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PRE-EMPLOYMENT CHECKS GUIDANCE FOR ORGANISATIONS

Guide

December 2020

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Guide

Pre-employment checks: guidance for organisations

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1 Overview

Recruiting talented individuals who are a good fit for the role is becoming an increasingly important consideration for many organisations, regardless of their size or sector. To improve retention, and reduce turnover, organisations need to avoid employing an unsuitable individual at the outset. This will have an overall effect of reducing the time, effort and costs the organisation will have to focus on either recruiting their replacement in the future or repairing any damage caused to the organisation by the individual, whether internally by lowering morale or externally through detrimentally impacting the reputation of the business.

To recruit the most suitable employee, organisations should carry out appropriate and proportionate pre-employment checks to determine the suitability of the candidate. As traditional recruitment practices continue to evolve, partly driven by the development of technology, organisations need to ensure they follow pre-employment checking procedures that are both legal and ethical.

This guide highlights the key checks that most organisations will carry out during their recruitment process, while explaining the risks and practical considerations that need to be taken into account when offering employment. The following pre-employment checks are explored in detail:

- **right-to-work checks** – the global movement of job-seekers has created an obligation on organisations to ensure they are not employing those who do not have permission to work in the UK, or in the particular role they are employed to undertake
- **criminal record checks** – to comply with legal obligations, and to ensure the safeguarding of vulnerable members of society, organisations may be required to request records to determine whether ex-offenders are suitable for particular employment
- **medical checks** – with an increasing focus on the inclusivity and diversity of recruitment processes, organisations need to tread carefully when asking questions relating to health and medical information
- **reference checks** – organisations are not usually under any legal obligation to obtain an employment reference, and there is no automatic right to receive a reference from a previous or current employer (except in certain sectors). However, it is common to request at least one reference and, as employers are under a duty of care to provide references that are accurate and not misleading, it is essential that they handle both the provision and receiving of references carefully
- **online and social media checks** – the increasing availability of professional, and personal, information online creates an additional source of information that is easily accessible by organisations when determining the overall suitability of an individual, but care must be taken to handle and use this information in the right way.

Pre-employment checks have to be carried out in accordance with the six data protection principles, as set out within the Data Protection Act 2018. Data protection legislation requires organisations to adhere to the following best practice principles:

- all personal data must be processed fairly, lawfully and transparently.
- personal data must be obtained only for specific, explicit and lawful purposes and must not be processed in any manner incompatible with the purposes for which it was collected.

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- Personal data must be adequate, relevant and not excessive in relation to the original purpose for which it was processed.
- personal data must be accurate, kept up to date and every reasonable step taken to ensure that any inaccurate data is erased or rectified without delay.
- personal data must not be kept for any longer than is necessary for the purpose for which it was collected.
- personal data must be processed in a manner that ensures appropriate security, using technical or organisation measures. These measures should include protection against unauthorised or unlawful processing and against accidental loss, destruction or damage.

Additionally, the data controller (the organisation carrying out the pre-employment checks) must be able to demonstrate accountability, that is, they can prove they take responsibility for their actions with regards to personal data.

There is more information relating to the handling of personal data under the Data Protection Act 2018 on the CIPD Knowledge Hub (www.cipd.co.uk/knowledge/fundamentals/emp-law/data-protection)

2 The purpose of pre-employment checks

Carrying out pre-employment checks, or ‘vetting’ a candidate, is an important part of the recruitment process whereby organisations consider whether the candidate is eligible for the job role.

With the selection of candidates focusing on their suitability for the job role, many organisations carry out pre-employment checks to safeguard their business from any negative impact caused by the recruitment of the individual. Vetting is a key part of due diligence carried out by HR to ensure the candidate will not bring the company into disrepute, or cause difficulties with any colleagues, customers or suppliers. There are also legal requirements placed on organisations to carry out certain pre-employment checks, for example checking whether candidates have a criminal record that prevents them from being employed in particular roles.

Standard pre-employment due diligence will usually require organisations to undertake the following checks:

- right to work in the UK
- criminal record certificates, where appropriate (as discussed in the ‘[Criminal record check](#)’ section)
- medical and health-related questionnaires
- validity of professional qualifications
- obtaining references from current or previous employers.

As candidates continue to embrace technology to create an online profile, more organisations are using online and social media checks during their vetting process, including reviewing professional sites such as LinkedIn®. There are risks associated with carrying out such checks and organisations need to ensure they are not falling foul of laws which are equally applicable to information received offline and that which is accessible on the internet. This is explored in more detail in the ‘[Online and social media checks](#)’ section.

The risks organisations will wish to guard themselves against by vetting will vary across different sectors, and between organisations. For example:

- in the retail sector, employee theft can occur and organisations will want to limit the risk of selecting a dishonest applicant.
- NHS Employers publishes NHS Employment Check Standards (www.nhsemployers.org/your-workforce/recruit/employment-checks), which specify the checks that have to be carried out before employing staff in NHS positions across England. A failure to meet these standards could result in risks to the health and safety of service users, and have an impact on the organisation's regulatory compliance.
- the Code of Practice on the *Security screening of individuals employed in a security environment* (BS7858) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417085/BS7858.pdf) applies standards for security screening of staff, including the requirement to carry out financial checks.

The specific checks an organisation requires may include reviewing an individual's background in areas other than employment, including, for example, identity, driving licence, address and credit checks. The type of role, sector and organisation will help to determine which specific checks are beneficial; for example, a credit check is likely to be necessary to determine suitability for a management role within a charity, but deemed unnecessary for a teaching role in the education sector. It's important to ensure any checks are proportionate to the role being recruited for.

Case study

As an example, throughout this guide we will use a case study based on a fictional organisation, IHR Construction Ltd. This company is a regional building firm offering a wide range of construction works, including maintenance, developments and adaptations. The company also offers construction contractors to provide specialist services to clients.

Because of an increase in building demand within the region, the organisation's HR team is looking to carry out a recruitment campaign to expand their employee numbers in different areas of the organisation.

Based on past experience, the HR team wishes to carry out full due diligence, including pre-employment checks, to avoid picking unsuitable candidates. This has previously led to costly customer complaints and a number of employees leaving shortly after their employment commenced.

The decision whether to recruit a particular candidate should be focused on finding the most suitable person for the job, taking into account all the available evidence, including that found during vetting. Negative factors that may reflect on the candidate's suitability could include:

- theft
- assault
- fraud
- failure to observe safety requirements
- bankruptcy proceedings.

Details of specific disciplinary offences may also provide reasons for the organisation to consider the candidate is unsuitable. For example, an organisation within the construction sector may consider a candidate to be unsuitable if there are previous incidents of:

- fighting,
- having a mobile phone on site when expressly prohibited by health and safety rules,
- failing a drugs or alcohol test,
- misuse of access cards.

Depending on the role in question, the particular factors that establish suitability may be more subjective or subtle. For example, when looking to hire a senior employee, organisations will often wish to employ a candidate who shares the organisation's values and can demonstrate they are capable of strategic thinking and strong leadership. However, while cultural fit is a valid consideration it's vital that organisations remain mindful of anti-discrimination law.

Preventing false information

The behaviour of candidates when submitting a CV or job application is regularly reviewed by recruitment and labour bodies, with a survey (https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/9to6v88v41/CV%20Lies%20170531.pdf) by YouGov revealing that 10% of respondents had lied on their CV. Inaccurate information can be provided to organisations in many areas on candidate documentation through, for example, overinflating experience, increasing the number of qualifications achieved or providing false details for references (as in the recent case of *Francis-McGann v West Atlantic UK Limited* ET case no 1303361/2017 (<https://hr-inform.co.uk/case-law/francis-mcgann-v-west-atlantic-uk-ltd-employment-references>)), where the employee used a fictional Star Wars character as a referee).

Organisations will be keen to receive true and accurate information so they can carry out a proper assessment of the candidate's suitability. Whilst some candidates may think a 'white lie' is acceptable, there is the potential that this could have a greater impact on their future employment than they think. For example, embellishing training courses that the candidate has undertaken may not seem a serious falsity, but could lead to the organisation deciding not to repeat a crucial training session because they believe this has been completed previously. The impact of this minor embellishment on the organisation, and others, may be significant and it also reflects negatively on the character of the candidate.

