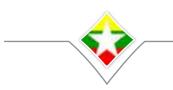












# Myanmar

# 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?

As there are generally no laws prohibiting or regulating the conduct of background checks by employers on prospective hires, there is no difference in the background checks that can be carried out on the different categories of workers above. In practice, however, the level of background checks would be most stringent on full-time workers.

# **SECTORS**

## 14. Do background checks differ in different sectors?

While there are generally no laws prohibiting or regulating the conduct of background checks by employers on prospective hires, the level and type of background checks conducted across different sectors could vary from employer to employer.

# **OUTSOURCING BACKGROUND CHECKS**

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

There are no express permissions or restrictions on outsourcing the carrying out of background checks to third party service providers.

# 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. However, as indicated in question 7, there is a possibility that, in the future, Myanmar may recognize certain principles and obligations which exist under common law.

## **DATA PROCESSING**

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

As indicated in question 3, there are no specific cross-sector personal data protection laws.

# SANCTIONS/ENFORCEMENT

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

There are no restrictions or laws regulating background checks by employers on prospective hires.

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

Not applicable.

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## **OVERVIEW**

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

Yes. Background checks are regularly undertaken by employers in New Zealand during the recruitment process.

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

The most common background checks are checking references and qualifications, and undertaking credit checks and criminal record checks. It is also fairly common for pre-employment drug tests, and/or medical examinations, to be undertaken, depending on the nature of the role. Note that credit checks are only warranted where the position involves significant financial risk.



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# **BACKGROUND CHECKS ON APPLICANTS**

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

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

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

• Handwriting

• Political views

• Union membership

Under the Privacy Act 1993, the collection of personal information must not be unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned. Except for a very limited number of roles, it is arguable that fingerprinting and handwriting checks would be unreasonably intrusive, and the onus would be on the employer to justify why such checks were relevant to the applicant's suitability for employment. Fingerprinting and handwriting checks are extremely rare.

Please see question 6 for further information about conditions which may need to be satisfied before such checks are carried out.

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

Political views and union membership. Under the Human Rights Act 1993, political opinion is a prohibited ground of discrimination. This means that it is unlawful for an employer to "refuse or omit to employ" an applicant based on his or her political views. Under the Employment Relations Act 2000, employers are also prohibited from discriminating against employees based on their union membership or non-membership.

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

All of the above background checks listed in the response to question 3, except social media and internet searches where the information is publicly available. Also, credit checks are only warranted where the position involves significant financial risk.

# 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?

Under the Privacy Act 1993, personal information about applicants must be sought directly from the candidates, or their authorization should be sought to obtain information from a third party. This means that the applicant's authorization needs to be obtained for all of the background checks listed in the response to question 3, unless the information is publicly available, for example, an internet search or <u>public</u> social media profile search. In relation to the latter, as a matter of best practice, it is recommended that employers notify applicants that an internet search or public social media profile search is to be undertaken.











In relation to particular checks:

#### Credit checks

The Credit Information Privacy Code 2004 predominantly governs the collection and use of credit information by "credit reporters" (agencies that carry on a business of reporting information relevant to the assessment of the creditworthiness of individuals). Rule 11 of the Code provides that a credit reporter may only disclose credit check information to a prospective employer if the disclosure is authorized by the individual concerned and is for a position involving significant financial risk.

#### Criminal records

An employer must apply to the Ministry of Justice in order to obtain a criminal background check for a prospective employee and can only do so with the individual's written consent. Under the Criminal Records (Clean Slate) Act 2004, individuals who have minor convictions, that did not attract custodial sentences and were committed at least seven years ago, are provided with a "clean slate" and may state that they have no criminal record where asked. It is an offense for an employer to ask a candidate to disclose a criminal record when that person is entitled by law not to do so.

#### Education and past employment records

Employers should ensure that an applicant has provided express authorization for them to contact their referees directly. Past employers are unlikely to provide new prospective employers with previous employment information without the applicant's consent, and if they did so, they would be in breach of the Privacy Act 1993.

#### Health checks/medical screening

Any information sought must be relevant to the position for which the applicant is applying. An employer cannot ask for information about an applicant's general health, but can ask for information about any health condition that is likely to affect his or her ability to safely or effectively perform the role for which he or she is applying. An employer cannot discriminate on the grounds of an applicant's disability. Under the New Zealand Bill of Rights Act 1990, every person also has the right to refuse medical treatment.

# 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?

Yes, there are limitations under the Privacy Act 1993 and the Human Rights Act 1993. Under the Human Rights Act 1993, it is unlawful for an employer to "refuse or omit to employ" an applicant based on one of the following prohibited grounds of discrimination: sex, which includes pregnancy and childbirth, marital status, religious belief, ethical belief, color, race, ethnic or national origins, which includes nationality or citizenship, disability, age, political opinion, employment status, family status and sexual orientation.

Employers are unable to use any information they obtain in a discriminatory manner. It is unlawful for an employer to use or circulate a job application form or ask any question of or about a job applicant which indicates that the employer intends to discriminate on one of the above prohibited grounds.

If applicants feel they have been discriminated against during a recruitment process, they can make a complaint to the Human Rights Commission.

Information obtained on social media sites often contains personal details about an applicant's age, sex, religious belief, marital status, family status, color, race and sexual orientation. If an employer takes any of the above information into account in deciding whether to employ the applicant, this could give rise to a claim of unlawful discrimination under the Human Rights Act 1993.











# **OTHER BACKGROUND CHECKS**

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

Yes. There are additional safety checks by way of a police vetting service for positions in organizations that are responsible for providing care to children, the elderly or other vulnerable members of society. Police vetting can reveal information about interactions with the police that have not resulted in a conviction, including driving demerit points and family violence information.

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

Only approved organizations have access to the police vetting service, at the discretion of the police. To be an approved organization, the employer will generally need to be a government agency or be involved with the care or education of vulnerable members of society.

# 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. Personal information must always be collected in accordance with the Privacy Act 1993 and should never be used for discriminatory purposes. Background checks can be completed before an offer is made (and conditional upon satisfactory results). When the background checks are carried out after the decision to make an offer of employment, the offer should be expressly conditional upon a satisfactory background check being completed.

# 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)?

Yes. There are limitations on an employer's ability to undertake ongoing checks on existing employees. Such checks would need to be justifiable and incorporated into employees' employment agreements.

It is arguably not permissible to require ongoing credit checks as this would potentially be in breach of the Credit Information Privacy Code 2004 (which expressly allows credit checks in a pre-employment context only).

Further, an employer would need a lawful purpose for ongoing checks on existing employees. Such checks could only be carried out where they are necessary and justified by the nature of the employee's role.

# **ENTITLEMENT TO WORK**

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# 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 2009 provides that employers must not employ applicants who are not entitled to work in New Zealand. Employers are required to take reasonable precautions and exercise due diligence to ascertain whether an applicant is entitled to work in New Zealand.











Employers may request evidence of an applicant's eligibility to work in New Zealand, such as a passport, New Zealand driver's license, birth certificate or work visa.

## 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, some sectors will justify more comprehensive background checks being conducted than others, due to the nature of positions. For example, credit checks may be required in certain roles in the financial sector where the positions involve significant financial risk, or certain industries, such as the education and medical sectors, may require thorough police vetting.

# **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, provided that the applicant has authorized the information being collected by the third party and the intended use/transfer of the information.

# **DATA PROCESSING**

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

Yes. Employers must not use the information in a discriminatory manner and must comply with the Privacy Act 1993.

Under the Privacy Act, when processing information collected for a lawful purpose, employers must:

- (a) ensure that employees are made aware of all intended recipients of their personal information and its intended use and transfer at the time it is collected;
- (b) ensure that the information is reasonably protected against loss, access, use, modification and disclosure;
- (c) provide individuals with a right to access their personal information and request corrections;
- (d) take reasonable care to check the information is accurate, up-to-date, complete, relevant and not misleading before using it;

(e) not keep personal information for longer than necessary;













(f) not use the information connected with one purpose for any other purpose, subject to the exceptions in the Privacy Act;

(g) not disclose the information to any other person or body or agency, subject to the exceptions in the Privacy Act; and

(h) not assign a unique identifier to the individual unless it is necessary to do so.

# SANCTIONS/ENFORCEMENT

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

- New Zealand Bill of Rights Act 1990
- Privacy Act 1993
- Human Rights Act 1993
- Criminal Records (Clean Slate) Act 2004
- Credit Information Privacy Code 2004
- Employment Relations Act 2000

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

The Human Rights Review Tribunal (HRRT) can determine breaches of the Privacy Act 1993 and the Human Rights Act 1993. The HRRT can award damages, a declaration that the employer has breached the law, an order preventing repetition of the breach and an order to take action to rectify the breach.

Contributed by: Phillipa Muir & Carl Blake, Simpson Grierson

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## **OVERVIEW**

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

Background checks are not very common in Pakistan but the trend is picking up.

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

Background checks in Pakistan are generally limited to education and past employment checks, criminal records, social media/internet searches and health checks.



 $MAY E R \bullet B R O W N$ 









# Pakistan

# **BACKGROUND CHECKS ON APPLICANTS**

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

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

There is no specific law governing background checks and any check may be carried out, especially once the consent of the applicant has been obtained.

• Handwriting

Political views

• Union membership

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

Please see above. Please note, however, that the Constitution of Pakistan prohibits discrimination on the basis of union affiliations and also political views. These checks should therefore be avoided.

In addition, there is no mechanism in Pakistan for an employer to check an applicant's credit/financial records or fingerprints.

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

Please see question 3.

# 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 only condition which an employer needs to satisfy before carrying out any background check is to ensure the applicant's consent has been 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?

There are no specific limitations. However, the information must be used strictly for the purposes for which it has been obtained, and adequate systems must be in place to protect the data.

# **OTHER BACKGROUND CHECKS**

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

No.

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# Pakistan

## 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?

Not applicable.

# 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)?

There is no major difference. However, obtaining the consent of existing employees may be more crucial because the checks are less likely to be justifiable 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?

The only requirement is to check that the employee has a valid National Identity Card and possesses the qualifications necessary for the job. All other checks are optional. If the employee is a foreign national, an employer is required to check that he or she is lawfully authorized to work.

# 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?

There are no legal restrictions/requirements; however, practice may vary from sector to sector. For example, in private security firms, an applicant's criminal record may be checked.

# **OUTSOURCING BACKGROUND CHECKS**

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

The law in Pakistan neither permits nor prohibits the outsourcing of background checks.











# Pakistan

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?

There are no specific limitations. However, the information must be used strictly for the purposes for which it has been obtained, and adequate systems must be in place to protect the data.

# SANCTIONS/ENFORCEMENT

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

Constitution of Pakistan.

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

Not applicable.

Contributed by: Zeeshan Ashraf Meer, Meer & Hasan

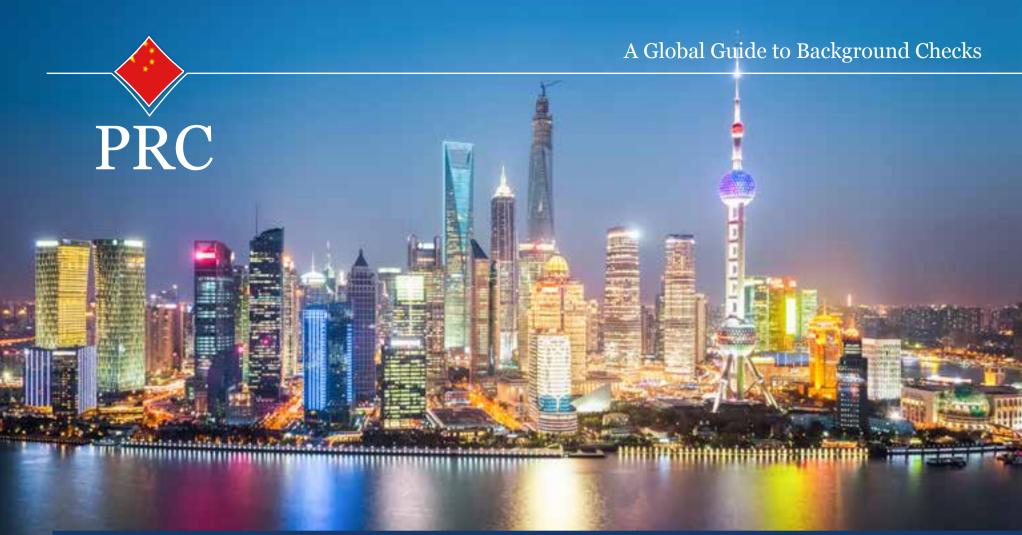
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# **OVERVIEW**

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

Yes, employers in the PRC 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 the PRC are education and past employment checks, and confirmation that the applicant has appropriate permission to work in the PRC.



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# **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Political views

• Fingerprinting

• Handwriting

• Union membership

Social media/internet search
 Drug and alcohol testing

# 3. Which of the above background checks are employers <u>permitted</u> to carry out on applicants?

All of the above, subject to the applicant's consent and other conditions (please see questions 5 and 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 <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Criminal records, credit/financial checks, health checks/medical screening, social media/internet searches, fingerprinting, 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 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

Criminal records checks are not usually required for all 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.

# Credit/financial checks

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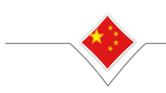
Credit/financial checks are not usually required for all employees and should only be requested where the need to protect the employer's business, customers or clients makes it appropriate.











#### Health checks/medical screening

It is generally unlawful to ask about the health of an applicant before offering him or her a job. Health checks are only permitted if there is an occupational requirement to justify one.

#### 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 they do not risk breaching the data protection regime in the PRC. Fingerprinting is a controversial topic in the PRC 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 PRC.

#### Handwriting

There is no law preventing the collection of handwriting, however, the collection of handwriting should be necessary, proportionate and transparent.

#### Union membership and political views

Employers should be cautious about collecting this type of data from applicants. It should not be used to influence whether an offer is made.

#### 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.

# 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.

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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?

Yes. Employers should not ask for details which relate to protected characteristics under the PRC labor law (e.g., nationality, gender, race, religion, disability, being a carrier of any epidemic pathogens or Hepatitis B) on an application form or before a job offer has been made. These questions should be asked as part of an equality monitoring form.

## 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?

- (a) The employer must request, and the individual must provide, certain original documents to establish the individual's eligibility to undertake the work on the offer.
- (b) The documents that are required depend on whether the person is subject to immigration control.
- (c) The employer must check the validity of the original documents and satisfy itself that the individual is the person named in them.
- (d) 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.
- (e) These documents are recommended to be retained for the duration of the individual's employment and for a further two years after employment has ceased (e.g., Article 20 and Article 30 of the PRC Regulation on Labor Supervision). For certain categories of employees (for example, expatriates working in the PRC), 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.

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# **SECTORS**

## 14. Do background checks differ in different sectors?

The background checks that are carried out as a 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 (Article 21 of the Administrative Rules on the Qualification of Acting as Director, Supervisor and Senior Management in Insurance Companies).

## **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.

## **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 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?

- PRC Employment Contract Law (2012)
- PRC Regulation on Employment Service and Employment Management (2008)

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- PRC Law on Employment Promotion (2007)
- PRC Regulation on Protecting Personal Data of Telecommunications and Internet Users (2013)
- PRC Trade Union Law (2009)

# 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. Criminal offenses may be committed in relation to background checks.

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## **OVERVIEW**

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

Yes, it is common practice in the Philippines for employers to carry out background checks on applicants. However, Republic Act No. 10173, or the Data Privacy Act of 2012 (the "Data Privacy Act"), now regulates the collection of personal information.

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

Companies in the Philippines commonly carry out checks on education and past employment records, criminal records, social media/ internet and require applicants to undergo health checks/medical screenings. Employers also usually require applicants to submit their Social Security System ID Number, Tax Identification Number and birth certificate.



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# **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
- Fingerprinting

• Handwriting

• Political views

• Union membership

- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search Drug and alcohol testing

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

Employers may carry out any of the above (but please see questions 4, 5 and 6 in relation to particular checks).

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

None of the checks mentioned above are expressly prohibited.

Fingerprinting and handwriting checks are impractical in the Philippines, as no Philippine database is available for these two checks.

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

A number of conditions apply to background checks (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 information requested during the background check process must be necessary and related to the fulfillment of a contract, for compliance with a legal obligation, to respond to a national emergency, to comply with the requirements of public order and safety, to fulfill the functions of a public authority, or must be necessary for the purposes of the employer's legitimate interests.

## Background checks excluding education and past employment records, criminal records and health checks/medical screening

In relation to the background checks excluding education and past employment records, criminal records and health checks/medical screening, the employer needs to obtain the consent of the data subject.

## Sensitive personal information

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In the case of sensitive personal information, such as political views, union membership and fingerprinting, the processing of information must be provided for by existing laws and regulations, must be necessary to protect the life and health of the data subject, and must be necessary for the protection of lawful rights and interests of natural or legal persons in court proceedings, or for the establishment, exercise or defense of legal claims, or when provided to government or a public authority.











#### Social media/internet searches

In relation to social media or internet searches, such searches must be necessary and proportionate with the purpose of the employer in checking any media presence of the applicant. There must also be a justifiable reason for conducting such media searches.

#### Drug testing

Drug testing is regulated by law (Republic Act No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002). Such tests may be carried out, provided that the drug use could have adverse and far-reaching effects on the employer, such as reduced productivity, an adverse impact on customer relations and physically dangerous situations. Under the Comprehensive Dangerous Drugs Act of 2002, officers and employees of public and private offices may be required to undergo random drug testing as provided for in company policies. Like every other test, it must be carried out with the applicant's consent and must be necessary and justified.

