Background Checks and References - the Do’s and Don’ts

Labour, Employment and Human Rights Group Seminar
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Background Checks and References: The Dos and Don’ts

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Outline

• Background Checks
  • Criminal Records Checks
  • Vulnerable Sector Checks
  • Other Checks

• Legal Sources of Information in the Technology Age

• Giving and Contacting Reference checks
Background Checks

- Legally permissible in Canada
- Limit background check to **necessary information**
- Risks of over investigation
  - Human rights complaints
  - Privacy concerns
- Conditional offer of employment made prior to checks

Background Checks – Common Types

- Criminal Records Check
- Vulnerable Sector Check
- Credit Check
- Educational Verification
- Driving Record Check
Criminal Records Check

• Criminal Records Check
  • Returns list of convictions from CPIC database.

• Police Records Check
  • Based on information from CPIC database, RCMP records, records from other police forces, searchable by name and date of birth
  • Includes non-criminal contact with the police

• Assess why you need a criminal background check
• New RCMP directive – If name and date of birth raise flag, fingerprints are required for positive identification before criminal records are released

Criminal Records Checks – Human Rights

• Several provinces prohibit discrimination on grounds related to criminal records
  • Ontario Human Rights Code – pardoned offences
  • British Columbia Human Rights Code – unrelated to job
  • Canadian Human Rights Act – pardoned offences

• Therefore, human rights considerations are associated with an employer’s right to require current or prospective employees to submit to and ‘pass’ a criminal record check
Criminal Records Checks – Ontario Human Rights Tribunal

- Jamal v. First Student Canada

- Applicant alleged discrimination in employment on the basis of record of offences.
- Charged with several counts, one charge withdrawn, the other resolved by peace bond.
- Following expiration of peace bond, sought employment with Respondent
- Denied because the respondent considered his "alleged involvement in criminal activities"
- Application was dismissed by the Tribunal

Criminal Background Checks – Emerging Issue

- Significant delay in getting the checks
  - If no flags – a week or two
  - If flagged
    - e.g. Toronto Police: 6 to 8 weeks
    - RCMP: 120 days
- Usually, in an offer to work, you would say: this offer is conditional on satisfactory criminal background check
- Poses a problem for workplaces with high turnover
Dilemma for Employers

- Employee hired conditional on results of a satisfactory criminal background check
- Due to delay, the employer permits the employee to start work pending the results.
- The background check reveals a drug conviction: the employer wishes to fire for cause
- Issue: Permitting the employee to work before the results are in, contradicts the employer’s position that a clean record is an essential job requirement. In the absence of just cause, the employer may be liable for wrongful dismissal.

How to avoid that result?

- Consider wording in the offer letter to minimize liability:

  The employee is starting employment prior to the employer’s receipt of the results of a criminal records check, based on the employee’s assurance that he/she has never been convicted of a criminal offence. If the results of the check are unsatisfactory, the employer shall be entitled to terminate employee’s employment, by providing him/her with the minimum notice or payment in lieu of notice, if any, required under the Employment Standards Act, 2000 and no other notice or compensation whatsoever shall be required or apply.
Criminal Records Checks

- Criminal Record Checklist
- Nature/working conditions of the job and employer
- The nature of the offence
- Circumstances of the offence
- Age at time it was committed
- When the offence was committed
- Efforts at rehabilitation

Consider this Candidate

- Male candidate
- Conditional offer of employment made for a managerial position.
- Would be in charge of predominantly female group of service representatives
- Background check reveals a conviction for assault from 2001
Vulnerable Sector Checks

- Used where employees working with vulnerable populations
  - Elderly, children, developmentally disabled

- Vulnerable sector checks used with teachers, social workers, day-care workers, sport coaches and volunteers, long term care nurses and personal support workers

- Used to determine the possible existence of a criminal record and/or a sexual offence conviction for which an individual has received a pardon.

Vulnerable Sector Checks – Recent Changes

- Local police used CPIC to conduct name-based queries of criminal records databases and flagged pardoned sex offender records
- Individuals could avoid being linked to pardoned sex offences if using different name

- RCMP made changes
  - New automatic query based on gender and date of birth
  - Fingerprints required to complete check when gender and date of birth matches pardoned sex offender record
- Significant time delay
Driving Record

- Statement of Driving Record
- Multi-year snapshot of a driver’s history
- Human Rights Considerations
  - Driver’s abstracts should only be requested where driving is an essential requirement of an employee’s position
- In Ontario, 3 year history can be obtained on-line with employee/candidate driver’s license number

Credit Checks

- Credit checks
- Investigate personal credit history of an individual
- May be performed where a prospective employee may have the opportunity to commit theft or fraud
- Can raise many human rights issues
Privacy

- Federal – PIPEDA
- Alberta, BC, Quebec
  - Privacy legislation modeled after PIPEDA
- Set out rules about the collection of personal information about identifiable individuals
- Ontario – No similar privacy legislation

What happens when you ask for too much?