To help prevent receiving false information, organisations can require candidates to sign a formal declaration in their application as a deterrent. An example declaration could read:

'I confirm that the above information is complete and correct and that any untrue or misleading information will give my employer the right to terminate any employment offered. I understand that any offer of employment is subject to the Company being satisfied with the results of a series of relevant checks, including references, eligibility to work in the UK, criminal convictions, probationary period and a medical report (in line with the operation of the Equality Act 2010).'

Organisations can access the CIFAS Staff Fraud Database (www.cifas.org.uk/services/internal-fraud-database) to report incidents of staff fraud. Once reported, prospective employers can access the database to check candidates have no reported cases of carrying out fraud in previous organisations.

Key points

- Recruitment decisions should be based on all available information that is received during the recruitment process.
- Any negative information relied on when making a decision should be supported by factual evidence, not based on subjective impressions or opinions.
- The focus should be on the suitability of the individual to carry out the particular role.
- Organisations should design their due diligence process to avoid specific risks to their business.

3 Right-to-work checks

Legislation

The key piece of legislation covering illegal working and right-to-work checks is the Immigration, Asylum and Nationality Act 2006 (the 2006 Act). This Act applies to any employment that started on or after 29 February 2008.

This Act was amended by the more recent Immigration Act 2016 (the 2016 Act).

For employment that began between 27 January 1997 and 28 February 2008, the previous statutory regime under the Asylum and Immigration Act 1996 continues to apply.

Organisations are placed under a legal duty to prevent illegal working by carrying out right-to-work checks to ensure prospective employees can legally work in the UK. While failing to carry out document checks is not an offence in itself, organisations can be subjected to civil and criminal penalties for employing illegal workers.

Section 15 of the 2006 Act defines illegal workers as adults, those aged over 16, who are subject to immigration control and do not have permission to carry out the work in question because they:

- have not been granted leave to enter or remain in the UK, or
- their leave to enter or remain in the UK is invalid, no longer applies or prevents them from carrying out the particular employment.

A **civil penalty** of a maximum £20,000 fine per illegal worker can be imposed on an organisation for employing an illegal worker. The fines are intended to be proportionate to the organisation's failure to comply with the legal duty and will be calculated on a sliding scale.

Following a referral to an immigration officer, a Civil Penalty Notice will be issued. From the date of issue, there is a 28-day period for the organisation to pay the penalty fine, object against the fine or lodge an appeal. Objections will require the organisation to provide evidence that they have carried out the required document checks or that the penalty imposed is too high because of a failure to take into account mitigating criteria, such as prior reporting of the suspected illegal worker or active co-operation with the Home Office.

Criminal penalties of an unlimited fine or a maximum of five years' imprisonment will be imposed where an organisation employs an individual and they have 'reasonable cause to believe' the individual does not have the right to work in the UK, at any time.

From December 2016, immigration officers have had the power to serve **Illegal Working Closure Notices**. These notices prohibit access to business premises and work being performed on these premises for a period of up to 48 hours.

A Closure Notice will be issued where there are reasonable grounds to believe the organisation is employing an illegal worker and the organisation has previously been:

- convicted of employing an illegal worker
- issued a fine in the previous three years for employing an illegal worker
- issued a fine at any time for employing an illegal worker that has not been paid.

The immigration officer can make a subsequent application for an **Illegal Working Compliance Order**, which imposes further conditions on the organisation for a period of up to 12 months. These conditions can include providing access to the premises for immigration officers and production of documents that evidence the organisation's compliance with right-to-work checks.

Carrying out pre-employment checks

Organisations will gain a 'statutory excuse' against civil liability where they can evidence they have complied with the duty to carry out pre-employment right-to-work checks, and any required follow-up checks. The initial document checks have to be carried out before employment begins, with the Home Office's Frequently Asked Questions (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/426972/frequently_asked_Qs_illegal_working_civil_penalty_May_final.pdf) confirming that organisations can carry out these checks immediately before employment starts, including on the individual's first day, or a reasonable time before employment starts. Care should be taken, however, to avoid carrying out checks too far in advance of employment because the individual's right to work status could change during this period. Follow up checks are carried out in line with the expiry date contained within List B documents, as explained below.

The Home Office also publishes guidance (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720858/29_06_18_Employer_s_guide_to_right_to_work_checks.pdf) for organisations outlining how to carry out right-to-work checks. This is updated from time to time so it's worth checking for changes.

To gain the statutory excuse, organisations are expected to follow the Home Office's three-step checking process before the period of employment begins, and for any follow up checks.

Three-step checking process

Step one: obtain original right-to-work documents from the prospective employee.

Step two: take all reasonable steps to check the document is genuine, relates to the prospective employee and does not prohibit the particular employment.

For each document, you should check:

- photographs are consistent
- dates of birth are the same
- names are consistent or evidence of a name change is provided
- qualification or professional certificates are current and consistent with other documents
- they are genuine and have not been tampered with
- they relate to the person providing them.

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Step three: copy the document in a format that cannot be altered and keep a secure, dated copy.

The whole of the document needs copying as evidence that right-to-work checks have been carried out, unless the document is a passport or travel document. Where a passport or travel document is provided, a copy should be taken of:

- the front page
- any page containing personal details of the holder, including the photograph and date of birth, and
- any pages containing right-to-work endorsements from the UK Government.

The copy should be in a format that cannot be altered or amended at a later date, for example a scan or photocopy. It is also recommended that the date on which the copy is made is written on the copy. All copies need storing securely on the employee's file, in line with data protection obligations, for the length of their employment and for a further two years after their employment ends.

Acceptable right-to-work documents

The prospective employee is required to produce original right-to-work documents for their prospective employer to check. The documents that are acceptable are set out in the Home Office guidance. For ease these are separated into two lists:

List A documents are available to individuals who have a permanent right to work in the UK. Where organisations receive a List A document, or combination of documents, there is no requirement to carry out follow-up checks and the statutory excuse will apply for the length of the individual's employment. These documents include a passport showing the holder is a British citizen or an EEA national, or a full birth certificate plus an official document providing the individual's National Insurance number.

List B documents are available to individuals who have a temporary or time-limited right to work in the UK. These documents are separated further into two different groups:

- Group 1 documents are time limited and the statutory excuse will apply until the individual's permission to work in the UK expires. Before expiry, organisations are required to carry out a follow-up check to determine whether the individual has a continued right to work in the UK from the date the original document expires.
- Group 2 documents require the organisation to carry out and receive a positive verification notice from the Home Office in advance of employment commencing. Receiving the positive notice will create a statutory excuse for six months, with the organisation required to carry out a follow-up check at the end of six months.

Additionally, the organisation will be required to apply to the Home Office for a positive verification notice where the individual cannot produce acceptable right-to-work documents and they have:

- an outstanding application that was submitted to the Home Office before any previous right to work expired
- a pending appeal against a Home Office decision
- a pending administrative review against a Home Office decision.

Case law example

In *Baker v Abellio London Ltd* (<https://hr-inform.co.uk/case-law/baker-v-abellio-london-ltd-dismissal-failure-to-produce-right-to-work-evidence>), the Employment Appeal Tribunal agreed that a dismissal for a failure to provide right-to-work documents, where the individual had the indefinite right to live in the UK, did not fall within the statutory illegality ground because the employee was not subject to immigration control under the 2006 Act. The EAT also highlighted that there is no legal requirement to obtain documentary evidence of right to work; the law merely provides organisations with an excuse from the civil penalty if these documents are collected. The EAT determined, however, that this could be a 'some other substantial reason' dismissal if the organisation genuinely and reasonably believed that they would be acting illegally if they continued to employ the individual without receiving the documents.

Completion of the checking process

Once the three-step checking process has been carried out and the organisation is satisfied that the documents are authentic, genuine and relate to the particular individual, the statutory excuse against civil liability will arise. This excuse remains applicable even if, at a later date, it is proved that the documents were false where the falsity is not reasonably apparent to an untrained individual carrying out a careful examination without technological aids. The excuse will not apply if it is reasonably apparent that a genuine document does not relate to the particular individual.

Organisations who have employees transferred to them where the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006 apply do not inherit the previous organisation's (the transferor's) statutory excuse against future civil liability. The new organisation (the transferee) will be required to carry out right-to-work checks on their transferred employees, within 60 days of the date of the transfer, to gain the statutory excuse.

Conditional employment offers

Organisations are advised to make all offers of employment conditional on the prospective employee providing satisfactory evidence of their right to work in the UK, and in the particular employment. The organisation should also confirm to the individual that they are entitled to withdraw the employment offer where the prospective employee fails to provide these documents.

