



Introduction

Background checks have become a critical part of the recruitment process in many countries. Employers with a global presence often seek to harmonize recruitment policies across different jurisdictions but addressing the various restrictions and regulations around background checks can be challenging.

A Global Guide to Background Checks provides an overview of both the legal and practical issues relating to background checks in 50 key countries. Our largest guide to date, it covers a wide range of background checks, from criminal record checks through to drug and alcohol testing, and identifies the applicable conditions, restrictions and sanctions in each country. It also incorporates new 'at-a-glance' traffic lights for each region, highlighting whether background checks are standard practice, unusual or prohibited in a particular jurisdiction.

We hope you find **A Global Guide to Background Checks** useful. It has been made possible with the input from lawyers across Mayer Brown's global office network and partner law firms in other jurisdictions.

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Firm Practice Leaders, Employment & Benefits Group Mayer Brown

User guide



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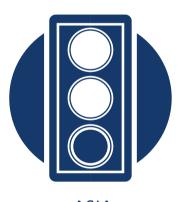


Contents

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ASIA BACKGROUND CHECKS TRAFFIC LIGHTS



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				SELECT A COUNTRY/JURISDICTION													
ASIA BACKGROUND CHECKS TRAFFIC LIGHTS	📕 Australia	🚪 Hong Kong	 Indonesia	🍨 Japan	Macau	腈 Malaysia	🧮 Myanmar	New Zealand	🗖 Pakistan	PRC	M Philippines	🚪 Singapore	🙎 South Korea	Taiwan	Thailand	🚪 Vietnam	
Education and past employment records																	
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Credit/financial checks																	
Health checks/medical screening																	
Social media/internet search																	
Fingerprinting																	
Handwriting																	
Union membership																	
Political views																	
Drug and alcohol testing																	

Background check is prohibited and/or permitted only in extremely limited circumstances

Background check is unusual and/or permitted only in limited circumstances









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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes. Australian employers commonly carry out background checks on prospective employees. The acquisition and use of a job applicant's personal information is subject to federal privacy legislation, federal/state/territory anti-discrimination laws and legislation dealing with "spent convictions."

2. What types of background checks do employers typically carry out on applicants?

Employer background checks typically cover issues such as a job applicant's educational qualifications, previous employment, health/medical condition, criminal record and even past online/social media activity.











BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Any of the above types of background checks could be undertaken, subject to a range of statutory conditions/restrictions (please see question 6). In relation to some categories of information, the job applicant's consent would be required.

Background checks on union membership and political views, while theoretically permissible, could not be used to inform hiring decisions as this would breach applicable federal/state/territory anti-discrimination legislation.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Some of the above types of checks have very little relevance in the Australian context (e.g., fingerprinting is only likely to arise in the context of a police background check).

Background checks that would involve requesting information from prospective employees about the following types of matters would breach specific prohibitions in federal anti-discrimination legislation:

- gender, sexual identity, marital status, etc.;
- age or age group; or
- disability including physical or mental disease, disorder or illness (unless relevant to the individual's ability to perform the inherent requirements of the position).
- 5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All of the background checks listed above.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Background checks in all of the above areas would involve the collection of "personal information" relating to a job applicant within the meaning of the Privacy Act 1988 (Cth) (the "Privacy Act"). An employer's collection and use of that information is subject to the restrictions imposed by the Privacy Act, which include the following:

• job applicants must be informed how their personal information will be collected from them and from third parties (e.g., referees);













- personal information must only be collected where it is relevant to a person's application for a particular position;
- a job applicant's consent must be obtained for the collection of "sensitive information", e.g., information relating to union membership, criminal record, health/genetic information, racial/ethnic origin, political opinions/affiliations, religious beliefs, sexual preferences; and
- job applicants must be allowed access to their personal information upon request.

Further specific points should be noted in relation to the following background checks:

Criminal records

An employer can run a criminal record check on a job applicant through the official authorities (e.g., Australian Federal Police), or a private organization offering criminal record check services, if the individual consents. An employer's use of the information that comes back from a criminal record check is subject to spent convictions legislation (please see question 7).

Health checks/medical screening

Job applicants cannot be compelled to answer questions about their health or to undergo a medical examination as part of the recruitment process. One exception is legislation in the state of Queensland which allows employers to require a prospective employee to disclose a pre-existing injury or medical condition (Workers' Compensation and Rehabilitation Act 2003 (Qld)). Pursuant to the Workers' Compensation and Rehabilitation Act 2003 (Qld), a "pre-existing injury or medical condition" for an employment process means an injury or medical condition existing during the period of the employment process that a person suspects, or ought reasonably to suspect, would be aggravated by performing the duties which are the subject of the employment. Please see question 7 on the permitted use of any health information that a job applicant may voluntarily provide.

Social media/internet searches

Searches of a job applicant's publicly accessible social media presence, to identify any negative personal activities or behavior, are common. However, employers may not insist that a prospective employee provide his or her social network password in the recruitment process.

Union membership and political views

Employers should (and generally do) avoid asking prospective employees about their union affiliation or political views, as a decision not to employ an applicant on this basis would breach a range of federal, state and/or territory anti-discrimination laws.

Drug and alcohol testing

Drug and alcohol testing tends to be more of an issue in the employment (rather than pre-employment) context (please see question 11).

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Generally, employers should only use information obtained through background checks to inform hiring decisions where the information is relevant to the particular role; and even then, care must be taken to ensure that the information is not used in a discriminatory manner.











For example, if a medical check is conducted to establish whether someone has a higher propensity to make workers' compensation claims (and a decision not to employ is made on that basis), this could provide evidence of unlawful discrimination on the grounds of disability or impairment.

