

Managing Risk in a Global Marketplace

Understanding the International Landscape for Pre-Employment Background Screening

Introduction

Although global migration is not a recent phenomenon, the number of foreign-born workers has risen considerably over the last decade. Statistics from The Migration Observatory at the University of Oxford have shown an increase in foreign-born people of working age in the U.K. from 2.9 million in 1993 to more than 6 million in 2012¹. Similarly, the number of foreign-born workers has almost doubled from 7.2% to 13.6%². Meanwhile, in the United States, the U.S. Department of Labor indicates that, in 2013, there were 25.3 million foreign-born workers in the U.S. labor force, comprising 16.3% in total.

What these statistics do not reveal is the considerably greater number of individuals who may have lived, worked or studied abroad. This is particularly prevalent in the European Union where the free movement of workers is a fundamental principle enshrined in the EU Treaties³. EU nationals are entitled to look for a job in another EU country, work there without needing a work permit, reside there for that purpose, and even stay there after their employment has finished.

It follows that as the workforce becomes more global, hiring decisions are taking on an increasingly international dimension. While the need for an organization to carry out background checks on its candidates remains important, an organization's background screening program should reflect the international trend in a more globalized workforce and accommodate cross-border elements.

The international legislative landscape for background screening can appear complex and difficult to understand, even

for organizations with experience of grappling with international compliance issues. Organizations intending to implement a pre-employment screening program internationally must be conscious of complying with the applicable laws when determining what checks to carry out on candidates from different jurisdictions. Organizations will quickly discover that whilst some checks are perfectly acceptable in one jurisdiction, they may be irregular, and sometimes illegal, in another, thereby exposing organizations to increased scrutiny from national regulators, as well as costly and publicly damaging litigation.

There are many factors that an organization must consider when determining how best to implement a background screening program in another country. Generally, these factors can be divided into a two-stage process: (1) determining the law that applies to the background screening and recruitment process; and (2) determining the sector in which the organization operates, as well as the role and responsibilities of the candidate.

¹ Dr. Cinzia Rienzo, Briefing: Migrants in the UK Labour Market: An Overview, 3rd revision, The Migration Observatory, University of Oxford. Available at: <http://www.migrationobservatory.ox.ac.uk/briefings/migrants-uk-labour-market-overview> (accessed on 5 September 2014).

² *ibid.*

³ Article 45 of the Treaty on the Functioning of the European Union.

STAGE 1 – TERRITORIAL SCOPE: DETERMINING APPLICABLE LAW

WHY DETERMINE THE APPLICABLE LAW?

Determining which national law applies to an organization will provide the overarching framework for determining which pre-employment background checks can lawfully be carried out. A country's employment, anti-discrimination and data protection/privacy laws may restrict what information an employer or recruiter can process when making a hiring decision.

HOW DO YOU DETERMINE THE APPLICABLE LAW?

The applicable national law is most often determined by the jurisdiction in which recruitment activities are carried out.

In many cases, the applicable law typically corresponds to the jurisdiction in which the organization is situated or otherwise has an establishment. More often than not, the place of recruitment coincides with the organization's location.

EXAMPLE 1

A company is headquartered and recruiting in Hungary. The applicable law that determines legally permissible background checks will be Hungarian law.

For companies with a greater international presence, it is possible for multiple laws to apply to the organization as a whole. This could be the case where the organization has subsidiaries or branches established in different countries.

EXAMPLE 2

A company is headquartered in France and has branches located in Canada, Brazil and Thailand. Each branch is individually responsible for recruiting and for conducting pre-employment background checks. In this scenario, each branch is subject to the law of the country in which it is located. Therefore, each location will be subject to different restrictions for background screening purposes.

In certain situations, an organization may wish to centralize all recruitment and background screening procedures. In this scenario, it is possible for a single law to apply in multiple jurisdictions.

