



## Criminal record checks on new employees – what can we ask?

Invariably as part of your pre-employment checks you will want to know about candidates' criminal records (not least if you operate in the financial sector), but what should you be asking and when can you refuse to employ someone who has a criminal record?

### **What can you ask for?**

As a starting point, employers are legally entitled to ask about any 'unspent' convictions and there is nothing to prevent you from asking a job applicant about their criminal record.

A 'spent' conviction is where a person has been convicted of a criminal offence but has not re-offended during a specific period from conviction. The individual is then considered to be rehabilitated, and their conviction becomes "spent". An 'unspent' conviction is where the conviction is still live and not 'spent'.

### **The mechanics and consent**

Depending on your business' size and resources, you may wish to get employee consent and carry out the checks on their behalf. Or alternatively you may ask the employees to request the check themselves and disclose the results to you.

There are three levels of criminal record check available and in each case the results are provided by way of a 'certificate'. The lowest level of check available is called the 'basic' check, followed by 'standard' and then 'enhanced' at the highest level. A basic check contains details of any unspent criminal convictions, any conditional and unconditional cautions, or otherwise a statement that the individual has no such convictions or cautions.

Practically, you should carry out criminal record checks once a successful applicant has been chosen, as opposed to as a pre-requisite for all candidates so that you are not using criminal records as a basis for your candidate selection. Also, since the process can be burdensome, you won't want to be completing the process for all candidates.

## What convictions will be disclosed?

Generally a spent conviction does not need to be disclosed to an employer and it is unlawful for an employer to discriminate on the grounds of a spent conviction. However, there are exemptions from this where an individual can be asked if they have any spent convictions for particular occupations, offices and professions which fall into five broad groups (these are listed in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975):

- **Professions** (such as medics, lawyers, accountants, vets, chemists and opticians)
- **Those employed to uphold the law** (e.g. judges and officers of the court etc.)
- **Certain regulated occupations** (which includes financial services)
- **Those who work with children**
- **Those whose work means they could pose a risk to national security**

In these circumstances, spent convictions must be disclosed and if the candidate fails to answer this will be a valid reason to withhold employment or to dismiss, as will a failure to provide honest information.

## Can I refuse to employ someone if they have a criminal record?

Firstly, this depends on whether the conviction is spent or not.

### *If an individual has a spent conviction:*

- you **cannot** refuse on that basis, unless the position applied for falls under the Exceptions Order;
- if the position falls within the Exceptions Order, then you **may** refuse to employ the individual;

The Rehabilitation of Offenders Act ('ROA') prohibits an employer using knowledge of a spent conviction as grounds for excluding, or dismissing a person from employment.

If the conviction is spent and the position is not exempt (as this role is not) a dismissal on this ground will almost certainly be unfair.

***If the conviction is not spent:*** the employer **may** decide not to employ the individual.

## When 'may' you decide not to employ a candidate?

Where, after looking at whether the conviction is spent or unspent, you have discretion to decide whether to offer the role to the candidate or not, unless there is specific guidance for a specific profession or industry, you must use your own judgment in deciding whether to employ someone who has a criminal record.

You will need to assess the relevance of the criminal record to the individual's role and the industry. The weight that you should attach to a criminal record will depend on various factors including: the employee's role, the type of criminal conviction and how long ago it was.

## General points to note

If you employ the candidate and later find out they lied about their criminal record (and was not entitled to conceal it by virtue of ROA) you may be able to argue that there has been a breach of trust and confidence.

Information about the commission, or alleged commission, of criminal offences is sensitive personal data for the purposes of the Data Protection Act 1998 (**DPA**). If you are processing sensitive personal data you must satisfy one or more of the conditions for processing which apply specifically to such data, as well as the one of the general conditions which apply in every case (one of the conditions is that the individual has given explicit consent to the processing of their sensitive personal data).

## What should I be doing?

Some practical steps to comply with these requirements are:

- make it clear in the early stages of the recruitment process what vetting will take place and how it will be conducted;

- do not lead employees to believe that they have to disclose spent convictions if they do not.
- only vet successful candidates to pre-employment vetting (as opposed to vetting all applicants);
- make it clear that any offer of employment is subject to certain conditions being met, including satisfactory criminal records checks; and
- be aware that you may be processing sensitive personal data and so you should ensure that you are satisfying the relevant conditions.