Avoiding race discrimination

During the recruitment process, job applicants are protected against discrimination relating to their protected characteristics, including age, disability, religion or belief, pregnancy and maternity etc. Due to the nature of right to work checks, there is a greater risk that organisations could fall foul of race discrimination laws if they treat individuals differently based on their race, or perceived race, when carrying out these checks.

To avoid this risk, organisations are advised to treat all individuals fairly and consistently during the recruitment process. As a minimum, the same documentary requirements and checking process should be applied to all individuals regardless of their actual race or perceived race; avoiding making assumptions about an individual's right to work without having sight of any evidence. The Government issued the *Code of Practice for Employers: Avoiding unlawful discrimination while preventing illegal working* (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/311665/Code_of_practice_on_avoiding_unlawful_discrimination_while_preventing_illegal_working.pdf) in May 2014 to provide advice for organisations on avoiding discrimination while complying with their duty to prevent illegal working.

As well as avoiding the risk of discriminating on the grounds of race, carrying out right-to-work checks on all prospective employees will provide the organisation with the statutory excuse against civil liability for all individuals, in circumstances where the person is an illegal worker.

Case study

IHR Construction has been following a recruitment process to hire two general labourers. Following the interview stage, their HR team have selected Richard Thompson and Carlos Perez as their successful candidates. Based on the name stated in Richard's application form, HR assume that he is a British citizen and make him an unconditional offer of employment. As Carlos has disclosed he is not a British citizen during his interview, HR make him a conditional offer of employment requiring him to provide evidence of his right to work in the UK.

The difference in treatment of Richard and Carlos is classed as race discrimination because Carlos is being subjected to less favourable treatment based on his race as a non-British citizen, that is, the requirement to provide right-to-work documents.

Furthermore, IHR could be subject to a penalty fine if a Civil Penalty Notice is issued against the organisation because they will not have the statutory excuse in relation to Richard. IHR cannot produce evidence that they complied with the pre-employment right-to-work checks and they could be facing a costly fine.

Individual illegal working offence

The 2016 Act introduced a new illegal working offence, which applies to an individual who is:

- carrying out work when they are disqualified from working by their immigration status, and
- they know or have reasonable cause to believe they are disqualified from working.

Individuals who are convicted can be subjected to a fine or imprisonment. Their earnings made during employment can also be seized under the Proceeds of Crime Act 2002.

Key points

- Organisations should carry out document checks to ensure prospective employees have the right to work in the UK.
- The organisation can be criminally liable if they employ an illegal worker and, at any stage, they reasonably believe the individual does not have the right to work.
- Carrying out the three-step checking process will provide the organisation with a statutory excuse against civil liability.
- Offering employment that is conditional on the provision of satisfactory evidence of the right to work will allow the organisation to withdraw the job offer if acceptable documents are not provided.
- The candidate should be given a reasonable amount of time to produce their documents, ensuring checks can be carried out before employment commences.
- To avoid the risk of discrimination, right-to-work checks should be applied consistently to all prospective employees, regardless of their race.
- Any candidate who provides false documents, or genuine documents relating to another individual, should be reported to the Home Office.

4 Criminal record checks

Legislation

The Rehabilitation of Offenders Act 1974 is the main piece of legislation regulating the disclosure of criminal records (ROA 1974).

The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the Exceptions Order) lists roles under which employers can require disclosure of spent convictions.

The Exceptions Order was amended by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 from 29 May 2013 (the Exceptions Order 2013).

Organisations can apply for a criminal record check through the Disclosure and Barring Service (www.gov.uk/government/organisations/disclosure-and-barring-service) (DBS) in England and Wales, Disclosure Scotland (www.mygov.scot/organisations/disclosure-scotland/), or AccessNI (www.nidirect.gov.uk/campaigns/accessni-criminal-record-checks) for those in Northern Ireland. Many organisations consider that having information about a candidate's criminal record will help them make a more informed recruitment decision, whether or not they are required by law to carry out such a check, while some sectors and job roles, such as roles working with vulnerable adults within the care sector, will require organisations to carry out a criminal record check before employment can commence.

In an attempt to balance the need for disclosure and the rehabilitation of individuals with criminal records, the ROA 1974 sets out the general rule that individuals who have been convicted of a criminal offence are considered to be rehabilitated if they do not re-offend within a specific period. As a result, their original conviction will be deemed to be 'spent' and will not be disclosed, unless an exception applies.

The criminal conviction remains 'unspent' during the specific rehabilitation period and should be disclosed where information on criminal records is requested. The length of the rehabilitation period depends on the type of sentence imposed and, since March 2014, any custodial sentences that are over four years will never be deemed 'spent'.

Individuals who fail to disclose any information regarding a spent conviction, when there is no requirement to do so (see below), are protected against detrimental treatment or dismissal for this failure.

Disclosure of spent convictions

The Exceptions Order displaces the general rule and states that, in certain roles, organisations can require individuals to disclose convictions that have become spent. These roles fall within five main categories:

- professional roles, for example solicitors and accountants
- officers or employees in roles requiring the upholding of the law, for example judges and prison officers
- specified regulated occupations, for example financial services and taxi drivers
- roles requiring working with children, caring for vulnerable adults or providing health services
- roles in which the individual could pose a risk to national security.

Before commencing employment in a role specified in the Exceptions Order, candidates can be asked to disclose any spent convictions, as well as any which are unspent. This is classed as an excepted question and the individual must be informed that they are under an obligation to answer this question. A failure to answer the question, without a valid reason, or to provide truthful information can be treated by the organisation as a reason to withhold an offer of employment or to dismiss.

For these professions, organisations will also be required to carry out a pre-employment criminal record check, as explained below. Whilst a spent conviction will be disclosed by this check, asking the candidate the excepted question within their application or at interview means this information is received much earlier in the recruitment process, and before the offer stage is reached. The organisation will then be in a position to carry out an earlier review of the candidate's suitability and they are also able to assess whether accurate information was provided when the certificate is later received.

Case study

IHR Construction Ltd's long-standing accountant has provided HR with notice of her intention to retire in three months. HR start their recruitment process immediately to ensure there is sufficient time for a proper handover to take place.

The organisation's application form for an accountant asks the applicant to specify whether they have any spent or unspent convictions by ticking either the 'Yes' or 'No' box, with space to write any further information. It also states, in writing, that this is an excepted question and the applicant is obliged to answer the question.

Jane Stevens completes the application form and ticks the 'No' box. Jane performs really well at the interview and HR believe she will be a natural fit for the business. HR make Jane an offer of employment but inform her that this is conditional on the receipt of a satisfactory enhanced DBS certificate.

When the DBS certificate is disclosed to the HR team, it contains details of a spent conviction. Even though the conviction itself does not affect Jane's suitability for the role, HR withdraw the offer of employment because Jane provided false information when answering the excepted question at the initial application stage. As a result, the organisation does not believe Jane is suitable for the role as they need to have full trust in their financial team.

Protected convictions and cautions

Following the Court of Appeal's decision that blanket disclosures of all convictions and cautions in criminal record certificates unlawfully interfered with an individual's right to privacy under Article 8 of the European Convention of Human Rights (in *R (T and others) v Chief Constable of Greater Manchester and others* [2013] EWCA Civ 25 (<https://hr-inform.co.uk/case-law/2013-02/r-on-the-application-of-t-v-chief-constable-of-greater-manchester-criminal-record>)), the Home Office made changes to the criminal record check system in May 2013.

With effect from 29 May 2013, the Exceptions Order 2013 classes certain spent convictions and cautions as 'protected'. These protected convictions and cautions will no longer be included in a criminal record check, and organisations cannot take them into account when offering employment or dismissing an individual.

Protected convictions are those where this is the only conviction the individual has, it does not relate to a 'listed offence', such as a violent or sexual offence, and the conviction resulted in a non-custodial offence, where:

- the individual was aged under 18 at the time of the offence and a period of five and a half years or more has passed, or
- the individual was aged 18 or over at the time of the conviction and a period of 11 years or more has passed.

A protected caution includes any caution that is not related to a 'listed offence', where:

- the individual was aged under 18 at the time of the offence and a period of two years has passed, or
- the individual was aged 18 or over at the time of the conviction and a period of six years or more has passed.