#### Credit/financial checks

Credit/financial checks are regulated by Philippine law, as bank deposits and certain investments are mandated by law to remain secret and credit standing may only be accessed by authorized entities.

#### Criminal records

Criminal records are usually disclosed by the applicants when they are required to submit police clearance and/or court clearance.

#### Pre-employment medical examinations

Labor rules require pre-employment medical examinations to be carried out on newly-hired employees or during application for employment.

# 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 during background checks should not give rise to any form of discrimination against the applicant. The information must be used in such a way that is connected to the particular job vacancy.

## **OTHER BACKGROUND CHECKS**

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

Social Security System ID Number, Tax Identification Number and birth certificate.

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

None, subject to the provisions of the Data Privacy Act.













# 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 Data Privacy Act applies at all times.

## 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 present legal framework does not distinguish between the personal information gathered prior to employment and that gathered during employment. The Data Privacy Act generally applies to all forms of background checks, save for the gathering of publicly available information.

## **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 have to check both the age and the citizenship of the employment applicant. Persons under 15 years of age should not be employed, except when employment is necessary in public entertainment or when the employment is in a family business.

If the applicant is a foreign national/"alien", the employer needs to check whether or not the applicant holds an Alien Employment Registration Certificate (AERC) for resident aliens or an Alien Employment Permit (AEP) for non-resident aliens.

Employment in public utilities is also limited to Filipino citizens by virtue of Commonwealth Act No. 108, as amended by Presidential Decree No. 715, otherwise known as the Anti-Dummy Law.

## 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. The Data Privacy Act does not apply to information about any individual who has worked for the government. Since government officials and employees occupy a position of public trust, the law requires that certain information about their employment be disclosed to the public. It also does not apply to information necessary for banks and other financial institutions to comply with Republic Act No. 9160, or the Anti-Money Laundering Act and other applicable laws. Information pertaining to covered monetary transactions made by an individual may also be disclosed even without the consent of the concerned individual.













# **OUTSOURCING BACKGROUND CHECKS**

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

Yes, provided that the background check is carried out lawfully. Since the Data Privacy Act governs all acts intended to gather personal information, an employer that requests an unlawful background check can also be made liable.

# 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 Data Privacy Act applies equally to anyone who personally conducts or outsources background checks. Hence, the Data Privacy Act provides that anyone who carries out, or instructs another to carry out, a background check shall be responsible for personal information under his or her control, including personal information transferred to a third party for processing.

# DATA PROCESSING

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

Section 12 of the Data Privacy Act provides that the processing of personal information shall be permitted only if not otherwise prohibited by law and when at least one of the following conditions exists:

- (a) the data subject has given his or her consent;
- (b) the processing of personal information is necessary and is related to the fulfillment of a contract with the data subject or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) the processing is necessary for compliance with a legal obligation to which the personal information controller is subject;
- (d) the processing is necessary to protect vitally important interests of the data subject, including life and health;
- (e) the processing is necessary in order to respond to a national emergency, to comply with the requirements of public order and safety, or to fulfill functions of a public authority which necessarily includes the processing of personal data for the fulfillment of its mandate; or
- (f) the processing is necessary for the purposes of the legitimate interests pursued by the personal information controller or by a third party or parties to whom the data is disclosed, except where such interests are overridden by fundamental rights and freedoms of the data subject which require protection under the Philippine Constitution.

# SANCTIONS/ENFORCEMENT

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

- Republic Act No. 10173 (Data Privacy Act of 2012)
- Republic Act No. 1405 (Law on Secrecy of Bank Deposits, enacted in 1955)
- Republic Act No. 6426 (Foreign Currency Deposit Act of the Philippines, enacted in 1974)









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- Republic Act No. 8791 (The General Banking Law of 2000)
- Republic Act No. 9160 (Anti-Money Laundering Law of 2001)
- Republic Act No. 9510 (Credit Information System Act, enacted in 2008)
- Articles 26 and 32 of the Civil Code of the Philippines (enacted in 1950)
- The Bill of Rights in the Philippine Constitution

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

Employers may be imprisoned or fined under section 25 of the Data Privacy Act and under relevant laws.

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## **OVERVIEW**

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

Employers in Singapore generally carry out background checks in relation to job applicants. This area is not governed by legislation and only undertaken as a matter of practice.

As background checks involve the collection, use and disclosure of personal data relating to applicants, employers must ensure that they comply with the data protection obligations under the Personal Data Protection Act 2012 ("PDPA").

Further, employers should take into account the Tripartite Guidelines on Fair Employment Practices ("TGFEP") and avoid asking for information that is irrelevant to the assessment of an applicant's suitability for a job as this may constitute a discriminatory practice.

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

The most common types of background checks relate to an applicant's employment record, educational background, criminal history and financial record/history. However, as criminal records are not publicly available, there may be practical difficulties in obtaining such information.

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# **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- 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?

All of the above. Generally, the above background checks are permitted as long as the conditions of the PDPA are complied with and the employer conducts the job application in a non-discriminatory manner.

• Handwriting

• Union membership

## 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.

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

All of the above.

# 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?

#### All of the above background checks excluding social media and internet searches

Generally, save where an exception applies, an employer would need the consent of the individual when conducting the above background checks.

In the context of conducting background checks for recruitment purposes, there is an exception under the PDPA that provides for the collection, use and/or disclosure of personal data without consent if it is "necessary for an evaluative purpose". This is defined as "for the purpose of determining the suitability, eligibility or qualifications of the individual to whom the data relates for employment or for appointment to office."

However, the exception only applies insofar as the personal data is "necessary" for the evaluative purpose, and, therefore, employers may not be able to justify conducting such background checks without consent if the personal information is not necessary for the purposes of the employment opportunity.

Separately, employers should restrict themselves to conducting the above background checks only when it is reasonable and relevant to the assessment of an applicant's suitability for a job. Under the PDPA, employers may only collect, use and/or disclose personal data for purposes that a reasonable person would consider appropriate in the circumstances (the "Purpose Limitation Obligation").

Similarly, the TGFEP stipulates that asking for information that is irrelevant to the assessment of an applicant's suitability for a job may be considered to be a discriminatory practice.











Employers should, therefore, assess the above background checks against the occupational requirements of the job and only conduct those background checks that are relevant and reasonable/appropriate in the circumstances.

#### Social media and internet searches

Employers will not need to obtain consent for background checks conducted via social media and internet searches, as personal information obtained from such sources is considered publicly available data and is not subject to the consent requirement under the PDPA.

Notwithstanding this, employers are still required to comply with the Purpose Limitation Obligation and avoid discriminatory practices when conducting background checks via social media and internet searches.

# 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?

Yes. Employers should avoid discriminatory practices and adopt an objective and fair selection criteria when making its recruitment decision. Therefore, any information arising from the above background checks that is not relevant to the assessment of an applicant's suitability for a job should not be taken into account when making the decision.

# **OTHER BACKGROUND CHECKS**

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

Yes, litigation searches are also permitted in Singapore.

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

The restrictions/limitations outlined in questions 6 and 7 apply equally here.

## 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, in relation to the Purpose Limitation Obligation, employers are more likely to be able to justify such background checks if they are carried out after the decision to make an offer of employment is made, such as where the offer of employment is conditional on the applicant passing or satisfying the requirements of such background checks.

# **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)?

Yes. The conditions that have been set out in question 6 continue to apply. In this regard, the "evaluative purpose" exception is equally applicable to the assessment of the employee's suitability for promotion or continuance in, or removal from, employment or office.

However, employers should note that another exception under the PDPA applies to conducting background checks on existing employees. This is where the collection of such personal data through background checks is reasonable for the purpose of managing or











terminating an employment relationship between the employer and the employee. Where such an exception is relied on, the employer does not need the consent of the employee for the collection of the personal data, but will be required to inform the employee that such collection is taking place and the purposes for the same.

In relation to question 7, it should be added that it is a criminal offense for an employer to discriminate against any employee by reason of his or her union membership.

# **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 Singapore, employers are prohibited from employing any foreign employees who do not possess a valid work pass. Therefore, before hiring any foreign applicants or employees, employers must ensure that they possess a valid work pass. Consequently, an employer must also exercise the appropriate due diligence to ascertain whether applicants and/or employees are foreign nationals by checking their passport, document of identity or other travel documents.

In addition, if the employee is to work in relation to a licensed activity, the employer may also have to ensure that various other criteria, including "fit and proper" criteria as well as appropriate licenses, have been fulfilled/obtained.

## 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. However, with respect to the Purpose Limitation Obligation, employers should consider whether the extent of background checks required would differ in light of the differing occupational requirements for full-time, part-time or contingent workers, and make adjustments accordingly.

## **SECTORS**

## 14. Do background checks differ in different sectors?

Yes. The level and extent of background checks will differ in different sectors. For example, in the financial services sector, certain financial institutions are expected to conduct due diligence measures on prospective employees, which will include background checks on their past employment and criminal records, including spent convictions. Further, there will be "fit and proper" criteria that may have to be complied with.

# **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. A third party vendor that conducts a background check on behalf of the employer may be considered a data intermediary. Data intermediaries are subject to a lesser range of data protection obligations under the PDPA. However, the employer will continue to











be required to comply with all data protection obligations under the PDPA as if it were processing the personal data itself and may be liable for any breach of the PDPA by the third party vendor.

Therefore, an employer seeking to engage a third party vendor to carry out background checks on its behalf should carry out the appropriate level of due diligence to ensure that the vendor is capable of complying with all obligations under the PDPA.

# **DATA PROCESSING**

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

Yes. An employer processing personal data collected from background checks must comply with the following obligations:

- (a) unless an exception applies, an employer may only use and/or disclose the personal data for the purposes for which the individual has been informed and provided consent. If an employer wishes to use and/or disclose the personal data for a different purpose, fresh consent must be obtained;
- (b) an employer should make reasonable efforts to ensure that the personal data collected is accurate and complete;
- (c) unless an exception applies, the employer must, on request from the individual to whom the personal data relates:
  - (i) provide the individual with access to that personal data and information about the ways in which the personal data has been or may have been used and/or disclosed in the year preceding the request; and/or
  - (ii) correct an error or omission in the personal data relating to the individual that is in the possession or under the control of the employer;
- (d) an employer must anonymise or cease to retain the personal data once it is no longer necessary for a legal or business purpose, i.e., for the purposes of evaluating that individual's suitability for employment;
- (e) an employer must take reasonable security measures to protect the personal data from unauthorized access, collection, use, disclosure, copying, modification, disposal or similar risks; and
- (f) an employer must not transfer the personal data outside of Singapore without ensuring that the recipient provides for the personal data so transferred a standard of protection that is comparable to that under the PDPA.

# SANCTIONS/ENFORCEMENT

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

- Personal Data Protection Act 2012 data protection
- Employment of Foreign Manpower Act (Cap 91A) eligibility to work in Singapore
- Industrial Relations Act (Cap. 136) prohibition against discrimination of employee based on union membership
- Tripartite Guidelines On Fair Employment Practices guidelines and recommendations on fair employment and non-discriminatory practices











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

#### Personal Data Protection Act 2012

Background checks which result in a breach of the PDPA may render the employer liable to sanctions, including financial penalties of up to SGD\$1 million. The Personal Data Protection Commission is the regulatory authority responsible for the enforcement of the PDPA, and has the power to initiate investigations on its own accord or following a complaint, and to impose the appropriate sanctions for any contraventions of the PDPA.

Separately, individuals who suffer loss or damage directly as a result of a breach of the PDPA can commence private action against the employer for civil remedies.

#### Tripartite Guidelines On Fair Employment Practices

Applicants and employees who feel aggrieved at perceived discriminatory practices can complain to the Ministry of Manpower ("MOM") and the Tripartite Alliance On Fair Employment Practices ("TAFEP"). The MOM and/or TAFEP may then contact such employers with a view to resolving the dispute and, if necessary, improving the employer's hiring or employment practices.

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# **OVERVIEW**

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

While global companies in Korea do conduct background checks, this is not common for local companies, which generally only conduct checks on education and past employment. Any background checks that concern personal information require the applicant's consent unless required by law.

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

The most common background checks in Korea are education and past employment checks.



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### **BACKGROUND CHECKS ON APPLICANTS**

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

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

All of the above, except certain criminal record checks and union membership checks, are permitted, subject to the applicant's consent and other conditions (please see question 6).

• Handwriting

Political views

• Union membership

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

Criminal record checks based on the criminal records information system are expressly prohibited under Article 6 of the Act on the Lapse of Criminal Sentences, and checks on union membership can be deemed an unjust labor practice under the Trade Union and Labor Relations Adjustment Act if conducted for the purpose of interfering with membership activities, irrespective of whether the individual has provided his or her consent.

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

Each of the permitted background checks (i.e., all of the above except for certain criminal record checks and union membership checks) technically require consent and some require additional conditions to be satisfied. However, please see question 6 for exceptions.

### 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?

Each of the permitted background checks mentioned above relate to checks on "personal information" or "sensitive information" under the Personal Information Protection Act ("PIPA"), except for credit/financial checks which are subject to the Use and Protection of Credit Information Act.

Under PIPA, "personal information" is broadly defined as information pertaining to a living individual which identifies a specific person with a name, address or other similar details (including information that, when combined with other information, also makes it possible to identify such a person). "Sensitive information" is defined as personal information concerning ideology, faith, labor union membership, political views or membership of a political party, health information or medical treatment, sexual orientation, genetic information, criminal records (e.g., sentencing, exemptions, suspended sentences, protective custody, probation, etc.). Similarly, "unique identification information" is defined as an individual's resident registration number, passport number, driver's license number or "alien" registration number.

In order to collect and use personal information, the employer must disclose the following to the applicants and obtain their consent prior to the collection and use of such information: (i) purpose of collection and use; (ii) specific items of personal information to be collected; (iii) time period for possession and use; and (iv) the applicant's right to refuse and any disadvantages from refusal. If











any of the above items change, the employer must acquire fresh consent from the applicant. For the collection and use of sensitive information or unique ID information, the same four items above must be notified and separate consent obtained for the collection and use of such sensitive or unique ID information.

However, there are two main exceptions, among others, to the notice and consent requirement for collection and use of personal information: (i) when the personal information is necessary for the execution of a contract with the applicant; and (ii) when otherwise required by law or necessary to comply with legal obligations under Korean law.

In the employment context, it is generally recognized that information such as name, gender, education and employment history is required for a company to enter into and maintain an employment contract, and therefore the collection and use of such information does not technically require notification and consent under PIPA as per the first exception. Further, collection and use of personal information in order to comply with social insurance programs or retention of employee personnel records in accordance with the Labor Standards Act would fall within the second exception and similarly does not require notification and consent under PIPA.

To collect personal credit information, the Use and Protection of Credit Information Act requires that the employer obtain consent from the applicant and also notify the applicant that his or her credit rating may be degraded at the time of such inquiry.

### 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. A separate additional consent is required if the obtained information will be used for any other purpose.

### **OTHER BACKGROUND CHECKS**

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

Military service, marital status, date of birth and gender are some of the other common background checks in Korea. However, please see question 10 in relation to asking applicants for details which relate to particular protected characteristics.

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

Notice and consent are required (please see question 6).

### 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 only ask for the minimum information required, such as educational background and past employment history. Employers should not ask for details which relate to protected characteristics (e.g., age, nationality, sexual orientation, religion, etc.) and for female applicants, employers should be cautious about asking for information that is not required for the job (e.g., appearance, height, marital status, 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 will need to be appropriate and necessary to maintain the employment relationship (please see question 6).

### **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 his or her eligibility to undertake the work on offer. The employer must check the validity of the original documents, including the visa, and satisfy itself that the individual is the person named in them and that he or she has the right to work in Korea.

Individuals under the age of 15 are not permitted to work in Korea.

### 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 or education sectors, applicants can be required to disclose spent convictions.

### **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?

When background checks are outsourced to a third party, the employer must notify the applicants but explicit consent is not required. PIPA requires a written delegation agreement containing the details of the arrangement to be in place, together with the following: (i) purpose and scope of the delegation; (ii) limitations on the scope of such delegation (e.g., prohibition of processing of personal information for any purpose other than the delegated purpose, and limitations on sub-delegation); (iii) technical and managerial protective measures; (iv) matters regarding supervision management of personal information possessed in relation to delegating; and (v) provision on compensation for damages in the event of a breach by the delegate company.











The identity of the delegate company and the scope of the delegated work must also be disclosed in the employer's privacy policy, and the employer may be liable as if it were directly responsible for any breaches or unauthorized disclosure of personal information which occur by the delegate entity.

### **DATA PROCESSING**

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

Yes. Please see question 6.

### SANCTIONS/ENFORCEMENT

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

- Personal Information Protection Act (2011)
- Labor Standards Act (1997)
- Use and Protection of Credit Information Act (1995)
- Act on the Lapse of Criminal Sentences (1980)
- Equal Employment Opportunity and Work-Family Balance Assistance (1987)
- Immigration Act (1963)
- Trade Union and Labor Relations Adjustment Act (1997)

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

The applicable sanctions differ depending on the legislation:

- Personal Information Protection Act: If personal information is collected and used without consent, the employer may be subject to an administrative fine of up to KRW50 million. In addition, for the collection and use of sensitive information or unique identification information without consent, the liable persons may be subject to criminal sanctions of imprisonment of up to five years or a criminal fine of up to KRW50 million. The employer may also be vicariously liable and subject to criminal fines up to the same amount, or be subject to a corrective order by the Ministry of Public Administration and Safety, the ministry that administers PIPA.
- Trade Union and Labor Relations Adjustment Act: If a background check regarding union membership is deemed to be an unjust labor practice, the employer may be subject to imprisonment of up to two years or a fine of up to KRW20 million.
- Use and Protection of Credit Information Act: If credit/financial information is collected and used without consent, the employer may be subject to criminal sanctions of imprisonment of up to five years or a criminal fine of up to KRW50 million.
- Act on the Lapse of Criminal Sentences: If criminal records are acquired or used in violation of the Act, the employer will be subject to criminal sanctions of imprisonment of up to two years or a criminal fine of up to KRW20 million.