EXAMPLE 3

A company is headquartered in Canada and is coordinating all hiring of people to work for its mining efforts in Niger. The applicable law is Canadian law and not the law of Niger. This is because the recruitment (Canada) and the placement (Niger) are two distinct events. If, however, the Niger office were responsible for recruitment, then the law of Niger would apply.

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STAGE 2 – MATERIAL AND PERSONAL SCOPE

After determining the applicable law, an organization will better understand what local restrictions (if any) apply to background screening, in turn determining which pre-employment background checks will form part of the local background screening program. However, if cross-border checks are required, an organization must not disregard the laws of other countries, which may restrict the availability of the data for foreign employers. External legal counsel should always be sought to determine what checks are legally permissible in each circumstance. However, the following criteria will assist organizations in determining the proportionality of such checks.

1. COUNTRY CONSIDERATIONS

Local employment, anti-discrimination and data protection/privacy laws may restrict what information an employer or recruiter can access or consider during the recruitment process. It is important to understand the applicable local restrictions, such as processing data unlawfully, could result in monetary penalties and, in some cases, criminal sanctions. In some jurisdictions, like Germany and Switzerland, a candidate is even legally entitled to lie on an application form or in an interview if asked an illegal question.

In general, many privacy-related laws in the employment context only permit an organization to process the minimum amount of data required to determine a candidate's suitability for a particular role, such as Section 32 of the German Data Protection Act. In some countries, like Poland, local employment law (Article 22-1 of the Labor Code) prescribes what specific information an employer can request from a candidate.

It is important to bear in mind that the applicable law may restrict the employer's ability to carry out a pre-employment background check, despite

the law of another country being less restrictive. Therefore, despite the availability of particular candidate data in the candidate's country of origin, the organization will be unable to process that data as part of the background check if local law imposes restrictions.

EXAMPLE 4

A company is headquartered in Sweden and is recruiting candidates from across the world to work in its Swedish offices. The applicable law is Swedish law. Section 21 of the Swedish data protection law generally prohibits Swedish companies from processing criminal record data. A candidate from the United States is offered a position in the company. Despite the availability of criminal data for candidates in the United States, a Swedish company cannot access or process that data due to the restriction imposed by Swedish law.

STAGE 2 – MATERIAL AND PERSONAL SCOPE

2. SECTOR-SPECIFIC CONSIDERATIONS

Sector-specific laws may require organizations operating in a particular industry to screen candidates to a certain standard. This is particularly the case in the healthcare, education, legal and financial sectors. Sector-specific laws, associated codes of practice and guidelines may provide exemptions to any restrictions imposed generally by local laws.