A further change was made on 28 November 2020 by an amendment to the Police Act 1997. Under the new regulation, youth cautions, reprimands and warnings are no longer automatically disclosed on standard and enhanced criminal records check. The multiple conviction rule, which required the automatic disclosure of all convictions where an offender had more than one, was also abolished. The change was in response to the Supreme Court's decision in R (on the application of P) v Secretary of State for the Home Department 2019 UKSC3 which established that both aspects were disproportionate and breached the right to a private life under the European Convention on Human Rights.

Carrying out criminal record checks

Organisations can ask all candidates to voluntarily disclose their criminal record information by including a question on this issue within application forms or as part of an interview. Purely relying on voluntary disclosure, however, is unlikely to result in the organisation being provided with all the necessary information because candidates may fail to disclose all relevant details, or provide false details. Voluntary disclosure will also not be sufficient where the organisation is required to request a standard or enhanced certificate.

Section 184 of the Data Protection Act 2018 prohibits organisations from requiring individuals to disclose their criminal record through a subject access request as a condition of their employment offer, that is, from making an **enforced subject access request**. An organisation will commit a criminal offence if they require job applicants to make this access request and can be subject to a fine. Rather than adopting this process during recruitment, organisations can make use of the criminal record disclosure schemes available to them.

To receive a certificate detailing an individual's criminal record, organisations can carry out checks through the DBS, Disclosure Scotland or AccessNI, depending on the location of the organisation. There are three types of disclosure certificates that can be applied for, and the type of information to be disclosed is regulated by the Police Act 1997 and the Police Act 1997 (Criminal Records) Regulations 2002. Those organisations that have previously relied on voluntary disclosure can ask an applicant to apply for a basic certificate to receive accurate details of any unspent convictions or cautions, with greater disclosure available for particular roles through standard and enhanced criminal record checks. Fees are charged per check, unless the application is submitted by a volunteer, who will only have to pay an administration charge.

Under the Data Protection Act 2018, organisations can process criminal record data for

the legitimate purpose of performing employment law obligations or rights. Before this processing takes place, an organisation is required to have a policy in place that explains how their processing of criminal record data will be carried out in line with data protection legislation, specifically outlining the internal policies on retention and erasure of data. A privacy notice for job applicants can also be provided to individuals during the recruitment process to communicate the organisation's compliance systems when carrying out these checks, and explain how data will be used.

Three levels of criminal record certificates

Basic certificate: costing £25, this certificate will contain details of unspent criminal convictions and cautions, or a statement that the individual has no such convictions or cautions on their record.

These certificates are available to all applicants, regardless of which role they are applying for. To receive a basic certificate, an individual can apply using the online application service through DBS or Disclosure Scotland, so long as they are aged over 16 at the time of the application. Employers can also engage a Responsible Organisation who is registered with the DBS to apply online for a basic criminal check on behalf of the employer. A list of Responsible Organisations (www.gov.uk/guidance/responsible-organisations) is provided on the Government's website and updated regularly.

Standard certificate: will contain details of all spent and unspent criminal convictions, cautions, police reprimands and warnings. This check is available for employment in certain specific professions, occupations and licences listed in the Exceptions Order and currently costs £26.

Enhanced certificate: contains all the details included in a standard certificate plus any information held by the police which is reasonably believed to be relevant, taking into account the purpose for which the certificate is obtained. This check is available for those carrying out activities or work in regulated activity with children or vulnerable adults, and for licences and judicial appointments listed in the Police Act 1997.

For certain job roles listed in the Police Act, including those carrying out a regulated activity, an **enhanced certificate with list check** can be applied for. For this certificate, the DBS will carry out a check of the statutory barring lists and disclose information on whether the individual is barred from working with children and/or vulnerable adults. An enhanced certificate currently costs £44.

In a similar process, Disclosure Scotland offers the **Protecting Vulnerable Groups (PVG)** scheme, which can be joined by those undertaking 'regulated work' with children or protected adults. There are three types of PVG disclosure records available that will all reveal whether the individual is named on a barred list or is under consideration for listing, that is, information has been received that means they may not be suitable for that type of work and an assessment is being undertaken to decide whether to list them.

Standard and enhanced certificates – the process

To receive a standard or enhanced criminal record check certificate, an individual aged over 16 must apply to the DBS or Disclosure Scotland. This application has to be countersigned or electronically submitted by an individual within a registered body, confirming that the position is eligible for the requested criminal record check. Registered bodies are organisations that carry out more than 99 DBS checks annually and are eligible to ask exempted questions, for example, the role is one where the individual can be asked to reveal their whole criminal

record history, including spent convictions. Those organisations can register with the DBS to countersign applications, paying the registration fee of £300. Once registered, the organisation is required to comply with the Code of Practice (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/474742/Code_of_Practice_for_Disclosure_and_Barring_Service_Nov_15.pdf) published by the DBS.

Alternatively, for organisations who carry out fewer DBS checks or have not registered with the DBS, they can use an umbrella body. The umbrella body is a registered body that countersigns applications on behalf of non-registered organisations. A list of organisations (www.gov.uk/find-dbs-umbrella-body) that are umbrella bodies is maintained on the Home Office website.

Since 2013, once the DBS or Disclosure Scotland have processed the application, a criminal record certificate will be issued to the individual applicant. The applicant can then review the certificate and has an opportunity to challenge any information disclosed by the certificate. Once the individual is satisfied with the disclosure, they should then provide this to the recruiting organisation.

Case law example

In *R (on the application of AR) v Chief Constable of Greater Manchester Police and another* (www.supremecourt.uk/cases/docs/uksc-2016-0144-judgment.pdf), an applicant for an enhanced criminal record check objected to the inclusion of a previous acquittal for rape. The chief officer of police reasonably believed the acquittal to be relevant, especially considering that the purpose for which the certificate was sought was to enter teaching roles. The applicant applied for judicial review, arguing there was a breach of his Article 8 right to privacy under the European Convention of Human Rights. The Supreme Court judged his right to privacy was not breached because the disclosure was proportionate, based on the potential employment, and there had been a balancing act carried out between the need for the disclosure and the effect on the individual's future employment prospects.

Within their judgment, the Supreme Court raised concerns regarding the lack of guidance in this area, especially for potential employers. As a result of this lack of clarity, this is an area that may be subject to future legal challenges, further guidance or updates. Organisations can stay up to date with any developments by checking the HR-inform employment law resources on employing ex-offenders (https://hr-inform.co.uk/employment_law/ex-offenders).

Receiving a criminal record certificate

In most cases where a criminal record check is required, an offer of employment will be made conditional on the receipt of a satisfactory DBS check. If the individual does not provide the organisation with the certificate, they will be entitled to withdraw the conditional offer. Where the certificate is provided, the recipient organisation will be required to consider whether the information contained in the certificate is satisfactory, that is, whether the individual remains suitable for the particular role. There will be a number of factors to take into account, including:

- the particular role applied for
- the relevance of the conviction to the role
- the seriousness of the offence
- the period of time that has elapsed since the offence
- any change in circumstances
- any explanation or context provided by the individual.

The organisation's policy on recruiting ex-offenders will usually outline how recruiting managers or HR are expected to undertake this consideration. The organisation may also find it useful to arrange a discussion with the individual to provide an opportunity to present an explanation or to have an input into the certificate review.

Case study

In their continued search for a replacement accountant, IHR Construction have carried out a further interview with Brian Harris. Brian meets the essential criteria of the role and appears to be a good fit for the company, therefore HR make him a conditional offer of employment subject to receiving a satisfactory DBS certificate.

After completing his DBS application, Brian sends his standard certificate to the HR department. The certificate reveals that Brian received a police caution for assault occasioning actual bodily harm five years ago. HR must decide whether this certificate is satisfactory, in line with the company's internal policy on recruiting ex-offenders. HR consider that the caution is not particularly relevant to the accountant role as it does not relate to dishonesty or fraud, it occurred several years ago and Brian has not re-offended since.

HR are concerned with the seriousness of the caution, however, because they understand violence must have occurred. They wish to know whether there is an explanation, so Brian is invited to a meeting to discuss the certificate. At the meeting, Brian reveals that he was cautioned following an altercation at a social event during his accountancy studies; however, he has not been in any trouble since because he is focusing on his career and has stayed away from a troublesome group of friends. After considering all of the circumstances, HR decide that Brian remains suitable for the role and deem the certificate satisfactory. The condition of employment has been met and arrangements are put in place for Brian's induction.