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### **OVERVIEW**

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

Yes, it is standard practice for employers to carry out background checks on job applicants in Taiwan. However, since the Personal Information Protection Act ("PIPA") came into force in 2012, employers have become more cautious with respect to the purpose and scope of background checks. Notwithstanding PIPA, the Employment Service Act ("ESA") prohibits employers from collecting personal documents unrelated to the employment concerned against the applicant's wishes. As a result, employers will usually acquire a written consent from the applicant and disclose the statutorily required notice items in advance (please see question 6).

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

Employers usually carry out background checks relating to education, work experience, military service, language ability, professional certificate/licenses, marital status and criminal records.



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### **BACKGROUND CHECKS ON APPLICANTS**

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

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

All the above background checks are permitted in Taiwan as long as the applicant's written consent is obtained.

### 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.

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

• Handwriting

• Political views

• Union membership

Except for handwriting, which is not considered to be personal information under PIPA, all the above background checks require either the applicant's consent or prior disclosure of statutory notices.

### 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?

For the above background checks (handwriting excluded), the employer should disclose the following items to the applicant when collecting his or her personal information: (i) the name of the agency collecting the personal information; (ii) the purpose of collection; (iii) classification of the personal information; (iv) time period, area, target and manner in which the personal information will be used; (v) rights of the applicant and ways to exercise such rights as prescribed in Article 3 of PIPA; and (vi) the effect on the applicant's rights and interests if he or she chooses not to provide his or her personal information. However, certain occupations, such as the private security service and taxi drivers, are exempted from the above statutory notice with respect to criminal record background checks, as individuals who have committed certain crimes are prohibited from serving as security guards and taxi drivers.

In addition, although it is not necessary to obtain written consent from the applicant for background checks due to the quasi-contract relationship between the employer and applicant for employment management purposes, if the background check item is not relevant to the execution of the employment contract, consent is required. Once again, certain occupations, such as the private security service and taxi drivers, are exempted with respect to criminal record background checks for the same reasons as stated above.

Background checks of criminal records, credit/financial checks, fingerprinting, health checks/medical screening and drug and alcohol testing that may be unrelated to the employment concerned shall require the prior consent of 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 information acquired above should only be used for employment management purposes, specifically the selection of applicants. Otherwise, written consents are required. Under no circumstances should the information acquired be used in a discriminatory manner against the applicant (in accordance with ESA).

### **OTHER BACKGROUND CHECKS**

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

As long as the collection, processing and use of the information obtained from the background check does not violate PIPA or ESA, they are permitted in Taiwan.

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

Please see question 6.

### 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. According to the Occupational Safety and Health Act ("OSHA"), employers are required to conduct pre-employment physical examinations for employees at the time of employment, and employees must agree to undergo the examinations. Therefore, for the employers obtaining employees' personal information through such physical examinations after the decision to make an offer of employment, neither the notice of statutory items nor applicants' consent are required in accordance with law.

### 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)?

Yes. According to the Labor Standards Act ("LSA"), employers shall prepare and maintain an employee record card indicating the name, sex, birth date, place of ancestral origin, educational background, address, national identification card number, employment starting date, wage, labor insurance starting date, merits and demerits, injury and disease and other significant facts relating to each employee, and shall keep an employee payroll roster in order to record entries such as wages payable, the items of wage computation and the total sum of wage payment. Employers shall also prepare and keep employee sign-in books or time cards to record employee attendance on a day-to-day basis. Furthermore, general health examinations and special health examinations shall be conducted for current employees pursuant to OSHA. Thus, background checks for the above-mentioned items for existing employees shall be exempted from the notice of statutory items as well as written consents. Other than the above, the law on background checks is the same for applicants 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 need to check basic eligibility information required by law, such as age, nationality and health conditions, as well as any













other particular eligibility requirements required by law, such as criminal records for the private security service and taxi drivers.

For age, LSA first prohibits employers from hiring anyone under the age of 15. In the case of foreign applicants, ESA requires the employer to confirm that the foreign national is in Taiwan legally and that, other than in certain extenuating circumstances, the job for which the foreign national is being hired falls under the specific categories enumerated in Article 46 of ESA.

The OSHA also prohibits employers from hiring individuals to engage in a particular type of work that the individuals are physically unsuited for; thus the employers are required to conduct a physical examination of the applicant or employee. For certain occupations, as noted above, such as the private security service and taxi drivers, criminal record background checks are required as individuals who have committed certain crimes are prohibited from serving as security guards and taxi drivers.

### 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. For some sectors in which previous convictions represent an automatic disqualification, such as security guards and taxi drivers, employers do not have to obtain consent from, or make the statutory notices to, the applicant in conducting a criminal record background check.

Furthermore, for certain sectors which do not fall fully under the scope of OSHA and where the employer is not required to conduct pre-employment physical examinations, the employer will need to obtain consent from, and make the statutory notices, to the applicant if it wishes to conduct a health check/medical screening or drug and alcohol test on the applicant.

### **OUTSOURCING BACKGROUND CHECKS**

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

Yes. The third party commissioned to carry out background checks shall be considered the commissioning employer for the purpose of the statutory responsibilities and obligations in PIPA.

### 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?

Generally no. According to PIPA, the outsourced third party shall comply with the same laws and regulations as those applicable to the commissioning employer. Thus, the background checks that can be carried out by the third party shall be the same as the employer.

However, when background checks are outsourced, the commissioning employer shall properly supervise the third party on the following matters:

(a) the planned scope, classification, specific purpose and time period of background checks;

(b) the proper security measures applied to the personal information taken by the third party;











- (c) other third parties, if any, further outsourced to by the outsourced third party;
- (d) notification to the employer and execution of the necessary remedial measures in the event that the third party or its employees violate PIPA and any other personal information protection related laws or regulations;
- (e) reserved instructions (if any) from the employer to the third party; and
- (f) the return of any instrument containing personal information, and the deletion of any personal information stored and possessed by the third party as a result of performing the outsourcing agreement, once the outsourcing agreement is terminated or rescinded.

In addition, the employer shall periodically confirm the implementation status of the third party and record the result of such confirmation.

The third party may only make the background checks requested by the employer; if the employer's instruction violates PIPA or other personal information protection laws or regulations, the third party shall notify the employer immediately.

### DATA PROCESSING

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

- Yes. Employers shall process the information collected in accordance with the following rules:
- (a) The rights and interests of the applicants or the employees should be respected in collecting, processing or using personal information and the information shall be handled in accordance with the principle of good faith. The employer may not process the information beyond the stated purpose of collection.
- (b) Upon request from the applicants or the employees, the employer shall reply, offer the collected personal information for review by the applicant or the employee, or provide copies of the collected personal information.
- (c) The employer shall ensure the accuracy of the personal information, and correct or supplement it, as well as discontinue processing or using the information in the event of a dispute regarding the accuracy of personal information either ex officio or upon request from the applicants or the employees.
- (d) The information collected shall be deleted, halted for further processing or use ex officio or upon request from the applicants or the employees when the specific purpose for the collection of personal information no longer exists, the relevant time period has expired, or in the event of a violation of PIPA in the collection, process and use of that information.
- (e) Where the failure to correct or supplement personal information may be attributed to the employer, after such information is corrected or supplemented, the applicants or employees to whom the personal information was provided to shall be notified of such corrections or supplements.
- (f) When the personal information is stolen, disclosed, altered or infringed in other ways due to the violation of PIPA, the employee should notify the applicants or the employees after an inspection.
- (g) The employer which keeps personal information files should adopt proper security measures to prevent them from being stolen, altered, damaged, destroyed or disclosed.











### SANCTIONS/ENFORCEMENT

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

- Personal Information Protection Act (as amended in 2012)
- Enforcement Rules of the Personal Information Protection Act (as amended in 2012)
- The Specific Purpose and the Classification of Personal Information of the Personal Information Protection Act (as amended in 2012)
- Employment Service Act (as amended in 2013)
- Enforcement Rules of the Employment Service Act (as amended in 2014)

### 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 carried out unlawfully, according to PIPA and ESA, imprisonment or detention of no more than two years and/or a fine of no more than NT\$200,000 shall be imposed. Administrative fines of up to NT\$500,000 may also be imposed if the employer fails to take corrective measures within a specific period after being ordered to do so.

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### **OVERVIEW**

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

The practice of carrying out background checks in Thailand varies widely among employers and may depend on the area of business or the particular position.

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

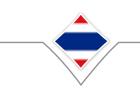
The types of background checks vary but may include verification of educational credentials and professional licenses, criminal records checks (of one or more jurisdictions), and a medical examination. Drug screening and other checks may also be carried out, depending on the circumstances.











### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- 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?

The law does not explicitly authorize, or prohibit, background checks. However, employers often require health checks/medical screening, where it is necessary for the position, for insurance purposes, and/or for work permit purposes. For some employers, it is standard practice to carry out checks of educational credentials and qualifications, as well as to check past employment references provided by applicants. There are also some categories of employment where drug and alcohol testing is often carried out. In relation to social media/internet searches, it is likely that some employers carry these out informally.

• Handwriting

• Union membership

Criminal records checks can be undertaken but they can take some time to complete (particularly if they involve multiple jurisdictions). Employers therefore often dispense with such checks, unless an employer has particular concerns which are specific to the position (e.g., if the position involves handling money or working with children).

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

The law does not explicitly authorize, or prohibit, background checks.

Nevertheless, there are specific points to note in relation to particular checks:

### Credit/financial checks

The Credit Information Business Act restricts the purposes for which members and service users can use credit information disclosed by the National Credit Bureau; consideration of employment is not among the permissible purposes. Nevertheless, if credit information is available (e.g., from a credit bureau overseas, which might be relevant when hiring a foreign national), an employer would not be prohibited by Thai law from checking such information. It would also be possible for an employer to ask an applicant to request a credit report and to submit it to the employer. Similarly, an employer could ask an applicant to disclose information on his or her bank accounts and/or securities holdings.

### Union membership

Pursuant to the Labour Relations Act, employers cannot discriminate, or take negative action, against their employees who are union members or otherwise involved in organized labour. However, this would not prevent an employer from carrying out a check of whether its employees are union members, as the issue is, instead, what the employer does with that information. Moreover, the Labour Relations Act does not address pre-employment consideration of whether to hire an applicant (i.e., one who is not yet an employee).

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#### Political views

At present, the interim Constitution does not address discrimination on the basis of political views. However, this was addressed in the 2007 Constitution, among various other attributes on which discrimination is not permissible. As a similar provision has appeared in a draft of the new Constitution, it is likely to again be addressed in the new Constitution, once approved. This would not necessarily mean that an employer could not carry out a check of an individual's political views. Rather, if this provision reappears in the next Constitution, the issue would be what the employer does with such information. Deliberations on the new Constitution are ongoing.

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

The law does not explicitly impose conditions on employers carrying out background checks. However, some legal provisions may apply indirectly. For example, any disclosure of personal health information would require the consent of the data subject. The medical facility possessing such information would therefore require the data subject's consent before releasing it to the employer. Similarly, the Royal Thai Police require consent of the data subject to process a criminal records check.

### 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 applicant's consent would be required to lawfully submit a request for a Thai criminal records check and, as noted in question 5, the applicant's consent may be required in relation to health/medical information, including the results of drug testing.

### 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 law does not impose explicit limitations on the use of information arising from background checks prior to hiring an employee. However, general provisions of law would be applicable. For example, having gathered the information, if the employer discloses it in a way that causes damage, the employer may be liable to the data subject in tort (e.g., civil liability). Depending on the circumstances, criminal charges may also arise (e.g., criminal defamation).

### **OTHER BACKGROUND CHECKS**

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

No other types of employment background checks are explicitly permitted. Some employers also carry out personality testing.

#### 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?

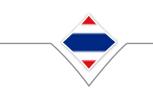
The law does not draw a distinction between background checks carried out before or after a decision is made to offer employment. Rather, a key distinction would be whether or not an individual is in an employment relationship with the employer. Accordingly, a key point would be the making of an offer of employment that could be accepted by the applicant, thus initiating the employment relationship. Please see response to question 11.











### 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 principle, employers are not prohibited from conducting background checks, whether prior to or during employment. Whether a background check is carried out before or after employment has commenced, if the resulting information is used in determining, for example, an employee's bonus, promotion, or salary increase, this may, nevertheless, present risks for the employer. For example, the applicable terms of employment—whether existing in an individual employment agreement, the employer's work rules and regulations, a collective bargaining agreement, or employer policies—might restrict the criteria on which an employer can make these types of employment decisions. Similarly, an employer is prohibited from discriminating against its employees who are union members, employee committee members, or otherwise involved in collective bargaining activities. It is also important to keep in mind that if an employee were to refuse to consent to, or cooperate with, particular background checks, this would not justify termination for cause.

That said, it should be noted that some categories of employer often carry out certain types of background checks during employment. For example, capital markets employees are often asked to disclose their personal securities holdings and/or trades, so that their employers can meet their SEC regulatory obligations to prevent insider trading. Also, industrial employers frequently require their employees to undergo drug testing, typically annually as part of the annual medical check, but random checks are sometimes also carried out. Even more broadly, a wide range of employers conduct annual medical checks, and foreign employees are required to undergo periodic medical examinations, for work permit purposes.

### **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 law does not set out specific steps for an employer to take to ascertain whether an applicant or employee is legally entitled to work. However, the employer can be criminally liable for employing people illegally, under a variety of different laws. For example, the Alien Employment Act B.E. 2551 and the Immigration Act B.E. 2522 (as amended) prohibit the employment of foreign nationals who are not authorized to work.

Another example is the Labour Protection Act B.E. 2541 (as amended), which prohibits the employment of children under a certain age and in carrying out certain types of work. There are also sector-specific laws, such as the Securities and Exchange Act B.E. 2535 (as amended), that require the holding of particular licenses to carry out particular jobs.

Employers therefore need to carry out such checks as would be necessary to make sure that employees can lawfully be employed for the type of work envisaged. Age and Thai nationality can be determined from a valid Thai national ID card. In relation to employing foreign nationals, as work permits are employer sponsored, an employer would know whether the employee had been granted a 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?

No.

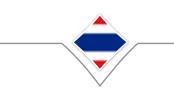












### **SECTORS**

### 14. Do background checks differ in different sectors?

The law does not explicitly authorize background checks. However, in some sectors, businesses are subject to additional compliance requirements. For example, securities companies are required to prevent insider trading. In order to comply with such a requirement, employers commonly require their employees to disclose their securities holdings and/or trades, in order to identify insider trading.

### **OUTSOURCING BACKGROUND CHECKS**

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

Some businesses specialize in carrying out investigations, and in principle, an employer could hire such a company to prepare a report on an applicant, subject to the other restrictions outlined herein.

### 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?

The law does not impose specific limitations on the processing of information arising from background checks prior to hiring an employee. However, general provisions of law would be applicable. For example, if the employer discloses information in a way that causes damage, the employer may be liable to the data subject in tort (e.g., civil liability). Criminal charges may also arise, depending on the circumstances (e.g., criminal defamation). It is therefore advisable to obtain the consent of the data subject to the collection, processing, use, transfer, and disclosure of such information, both overseas and domestically.

### SANCTIONS/ENFORCEMENT

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

Although the law in Thailand does not address employment background checks specifically, general provisions of law would nonetheless be relevant, including provisions of the following legislation:

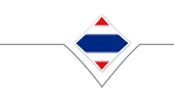
- The Civil and Commercial Code
- The Penal Code
- Credit Information Business Act B.E. 2545 (as amended)
- Labour Protection Act B.E. 2541 (as amended)
- Labour Relations Act B.E. 2518 (as amended)
- National Health Act B.E. 2550 (as amended)











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

As noted above, if an employer discloses information in a way that causes damage, the employer may be liable to the data subject in tort (e.g., civil liability), and criminal charges may also arise, depending on the circumstances (e.g., a disclosure could amount to criminal defamation). In addition, if an employer made a negative employment decision based on an employee's union/collective bargaining involvement, this would be a criminal offense. If an employer disclosed employee health/medical information without the employee's consent, this would also constitute a criminal offense. Other breaches may also arise, depending on the circumstances.

In the case of a criminal offense, the potential penalties would depend on the provision of law breached. Typical penalties include fines and/or imprisonment. These can be imposed on the employer, as well as individuals who have the authority to act on behalf of the employer, such as directors and management personnel.

Contributed by: David Duncan, Tilleke & Gibbins

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A Global Guide to Background Checks







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### **OVERVIEW**

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

Yes. Employers in Vietnam regularly carry out background checks on applicants. The scope of background checks are not limited by law. However, the information required needs to be directly related to the execution of the labor contract and subject to the consent of the applicant.

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

The common background checks in Vietnam are education, professional qualifications, past employment and health checks.



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# Vietnam

### **BACKGROUND CHECKS ON APPLICANTS**

- Education and past employment records
   Fingerprinting
- Criminal records
- Credit/financial checks
- 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?