EXAMPLE 5

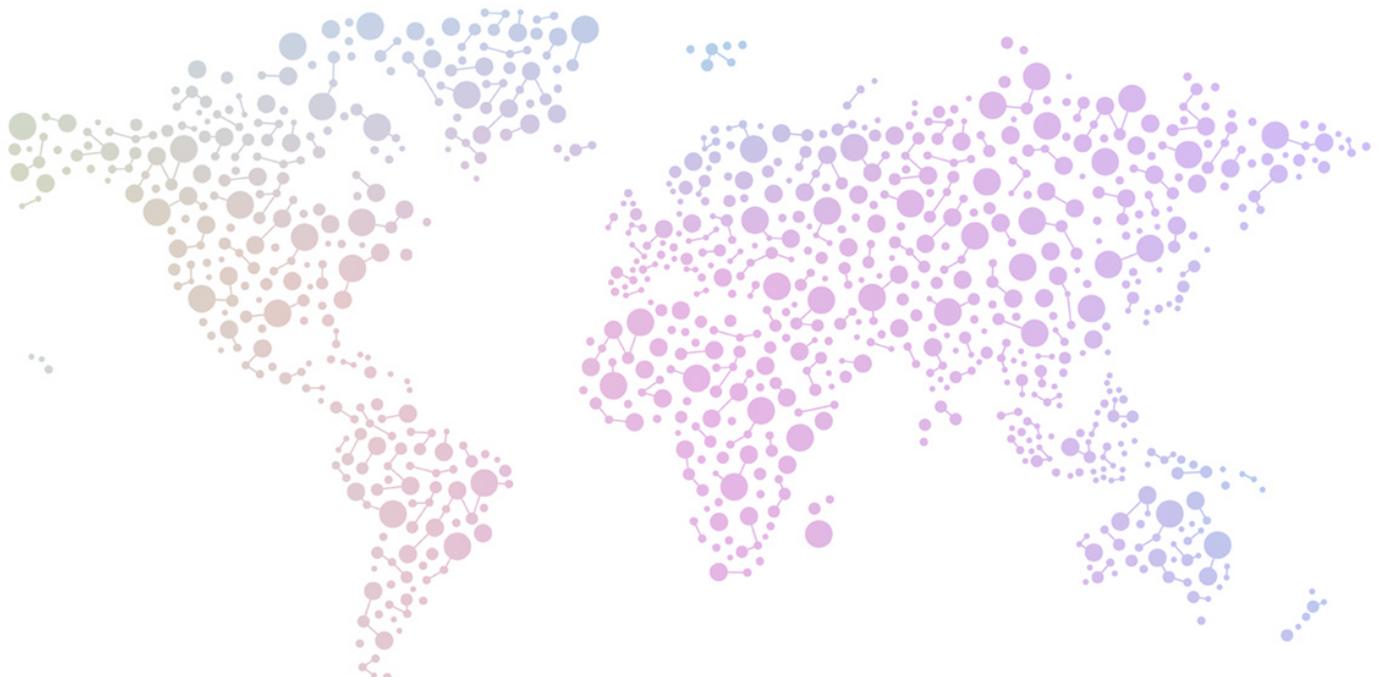
The UK Rehabilitation of Offenders Act 1974 establishes a general rule that gives individuals the right not to disclose the details of ‘spent’ criminal convictions (i.e. a conviction which, after a ‘rehabilitation period,’ is considered to never have occurred). The UK Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 provides exceptions to the general prohibition of declaring ‘spent’ criminal convictions for individuals working with children, in the healthcare, legal and financial sectors.

3. ROLE AND RESPONSIBILITIES OF THE CANDIDATE

Where national law generally restricts the availability of certain background checks, and no other exception applies under sector-specific laws, the particular role that a candidate will occupy may nonetheless warrant a check if it is proportionate. To that extent, a check may be justified where it is reasonable, relevant and necessary.

EXAMPLE 6

In France, employers are not entitled to conduct financial checks on candidates or generally inquire into a candidate’s financial position. However, if the very specific nature of the role means that a check is reasonable, relevant and necessary, an inquiry into the candidate’s financial situation may be justified. Such exceptions may include asset management and financial roles in the banking industry.



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Conclusion

When an organization wishes to extend its background-screening program to other countries, it is crucial to take into account all applicable laws when determining what types of pre-employment background checks to carry out on job candidates. Processing a candidate's personal information unlawfully could result in monetary penalties and, in some cases, criminal sanctions.

Clearly, this is an area where organizations can't afford to make mistakes – the risks are simply too great. While this report aims to shed light on the factors for consideration when implementing a screening program in another country, the situation will always remain inherently complex. This is especially true in the cases of hiring middle-career professionals and senior executives from or based in foreign countries.

Tailoring a global background-screening program does not mean creating 196+ different programs, but, instead, understanding the base business requirements, and understanding how those requirements translate under each applicable national law.

Your screening provider should be able to provide clear guidance on the legislative and regulatory landscape across multiple jurisdictions and help tailor your program to these different jurisdictions. They should also be able to advise which available methods—from technology-driven record checks to in-depth investigations—are appropriate for the jurisdiction, the job candidate and the position in question.

About Bishops Services Inc.

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