Employing ex-offenders

Although an organisation's policy on recruiting ex-offenders will usually set out practical aspects, such as carrying out criminal record checks and reviewing certificates, organisations may wish to go further than this and review whether their business practices support the employment of those with criminal convictions. Good practice in this area includes:

- avoiding automatic exclusions of those with criminal records from recruitment
- providing training on software and skills, including soft skills, that may have lapsed over time
- only sharing details of the criminal record with those who need to know and in line with data protection obligation; making sure the individual knows the extent of confidentiality in this matter
- providing a positive 'buddy' system to integrate the individual back into working life
- reviewing the working environment to assess the risks, and determining whether any additional support is necessary.

More information on this area can be found in the HR-inform 'how to' guide on hiring ex-offenders (<https://hr-inform.co.uk/how-to-guide/how-to-support-recruitment-of-ex-offenders>).

DBS Update Service

DBS certificates only contain correct information as at the date of issue; for example, if a conviction is imposed one week after the DBS certificate is issued, this will not be disclosed to the organisation. As a result, organisations are advised to avoid the risk of relying on an out-of-date certificate by requesting candidates to provide a new one at the recruitment stage.

In sectors where up-to-date DBS certificates will be requested by each recruiting organisation, an applicant can avoid having to apply for a new certificate each time they move roles by subscribing to the DBS Update Service, and paying the yearly fee, which is currently £13. Once subscribed, the online service allows the recruiting organisation to carry out a free online check on the prospective employee, with their consent, to determine whether there is any updated information to take into account since their previous DBS certificate was issued.

The Update Service avoids the risk that organisations are relying on information contained in a previous DBS check by allowing criminal record and barring information in relation to that individual to be frequently updated.

The DBS has produced a code of practice (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/474742/Code_of_Practice_for_Disclosure_and_Barring_Service_Nov_15.pdf) for registered bodies and recipients of information disclosed by the Update Service on how information should be handled once disclosed.

Individuals who are members of the PVG scheme available through Disclosure Scotland will also receive a scheme certificate that contains accurate information up to the date this is issued. While membership of the scheme continues, Disclosure Scotland will continually check the member's suitability to carry out regulated work. Should the service be provided with information that leads to a consideration for listing, they will inform the organisation currently employing the individual. Any subsequent decision to bar the individual will also be informed to the organisation, and any others listed on their record.

Key points

- Spent convictions do not have to be disclosed, unless an exception applies.
- Criminal record checks may be required before employment can commence in particular roles and sectors.
- There are three levels of criminal record checks, with standard and enhanced certificates providing information on spent and unspent convictions.
- Once a criminal record certificate is received, the recipient organisation will have to review any information disclosed to determine whether the prospective employee remains suitable for the particular role.
- The DBS Update Service can be used where the candidate subscribes to the service and provides consent for the recruiting organisation to carry out an up-to-date online criminal record check.
- A criminal record check will not disclose information on protected convictions or cautions; therefore, organisations should examine all information and evidence available to determine the suitability of the candidate.
- Organisations should have an internal policy on the recruitment of ex-offenders, which can be made available to applicants during the recruitment process.

5 Medical checks

Since the Equality Act 2010 was introduced (the EqA), section 60(1) imposes a general rule that organisations cannot ask candidates health questions before they are offered employment. This will apply to all recruitment processes, whether internal or external, at pre-offer stage or before a candidate is included in a pool of unsuccessful candidates to be offered jobs in the future. The general prohibition covers any type of health questions whether asked in person, for example at interview, in writing on a recruitment form or made to a third party such as an ex-employer. The prohibition is aimed at preventing organisations from making sifting decisions based on the physical and mental health or disability of candidates, rather than focusing on their suitability for the job role itself.

When making a job offer, this can be made conditional on the individual having a satisfactory medical check. At this stage, health questions and/or a health assessment can take place. These will usually focus on determining whether the individual has a health condition which means the organisation needs to discuss any suitable reasonable adjustments, as any disclosure of a condition that is classed as a disability under the EqA will trigger the legal duty to make reasonable adjustments to reduce or remove disadvantages faced by the disabled worker. Employers should use questionnaires related to health with all new recruits rather than singling out people because ill health or disability is suspected, to avoid potential claims of less favourable treatment or discrimination.

The **General Data Protection Regulation** categorises health and medical data as ‘special category data’. Before processing this data, organisations will need to identify a lawful basis for processing a special category condition; generally for recruitment purposes this will be the condition that the individual (the data subject) has provided their explicit consent to the processing.

Exceptions

There is an exception to the general rule under the EqA where health-related questions can be asked before an offer of employment is made.

Section 60(6) of the EqA allows organisations to ask health- and medical-related questions to:

- establish if the individual requires reasonable adjustments during an assessment process to remove any disadvantages they face. Alternatively, the organisation may choose to ask the candidate themselves whether they require adjustments to avoid asking health questions
- determine if the candidate can carry out a function that is intrinsic to the role
- carry out diversity monitoring of applicants applying for the role
- take positive action in relation to disabled people
- assess whether the individual meets an occupational requirement to have a particular disability
- meet an occupational requirement imposed by the organisation, for example, where a charity for the blind wishes to employ an individual with a visual impairment to lead a new project.

The Government Equalities Office has produced guidance (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85013/employment-health-questions.pdf) for organisations on when health or disability questions can be asked in these specific circumstances.

Enforcement

A job-seeker cannot make a claim to an employment tribunal on the sole basis that they have been asked a health- or disability-related question in prohibited circumstances. There is no stand-alone claim or remedial award available.

Individuals can, however, bring a claim for unlawful disability discrimination where they were not offered a job and this failure can be linked to the organisation asking a prohibited health question, or the applicant's answer to such a question. In these circumstances, the organisation will be placed under the reverse burden of proof to prove that the decision was reached on non-discriminatory grounds. This may be through, for example, evidencing that the health question was asked to ascertain whether reasonable adjustments were necessary, proving that the answer to this question was not disclosed to those making the selection decision, and demonstrating that the reason for the application being unsuccessful was because the candidate did not meet the role requirements, such as having insufficient experience. Where a tribunal finds the reason for not offering the role was discriminatory, either because the individual was disabled or they were perceived to be disabled, the organisation will face a costly compensation award.

The Equality and Human Rights Commission is also responsible for ensuring organisations comply with section 60 of the EqA. The Commission have enforcement powers to investigate and serve compliance notices against organisations, where they believe it is proportionate to do so. This will usually be where organisations are reported for persistent non-compliance.

Case study

Finn Murray is completing an application form for a role as a roofer with IHR Construction Ltd. The form contains the following two questions:

- How many absences has the applicant had in the past 12 months that were related to ill health?
- Does the applicant have any health conditions that affect their ability to climb up and down ladders?

Finn has a physical health condition that causes him severe back pain and has resulted in a number of health-related absences from work. As a result, Finn doesn't answer any of these questions and leaves them blank. Finn is later informed that his application was unsuccessful and he believes this is discriminatory.

The organisation is prohibited from asking the first question because it relates to health and has been asked before an offer of employment has been made, but does not fall within one of the excepted circumstances. If HR decided not to progress Finn's application because of his failure to answer this question, they could face a disability discrimination claim.

The business is entitled to ask the second question because the requirement to climb up and down a ladder is likely to be an intrinsic part of the roofer role. This question, therefore, falls within one of the exceptions and can be asked before an offer of employment is made.

Key points

- Organisations are generally prohibited from asking health questions before making offers of employment.
- The prohibition covers all health questions, whether asked verbally, in writing, or to third parties such as previous employers.
- There are exceptions available within the legislation allowing health-related questions to be asked before offering employment, including to establish whether candidates require reasonable adjustments during assessment processes.
- Organisations can face claims for disability discrimination if they ask health questions where there is no applicable exception; they may be required to prove any subsequent recruitment decisions were based on non-discriminatory factors.
- The Equality and Human Rights Commission have the power to investigate and serve notices on non-compliant organisations.

6 Obtaining employment references

Organisations are, generally, under no legal obligation to obtain an employment reference for a prospective employee. It is, however, common practice for organisations to request at least one reference from the individual's current or most recent employer, with many asking for at least two referees to be provided on application forms. If the prospective employee cannot provide two employment references, it is good practice to accept an educational reference or a character reference to avoid placing the individual at a disadvantage.

It is good practice for organisations to request, and obtain, references after an offer of employment has been made to the individual rather than before. Job offers can be made conditional on receipt of a satisfactory reference, allowing organisations to withdraw the employment offer if the references are not deemed satisfactory.