As a matter of Vietnamese law, before entering into a labor contract, employers are permitted to require the applicant to provide them with information regarding name, age, sex, residency, education background, professional qualifications, health status and other information directly relating to the signing of the labor contract.

• Handwriting

• Union membership

Certain background checks require the consent of the applicant (please see question 6).

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

As discussed above, employers could request any information in respect of background checks if such requested information is directly related to the signing of the labor contract.

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

Please see questions 3 and 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?

The information required must be directly related to the execution of the labor contract.

The following background checks require the applicant's consent: criminal records, credit/financial checks, fingerprinting, handwriting, union membership, political views and drug and alcohol testing.

### 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 for the purpose of signing the labor contract.

### **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)?

Checks may be carried out on existing employees but this is subject to the consent of the employee, except where the collection of information is required pursuant to a decision of the competent authority.

### **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 in Vietnam take the following steps to check that an applicant/employee is legally entitled to work:

- Request that the applicant/employee provides certain original documents to prove the applicant/employee's eligibility to undertake the job;
- Check the validity of the given documents and information by itself; and
- Make copies of the original documents since the employer is not permitted to keep the originals of the applicant's/employee's identity papers, certificates and qualifications.

### 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 may vary from sector to sector and the information required is subject to the decision of each employer.











# Vietnam

### **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?

Applicants/employees must provide their consent if background checks are outsourced to a third party vendor.

### **DATA PROCESSING**

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

No. However, employment law provides that the information requested must be directly related to the signing of the labor contract.

### SANCTIONS/ENFORCEMENT

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

- The Civil Code No. 33/2005/QH11 dated 14 June 2005 of the National Assembly
- The Labor Code No. 10/2012/QH13 dated 18 June 2012 of the National Assembly

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

If an employer fails to comply with any of the requirements in relation to background checks, causing damage to the employee, the employer will need to compensate the employee for direct and consequential damages and losses.

Contributed by: Hoang Anh Nguyen & Huong Nguyen, Mayer Brown JSM (Vietnam)

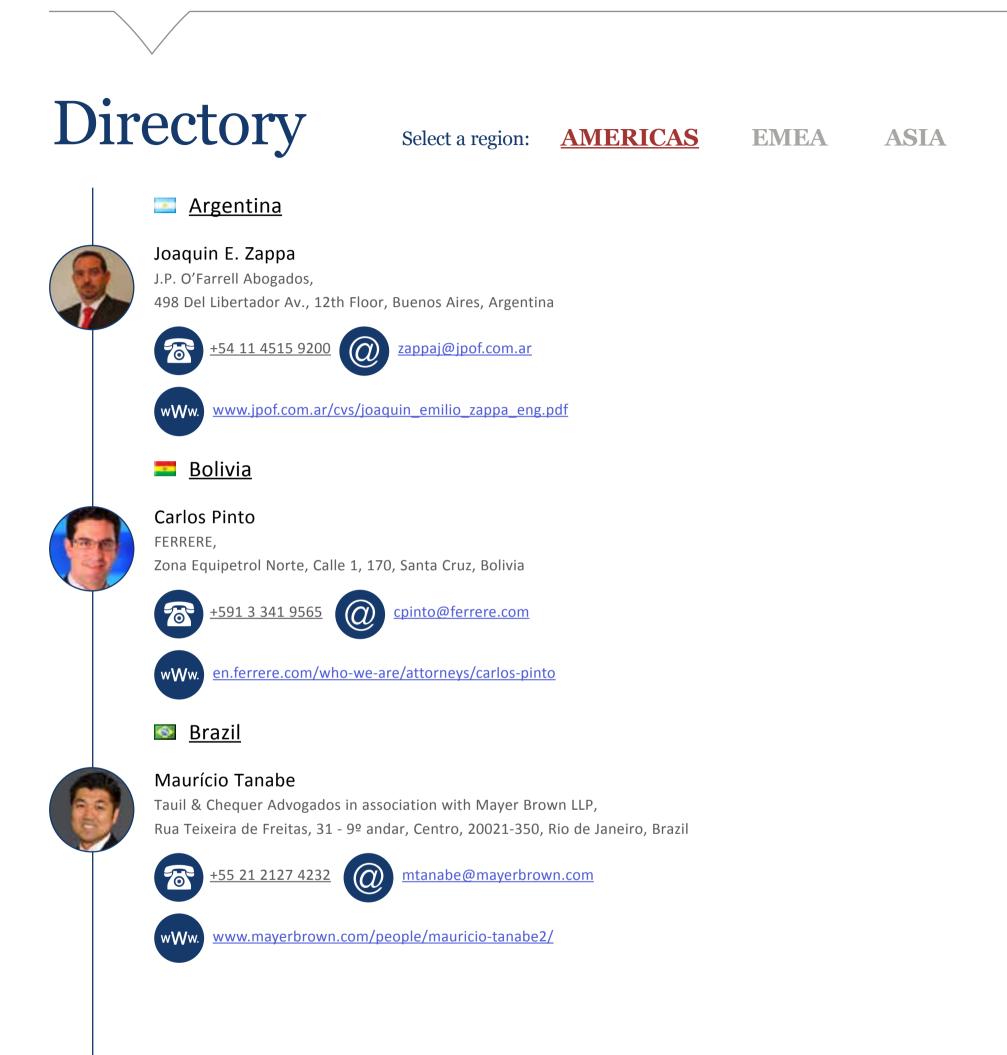


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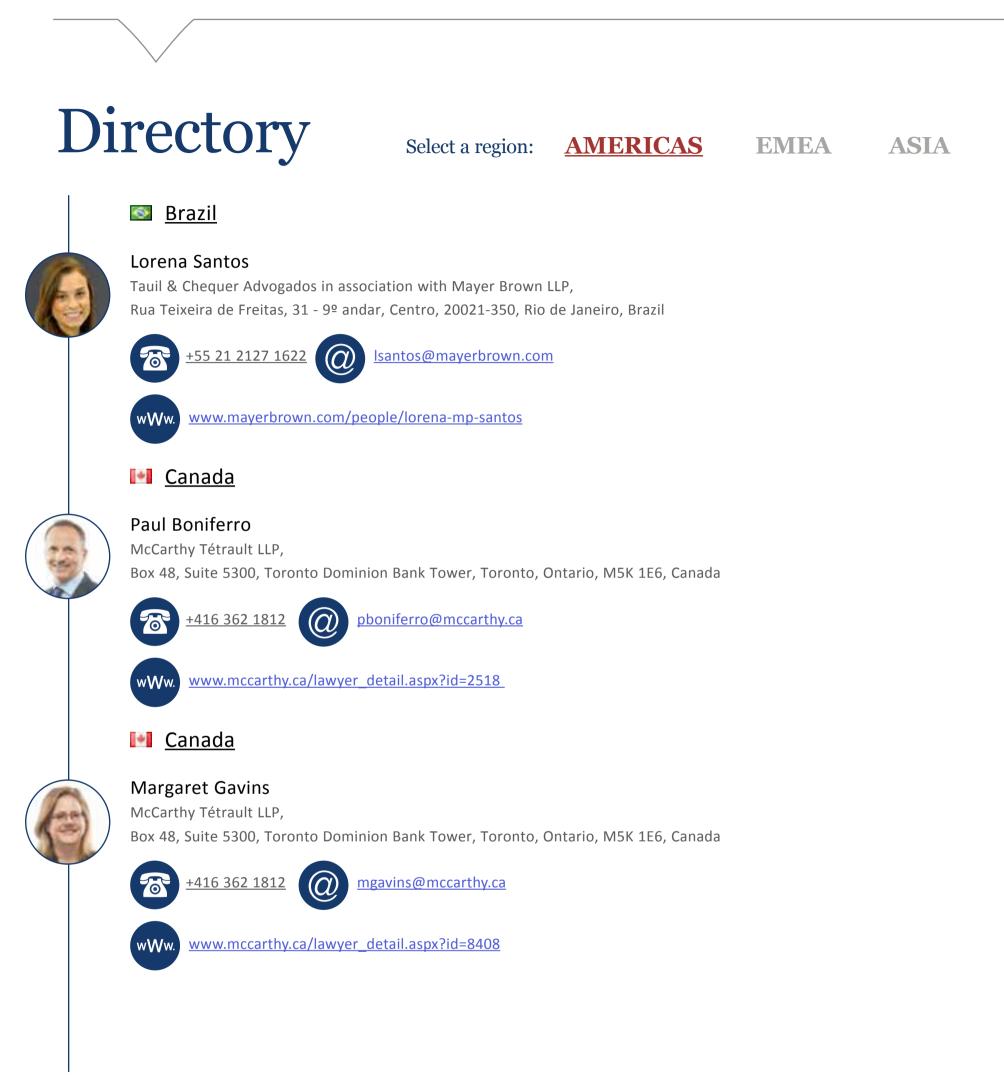
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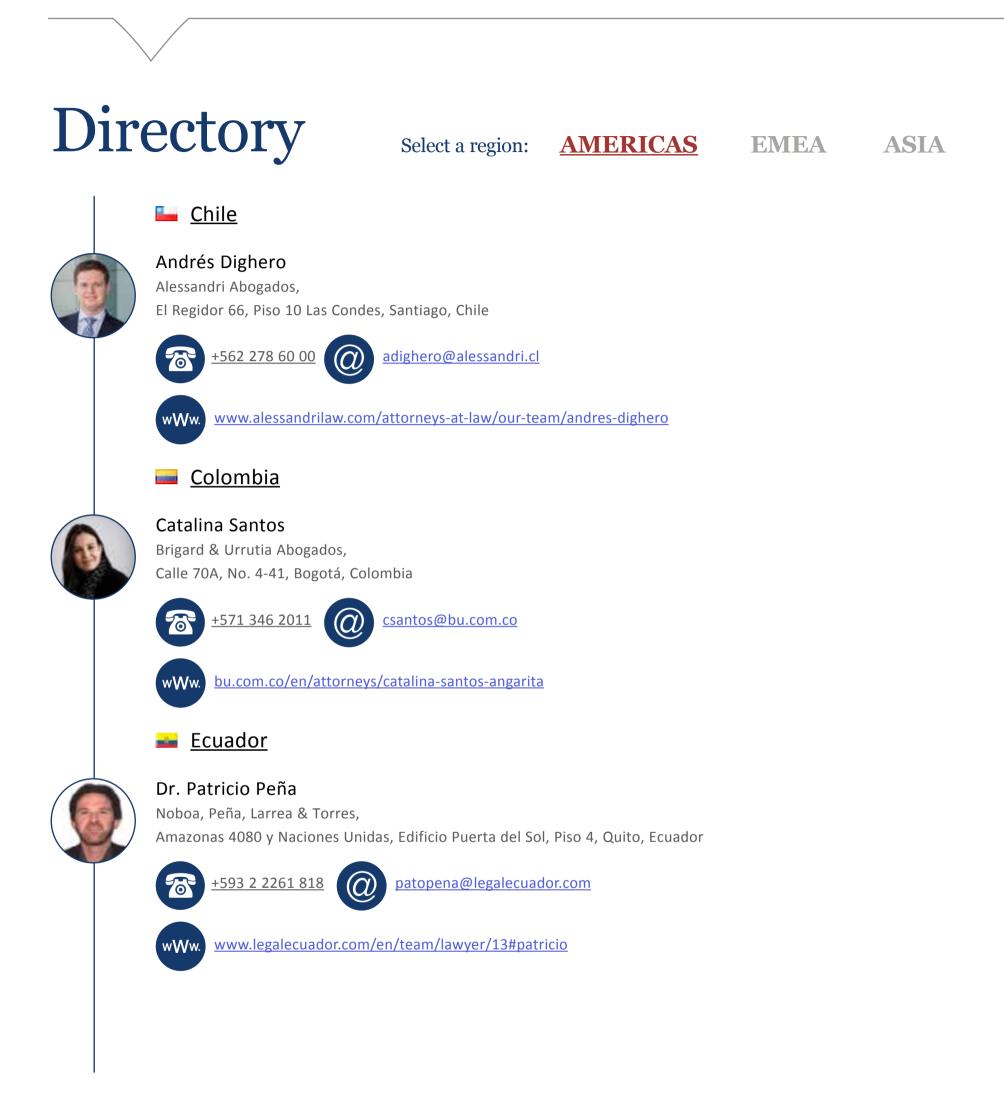