In relation to criminal record checks, employers must not take into account spent convictions in assessing the character and fitness of a job applicant (and applicants are not required to disclose any spent convictions they may have). What constitutes a "spent conviction" varies between the applicable federal, state and territory statutes. Generally, convictions that are more than ten years old (or five years old for young offenders) – and carry low maximum jail terms (e.g., six months in New South Wales, Tasmania, Australian Capital Territory and Northern Territory; 30 months in Queensland and federally) – will be considered spent convictions. Several exclusions apply. For example, persons convicted of violence/sex offenses must disclose these when seeking employment involving children; and in certain occupations where there are licensing or other regulatory requirements, employers may ask about prior criminal activity and take that information into account in deciding whether to employ a person (e.g., teaching, nursing, policing, corrections, financial and legal services). Discrimination on the basis of an irrelevant criminal record is also unlawful under federal, Tasmanian and Northern Territory legislation.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

The main difference is that a background check carried out after an offer has been made would remove any concern that information obtained through a background check (e.g., in relation to union membership or a medical condition) had resulted in a discriminatory decision against hiring the job applicant.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Unusually, privacy protections for employees are reduced once they commence employment due to the "employee records" exemption from the federal Privacy Act. Private sector employers covered by this legislation are not subject to its limits on the collection, use, storage and disclosure of any record of personal information relating to an employee's employment (e.g., information relating to terms and conditions of employment, engagement, discipline, termination, performance, conduct, union membership, etc.). In practice, however, employers generally implement processes to ensure the sensitive and confidential handling of such information.

Different arrangements for background checks during employment apply as follows:













- Health checks/medicals: At common law, employers may reasonably direct an employee to undergo a medical examination to determine the employee's fitness for duties. This issue is also often regulated by the terms of an applicable industrial award or enterprise agreement.
- Social media/internet activity: Employers may monitor employees' usage of work internet and email systems, subject to the possible application of the Privacy Act (because such information falls outside of the legislation's employee records exemption) and monitoring/surveillance laws that apply federally and in several states.
- Drug and alcohol testing: As with health checks, employers have the ability to insist that employees submit to drug and alcohol testing, through a combination of common law rules and award/agreement provisions.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The federal Department of Immigration and Border Protection provides the following information for employers:

- Australian citizens, Australian permanent residents and New Zealand citizens are legal workers and have unlimited permission to work in Australia. A single check confirming this at the time of employment is all that is required.
- Employers who believe their worker is a foreign national must carry out further checks to confirm that person has a visa with permission to work.
- The preferred method of checking visa details is to register for [the Department's] free, online system, Visa Entitlement Verification Online (VEVO). Alternatively, employers can ask their workers to send their visa details directly to them using VEVO Email.
- Employers do not need to register but will receive an email directly from a visa holder with his or her VEVO results. This can be used as evidence that the employer took steps to confirm permission to work.
- Employers found to have employed, referred or contracted a foreign national who does not have permission to work or is in breach of his or her visa conditions (an illegal worker) face penalties of up to AUD\$3,060 to AUD\$102,000 per illegal worker.

Source: https://www.immi.gov.au/About/Pages/managing-australias-borders/employing-legal-workers.aspx

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes, in relation to criminal record checks and spent convictions legislation (please see question 7).











OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

The handling of any personal information by a third party will be subject to the requirements and restrictions in the federal Privacy Act (please see question 6).

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Yes. Such information must be handled in accordance with the Privacy Act (please see guestion 6).

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Privacy Act 1988 (Cth)
- Crimes Act 1914 (Cth), Part VIIC
- Criminal Records Act 1991 (NSW)
- Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)
- Spent Convictions Act 2011 (SA)
- Annulled Convictions Act 2003 (Tas)
- Spent Convictions Act 1988 (WA)
- Spent Convictions Act 2000 (ACT)
- Criminal Records (Spent Convictions) Act 1992 (NT)
- Disability Discrimination Act 1992 (Cth)
- Fair Work Act 2009 (Cth), Part 3-1
- Legislation in each state and territory prohibiting discrimination on grounds of physical/mental disability or impairment and on the grounds of industrial activity, union membership, political belief/activity (e.g., Equal Opportunity Act 1995 (Vic))













19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

- Privacy Act breaches: civil penalties of up to AUD\$340,000 for individuals and AUD\$1.7 million for organizations.
- Anti-discrimination law breaches: injunctions, compensation and/or (under the Fair Work Act 2009 (Cth)) civil penalties of up to AUD\$10,200 for individuals and AUD\$51,000 for corporations.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes. Generally it is quite common in Hong Kong for employers to carry out background checks on applicants. While there is no specific legislation in Hong Kong governing the conduct of background checks, an employer should be mindful of the potential implications under the discrimination and personal data privacy legislation in Hong Kong when it conducts such checks. An employer will also require the consent of the applicant for most checks.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Hong Kong are education and past employment records checks and checks to ensure that the applicants are "lawfully employable" in Hong Kong (in short, this means that the applicant has the right to work in Hong Kong). Some employers also make an employment offer conditional upon satisfactory pre-employment health checks.











BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing
- 3. Which of the above background checks are employers permitted to carry out on applicants?

An employer can conduct all of the above checks, subject to the applicant's consent and other conditions set out in question 5.

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above background checks are expressly prohibited, subject to the conditions set out in questions 5 and 6.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All of the above checks are subject to compliance with the Personal Data (Privacy) Ordinance ("PDPO") and should not be conducted in a way that amounts to unlawful discrimination.