Carrying out reference checks

Step one: request details of referees from the prospective employee, usually through an application form.

Step two: once a conditional offer of employment is made, send a reference request to the referee.

Step three: on receipt of the reference, consider whether this contains information that reflects on the prospective employee's suitability for the role.

Providing a reference

There is no automatic right to receive a reference from a previous or current employer, except for roles in organisations covered by the Financial Conduct Authority and the Prudential Regulation Authority.

The House of Lords (<https://hr-inform.co.uk/case-law/spring-v-guardian-assurance-plc-and-others-references-duty-of-care>) has stated that **employers have 'at least a moral obligation' to provide references**. Care should be taken to refuse providing references where:

- there is an express or implied contractual right to receive a reference
- a refusal could lead to adverse inferences being drawn about the employee concerned
- a refusal could be seen as discriminatory, for example, as an act of victimisation after a complaint of discrimination has been raised.

When providing an employment reference, the organisation is under a duty of care (<https://hr-inform.co.uk/case-law/bartholomew-v-london-borough-of-hackney-references-duty-of-care>) to provide one that is true, accurate and fair, and must not give a misleading impression, including by omission. Case law has also established the following:

- References must give all, not part, of the history of the person: it is unfair to give partial facts if those result in the offer being withdrawn, for example where this causes the recipient organisation to assume the information is missing because it is negative, so the offer is withdrawn.
- References must not conceal facts from the organisation offering employment since they could sue for misleading information if this causes some detriment.
- References should give facts, not opinions, such as start and end dates, job title, salary and sickness absence (excluding any absence relating to disability or parental leave).

References may also provide additional factual information covering areas such as the employee's performance, integrity, relevant personal information and reasons for leaving. Factual evidence must always be available to support any such statements in a reference. A template reference, available on HR-inform, has been included within Appendix 1 to demonstrate one method for organisations providing a reference to a prospective employer.

To avoid breaching the duty of care and the risk of providing misleading information, many organisations have adopted a policy whereby they provide a brief reference that merely states the former employee's job title, start and end dates of employment, and duties of the role. Where this is the form of reference adopted, organisations should make it clear in the reference that it is their policy to only provide this information. This will ensure the limited reference does not raise any concerns with the prospective employer.

In some cases, the requesting organisation may send a letter outlining the information they wish to receive to assess the suitability of the candidate, or provide a list of questions to be answered. It will be for the organisation providing the reference to determine whether they can provide all the requested information and, if so, to ensure this remains true, accurate, fair and not misleading.

Receiving a reference

The organisation who receives the reference has to determine whether this is satisfactory. Although this is a subjective determination, organisations are advised to remain focused on whether the reference confirms the prospective employee is suitable for the particular employment role, or if it renders them unsuitable, taking into account all other information collated during the recruitment process.

The recruiting organisation may wish to follow up on the information disclosed by having an informal conversation with the author of the reference, or the previous employer. Asking the previous employer specific questions can disclose additional information; however, caution should be taken in these circumstances as to how any additional information is interpreted. In most cases, the conversation will take place between two strangers and prejudicial information could be provided. After an informal conversation, good practice suggests:

- Any information provided should not be used as a substitute for the prospective employer making their own judgement about employment.
- The information should be weighed against all evidence received during the recruitment process, making a balanced decision that takes into account all available information.
- Consideration as to the context and circumstances of the information provided, especially where this is historical, should be carried out as circumstances can change. It is usually appropriate to involve the individual themselves in this consideration.

Where the reference is not satisfactory, the organisation can withdraw a job offer that has been made conditional on the receipt of a satisfactory reference. If an unconditional employment offer was made and accepted by the applicant, a withdrawal of the offer will breach the existing contract of employment and the organisation will have to provide the employee with notice of termination of their employment.

Data protection

Under current data protection legislation, organisations should ask prospective employees for their specific consent to obtain employment references from their prospective employees. It is best practice to use a specific consent form for the prospective employee to sign and date, which also informs them of their right to withdraw their consent at any time.

The Data Protection Act 2018 provides that confidential employment references are exempt from the right for individuals (data subjects) to access personal data processed by organisations through a subject access request. This covers requests for access made to the organisation that provided the reference, and the organisation that received the reference. Even though there is no requirement to disclose, organisations may still choose to provide the employment reference to the requesting individual and can ask the other party for their consent to do so. A disclosure can take place without consent where third party information is not revealed, for example the identity of the author of the reference is redacted, or where it is reasonable to disclose the reference without their consent. As such, there is no method of ensuring the individual concerned cannot view the information contained in the reference and, should a claim be brought in the employment tribunal where this document is relevant, the reference will be caught under the duty of disclosure during litigation. Therefore, it is important organisations are aware of what information should, and shouldn't, be included in the reference as the exemption within the legislation will not prevent all disclosures.

Key points

- There is no obligation on organisations to request a reference or to receive an employment reference, except for certain financial roles.
- Organisations that write employment references are under a duty to ensure these are true, accurate, fair and do not give a misleading impression, including by omission of information.
- Any contractual policy to provide a basic reference should be disclosed to the recruiting organisation within the reference to prevent adverse inferences being drawn.
- References should be requested once an offer of employment has been made to the candidate, with this offer being made conditional on the receipt of a satisfactory reference.
- The recruiting organisation should assess whether the information contained in an employment reference means the candidate is not suitable for the role.
- Any information contained in a reference that causes the recruiting organisation to withdraw the employment offer should be disclosed to the candidate.

7 Online and social media checks

There has been a marked increase in the proportion of organisations making use of social media to research candidates' backgrounds. Numerous surveys have scrutinised the inclusion of social media checks in organisations' recruitment processes, and a review by YouGov (https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/wkikbhg88s/InternalResults_170316_business_decision_makers.pdf) suggests that nearly one in five organisations have decided not to employ a candidate because of the content contained on social media profiles, with large organisations more likely to make this decision. Using a search engine or social media in this way is not necessarily unlawful. However, it is important to balance the organisation's interests with those of individual applicants, and organisations should be cautious about the way in which they approach such searches.

Carrying out online checks

Organisations should approach online checks with caution, taking into account the following:

- information contained online may not always be accurate, up to date or provide context
- care needs to be taken to confirm that the information sourced online relates to the particular individual, especially where the individual has a common name or there are numerous online references
- organisations are advised to allow candidates to respond to any information they have found online, in the same way as they provide the opportunity to respond to any other information sourced during the recruitment process
- candidates need to be informed, at an early stage, that online searches may be conducted by the organisation. a privacy notice for job applicants can be used to inform the individual of the purpose of processing this data and the legal basis for this processing
- online searches should not be a 'fishing expedition'; instead, searches need to be aimed at assessing whether the candidate is suitable for the job or not
- the laws relating to discrimination apply equally to checks carried out online.

Case study

To meet the increased administrative tasks caused by the additional members of staff, IHR Construction Ltd is looking for a new office assistant. After interviewing two candidates, HR have decided Sarah Houghton is more suitable for the role.

Before making an offer to Sarah, the HR team carry out an online search as part of their pre-employment checks; the candidates were informed this could take place at the interview stage. During this search, HR access a public social media profile that has photographs and comments revealing that Sarah has previously undergone gender reassignment.

As a result of finding this information, HR decide they won't offer Sarah employment because they believe she may feel uncomfortable in the work environment. This is an act of direct discrimination because the decision has been made based on the candidate's protected characteristic of gender reassignment, which has been disclosed through the online search.

The use of social media

Use of social media is developing rapidly and it is currently difficult to lay down hard-and-fast rules for organisations. People who upload material to open-access social media platforms may reasonably anticipate that this source may be searched by potential employers.

Carrying out vetting of candidates using their social media will need to be conducted in compliance with data protection legislation; for example, there should be a legal basis for checking social media profiles and any data collected must be proportionate, necessary and relevant to the performance of the particular job role. For example, organisations in the not-for-profit sector may wish to review the social media profile of leadership candidates to ensure the content on these profiles does not create a reputational risk for the organisation should the candidate be employed in a public-facing role.

LinkedIn® is a social media platform mainly used for professional purposes, while other forms of social media, including for example Facebook and Twitter, may have mixed public and private use. All individuals have an overarching right to privacy under the European Convention of Human Rights that will cover the content posted on privately used social media sites; however, this right is not unlimited and can be subject to necessary restrictions. Organisations will need to consider whether they have struck the right balance between their legitimate business interest, that is, making an informed recruitment decision, and the candidate's 'right to privacy' if they carry out a search on a private social media profile, rather than those profiles that are solely for professional use.