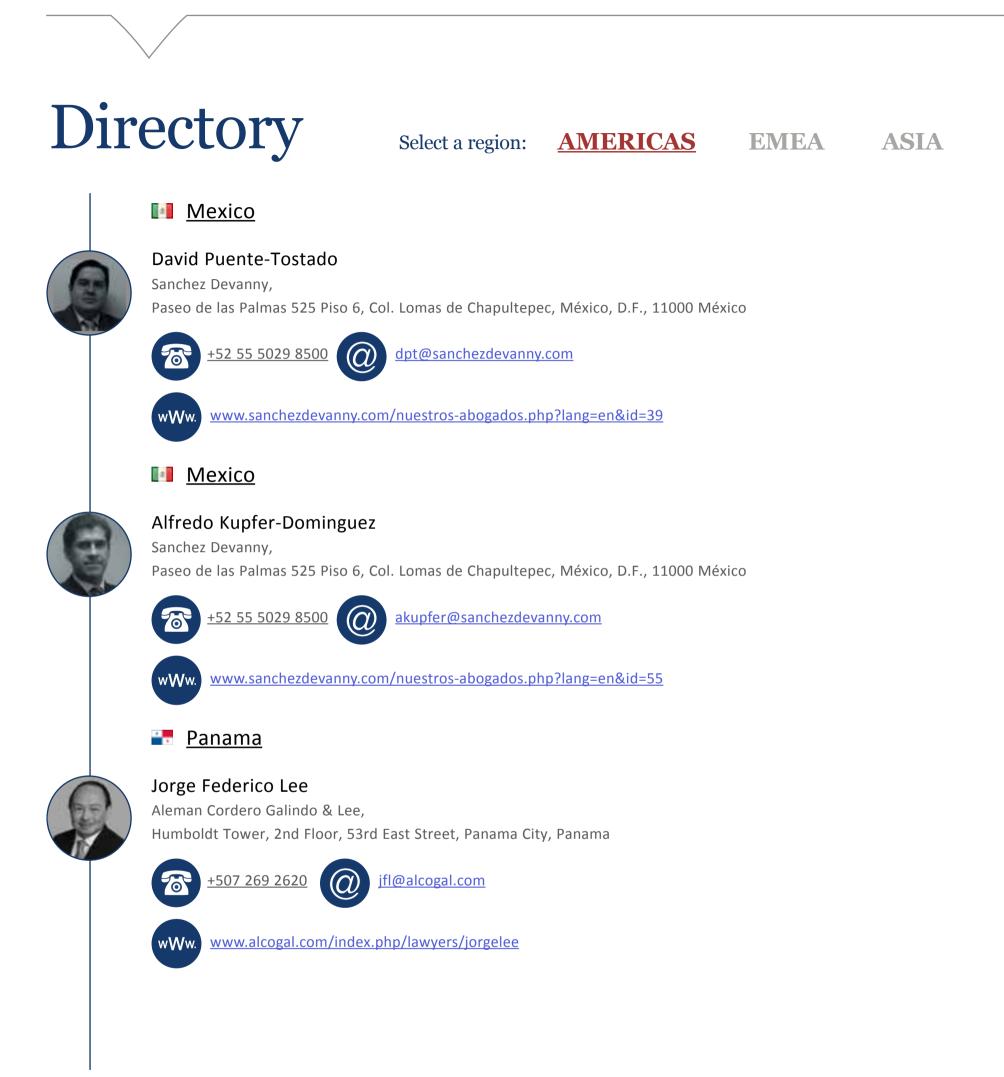












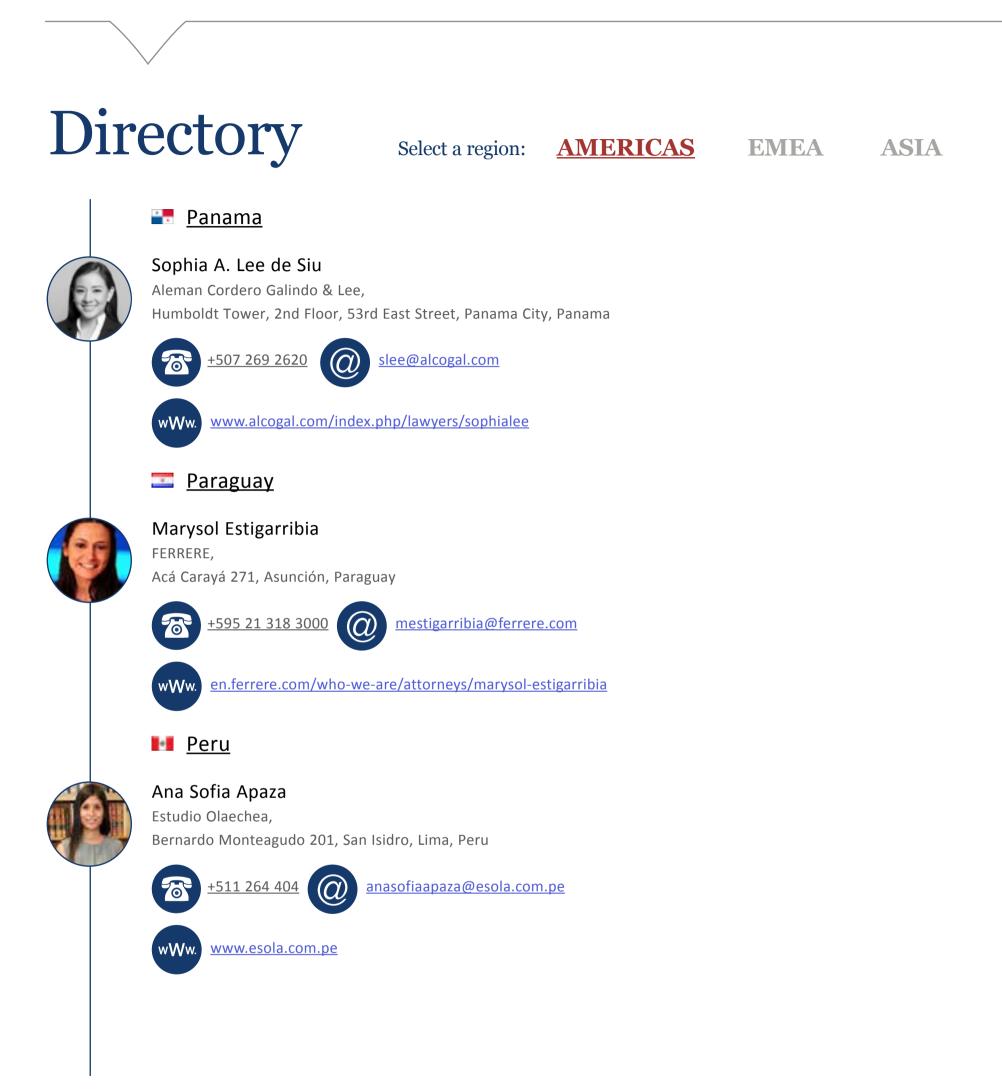
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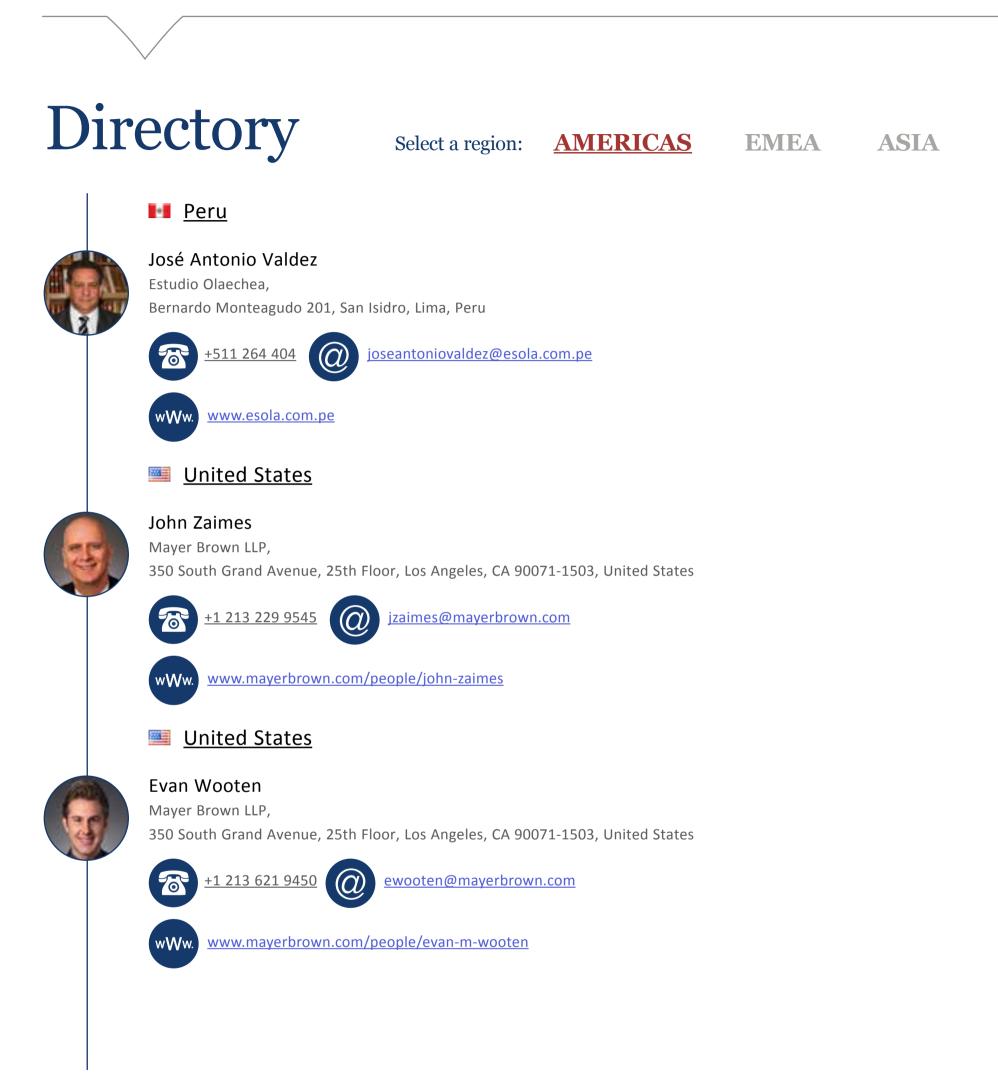