- SAS Institute (Canada) Inc., Alberta P2005-IR-008
- SAS hired Back Check for the purposes of conducting background checks
- Applicant applying for position as Administrative Assistant/Receptionist
- Told that SAS had decided against hiring her
- She made an access request and asked why a personal credit check was reasonable in the circumstances
- Was told that personal credit checks were conducted on every single applicant
What happens when you ask for too much?

- She brought a complaint to Alberta Commissioner
- Alberta Commissioner analyzed whether or not collection involved personal information or personal employee information
- Organization gave three reasons for purposes for collection of the information:
  1. To assess the applicant's suitability to manage petty cash
  2. To minimize credit card fraud
  3. To validate employment history

What happens when you ask for too much?

- The Commissioner found no correlation between individual's ability to manage own finances and manage petty cash
- Gaps in resume could be dealt with through pre-employment interview and verifying references
- Credit Report contains significant amounts of unrelated personal information
- Information, therefore, was not employee personal information
- Not reasonable to collect information as part of hiring process
Background Checks: Best Practices

• Advise applicants in writing of the specific background checks that will be required

• Obtain the applicant's written consent for the checks

• Conduct background checks after making a conditional employment offer

• Limit checks to information that is necessary and related to the requirements of the job

Screening Applicants - Today’s Resume
Legal Sources of Information – Screening Applicants

- 45% of employers questioned are using social networks to screen job candidates
- More than half of employers said that provocative photos were the biggest factor contributing to not hiring a potential employee
- 44% of employers pinpointed references to drinking and drug use as red flags
- Other warning signs included bad mouthing of previous employers and colleagues and poor on-line communication skills (study conducted by Harris Interactive for CareerBuilder.com, 2009)
Legal Sources of Information – Screening Applicants

• Facebook most popular online destination for employers to check out candidates, followed by LinkedIn and MySpace

• 7% follow job candidates on Twitter
Employer Collection – Screening Applicants

• Under BC PIPA, organizations are required to give notice to job applicants about the personal information that will be collected, used and disclosed during the application process AND the collection must be reasonable for the purposes of administering the application process

• Question whether the collection of information about an applicant from a social networking site is a direct collection, or an indirect collection?

Employer Collection – Screening Applicants

• One of the exceptions to the consent requirement is where personal information is publicly available

• This should eliminate the statutory notice requirement for collection from Facebook, however note that collection must still be for reasonable purposes
Providing References and Contacting References

• Giving References
  • Why are employers concerned?
  • No comment policies
  • Inaccurate references
  • What should employers do?

• Contacting References

Providing References: Legal Considerations

• Privacy Issues
  • Varies by provinces
  • May require consent

• Defamation Concerns
  • Protected by qualified privilege
    • If made in reasonable and honest belief that are true
    • Comments not malicious

• Negligence
  • Duty of care to former employee
  • Not yet in Canada
  • Common in the US
No Comment Policies: Legal Considerations

• Hinder former employee's ability to mitigate damages
  • May lead to longer notice period

• Confirmation of Employment – Common Practice
  • Position, duties, length of service

Inaccurate References: Legal Considerations

• Must be accurate for qualified privilege to apply

• If omit negative information
  • Negligence action by new employer
    • Duty of care to new employer?
  • Intentional infliction of harm
  • Not yet in Canada
  • In US
Providing References: Practical Considerations and Best Practices

- Do you have an established policy regarding references?
  - who is authorized to provide references
  - approved/standard content
  - verbal and/or written
  - form of consent required from the candidate
  - record keeping requirements
- Consistent approach to references will set expectations.

Contacting References

- What should you ask?
  - In what capacity does he/she know the candidate
  - Details of position/work experience
  - Reasons for termination or resignation
  - Verify all facts provided by candidate
  - Determine whether there is a blanket no comment policy
  - Consider follow up meeting with candidate
BIOGRAPHIES
Donna J. Gallant provides employment and labour law advice to management across a broad range of industry sectors. She works with employers on a day-to-day basis to develop, implement and update their human resource policies and practices, and to resolve workplace issues quickly as they arise. She represents employers in wrongful dismissal litigation, grievance arbitrations, and claims pursuant to human rights, employment standards, and workers' compensation legislation. Donna frequently provides advice on employment and labour issues in the context of corporate reorganizations, mergers and acquisitions.