Prior to conducting background checks, employers are required to inform the applicants of the purpose of the collection (e.g., by way of a personal information collection statement). An employer should take all reasonable steps to ensure that the personal data collected is accurate, protected against unauthorized access, and is not kept longer than is necessary. The applicant should have the opportunity to access his or her personal data and make corrections where applicable.

Information obtained from background checks often contains personal details of an applicant, which may include the protected attributes under the four anti-discrimination ordinances and the Employment Ordinance. These protected attributes are sex, marital status, pregnancy, disability, family status, race (which includes the color, descent or national or ethnic origin of an individual) and union membership. Employers should be cautious not to treat an applicant less favorably on the ground of any of these protected attributes.

It is good practice for an employer to obtain written consent from an applicant before any reference and background check is conducted.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Apart from the compliance with the PDPO stated in the response to question 5, there are specific points to note for particular checks:











Criminal records

Third party criminal record checks are not available from police or courts, and there may be practical difficulties in obtaining this information. Certificates of No Criminal Conviction are issued to individuals for visa/emigration purposes only. While third parties (e.g., an employer) are not able to carry out criminal background checks on an individual, an employer may make it a condition of employment that the applicant demonstrates to the employer's satisfaction that he or she has no criminal history. This may involve the applicant lodging a Data Access Request ("DAR") under the PDPO with the Police Department to obtain any personal data held by the police in relation to the applicant's criminal history. Alternatively, the applicant may nominate the employer to be the "Relevant Person" for the purposes of lodging the DAR. Upon receipt of the DAR, the Police Department will be obliged to provide the documents containing the applicant's personal data which have been requested in the DAR (which may include any charge sheets, etc.). There will be a fee payable to obtain the documents under the DAR.

There are generally no restrictions on asking an individual about his or her criminal history. However, in relation to "spent" convictions, an employee is not obliged to disclose the existence of spent convictions, either voluntarily or in response to a direct question. There are exceptions to disclosure of spent convictions, such as for a licensed position in the financial services sector or in relation to becoming a lawyer, accountant or insurance broker. A conviction is "spent" where the individual's sentence did not exceed three months or the imposed fine did not exceed HK\$10,000, he or she did not commit any other offense in Hong Kong and a period of three years has elapsed without that individual being again convicted in Hong Kong of an offense. It is not a lawful or proper ground to dismiss or exclude an individual from any office, profession, occupation or employment or to prejudice him or her in any way in that office, profession, occupation or employment based on a spent conviction or a failure to disclose that spent conviction.

Health checks/medical screening

Employers should comply with their obligations under the Disability Discrimination Ordinance ("DDO") and the PDPO in relation to the collection, handling and use of personal data. An employer should <u>not</u> obtain full details of the applicant's medical information (as not all of it may be relevant to the assessment of whether the applicant can perform the job for which he or she is applying). An employer should only seek to obtain such information as is necessary to determine whether the applicant can perform the inherent requirements of the position (and if the applicant is unable to perform those inherent requirements, what accommodation the employer can make for the applicant to assist him or her to perform the inherent requirements of the position).

Social media/internet checks

The collection of personal data by these checks must be necessary for, or directly related to, the purpose of employment. Information from social media sites often contains personal details which may reveal an applicant's protected attribute(s). Employers must be cautious not to treat an applicant less favorably on the ground of any of these protected attributes.

Fingerprinting

Fingerprints may fall within the definition of personal data under the PDPO. An employer must exercise caution when it takes fingerprinting from an applicant. It should also comply with the requirements under the PDPO. In this regard, the Office of the Privacy Commissioner for Personal Data (the "PCO") (the statutory body which oversees the enforcement of the PDPO) in Hong Kong has issued guidelines on the collection of fingerprint data to assist data users to comply with the PDPO. Taking fingerprints is uncommon in Hong Kong unless it is for a specific occupational requirement.

Union membership and political record checks

It is important to ensure that employment decisions are not influenced by the information collected by these checks, as it could potentially amount to unlawful discrimination. Under Part IVA of the Employment Ordinance, it is unlawful to discriminate against an individual on the ground of his or her trade union membership. It is also an offense to offer employment conditional upon the offeree not being a member of a trade union.











Drug and alcohol testing

An employer which requires job applicants to undergo drug and alcohol testing should be aware of the potential risks under DDO. While there is no case in Hong Kong that has determined that addiction to a drug amounts to a disability for the purposes of the DDO, there is a possibility that a Hong Kong court may come to this finding. An employer should only collect personal data that is directly related to assessing the suitability of the employee necessary for the specific position, and be careful not to discriminate on the basis of an applicant's disability.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Information arising from background checks should be used for the purpose of screening the individual for a particular role, or the purposes communicated to the applicant when his or her personal data was first collected. Care must be taken not to use such information in a discriminatory way.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Yes. Litigation searches are permitted. It is possible to conduct an electronic search (through a third party service provider) on the claims and proceedings in which a person is involved (whether as a plaintiff or a defendant).

9. Are there restrictions or limitations on the scope of these checks?

The litigation search would only reveal that a person is a party to litigation but not the substantive details of the litigation.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No. An employer will be subject to the same requirements and restrictions under the PDPO and the anti-discrimination law whether it conducts a background check before or after the decision to make an offer of employment is made. Where information relating to an applicant's protected attribute(s) is collected before the decision to make an offer of employment, an employer should ensure that the information is not used in a discriminatory way and should put in place internal policies to prevent the irrelevant materials from making their way through and influencing the decision maker. There is, however, no legislation which stops an employer from requiring an applicant to undergo a health check before a job offer is made. The key issue is the basis on which the decision to make (or not to make) a job offer is made.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment and an employer will be subject to the same requirements and restrictions under the PDPO and the anti-discrimination law.













ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Under s17J(1) of the Immigration Ordinance (the "IO"), an employer must not enter into a contract of employment to employ any other person unless the employer first inspects:

- (a) the identity card of the other person, and, where the identity card held by the other person is not a permanent identity card as defined in the Registration of Persons Ordinance, then a valid travel document held by the person;
- (b) the official passport held by such other person;
- (c) if such other person is a claimant who has substantiated a claim under Part VIIC of the Immigration Ordinance, the Director of Immigration's permission; or
- (d) where the person is not the holder of an identity card and is not required to be registered under the Registration of Persons Ordinance:
 - a valid travel document;
 - a Vietnamese refugee card;
 - a certificate of exemption; or
 - any other approved document,

held by the person.

If an employer fails to inspect the identity document of a prospective employee as required under such section of the IO, the employer is guilty of an offense upon conviction and liable for a fine of up to HK\$150,000 and imprisonment for up to one year.

The IO also contains requirements on the keeping of records by an employer in relation to the identity card/travel document numbers of its employees.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes. For example, applicants who are regulated by certain financial regulatory bodies (e.g., the Securities and Futures Commission) are likely to be subject to more stringent vetting.











OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

If an employer opts to outsource the carrying out of background checks to a third party vendor, it must inform the applicants of this fact before conducting these checks. It must also take reasonable steps by contractual or other means to ensure that the third party vendor complies with the data protection principles under the PDPO.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) ensure the accuracy of the data collected and that it is not to be kept for longer than necessary;
- (b) not use the information collected for a purpose other than the purpose communicated to the applicant when his or her data was first collected (i.e., for pre-employment screening);
- (c) take all practicable steps to ensure the applicant's personal data is protected against unauthorized or accidental access, processing, erasure, loss or other use; and
- (d) before using the data, an employer should explicitly provide the applicant with details of his or her rights to request access to and corrections of that personal data, as well as the name and address of the person to whom such requests should be made.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Employment Ordinance (Cap 57)
- Rehabilitation of Offenders Ordinance (Cap 297)
- Disability Discrimination Ordinance (Cap 487)
- Sex Discrimination Ordinance (Cap 480)
- Family Status Discrimination Ordinance (Cap 527)
- Race Discrimination Ordinance (Cap 602)
- Personal Data (Privacy) Ordinance (Cap 486)













- Immigration Ordinance (Cap 115)
- Hong Kong Bill of Rights Ordinance (Cap 383)
- The Fit and Proper Guidelines issued by the Securities and Futures Commission

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If an employer fails to comply with the data protection principles under the PDPO, the PCO may issue an enforcement notice requiring the employer to take remedial steps for its contravening acts or omissions. If the employer contravenes this enforcement notice, it commits an offense and is liable on first conviction to a fine of up to HK\$50,000 (and a daily fine of HK\$1,000 for a continuing offense) and to imprisonment for two years.

An applicant/employee may make a complaint to the Equal Opportunities Commission (the "EOC") if he or she feels aggrieved by the employer's decision on allegedly discriminatory grounds. The EOC has the power to conduct a formal investigation and to issue an enforcement notice. The individual may make a claim against the employer by way of civil proceedings. Depending on the nature of the breach, it may amount to an offense.

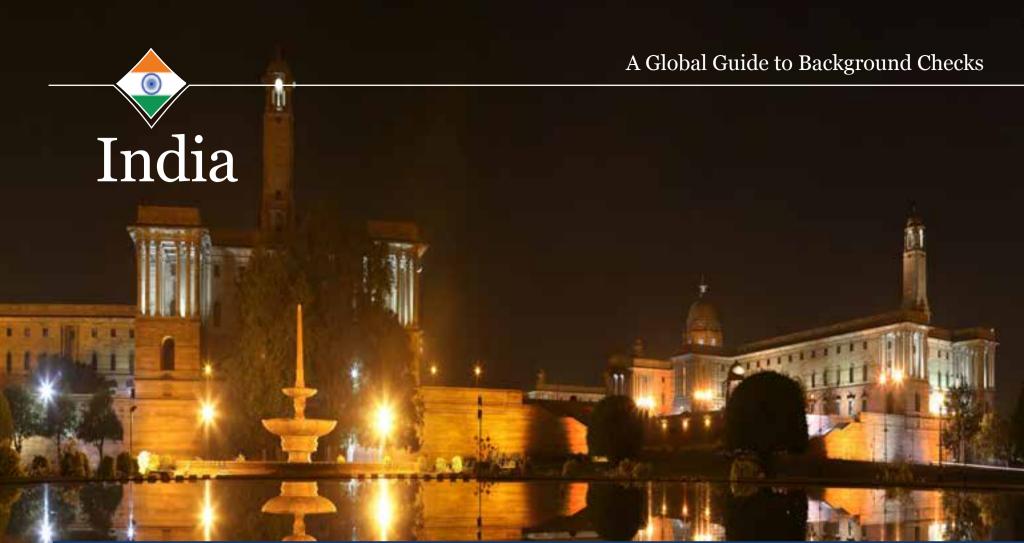
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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes. Employers in India regularly carry out background checks on applicants. However, certain checks are subject to obtaining prior consent from the applicant from a data protection perspective.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in India are education and past employment checks.











BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above, subject to obtaining the applicant's prior informed consent and other conditions in relation to certain checks (please see questions 5 and 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of these checks are expressly not permitted, but please see questions 5 and 6 for additional information.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Credit/financial checks, fingerprinting, health checks/medical screening and drug and alcohol testing, where such information is stored or intended to be stored in electronic media.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In India, there is no law that specifically governs background checks. However, companies normally obtain employee consent prior to conducting the checks since obtaining consent helps companies access data (such as education records) in certain circumstances. Further, if the nature of the background check involves collecting sensitive personal data then the Information Technology Act 2000 (the "IT Act") and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the "Sensitive Personal Data Rules") could apply. Among other requirements, the IT Act and Sensitive Personal Data Rules require an individual's "informed consent" to be obtained before collecting any "sensitive personal data or information," if it is stored or intended to be stored in electronic media. Sensitive personal information or data in relation to an individual is defined to include personal information which consists of information relating to passwords; financial information such as bank account, credit or debit card or other payment instrument details; physical, physiological and mental health condition; sexual orientation; medical records and history; and biometric information. Thus, the applicant's prior informed consent would be required in relation to credit/financial checks, fingerprinting, health checks/medical screening, and drug and alcohol testing, where the data or information is stored or intended to be stored in electronic media.

For checks relating to education and past employment records, criminal records, social media/internet searches, handwriting, union membership, and political views, since conducting these checks would not involve collecting any sensitive personal data or information, there is no statutory requirement to obtain the individual's consent. However, as mentioned, companies normally still choose to obtain prior employee consent since obtaining consent could help companies to access data in certain circumstances. For example, certain universities may have a policy of sharing the education records of an individual only with the individual's consent.











Obtaining "informed consent" requires that the applicants are given notice of the data that is collected, the purpose of collection, the intended recipients of the information and the name and address of the third party agency which is collecting the information. Further, the applicant concerned must be clearly informed about the name and address of the third party agency collecting the information and the fact that such agency will have access to all sensitive personal data or information of the applicant provided during the course of the background checks.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

No. While taking the decision on whether or not to employ an individual, there is no limitation on the employer as to how to use the information obtained from legally compliant background checks. However, it is important to ensure that the applicant is not denied employment on account of being a woman (except where the employment of women for that particular work is prohibited or restricted under law), since such discrimination is prohibited under the Equal Remuneration Act 1976.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No. In addition to the education and past employment records, employers in India sometimes choose to undertake reference checks if the applicant has provided specific references.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

As mentioned in the response to question 6, in order to collect any sensitive personal data or information stored or intended to be stored in electronic media, the employer would have to seek the employee's informed consent. If the employer can obtain such consent from the employee prior to making a decision on the offer of employment, there would not be any restriction on carrying out such checks.

Additionally, it is worth noting that occasionally employers may be <u>required</u> to carry out pre-employment background checks under specific local laws. For example, a few years ago in Pune, when there were reports of certain suspected terrorist activities, the authorities issued an order asking all employers to mandatorily conduct criminal record checks prior to hiring any employees.

Further, the provisions of the Industrial Employment (Standing Orders) Act, which is usually applicable to certain classes of establishments that employ more than 100 workmen, provide for model "standing orders" to be followed by the employer. A "workman" is defined under the Industrial Disputes Act 1947 as a person who is usually involved in manual, skilled, unskilled, technical, operational, clerical or supervisory work. This definition specifically excludes individuals who are (i) employed mainly in a supervisory capacity and drawing wages exceeding INR10,000 per month; or (ii) employed mainly in a managerial or administrative capacity. In some states, these model standing orders require employers to conduct pre-employment medical checks. However, there are no specific processes prescribed for conducting such checks.











BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

There are no restrictions in relation to carrying out different types of background checks on existing employees (such as the check being relevant to the type of job that the individual was hired to do). However, for existing employees, while the employer can undertake different types of background checks, the employer can normally only take disciplinary action against the employee if the information revealed by the background check is relevant to the individual's job or affects his or her employment.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The requirements for being legally entitled to work in India vary based on the nationality of the individual.

In relation to persons holding non-Indian passports, individuals who fall in the category of "Person of Indian Origin" (PIO) or "Overseas Indian Citizen" (OCI) are permitted to work in India without any additional requirements. However, other non-Indian passport-holders are required to have a valid employment visa in order to be legally entitled to work in India. In India, an employment visa is only granted to an individual in relation to a specific employer, on production of certain documents, including a letter from the prospective employer. An employment visa granted in respect of a particular employer cannot be used while working with any other employer in India. So, if the applicant requires an employment visa, the employer would have to assist the applicant in obtaining an employment visa.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

No. While employers in different sectors may place greater significance on some types of background checks than others, the restrictions in relation to consent requirements for the collection of data for conducting background checks apply uniformly across sectors.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes. Employers are permitted to outsource the performance of background checks to a third party vendor, subject to data consent requirements being fulfilled (please see question 16).











16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Yes. In relation to background checks which involve the collection or processing of sensitive personal information (which requires specific consent from the individual), it is important to ensure that the individual consents to the transfer of such data to the vendor, or the collection, handling and processing of such data by the vendor.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Yes. Once the information is collected, there are additional processes that need to be followed in relation to storing, transferring and processing the sensitive personal data or information. The data collected must be used only for the purpose for which it was collected. Further, both the employer and any agency which is collecting information on behalf of the employer are required to keep the information secure by following reasonable security practices and procedures commensurate with the data in question, and also have a privacy policy in accordance with the provisions of the Sensitive Personal Data Rules. By way of example, it would be considered that reasonable security practices or procedures have been implemented when an entity has implemented security practices and standards and has a comprehensive documented information security program as well as information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information being protected. One example of such security measures is the International Standard IS/ISO/IEC 27001 on "Information Technology – Security Techniques – Information Security Management System – Requirements."