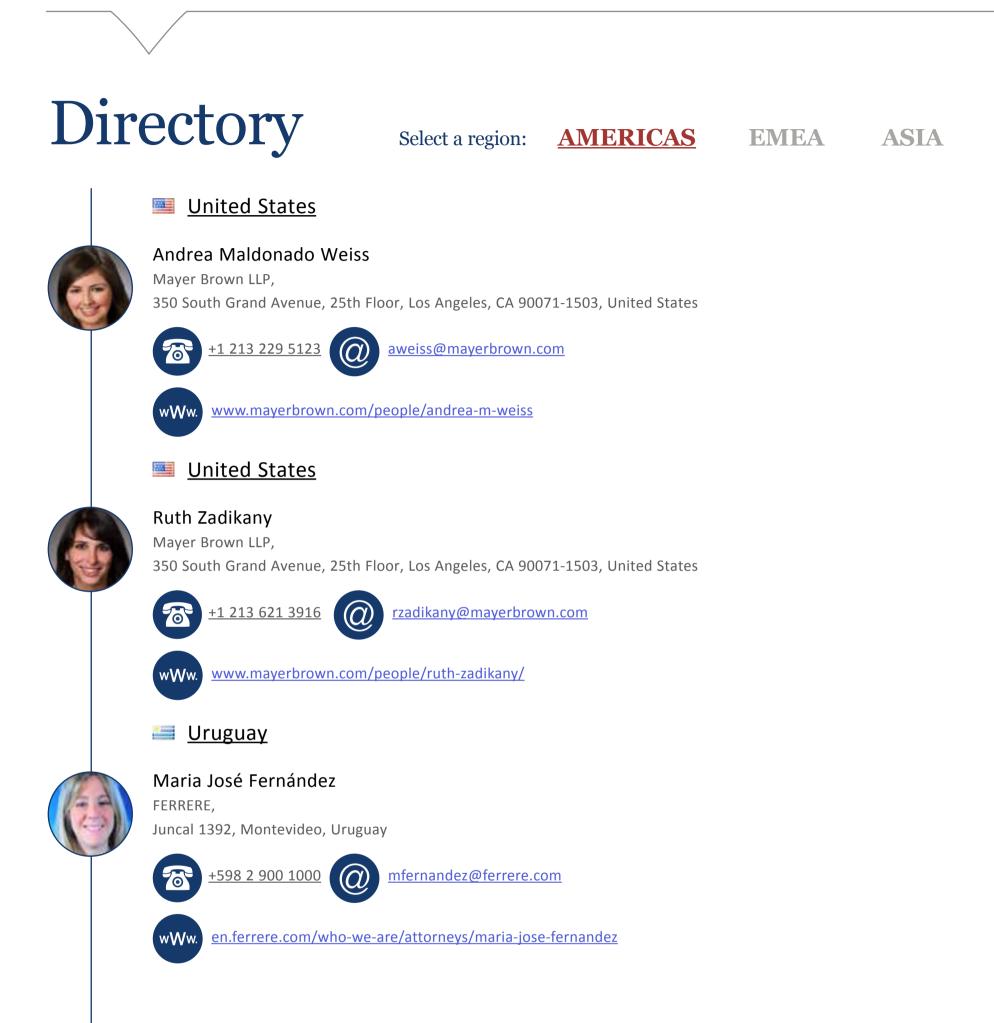










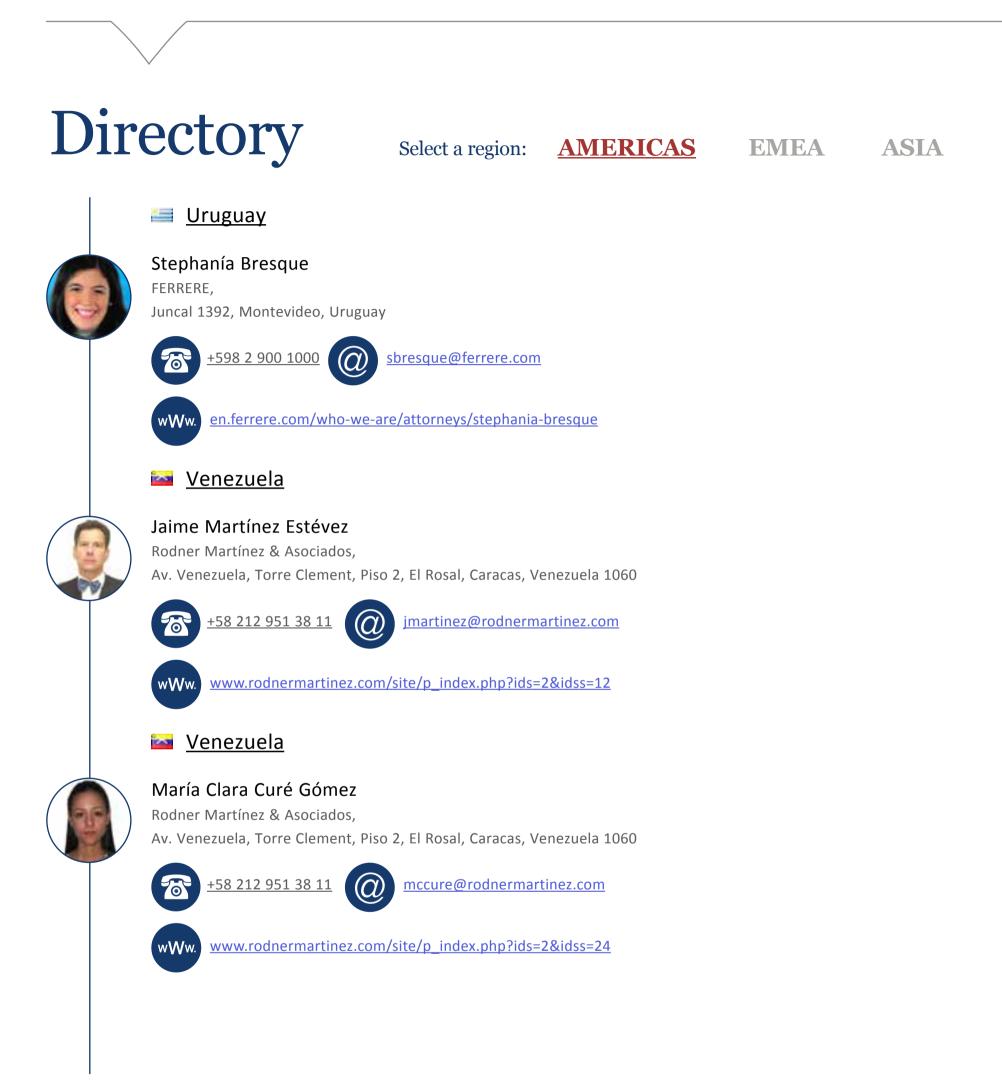










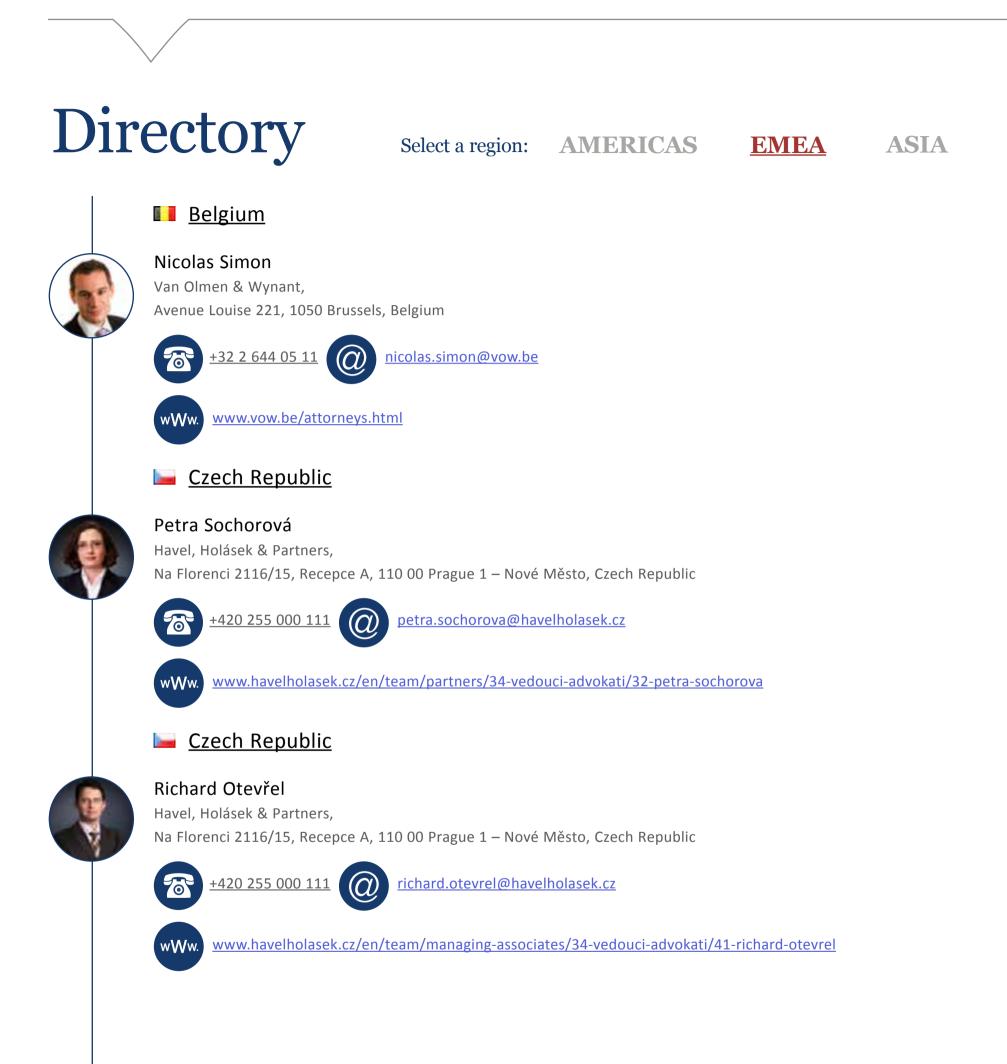










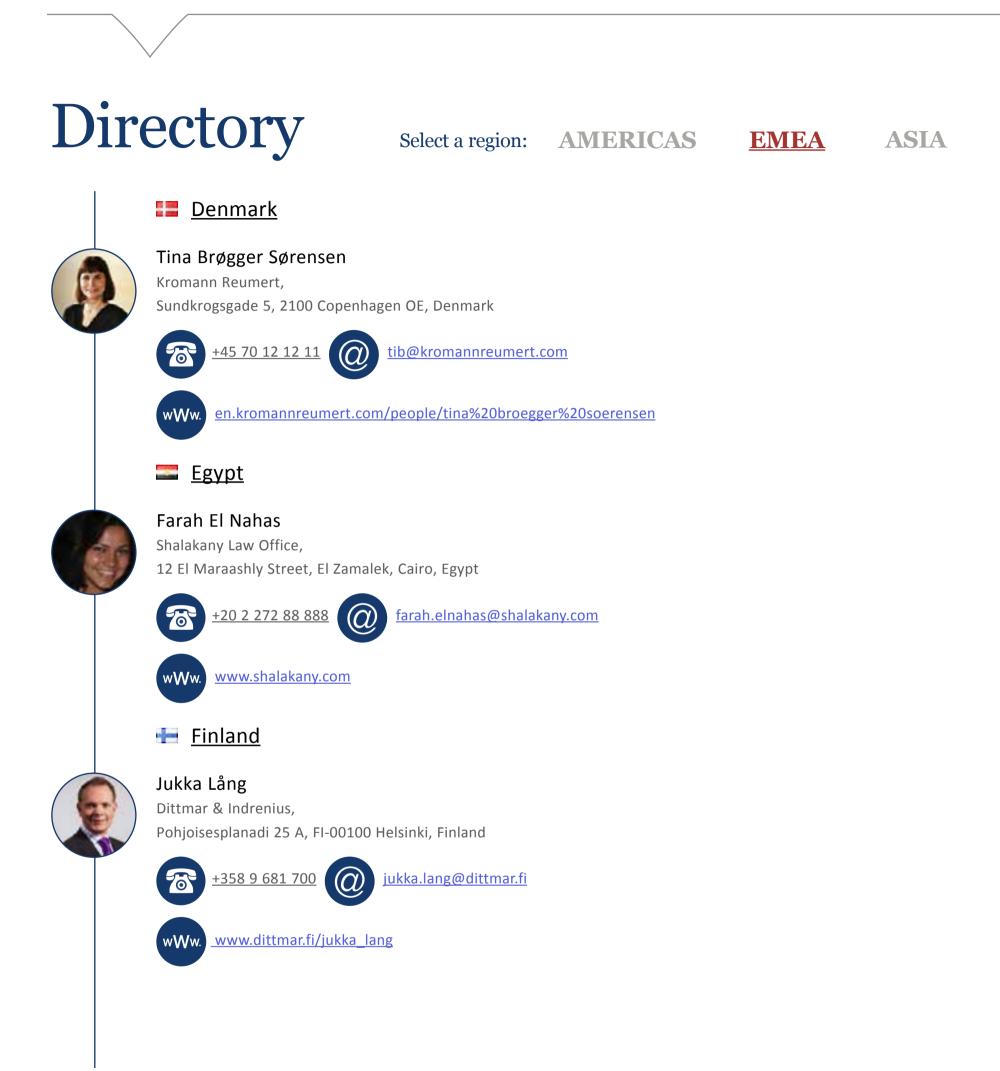












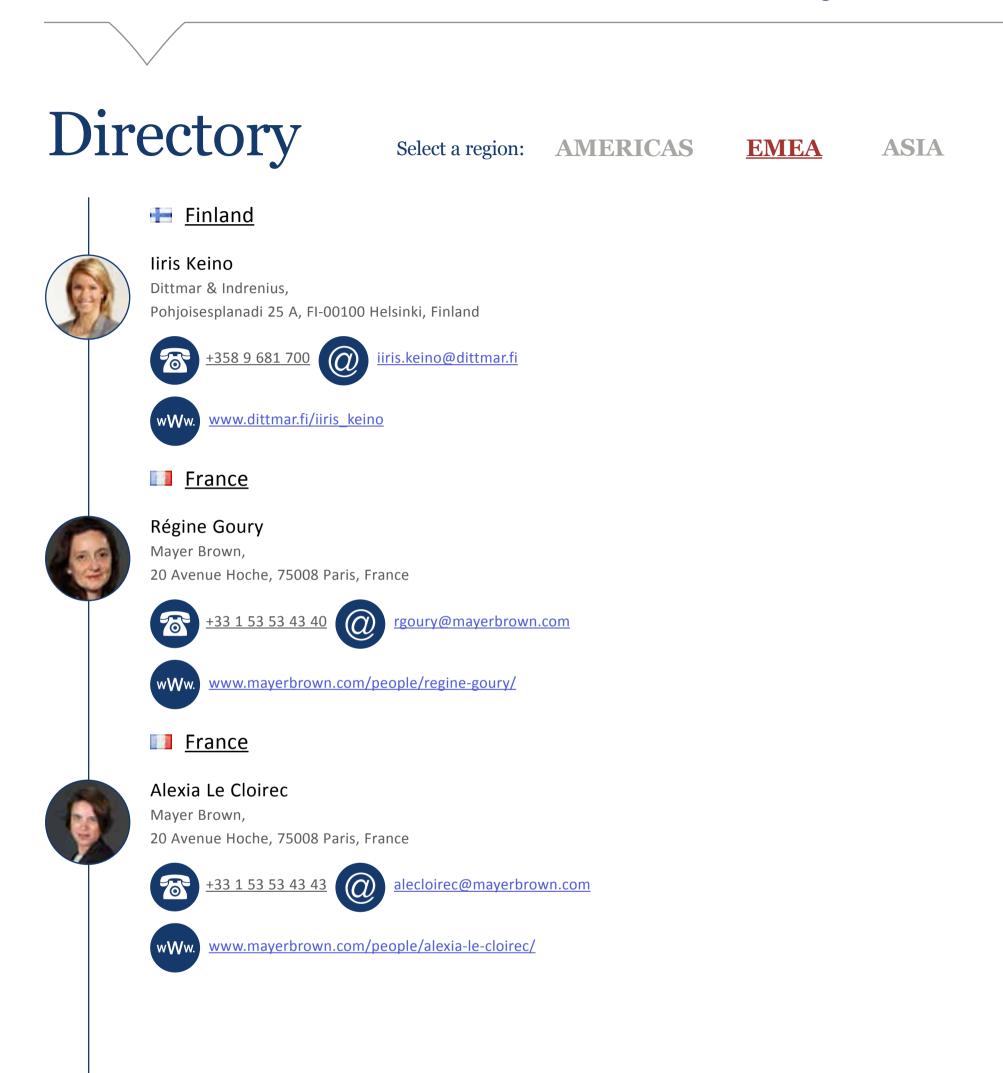
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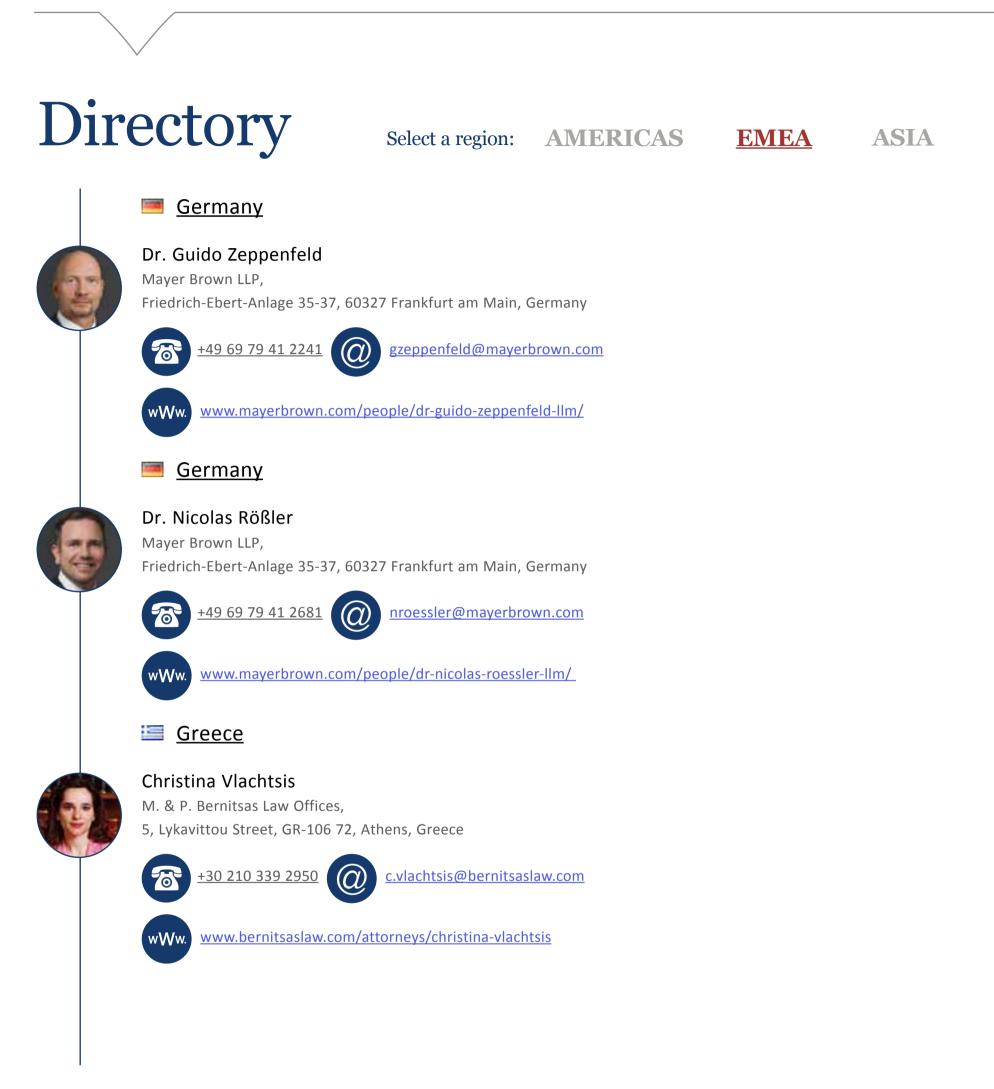