Organisations who use social media to review a candidate's suitability for the role need to avoid using this as a fishing or trawling exercise, that is, they need to avoid simply looking for anything on social media which means the candidate is unsuitable. Instead, before this search takes place, organisations can determine what aspects they need to confirm using social media in order to make their selection decision. This will differ depending on the particular organisation and the role they are hiring for. Some key areas which organisations may use social media for include:

- confirming the individual's online job resume follows their application form
- matching qualifications to the individual's education history
- determining whether there is a reputational risk of hiring the candidate for high-profile roles.

Where information is sourced through social media which raises concerns about the candidate's suitability, it is good practice to discuss this with the candidate. The candidate may provide context that has not been considered by the organisation, for example, an online job resume may not match an application form because a previous employer had a social media policy prohibiting staff from linking their personal accounts to the business. A full consideration of this information, alongside any context, further details and information sourced elsewhere during the recruitment process, will help organisations make an informed recruitment decision.

Key points

- Care should be taken to ensure any information accessed online is accurate and up to date.
- The same legal protections, including data protection and anti-discrimination, apply equally to online searches as they do to offline recruitment checks.
- Organisations should limit online and social media checks to information made accessible online for professional purposes, not for personal use.
- Online data should be accessed to source specific data that is necessary to assess the candidate's suitability for the particular job role, not as a fishing or trawling exercise.
- Candidates should be informed that online searches may be carried out, in advance of any search, and they should be provided with the opportunity to respond to any information sourced online.

8 Using lists of high-risk candidates

Organisations may have heard of ‘blacklisting’ candidates and believe that this relates to a list of individuals who are deemed to be unsuitable for the organisation. ‘Blacklisting’ has a statutory basis, however, and it is prohibited.

What is a blacklist?

The BEIS defines ‘blacklisting’ as the *‘systematic compilation of information on individual trade unionists [used by] employers and recruiters to discriminate against those individuals because of their trade union membership or because of their involvement in trade union activity’*.

Under the Employment Relations Act 1999 (Blacklists) Regulations 2010, it is prohibited to:

- compile, supply, sell or use a blacklist
- refuse employment to an applicant, dismiss an employee or subject an employee to a detriment for a reason related to a blacklist
- refuse to provide employment agency services to an individual for a reason related to a blacklist.

The blacklisting regulations will be breached if the motive for the list is to discriminate based on trade union membership or activities. If an individual is refused employment and they can show that their name was contained on a blacklist, the tribunal will conclude there has been a breach of the regulations unless the organisation can show there was another reason for refusing employment.

Case study

IHR Construction Ltd have had bad experiences in the past with staff who were members of a trade union, and they have defended a number of employment tribunals that were brought by union-represented ex-employees.

At the selection stage of the process to recruit four new groundworkers, there is a pool of five candidates who they have determined are suitable for the role based on their previous experience and skills. Before deciding who will be successful, the HR team wish to find out whether any of the candidates are members of a trade union.

HR have previously been made aware that there is a list available within the construction sector naming construction workers who are members of recognised trade unions. HR approach another local construction organisation and ask for this list to be sent to them. The list, once received, shows that two of the pool of five candidates are members of a trade union. As a result, IHR make offers of employment to the remaining three candidates and inform the two union members that they have been unsuccessful.

The list of construction workers will be classed as a ‘blacklist’ as the intention behind the list is to discriminate against individuals based on their trade union membership. If the candidates who were not offered a job can show their names were on the blacklist, they are likely to make a successful claim at tribunal unless IHR can evidence another reason why they were unsuccessful.

Using non-prohibited lists

Blacklisting has been a particular problem in the construction industry, prompting the creation of the Construction Workers Compensation Scheme (https://www.designingbuildings.co.uk/wiki/Construction_Workers_Compensation_Scheme) (which closed in June 2016) and the issuance of government guidance (<https://www.gov.uk/government/publications/blacklisting-of-trade-unionists-guidance>).

The Scottish Affairs Select Committee has strongly criticised blacklisting of workers in the construction sector (<https://publications.parliament.uk/pa/cm201415/cmselect/cmsscotaf/272/27202.htm>), despite this practice having been made illegal in 2010. CIPD members can see more information in our law Q&A on blacklisting of trade union members (<https://www.cipd.co.uk/knowledge/fundamentals/relations/employees/trade-unions-questions>).

Refusing to employ or blacklisting union members gives rise to legal claims for defamation, conspiracy and breach of data protection laws (<https://ico.org.uk/your-data-matters/construction-blacklist/>).

It is unlawful for organisations to:

- refuse employment to, or to blacklist, union members
- refuse employment or sack individuals as a result of appearing on a blacklist
- refuse to provide a service on the basis of an individual appearing on a blacklist

Individuals or unions can pursue compensation or solicit action against those who compile, distribute or use blacklists.

If a list of unsuitable applicants has been made for a purpose other than to discriminate against union members, or those who participate in trade union activity, the list will not be classed as a blacklist. This was the case in *Maunders v Proteus Well Services Ltd and others* ET case no 1810036/2010 (<https://hr-inform.co.uk/case-law/maunders-v-proteus-well-services-ltd-and-others-trade-union-blacklist>), where the reason for the inclusion on a security database was because of the claimant's aggressive behaviour towards security staff, and not his trade union activities. It may be difficult for an organisation to provide the motive behind such a list, however.

There are wider questions for organisations to consider when determining whether it is legitimate for them to put the names of former employees onto a list that can be accessed by other organisations. It would, for example, be highly problematic to include people's names on such a list simply because they are regarded as 'troublemakers'. Concerns may also arise in relation to data protection, for example:

- the requirement to tell individuals how information about them is used, and to allow them access to that information
- the right for individuals to request removal or deletion where there is no compelling reason to keep processing the data
- the difficulty of reliably verifying that a candidate's identity is the same as one on a list
- the difficulty in ensuring that information is accurate and that reasons for inclusion are verified
- personal data should not be processed for longer than is necessary, and events that occurred previously are less likely to be relevant to a candidate's suitability later on.

There may, however, be cases where the production of a list is legitimate, for example, where the organisation owes a duty of care to vulnerable people. In healthcare sectors, individual organisations might wish to share information about employees where there

is evidence of the kind of misbehaviour that would put patient safety at risk because the duty of care to patients is the overwhelming duty.¹

In such cases, the duty to share information might not be limited to the organisation itself, but might apply to wider organisations such as the NHS, or local authority, or client, whose reputation is liable to be affected by recruitment practices in the sector and is in a position to exercise authority or offer advice to organisations.

A critical element for the organisation to consider is whether there is evidence of actual wrongdoing. Where this evidence is already in the public domain, it may be legitimate for organisations to draw this to the attention of the prospective employer. It will not be fair to the individual concerned, however, to make information based solely on suspicion, or hearsay, or derogatory opinions widely available.

In the health, education, care and other sectors where vulnerable people are at risk, employers have a duty of care to protect them. Evidence of inappropriate behaviour that places these people at risk should be recorded. If the organisation is approached from a prospective employer, it would be a breach of their duty of care to other vulnerable people to not disclose this evidence to the prospective employer.

In summary, producing a list of people who are not judged suitable for further employment in a specific sector will not necessarily be unlawful, but should only be considered where there is a legitimate purpose for producing the list. This is an area of law where future developments and regulation can be anticipated.

Key points

- It is unlawful to produce or use lists of individuals in order to discriminate against them because of their trade union membership or involvement in trade union activity; organisations should not undertake this.
- The production of lists that are created with the purpose of safeguarding the welfare of vulnerable groups is unlikely to be unlawful. However, organisations should take care and have regard to data protection legislation and discrimination laws.
- Where potentially damaging information about individuals is shared with other organisations, it is good practice to make clear who has been responsible for sharing the information and can be approached for further details if necessary.
- Individuals should be made aware if their name has been added to the list, and given the opportunity to challenge it.
- In any case, where an individual is refused employment because their name is on a list, that information should be shared with them.
- It will be unfair to individuals to make information based solely on suspicion, hearsay or opinion widely available.