Additionally, under the Sensitive Personal Data Rules, the company is required to designate a Grievance Officer and publish his or her name and contact details on its website. The Grievance Officer is required to redress any grievances raised by the provider of the information with respect to processing information in a time bound manner. The Grievance Officer shall redress the grievance in an expeditious manner, and within one month from the date of receipt of the grievance.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

As mentioned in the response to question 6, while there is no law that specifically governs background checks in India, if the nature of the background check involves collecting sensitive personal data which is stored or intended to be stored in electronic media, then the IT Act and the Sensitive Personal Data Rules could apply.

The only employment-related discrimination legislation applicable to private employers in India is the Equal Remuneration Act 1976, which prohibits gender-based discrimination. However, given that the results of the background checks would involve factors such as criminal records, employment history, etc., it is unlikely that any discrimination legislation would apply to decisions made based on these findings.

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

In the event that employee consent is not obtained for the collection/transfer of sensitive personal data or information, the employees concerned may take legal action against the employer for (i) failure to implement reasonable security practices in respect of their sensitive personal data or information; and (ii) failure to comply with the Sensitive Data Rules which have been prescribed under the IT Act. These offenses are punishable as follows:











- Under section 43A of the IT Act, if the employer or the agency that conducts the background check fails to implement or maintain reasonable security practices in respect of sensitive personal data or information and causes wrongful loss to the employees concerned or wrongful gain to any person, it may be liable to pay damages by way of compensation to such employees.
- Further, under section 45 of the IT Act, it may also be liable to pay compensation not exceeding INR25,000 to employees affected or a penalty not exceeding INR25,000 for contravention of the Sensitive Data Rules (including failure to obtain consent of employees, unauthorized disclosure or transfer of sensitive personal data or information to third parties, etc.).

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes. Employers in Indonesia regularly carry out background checks on applicants. Background checks are not expressly regulated by Indonesian employment laws. Certain background checks are subject to the consent of the applicant in practice.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks involve checks on an applicant's educational credentials, employment history and professional licenses which, in practice, are usually provided voluntarily by the applicant.











BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing
- 3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above. Certain checks are subject to the consent of the applicant in practice. Please see questions 5 and 6.

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above checks are expressly prohibited, but please see questions 5 and 6.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All of the above checks are permitted, subject to the applicant's consent.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to the above background checks, the employer must obtain the consent of the applicant for certain checks, as indicated. The checks undertaken must be appropriate and proportionate to the position being applied for and must not discriminate or discourage people from applying.

There are specific points to note in relation to particular checks:

Criminal records

Employers may require prospective or existing employees to obtain a Statement of Good Behaviour, or *Surat Keterangan Catatan Kepolisian* ("SKCK"), from the local district office of the Indonesian National Police.

An SKCK is a letter issued by or on behalf of the Chief of Police in the district in which an individual is domiciled confirming that the individual named in the letter is of good behavior and not presently involved in any criminal investigation or proceedings. This statement from the Chief of Police is based on the information provided by the head of the village or sub-regency where the individual lives and a review of the local criminal record. An SKCK does not indicate whether an individual has a criminal record but confirms that the individual is not currently involved in criminal proceedings within that specific district only. Centralized/national criminal records are not available or searchable.

An SKCK is valid for six months and only relates to the specific police district where the individual is domiciled. Only the employee concerned may apply for and obtain an SKCK, but prospective employers are entitled to require a "clean" SKCK as a pre-condition to











hiring, and the employment agreement and related terms and conditions of employment may include an obligation for the employee to produce a valid, "clean" SKCK at any time.

Health checks/medical screening

Employers often require potential employees to undergo a health check-up. This is lawful and in fact is required by Law No. 1 of 1970 dated January 12, 1970 regarding Work Safety ("Work Safety Law"). Article 8 of the Work Safety Law provides broadly as follows:

"The manager is required to check the physical health, mental condition and physical ability of the employees to be employed or transferred in accordance with the nature of the work assigned to such workers."

Further, Minister of Manpower and Transmigration ("MOMT") Regulation No. Per.02/MEN/1980 dated March 13, 1980, regarding Employee Health Check-ups in Organizing Work Safety, elaborates on the type of health check-up to be conducted as referred to in the Work Safety Law. It provides for a complete physical examination, physical fitness, lung X-ray, routine lab tests and other necessary examinations. Based on this provision, an employer can require a potential employee to undergo a physical examination as a condition of employment. It is important that all potential employees be subject to the same conditions. The potential employee should give his or her written consent to the examination and to the release of the results to the employer. The employer can also require prior medical records be made available to the employer, on a non-discretionary basis and with the potential employee's written consent.

Credit/financial checks

Information of this kind is seldom used in the recruitment process in Indonesia. However, Bank Indonesia does issue comprehensive individual credit history reports, which will only be issued based on the request of financial institutions and the relevant individual requesting the information, as this information is considered confidential.

Fingerprinting and handwriting checks

There is no law preventing the collection of fingerprints and handwriting checks. However, great care must be taken by employers to ensure they do not infringe the personal privacy of employees, thus obtaining the potential employee's consent is advisable. Taking fingerprints and handwriting checks are uncommon in Indonesia.

Social media/internet checks

There is no prohibition on verifying information provided on public websites, such as news sources, Google searches or social network site searches. The only information that can be collected and retained by employers is information that can be accessed or obtained publicly, not private information.

Union membership and political views

Employers should be extremely cautious about collecting this type of information from applicants. In particular, such information should not be used to influence whether an offer is made, as this could potentially be discriminatory.