Donna's experience includes:

- Employer counsel in human rights cases, wrongful dismissal litigation, grievance arbitrations
- Employer representative in workers' compensation cases
- Advising on labour and employment issues in context of mergers and acquisitions
- Assisting employers to negotiate terms of severance in the context of individual terminations
- Assisting employers to implement mass layoffs, downsizings and plant closures
- Advising employers in the conduct of investigations of harassment, theft, and drug use
- Advising employers in the negotiation and drafting of executive employment agreements

Donna articled with the firm in 1983 and became a partner in 1990. In 1993 Donna took a leave of absence from practice to focus on family and volunteer interests. In 1997, she accepted a position as in house counsel and corporate secretary for a public company, where she practised until her return to the firm in 2004.

Representative Experience

- **MIJO Corporation sold to DG FastChannel for $40 million**
  Counsel to MIJO Corporation in its $40 million cross-border acquisition by DG FastChannel, Inc.

- **NFI Industries acquires IPD Global**
  Advised NFI Industries

- **Logistec acquires Rideau Bulk Terminals**
  Advised Logistec Corporation and Logistec Stevedoring (Atlantic) Inc.

- **Alliance Grain Traders Income Fund completes $104 million transformational acquisition and conversion from income trust to corporation**
  Advised Alliance Grain Traders Inc.

- **MIJO acquires Thunder North**
Advised MIJO Corporation

- C.H. Robinson Worldwide acquires Transera International
  Advised C.H. Robinson Worldwide, Inc.

- Asia Bio-Chem closes qualifying transaction
  Advised Asia Bio-Chem Group Company Ltd.

- MIJO buys Broadcast Duplication Network
  Advised MIJO Corporation

- Medical Capital Holdings acquires Specialty Board Games in Canadian exchangeable share transaction
  Advised Medical Capital Holdings, Inc.

- MIJO buys Stancon Video
  Advised MIJO Corporation

Presentations


- Human Rights Seminar, June 4, 2009


- National Human Rights Seminar, Toronto, June 3, 2008

- Fasken Martineau National Human Rights Seminar, May 25, 2007


- National Human Rights Seminar, May 26, 2006

- OBA Conference - How to Avoid Harm Caused by Departing Employees, November 8, 2005


Publications


- “The HR Space: $300 Million Overtime Class Action Against CN Rail Gets Green Light”, Labour, Employment and Human Rights Bulletin, September 8, 2010

BIOGRAPHY
Donna J. Gallant

- "Labour Relations and the Local Health System Integration Act, 2006", by Donna Gallant, March 8, 2006
- "The Window is Now Open", Labour Alert by Donna Gallant, December 2004

Memberships and Affiliations
- Member, Canadian Bar Association
- Member, Ontario Bar Association
- Member, Human Resources Professionals Association of Ontario
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Alix Herber has a practice that focuses on advising and representing employers in labour, employment, and human rights matters. She offers practical advice to employers on a wide array of issues including, labour relations, performance and discipline management, employee terminations, wrongful dismissal litigation, employment standards, and human rights. In particular, Alix enjoys working with her clients to provide them with strategic advice on various matters including collective agreement interpretation and collective bargaining, union organizational campaigns, company restructurings, employment agreements, and the duty to accommodate. Working closely with her clients, she is also actively involved in auditing and drafting workplace policies as well as providing training for employees at all levels on issues such as harassment and discrimination.

Alix has also spent several years as In-House Counsel of one of North America's largest food processing and distribution companies and as Senior Director of one of its major operating divisions. In those roles, she focused on operational labour relations and the administration of approximately 50 collective agreements, leading negotiations in bargaining a number of them.

Alix is a frequent speaker at conferences relating to employment, labour relations and human rights area.

Alix first joined the firm in 2001 as an associate in the Labour, Employment and Human Rights Group. She is an active participant in the firm's National Human Rights Seminar and the Annual Labour and Employment Seminar for clients.

Representative Experience

- Diploma acquires Carsen Medical in cross-border transaction
  Advised Diploma PLC

- L.V. Lomas buys Hacrima Holdings
  Advised L. V. Lomas Limited

- PwC sells certain regions of personal insolvency practice to Meyers Norris Penny
  Advised PricewaterhouseCoopers LLP

- PwC acquires MTS Allstream’s Professional Services consulting group
  Advised PwC

- Open Link acquires dbc SMARTsoftware
  Advised Open Link Financial, Inc.