¹ See *Guidance for Employers on Sharing Information about a Healthcare Worker where a Risk to Public or Patient Safety has been Identified* at www.nhsemployers.org/-/media/Employers/Documents/SiteCollectionDocuments/Guidance-on-sharing-information-on-healthcare-workers-July-2013.pdf

9 Outsourcing and employment agencies

CIPD research (www.cipd.co.uk/Images/resourcing-talent-planning_2017_tcm18-23747.pdf) suggests that an increasing number of organisations are outsourcing elements of their recruitment activity, for example to recruitment agencies. Recruitment agencies fulfil an essential role in the UK's flexible labour market and the recruitment sector has worked hard in recent years to maintain its reputation and promote good employment practices. The work of regulatory bodies, such as the Employment Agency Standards Inspectorate (www.gov.uk/government/publications/employment-agency-standards-eas-inspectorate-enforcement-policy-statement), are also helping to improve the practices of agencies.

Particular issues in relation to pre-employment checks can arise, not only for organisations that use employment agencies, but more generally in managing the supply chain. Some companies offer an employee vetting service independent of labour supply, whereby they are engaged at the offer stage and the candidate supplies personal details to be checked by the third party on behalf of the organisation. HR and recruitment consultants may also act as intermediaries, for example by supplying vetting specialists to sit alongside organisations' payroll teams.

Baseline checks might include establishing the right to work in the UK, identity and reference checks to validate skills and experiences. Employment agencies may also offer specialist help in conducting the detailed checks required in specific sectors, such as finance or IT.

Although organisations may believe they can avoid the need to engage in time-consuming statutory and other checks by using the services of employment agencies, they will not protect themselves against possible reputational damage by distancing themselves from the recruitment process. Organisations should have contracts in place with employment agencies to guarantee data security and quality.

Organisations that use employment agencies or other intermediaries to help recruit workers should:

- choose a reputable agency that takes steps to protect its own reputation (for example, through membership of professional bodies, such as the Recruitment and Employment Confederation (www.rec.uk.com/), and adherence to good practice guidelines in recruitment of job-seekers)
- agree what specific pre-employment checks are necessary and appropriate, ensuring these are non-discriminatory and relevant to the role
- set out which checks are necessary in the supply agreement
- be clear about respective responsibilities; duplication in checks is preferable to leaving gaps
- be clear about the employment status of staff supplied by the agency and ascertain whether they are employed by the organisation
- ensure checks are carried out in relation to both permanent and temporary staff
- be aware of any secondary suppliers and establish which agency takes responsibility for the vetting process as a whole.

Labour-only subcontractors

The Ethical Trading Initiative (ETI) (www.ethicaltrade.org/) is an alliance of companies, trade unions and voluntary organisations that aims to improve the lives of poor and vulnerable workers across the globe who make or grow consumer goods. The ETI has published a base code that draws on ILO conventions and contains nine principles, of which the eighth requires that *'regular employment is provided'*. Clause 8.2 of the code says that employment regulations *'shall not be avoided through the use of labour-only contracting [or] subcontracting'*.

Because labour-only workers are self-employed, contractors pay no National Insurance contributions, sick pay or holiday pay. The Construction Industry Scheme (CIS) (www.gov.uk/what-is-the-construction-industry-scheme) is a set of special rules for handling payments for construction work that contractors make to subcontractors and applies to all construction work carried out in the UK. HMRC also publishes an Employment Status Indicator (ESI) tool (www.gov.uk/guidance/check-employment-status-for-tax) that enables an organisation to check the employment status of an individual or group of workers, clarifying whether they are an employee or self-employed for tax, VAT and National Insurance purposes.

Labour-only subcontractors and their workers will generally be self-employed, in which case the issue of pre-employment vetting will not strictly arise. But organisations will want to:

- be confident that labour-only subcontractors are reputable
- incorporate in commercial contracts a requirement for subcontractors to follow the guidance on good practice in this guide
- ensure that labour-only subcontractors meet their legal obligations, including where appropriate under the Construction Industry Scheme.

10 Conclusion

The exact pre-employment process to be followed will differ between organisations, and will depend on the nature of the vacant role. However, due diligence in carrying out proper and accurate checks will result in the following benefits:

- more informed recruitment decisions
- reducing the potential risk to the organisation of recruiting unsuitable candidates, particularly for those working in sensitive roles
- compliance with legal and regulatory obligations
- preventing discriminatory decision-making
- improved recruitment and retention rates
- lower recruitment costs
- greater morale and reduced disruption across the workforce.

Organisations will also need to consider the practical implications of carrying out pre-employment checks and ensure the recruitment process provides the opportunity for further assessment of suitability once these are carried out. Making offers of employment conditional upon the carrying out of satisfactory checks will allow organisations to take appropriate action, should the individual be deemed unsuitable for the role following additional disclosure of relevant information.

Further information on the recruitment process and pre-employment checks can be found in the employment law resources available online on the [HR-inform website](#). Resources available to subscribers include our 'How to' guides detailing best practice for organisations, including our guide on handling employment references, and downloadable and customisable documents relating to pre-employment checks, including:

- template letters – including those to offer or withdraw a conditional offer of employment, to request an employment reference, or to provide a reference
- organisational policies – outlining internal recruitment and selection procedures, and a policy on providing a reference for current and ex-employees
- management forms – covering consent from candidates to verify qualifications, to request a reference or to carry out a medical examination.

HR-inform subscribers and CIPD members can obtain free 24-hour advice on all aspects of employment law and specific situations they face in their recruitment processes, including carrying out pre-employment checks and making offers of employment. Employment law advice is available by calling the helpline on 03330 431 217.

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Letter providing a reference for a former employee

Private and Confidential

[Insert name]

[Insert address]

[Insert date]

Dear *[insert name]*,

Strictly confidential – employment reference

I refer to your reference request of *[insert date]* concerning our former employee *[insert name of employee]*. I am pleased to confirm the following information.

[Insert name] was employed by *[insert Company name]* in the capacity of *[insert job title]* from *[insert date employment commenced]* to *[insert date employment ended]*. *[Delete as appropriate – His/Her]* employment ended by reason of *[insert reason eg mutual termination/redundancy/reorganisation/dismissal]*.

[Insert name]'s duties included the following responsibilities *[insert details of job duties]*.

[Insert any other comments – these must be accurate, fair and provide an objective and balanced view of the employee's performance during their employment].

Yours sincerely,

[Insert name]

[Insert job title]

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Checklist for pre-employment checks after conditional job offer

Requirement		
<input type="checkbox"/>	Proof of the right to work in the UK	<p>This is a requirement for all roles.</p> <p>If an employer is found to have employed someone who is not eligible to work in the UK they can be fined £20,000 per worker and can be sent to jail for up to five years. An employer can also receive an unlimited fine if they employ someone they know is working illegally.</p> <p>You must see the worker's original documents and you must check that the documents are valid with the worker present.</p> <p>You must make and keep copies of the documents and record the date you made the check.</p>
<input type="checkbox"/>	Satisfactory references	<p>There is no legal requirement to provide references but most businesses will provide factual information (e.g. dates of employment). It is lawful to provide a less favourable reference as long as the content is based purely on fact.</p>
<input type="checkbox"/>	Criminal record checks (DBS)	<p>Unless there's specific need to check someone's criminal record for a job, it's against the law for employers to refuse to employ them because of spent convictions. However, it is reasonable to make a conditional offer on the basis of a satisfactory DBS check in many instances, for example for people who are working with children or vulnerable adults.</p>
<input type="checkbox"/>	Medical questionnaire/examination	<p>Under the Equality Act 2010 it is illegal to ask prospective employees any questions about their health at the interview stage unless a specific exemption applies, for example, to identify whether reasonable adjustments are needed for an interview assessment.</p> <p>You can ask health-related questions after making a conditional offer of employment. If, however, you then fail to make 'reasonable adjustments' to accommodate a disability (as defined by the Equality Act), or you withdraw the offer after learning of a medical condition unless it specifically prohibits that person from doing the job in question, you could face a discrimination claim.</p> <p>Job offers can be made condition on a satisfactory medical check and/or health assessment. This will focus on whether any reasonable adjustments are needed for the employee to carry out the role.</p>
<input type="checkbox"/>	Checking/gaining certain qualifications	<p>This is important in many roles and certificates are now very easy to counterfeit.</p> <p>If the candidate is unable to provide you with their original certificate or you have any concerns that the certificate provided is not the original/genuine you can contact the relevant examination board or go through a reputable organisation who manages qualification verification to check this. To do this you will need to obtain permission from the individual and there may be a charge associated.</p>



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Issued: December 2020 Reference: 7758 © CIPD