Drug and alcohol testing

These tests can be carried out but only in limited circumstances, for instance, where working under the influence of drugs or alcohol could give rise to health and safety considerations (for example, where employees drive or operate machinery) or serious damage to the employer's business. The applicant would need to consent to the test. Drug and alcohol testing should only be carried out during employment if justified, necessary and proportionate, and with the consent of the employee.











7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used where relevant to the particular role of the employee or potential employee and should not be used in a discriminatory manner.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment, but must be appropriate, necessary, proportionate and justified by reference to the employee's role.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Prior employment

Requesting letters of recommendation from previous employers is common. Employers are legally obliged to furnish an Employment Statement at the request of any outgoing employee. This statement confirms the period of employment and job title but does not necessarily include a recommendation or an appraisal of the employee's job performance. The prospective employer may verify the information contained in the Employment Statement by contacting the previous employer directly. The previous employer may respond to such inquiries, but care must be taken by a former employer in issuing a broader letter of reference not to make statements that may be construed as defamatory, recognizing that defamation is a civil cause of action and a criminal offense.











Professional licenses

The employer may seek confirmation from the relevant licensing body to verify the validity of the license provided by the candidate.

Education history

Employers in Indonesia often request copies of an applicant's degrees or certificates that are certified as a true copy by the educational institution or by a public notary to verify authenticity. The prospective employer may verify the information contained therein by contacting the educational institution directly.

Permits

The employer must apply for the necessary permit to employ any expatriate. A work permit is always limited to a particular employer. It is not possible to transfer an existing work permit among employers.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

No. Apart from the appointment of Directors and Commissioners of companies, there are no specific rules requiring background checks for different sectors. Articles 93 and 110 of Indonesian company law require that an individual appointed as a Director or Commissioner must not have been convicted of a criminal offense that caused losses to the state during a period of five years prior to his or her nomination.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

There are no rules governing the use of background check service providers and such providers are rarely used (although corporate search houses exist). In any event, the employee's consent or involvement is required for the available background checks.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Indonesia does not have a data protection authority or governmental agency that controls background checks. However, the prior written consent of the employee or candidate is necessary if the background check will involve personal data in an electronic format.











This consent must be in the Indonesian language or in a bilingual format. Such written consent may be in an electronic format.

In practice, employers in Indonesia regulate the data privacy of their employees by way of unilateral employee consents, employment agreements, company regulations and collective labor agreements. Such agreements permit the collection, retention, disclosure and use of the employee's personal data or other confidential information, including transmission within Indonesia or overseas to affiliates, services providers and government agencies. Such agreements and consents are justified by the freedom of contract principle under the Indonesian Civil Code.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

There are no specific privacy or data protection requirements under Indonesian employment laws for employers who want to obtain criminal records, school records or employment or financial information of employees or potential employees. However, Indonesia has enacted various laws relating to data privacy in a number of areas. Indonesian legal scholars often refer to Article 28G of the 1945 Constitution as the rather vague basis for more specific data privacy legislation. The Article reads:

"Each person shall have the right to protection of their personal selves, families, respect, dignity and possessions under their control and shall have the right to security and protection from threat of fear for doing or for not doing something which constitutes a human right."

More specifically, Law No. 11 of 2008 regarding Electronic Information and Transactions prohibits the transmission or use of the personal data of an individual through electronic media without the consent of such individual.

Other relevant laws include:

- Law No. 13 of 2003 dated March 25, 2003 regarding Manpower ("Manpower Law")
- Law No. 39 of 1999 dated September 23, 1999 regarding Human Rights ("Human Rights Law")
- Law No. 40 of 2007 regarding Limited Liability Companies
- Law No. 29 of 2004 regarding Medical Practice
- Minister of Health Regulation No. 269 of 2008 regarding Medical Records
- Law No. 1 of 1970 regarding Work Safety ("Work Safety Law")

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

Any act that violates privacy or confidentiality will always give rise to a potential violation of Article 1365 of the Civil Code. Article 1365 of the Civil Code is a statutory tort provision and provides as follows: "Every unlawful action, that causes damage to another person, obliges the person whose fault causes such loss to compensate such loss."

The "law" that is referred to in this Article does not mean that a specific statute must be violated in order to invoke the Article. Rather, either an affirmative act that violates a reasonable standard of care or a failure to act that violates a reasonable standard of care that causes damage will result in a violation of this provision.











Further, Law No. 11 of 2008 regarding Electronic Information and Transactions ("Law No. 11") does not provide a specific sanction for violation of the obligation to obtain an individual's consent for the transmission or use of personal data through electronic media. However, Law No. 11 does provide that any person whose rights are infringed may file a claim for losses caused by such violation.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes. It is standard practice in Japan for employers to carry out limited background checks. However, while some types of background checks are permitted and used, some types of background checks are only permitted in very limited circumstances. Employers must assess the need for the background check and weigh this against the risk of liability if the background check is challenged and compensation sought.

2. What types of background checks do employers typically carry out on applicants?

The background checks typically carried out in Japan are education and past employment checks and checks of publicly available information on social media or from an internet search.











BACKGROUND CHECKS ON APPLICANTS

• Education and past employment records

Criminal records

• Credit/financial checks

Health checks/medical screening

Social media/internet search

Fingerprinting

Handwriting

• Union membership

Political views

Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above are technically permitted, however many are subject to strict conditions and only permissible in very limited circumstances (please see questions 5 and 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above checks are expressly prohibited, however, please see questions 5 and 6.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Criminal records, credit/financial checks, health checks/medical screening, fingerprinting, union membership, political views and drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

All types of background checks are subject to data protection and privacy conditions, and several types are only permissible in very limited circumstances.

