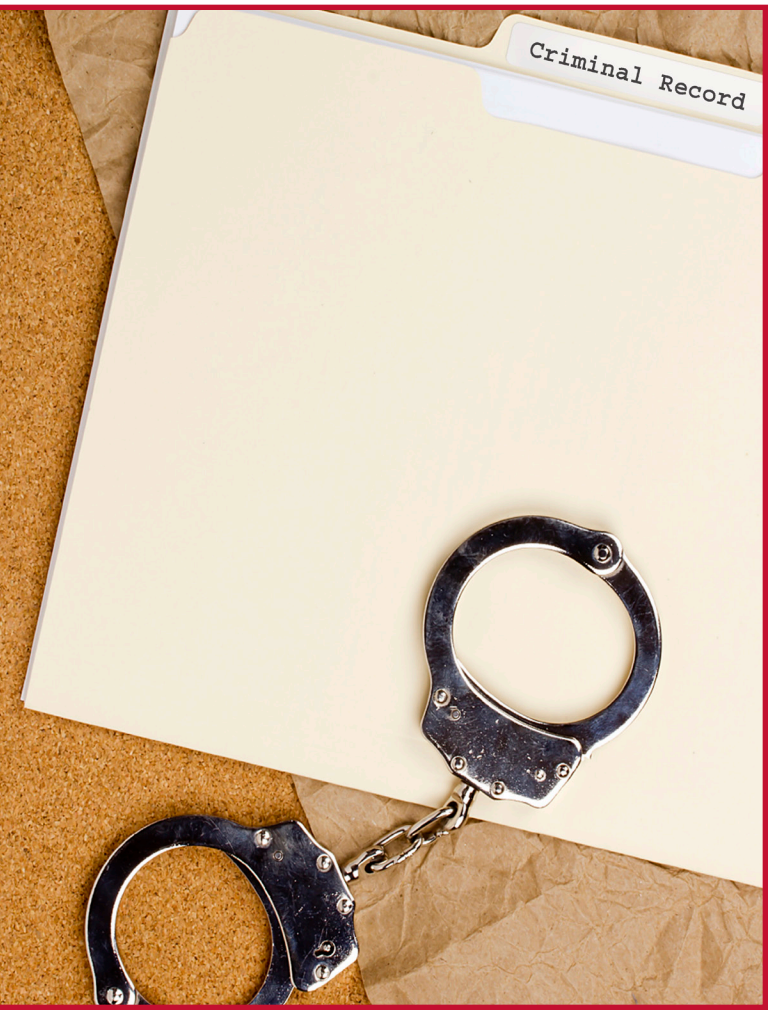
MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers



Criminal Record Checks

Managing liability and getting the information you need

Hiring the right people is integral to the success of any organization. In some cases, a criminal record check might provide valuable information, but be careful what you ask for and what you do with the information you receive. Using information improperly can result in liability under applicable, local human rights legislation.

What criminal record information is an employer legally allowed to obtain?

The information an employer can legally consider when making an employment decision varies across Canada. Every employer must therefore ensure its criminal record check procedure is tailored to the laws of each of the jurisdictions in which the employer carries on business.

Human rights legislation in British Columbia, Ontario, Quebec, Newfoundland, Prince Edward Island and potentially Manitoba (not yet determined) prohibit discrimination in employment on the basis of a criminal record. However, the scope of the prohibition varies. In British Columbia, for example, it is generally discriminatory to refuse to hire or continue to employ an employee because the individual has been charged or convicted of a criminal or summary conviction offence unrelated to the employment.

Conversely, in Ontario, it is not discriminatory to refuse to hire or continue to employ an individual on the basis the individual has been charged with a criminal offence, regardless whether the charge is related to the employment. It is also not discriminatory to refuse to hire or continue to employ an individual on the basis of a criminal record, unless the individual has been granted a pardon or the offence is in respect of a provincial offence (*e.g. Highway Traffic Act*). That said, refusal to hire an employee based on a pardoned conviction or provincial offence may be justified where: (i) having a clean criminal record is a *bona fide* qualification for the job; and, (ii) the essential functions of the job cannot be altered without creating undue hardship. For example, a trucking company may refuse to hire an individual with multiple safety-related convictions under the *Highway Traffic Act* on the basis of public safety.

Best advice? As an employer, consider *why* you think you require the information. Is the information rationally connected to

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the functions of the job? Is the connection in whole or in part? Could the applicant be accommodated without undue hardship to the employer?

What are the risks of obtaining information even if the employer does not consider the information in its employment decision?