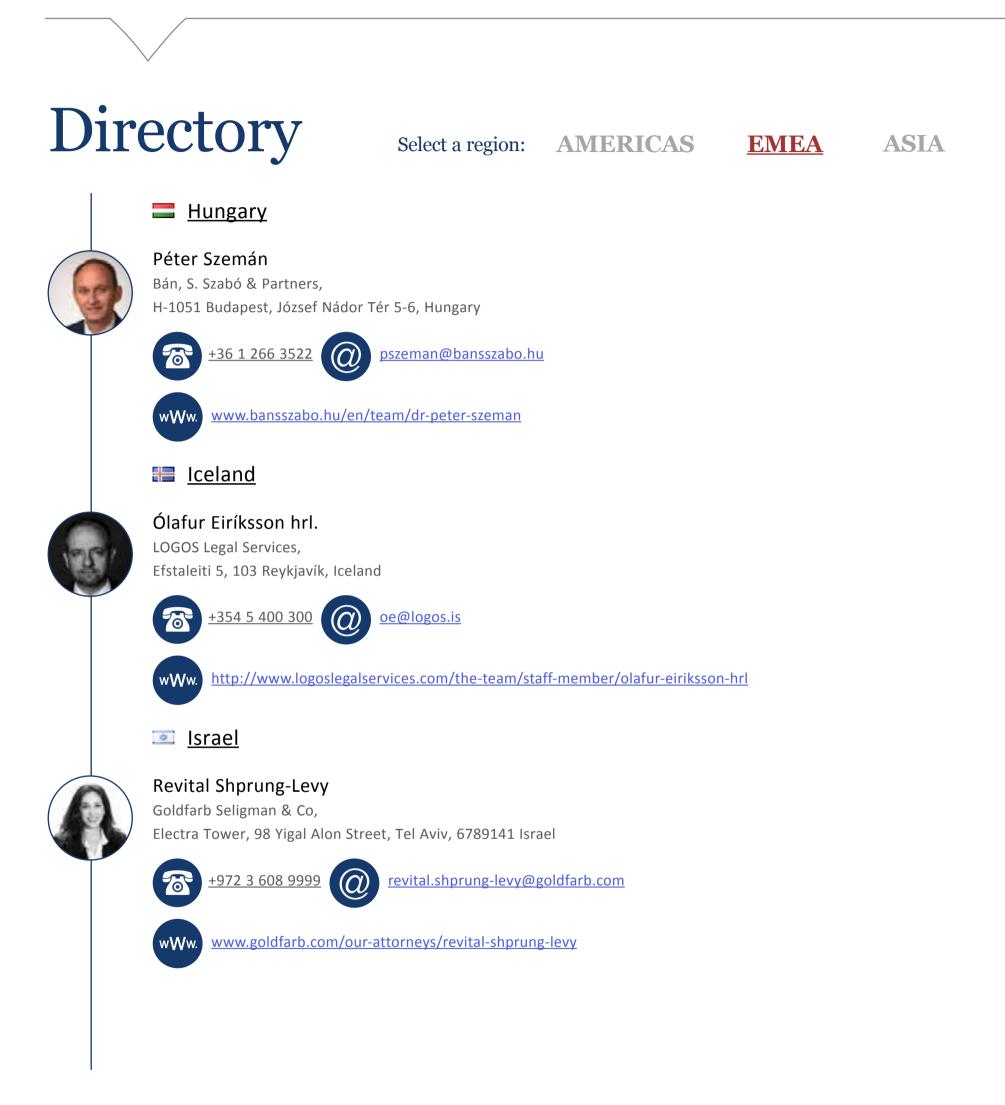










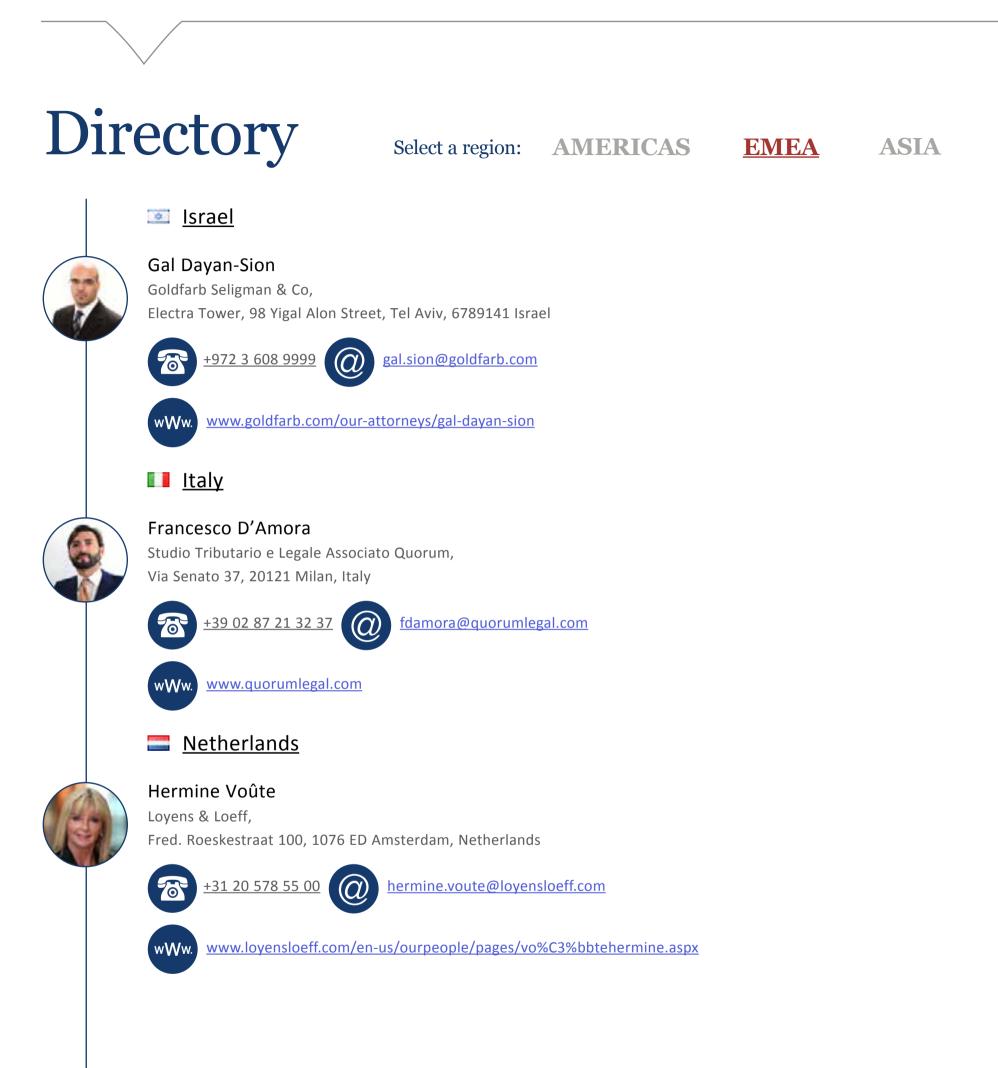










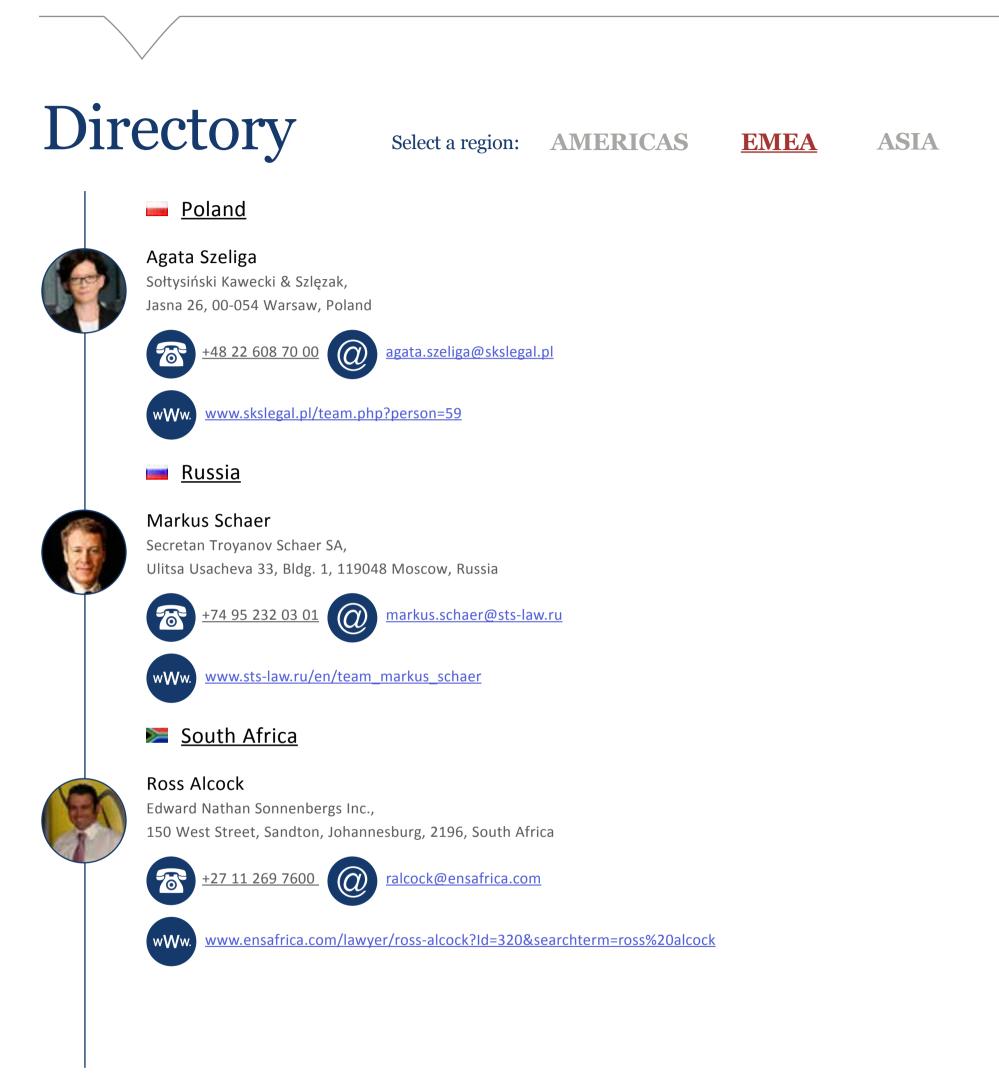










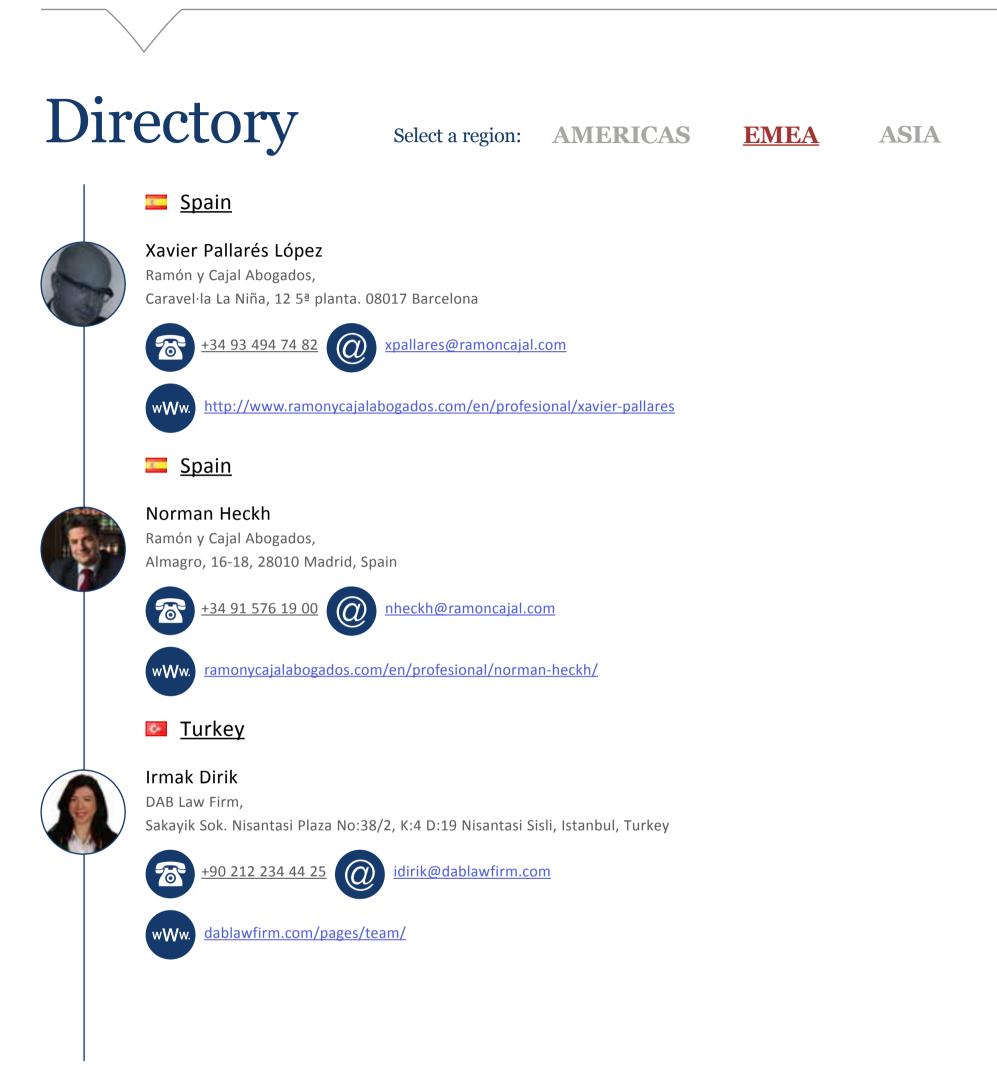










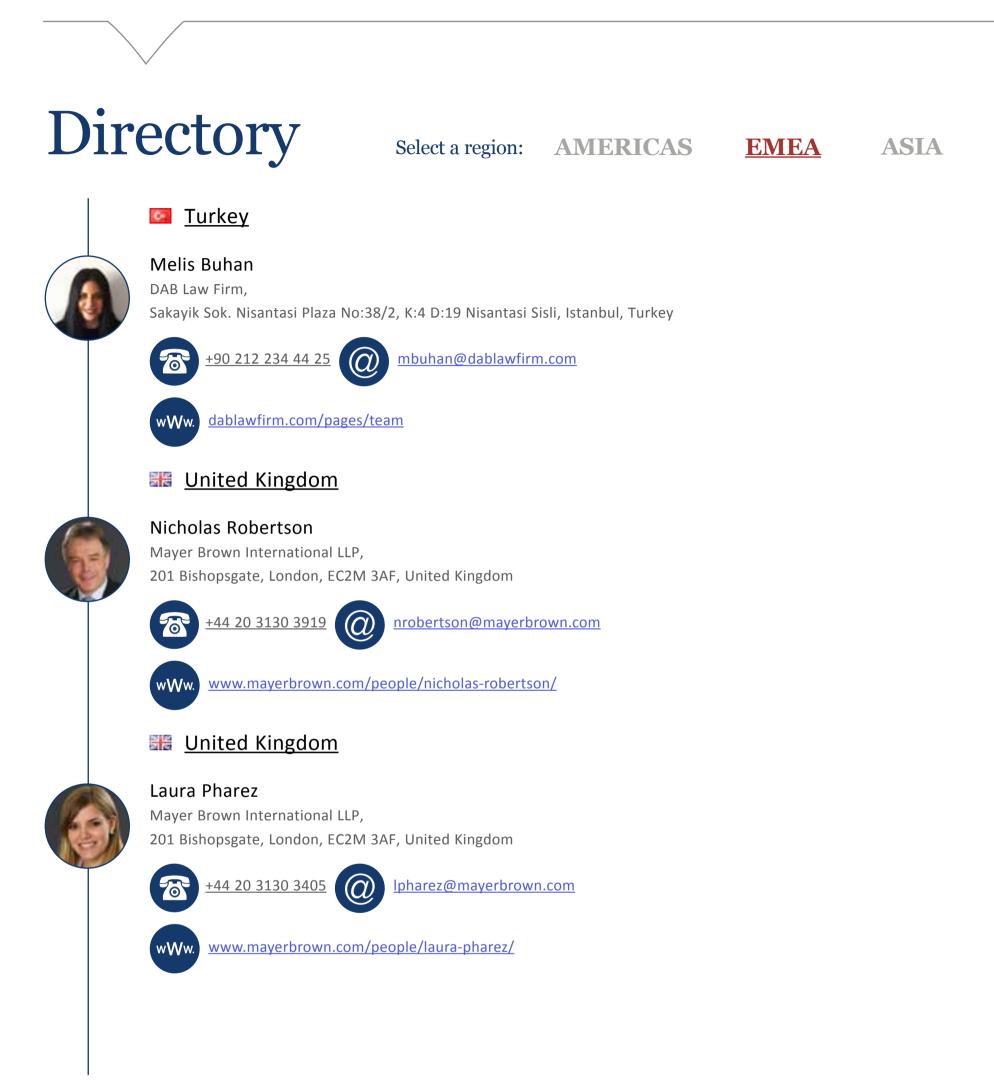












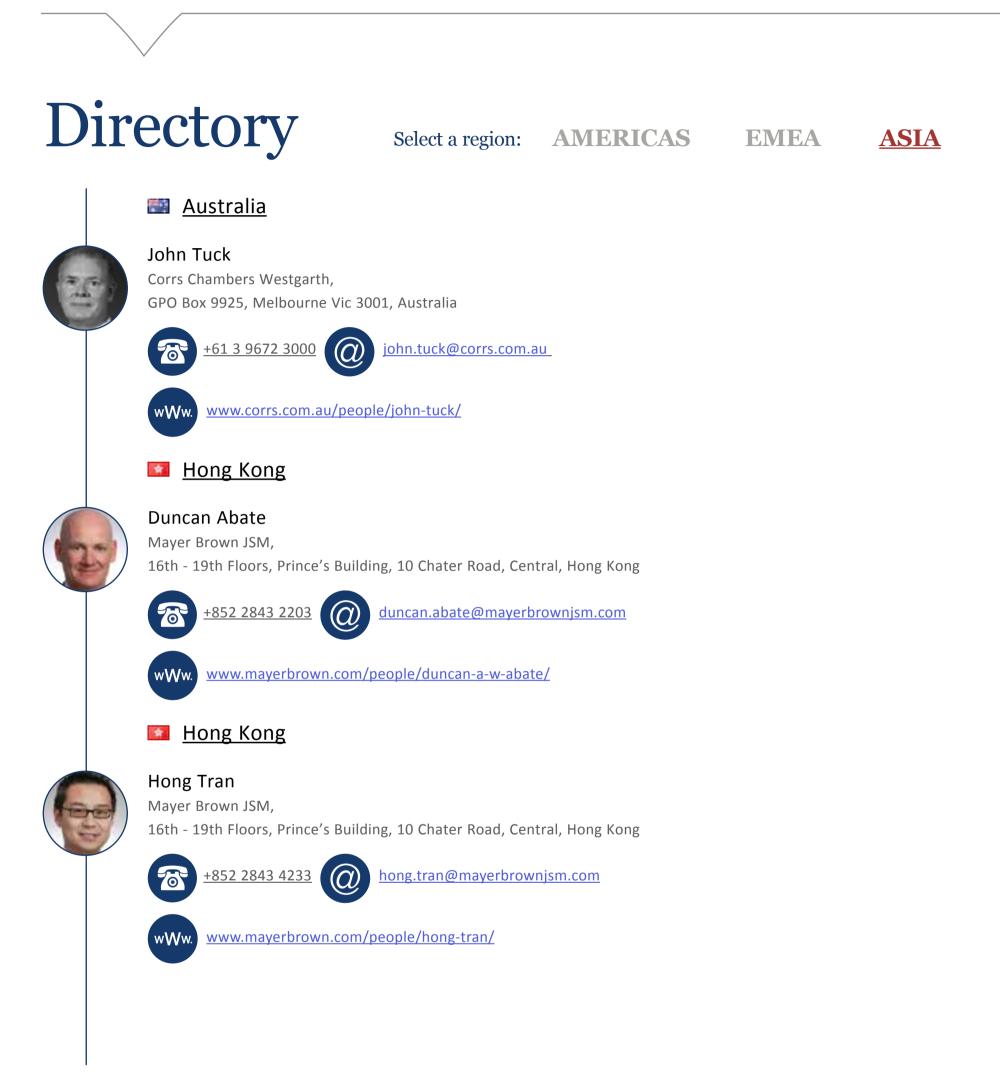
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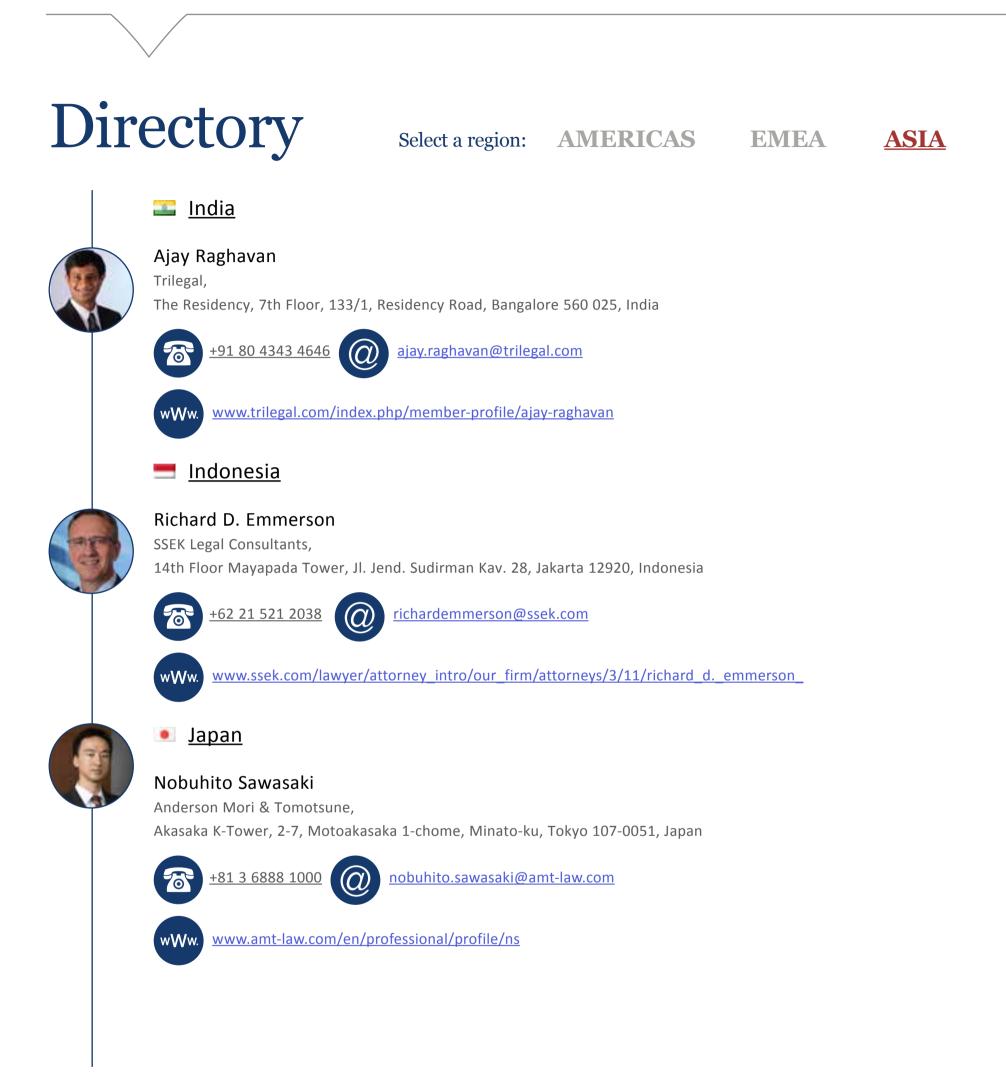