- XATA acquires Turnpike Global
  Advised XATA Corporation

- International Power acquires Canadian wind farm developer AIM PowerGen
  Advised International Power

- FCI sells North American-based electrical division to Hubbell for US$360 million
  Advised FCI S.A.
**BIOGRAPHY**

Alix P. Herber

- **Ontario Superior Court issues injunction against picketing union workers and orders union to pay legal costs**
  - Counsel to Wasteco

- **Handleman sells its Canadian music operations to Anderson Merchandisers**
  - Advised Handleman Company

- **Lift Technologies sold to Calvi Holding**
  - Advised Calvi Holding Srl

- **Klöckner sells Canadian subsidiary Namasco to Samuel, Son & Co.**
  - Advised Klöckner & Co and Namasco Ltd.

- **Yildiz Holding A.S purchases Godiva Chocolatier business from Campbell Soup for US$850 million**
  - Advising Yildiz Holding A.S.

- **NewPage buys North American paper operations of Stora Enso in US$2.5 billion deal**
  - Advised NewPage on the Canadian aspects of this transaction

- **International Automotive Components completes Collins & Aikman soft trim acquisition**
  - Advised International Automotive Components Group North America

- **United Group completes US$408 million acquisition of UNICCO**
  - Advised United Group Limited

- **Food retail and day care industries collective bargaining agreements**
  - Has been the lead negotiator of several collective bargaining agreements in the food retail and day care industries.

**Presentations**

- **Background Checks and References, Labour, Employment & Human Rights Group Seminar, May 11, 2011**

- **Toronto Fasken Martineau Symposium (1st Edition), Fasken Martineau Institute, April 27, 2011**

- **26th Fasken Forum, Labour, Employment, Human Rights, Pensions & Benefits Conference, April 1, 2011**

- **Hours of Work and Overtime - The New Flexibility, Lorman Education Services, October 22, 2010**

- **Workplace Violence and Harassment Laws - Are You In Compliance?, Labour, Employment and Human Rights Group Seminar, October 20, 2010**

- **The Ontario Employment Standards Act in Ontario Seminar, Lorman Education Services, August 13, 2009**

- **Human Rights Seminar, June 4, 2009**

- **The Ontario Employment Standards Act in Ontario Seminar, Lorman Education Services, July 31, 2008**

- **National Human Rights Seminar, Toronto, June 3, 2008**

- **Bill 14 - Regulation of Paralegals and implications for HR Professionals and Health and Safety Inspectors, Speaker, Retail Council of Canada, December 11, 2007**

- **Fasken Martineau National Human Rights Seminar, May 25, 2007**

**Publications**

BIOGRAPHY
Alix P. Herber

- "The HR Space: With the Click of a Mouse: Employee Fired for Disseminating Inappropriate E-mail at Work", Labour, Employment and Human Rights Bulletin, April 20, 2010

Memberships and Affiliations
- Member of the Canadian Bar Association
- Member, Ontario Bar Association, Employment and Labour Divisions
- Member, Student Development Committee
- Member, Women Presidents' Organization

Community Involvement
- Member, Human Rights Watch Toronto Network, a subcommittee of Toronto Human Rights Watch Council
- Past Board Member of Jessie's Centre for Teenagers, a multi-service resource for pregnant and parenting teenagers who are eighteen years old or younger, and their children. (2004-2005)
- Past Co-Chair of the Board of Directors and Chair of the Human Resources Committee for Opportunity for Advancement for three years. OFA is a not for profit United Way agency providing programs to women in disadvantaged life situations. (2001-2004)
- Past Board Member, Margaret Frazer House, providing support to women with mental illness
Hadiya J. Roderique

Associate

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Hadiya Roderique is an associate in the Labour, Employment and Human Rights Group. She is engaged in a broad practice assisting employers with matters relating to restructuring, downsizing, human rights, employment agreements and terminations, labour relations and collective agreement interpretation.

As a law student at the University of Toronto, Hadiya was the Vice-President (Student Affairs) of the Students' Law Society and served as an executive member of Downtown Legal Services, the law school's legal clinic.

Hadiya summered with the firm in 2007 and was seconded to SonyBMG Canada Inc. In 2008/09, she articled with the firm and joined as an associate in 2009.

Presentations

- Tips for Accommodating Disability, Labour, Employment and Human Rights Group Seminar, September 22, 2010

Publications

- "Cell Phone Ban and Employer Liability", Canadian Labour Relations and Employment Topics, November 2009
BIOGRAPHY
Hadiya J. Roderique

- "Giving Working Notice - What you Need to Know", Law Society of Upper Canada's Six Minute Employment Lawyer Conference, June 17, 2009

Memberships and Affiliations
- Member, Canadian Bar Association
- Member, Ontario Bar Association
- Member, Law Society of Upper Canada

Rankings and Awards
- Gordon Cressy Student Leadership Award, University of Toronto (2008)
- Education Equity Award, Law Society of Upper Canada (2007)