Even if an employer does *not* rely on information collected, the fact the information *was* collected – while itself not necessarily illegal – puts the employer at risk of an *allegation* of improper use. In such a case, the onus will shift to the employer to demonstrate it did not rely on the information in making its employment decision.

For example, a criminal record check revealing several convictions for drug-related offences may result in an allegation the prospective employer did not hire the applicant due to a drug addiction or mental disability (both protected disabilities under human rights legislation) which cannot form the basis for an employment decision.

Best advice? Consider carefully what information is *necessary* (as opposed to *nice to have*) and only seek out and review that which is *necessary*.

What is the process?

In each case the prospective employee must provide informed consent. After obtaining consent, criminal record information can be obtained from the RCMP, local or regional police services, and private agencies. Processes vary from region to region, but in most regions there are two basic methods:

"Vulnerable Sector Check" or "Police Reference Check" - The information disclosed is detailed and may only be conducted by a local police station. It includes criminal convictions, outstanding charges before the courts, probation and whether the applicant is suspected of committing a criminal offence or is involved in a serious criminal investigation. A Vulnerable Sector Check is generally only obtained for a position of authority or trust relative to vulnerable persons; for example a teacher, social worker, day-care worker, or nurse. In Toronto, only an employer registered as a "vulnerable sector employer" may obtain a Vulnerable Sector Check. However, in other regions, anyone may obtain a Vulnerable Sector Check by attending at the criminal records check office and requesting one be completed. Generally, this process takes time; for example, in Toronto it can take up to twelve weeks.

"Criminal Record Check" or "Clearance Letter" - The information disclosed is less detailed than what is disclosed in a Vulnerable Sector Check and may be conducted through a private agency or local police station. This process generally verifies, at a minimum, the applicant does not have a criminal conviction for which a pardon has not been granted and can take five to ten business days. If a Clearance Letter search suggests the applicant may have a criminal record, a Clearance Letter will not be issued. In Toronto, the applicant must then submit fingerprints for a more definitive report. This can take more than 120 days. For a quicker resolution (a matter of days), fingerprints can be submitted electronically to some local police stations or an accredited private agency. This is more expensive than obtaining a Clearance Letter. However, it may also be the fastest and most efficient.

Tips and Best Practices

As noted above, a criminal record check can take time. Moreover, obtaining and using this information carries certain risks. To manage this risk an employer should consider the following tips:

- Evaluate whether a clean criminal record is *necessary* for the performance of the job, or whether background information can more readily be obtained through other methods, such as a reference check.
- Conduct a Vulnerable Sector Check only where the employee will have direct contact with vulnerable persons.
- Keep notes of the decision to select one applicant over another, demonstrating the reasons were *bona fide* and not discriminatory.
- Given the length of time it can take to complete a criminal record check, any offer of employment should be in writing and conditional on a satisfactory (to the employer) report. If an offer of employment is not conditional upon the satisfactory completion of a criminal record check, an employer may be liable for notice upon termination if the employee is hired prior to the completion of the record check and must then be terminated due to an unsatisfactory report.
- Keep the results of a criminal record check confidential. The information should only be disclosed to individuals within the organization on a need-to-know basis.

To learn more and/or for assistance designing a hiring protocol tailored to your organization, contact a member of the Sherrard Kuzz LLP team.

DID YOU KNOW?

As of October 1, 2012, Ministry of Labour Inspectors will commence enforcement of the requirement employers post a new health and safety awareness poster, *"Health & Safety at Work – Prevention Starts Here"*. The poster is available in 17 languages and can be found at:

http://www.labour.gov.on.ca/english/hs/pubs/posterinfo.php

Accommodation is a Three-Way Street:

The employee, employer and union must participate

As many employers know, the law requires accommodation of an employee with a disability to the point of undue hardship. This often includes developing a return to work program tailored to the employee's specific needs. An ever-present theme in these situations is the degree of access an employer has to an employee's medical information, particularly when an employee refuses access due to an assertion of a privacy interest.

Complex Services

The recent arbitration decision of *Complex Services Inc. v. Ontario Public Service Employees Union, Local 278* dealt with precisely this type of conflict. The grievor was employed as a security guard at a Niagara Falls casino. Between May 2010 and April 2011, she was on a medical leave related to both physical and mental health related issues. When she was cleared to return to work, the employer initiated a gradual return to work plan which focused on the grievor's physical disability. However, shortly after her return, the employer developed concerns about the grievor's mental health. These concerns emerged when the employer proceeded to revive an investigation which had been underway when the grievor began her leave, in relation to suspected misconduct on her part.