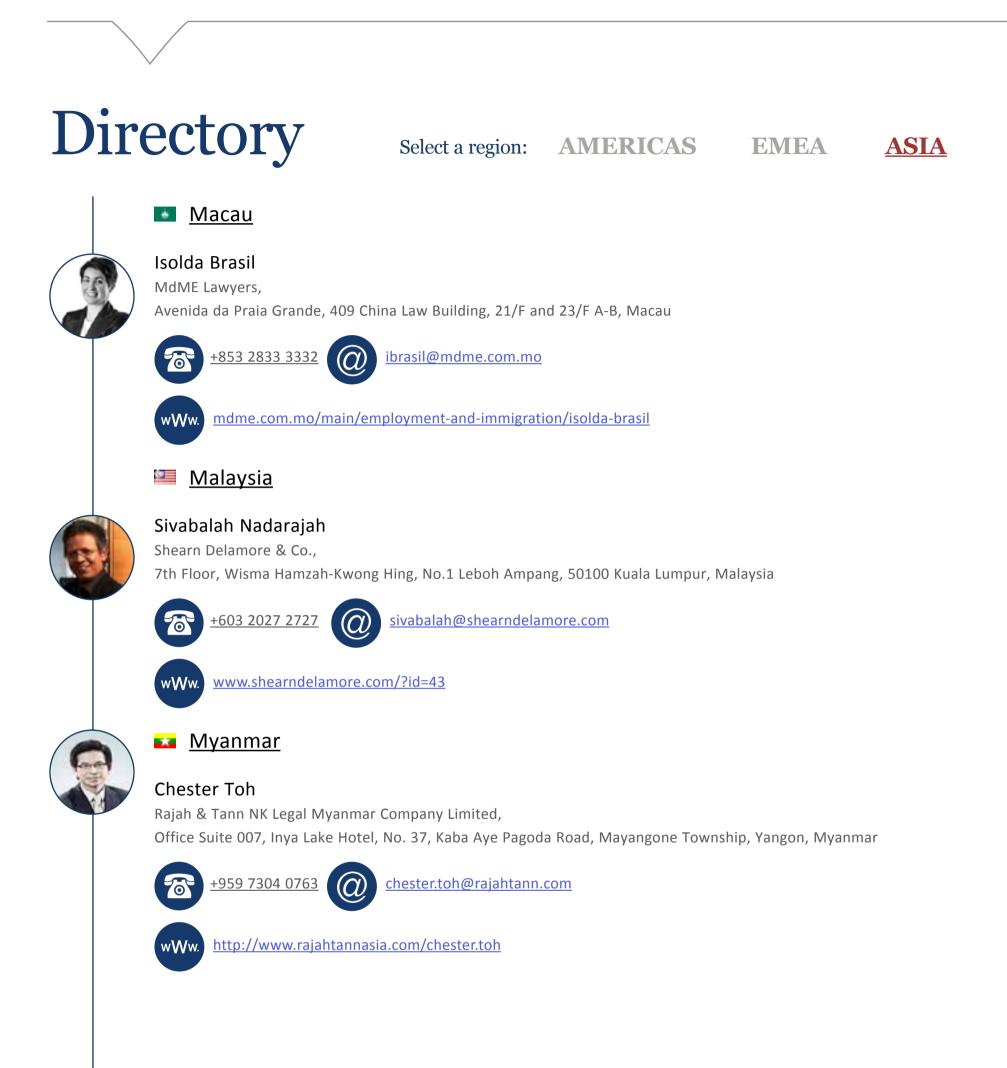
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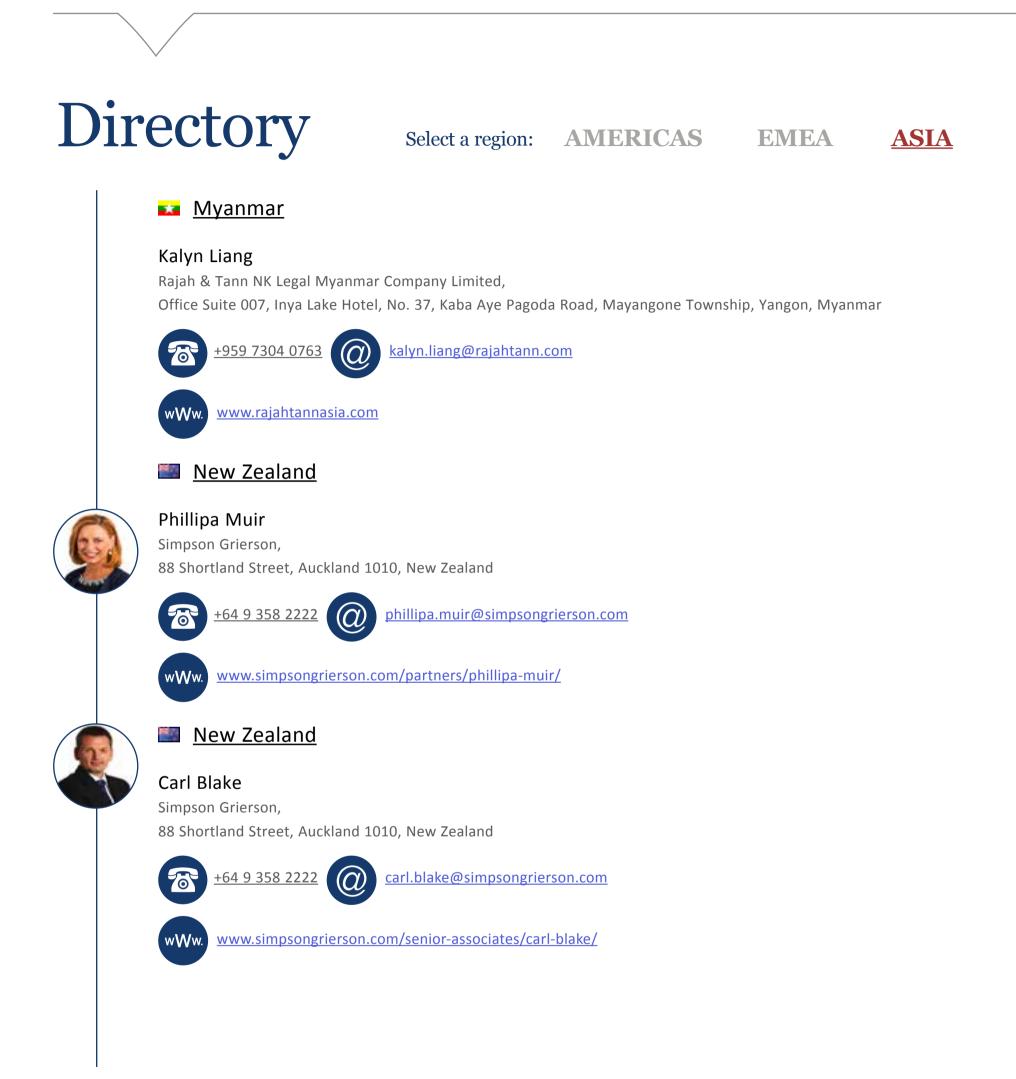










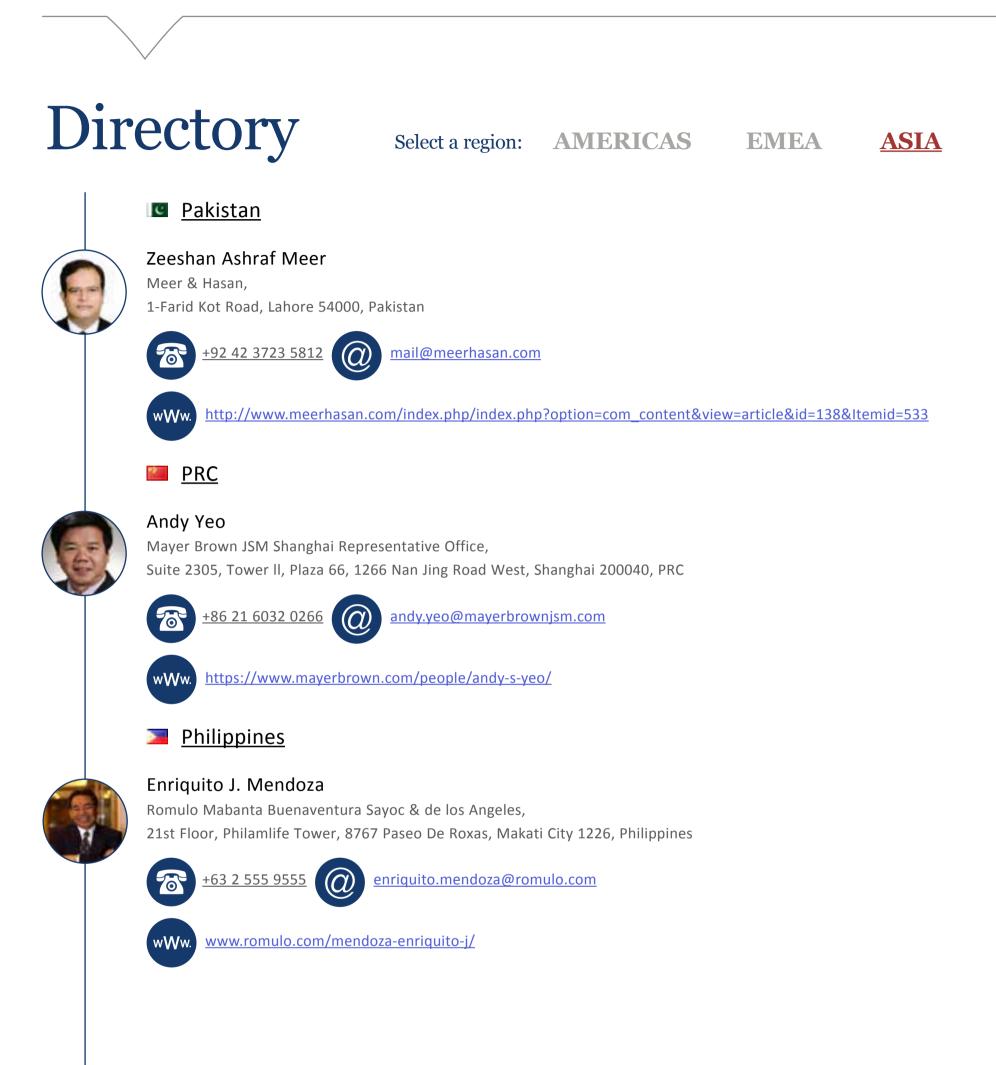










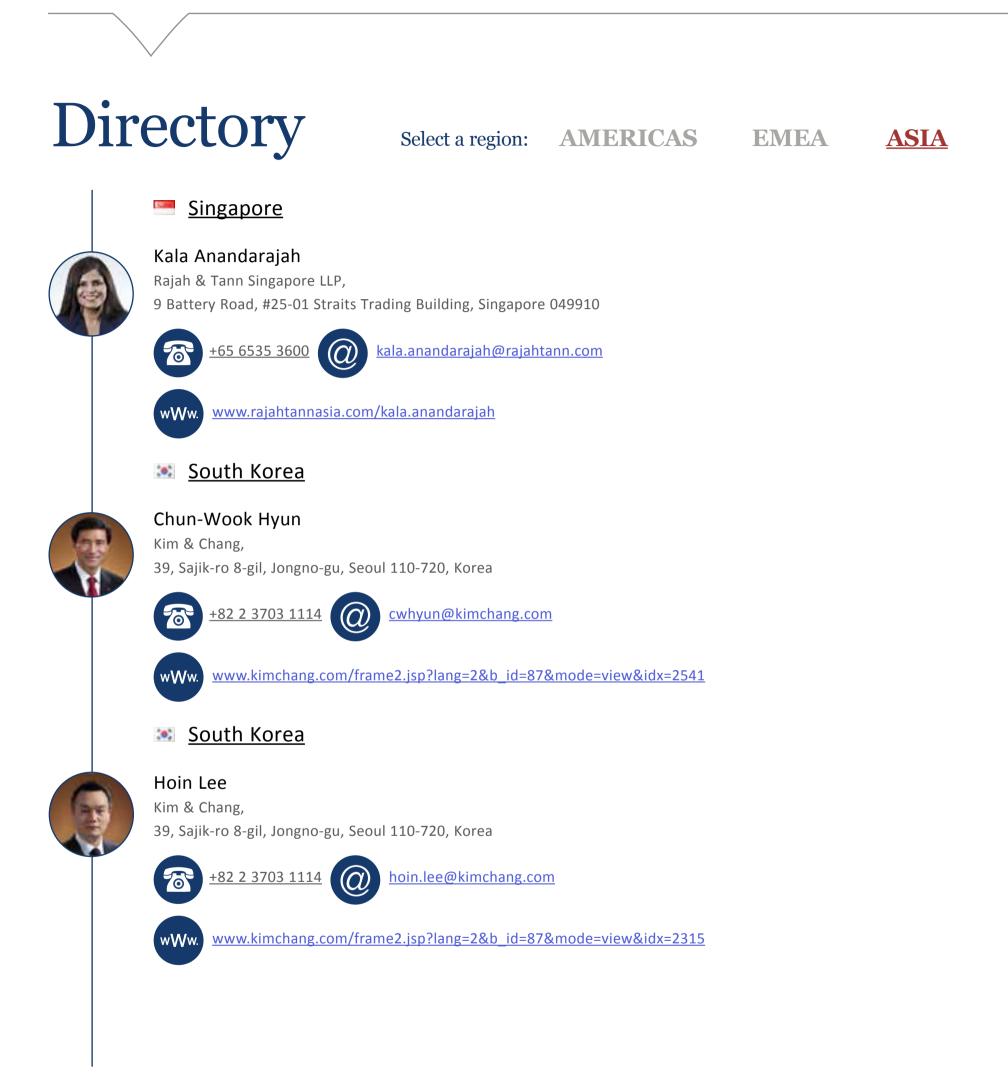












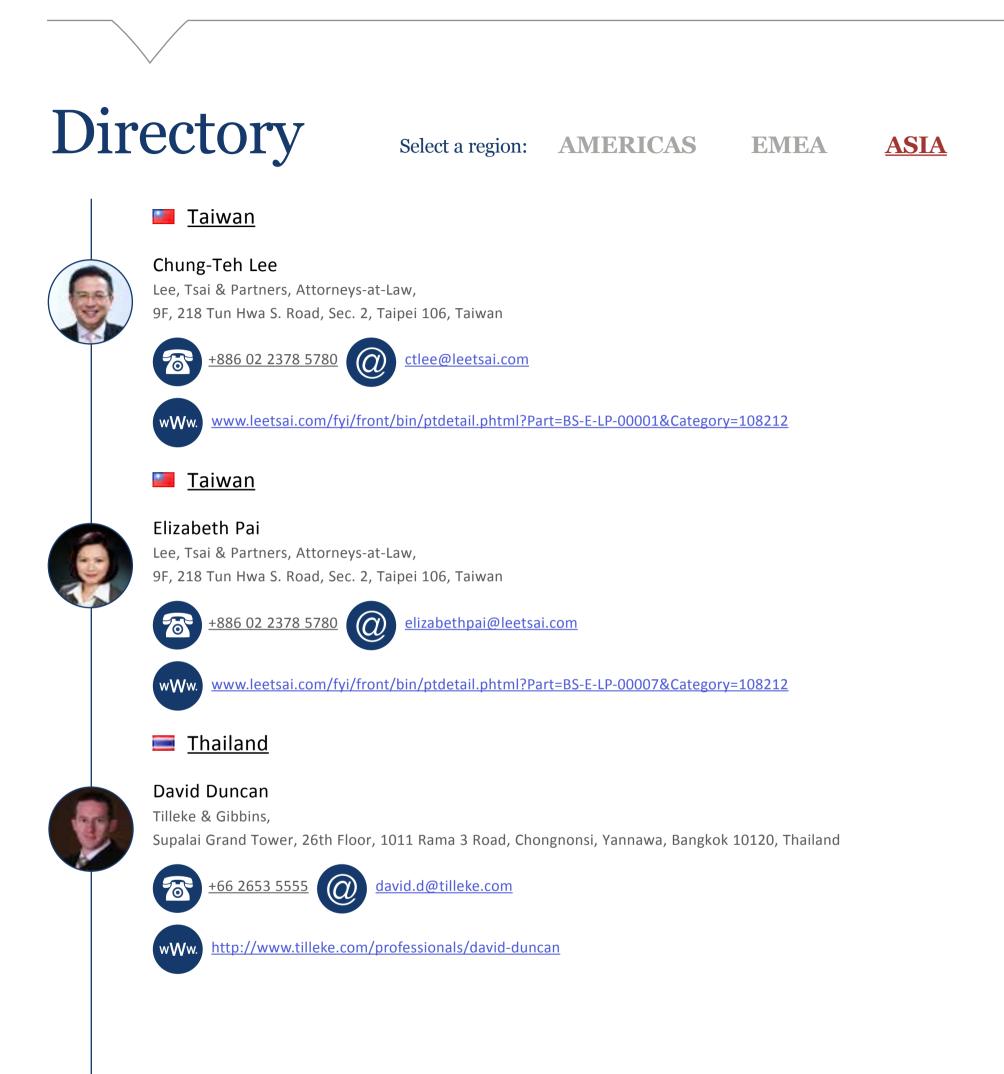
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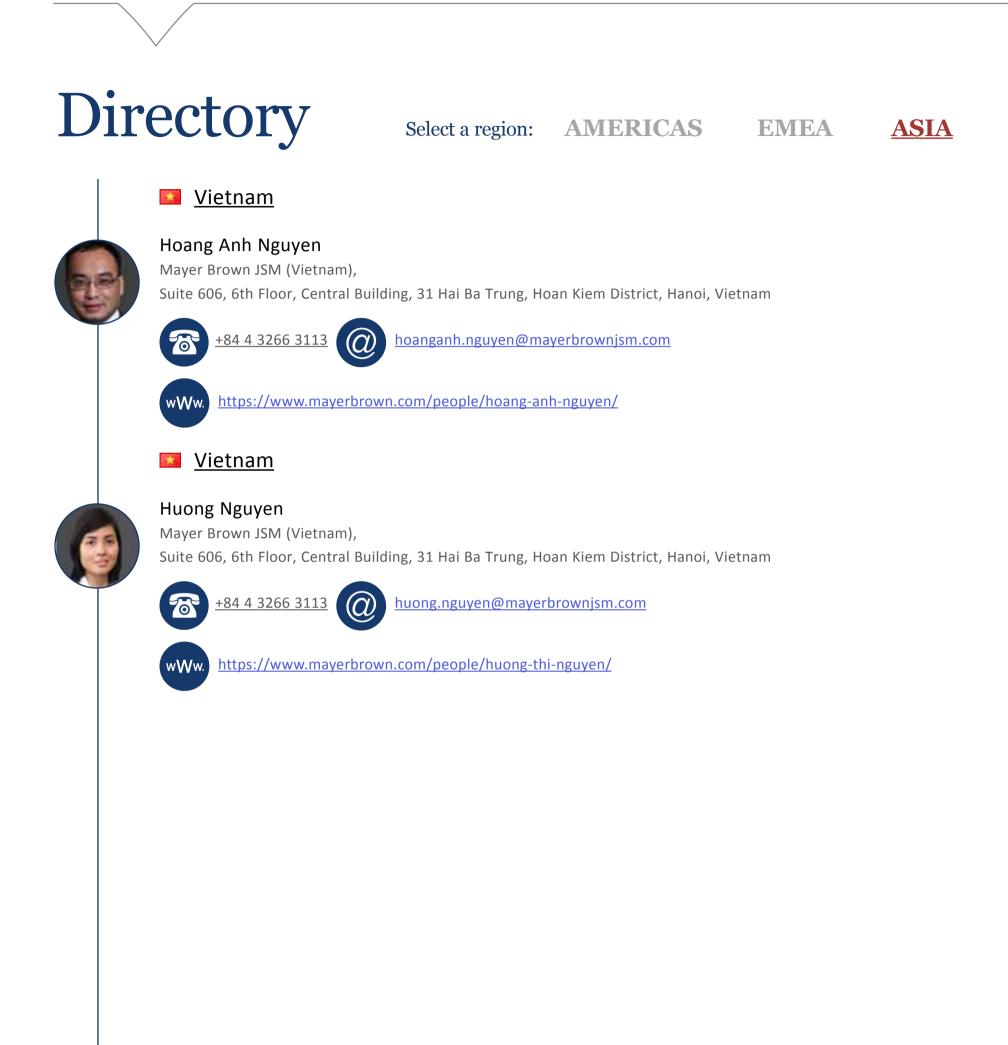




















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