Before the investigation recommenced, the employer wrote the grievor to inquire whether there was "any medical reason" she would be unable to participate. The employer received no answer. After a follow-up inquiry, the disability insurer intervened to advise that the grievor required all communications to be made through her union representative.

At a subsequent meeting between the grievor, her union representative and the employer's disability consultant, the grievor agreed to visit an employer-appointed physician who was to conduct an assessment of her limitations and restrictions. As a condition of seeing the grievor, the physician asked her to sign a consent authorizing the physician to release his assessment to the employer. The grievor mistakenly thought she was being asked to release all her medical files and refused to sign. She left without an assessment having taken place.

A prolonged string of back-and-forth communications ensued during which the employer attempted to explain to the grievor she was only being asked to release information about her functional abilities; information the employer legitimately needed to safely and effectively accommodate her. As an alternative, the employer proposed an independent medical review of the employee's medical documentation. The grievor rejected all requests. In her view, it was not a requirement of the accommodation process she release her medical records, and she believed she had done her part by having met with the physician. She remained adamant her medical information was private and confidential and outside the purview of the accommodation process. Throughout this process, the union assumed the role of conduit: of the grievor's concerns to the employer and of the employer's concerns to the grievor. The union did not appear to exhibit a role as adviser to the grievor.

In light of the grievor's continued refusals, the employer notified the union it was placing the grievor back on medical leave until it could confirm she was fit to work and could be "safely and properly" accommodated. The union filed a grievance, claiming the employer had harassed and discriminated against the grievor. The employer also filed a grievance, alleging the grievor had failed to comply with her obligations in the accommodation process.

Arbitrator Surdykowski dismissed the employee's grievance and allowed the employer's. He found the grievor had not complied with her obligations in the accommodation process. Acknowledging medical information is presumptively private, Arbitrator Surdykowski noted "the right to privacy with respect to medical information is [not] absolute", and the grievor had taken a "rigid and unrealistic view" she had an absolute right to accommodation without providing medical disclosure. Further, Arbitrator Surdykowski held the physician's request the grievor sign a consent was reasonable, as was the employer's requests for further information. The result of the grievance included a declaration the employer was entitled to have its appointed physician review the grievor's medical documentation, and also to refuse to permit the grievor to return to work until that process took place.

Lessons Learned for Employers

Situations such as those faced in *Complex Services* will need to be assessed on a case-by-case basis. Still, it is important to remember the following:

- Accommodation is a three-way street. The employer, employee, and union (in a unionized workplace) each have obligations.
- An employer has an obligation to accommodate the needs of a disabled employee to the point of undue hardship and to ensure the employee can perform his or her work safely.
- An employee has a legal obligation to provide medical information an employer reasonably requires to determine what is necessary to accommodate.
- An employee cannot demand accommodation and at the same time withhold medical information reasonably necessary for the accommodation process.
- An employee's privacy rights with respect to medical information are not absolute. There can be consequences if the exercise of a privacy right thwarts an employer's legal obligations.
- A union is not an idle bystander in this process. It is required to take an active role and to share joint responsibility with the employer to facilitate and support accommodation.
- An independent medical examination is an option of "last resort but can be a necessary and appropriate request".

To learn more, and/or for assistance managing disability related issues in your workplace, contact a member of Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Drugs and Alcohol in the Workplace

Drug and Alcohol Issues in the Workplace
- It's not just about the user…

Preventative Management Strategies
- Developing and implementing a drug and alcohol policy.
- Can an employer require employees to undergo pre-employment screening?
- Is there an obligation to conduct testing for employees in safety sensitive positions?
- Can an employer conduct random testing?
- Can testing be required to monitor an employee participating in a rehabilitative return to work program?

Responding to Workplace Incidents Involving Drugs and Alcohol
- When and what can an employer search?
- Is post-incident impairment testing permitted?

Understanding Drug and Alcohol Testing
- What tests are available?
- What is being tested?
- Is employee consent required?
- Is privacy an issue?

Discipline for Drug and Alcohol-Related Misconduct
- What if an employee refuses to provide a sample?
- What steps can an employer take if an employee fails a drug or alcohol test?
- What can an employer do if an employee breaches a last chance agreement?
- When is dismissal appropriate?
- Is there an overriding duty to accommodate an employee with an addiction?

DATE: **Tuesday September 18, 2012; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre,** 75 Derry Road, Mississauga L5W 1G3

COST: Please be our guest

RSVP: **By Friday September 7, 2012 at www.sherrardkuzz.com/seminars** or to 416.603.0700
(for emergencies our 24 Hour Line is 416.420.0738)

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

HRPAO CHRP designated members should inquire at www.hrpa.ca for certification eligibility guidelines regarding this *HReview Seminar*.

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