All background checks collect Personal Information, as defined under Japanese privacy law. An Information Handler (including an employer) that collects Personal Information must disclose the Purpose of Use of the collected information in advance or soon after collection. An Information Handler that uses and retains Personal Information is obliged to protect and maintain the Personal Information.

There are also specific points to note in relation to particular checks:

Criminal records, union membership, political views, fingerprinting, drug and alcohol testing

It is generally accepted that the Japanese constitution guarantees individuals a Right to Privacy and that information in the above categories is sensitive information, in that its collection and processing without consent would violate an individual's Right to Privacy. As a general principle of law, it is not permissible to collect or process such information (including by way of a background check), unless there is a reasonable reason to do so and the individual consents to such collection and processing.

Additionally, various administrative guidelines specifically restrict an employer's right to acquire certain information about job applicants, including:











- information regarding race, ethnicity, social status, family origin (*monchi*), legal domicile (*honseki*), place of birth or other information which might result in social discrimination;
- information regarding their political opinions or religious beliefs; and
- information about their membership of labor unions.

It is generally understood that criminal records, fingerprinting and drug and alcohol testing constitute "information which might result in social discrimination" and therefore their collection and use is restricted.

The guidelines provide an exception, whereby an employer may conduct such background checks where the information is essential in order for the employer to conduct its business. In such a case, the employer must obtain the information directly from the applicant and must expressly explain why the employer needs to know the information.

Health checks/medical screening

Administrative guidelines specifically prohibit employers from acquiring information about whether an employee (including an applicant):

- suffers from HIV/AIDS, Hepatitis B and other diseases which are not easily transmitted; or
- suffers from inherited conditions, such as color blindness.

Such information may only be collected where it is essential for deciding whether the individual is able to perform the job.

If an employer acquires health-related information from any third party, the employer must first obtain consent from the applicant/employee and explain why the employer needs to know the information.

Credit/financial checks

Information about an applicant's credit/financial status could constitute sensitive information. Therefore, as a general principle of law, it is not permissible to collect or process information about credit/financial status (including by way of a background check), unless there is a reasonable reason to do so and the individual consents to such collection and processing.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

An employer is prohibited from using or processing Personal Information about applicants or employees beyond the Purpose of Use as defined by the employer when the information was collected. Therefore, if the Purpose of Use for information collected via a background check was to determine a candidate's suitability for a job, it may only be used for that purpose.

The employer must obtain consent from the applicant or employee if the employer needs to use or process personal information outside that Purpose of Use, prior to such use or processing.

Employers are also generally prohibited from discriminating between job applicants on the grounds of sex or age.













OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

The answer may change. Background checks are usually carried out in order to decide whether an offer of employment shall be made or not. Accordingly, after the decision to offer employment is made, in principle background checks are not permissible as they are no longer necessary.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

In general, the same principles apply to carrying out background checks on employees. As outlined above, Personal Information from permissible background checks (e.g., education) may be collected at any time. Personal Information that is sensitive information (e.g., criminal record, alcohol and drug testing, medical screening) should only be collected if there is a reasonable reason for collection and the individual consents, otherwise such collection is a breach of the Right to Privacy.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employers may face criminal punishment (such as a fine or imprisonment) if their employees do not have the correct work permits. Therefore, an employer may request copies of a residence card or other evidence showing their work permits.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.











SECTORS

14. Do background checks differ in different sectors?

Restrictions on background checks do not generally differ by sector. However, as outlined above, certain background checks are only permissible in very limited circumstances. It may be that, in certain sectors or for certain types of positions, particular background checks will be permissible. For example, if an employer intends to hire a new staff member for its accounting department, information about his or her credit/financial status can be collected.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Background checks of generally permissible Personal Information (e.g., education, work history, and social media and internet searches) may be outsourced to a third party under an outsourcing arrangement. In general, background checks of sensitive information may not be outsourced.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Where information collection or processing is outsourced, the employer is obliged to supervise the handling of the Personal Information by the service provider. Administrative guidelines suggest that the employer should (among other things):

- establish that the service provider has sufficient security measures to protect the information (e.g., a privacy policy, internal rules regarding information protection, employee training); and
- ensure that provisions regarding the proper handling of Personal Information are included in the outsourcing agreement.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

For Personal Information collected from background checks, an employer is obliged to:

- (a) disclose the Purpose of Use of the collected information;
- (b) only use the information for that stated purpose unless the individual's consent is obtained;
- (c) amend or delete incorrect information if requested;
- (d) delete the information once the Purpose of Use is completed;
- (e) take appropriate steps to protect the security of the information; and
- (f) supervise all employees and service providers that handle the information.













Japan

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Personal Information Protection Act (Act No. 57 of 2003, as amended) (*kojinjoho hogo ho*) and its Ancillary Guidelines such as the Ministry of Health, Labor and Welfare Ancillary Guidelines regarding Health Information
- Article 13 of the Constitution of Japan (Nihon-koku kenpo)
- Employment Security Act (Act No. 141 of 1947, as amended) (shokugyo antei ho) (and Ancillary Guidelines)
- Worker Dispatch Act (Act No. 88 of 1985, as amended) (rodosha haken ho) (and Ancillary Guidelines)
- Civil Code of Japan (Act No. 89 of 1896, as amended) (minpo)

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

Under the Japanese Civil Code, if the Right to Privacy is infringed without justifiable grounds, an infringing party is required to compensate an infringed party for damages suffered.

Administrative agencies are authorized to impose administrative sanctions on employers which violate the Personal Information Protection Act and the Employment Security Act.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Background checks are not specifically regulated under Macau law, but it is common practice for large corporations to conduct such enquiries when hiring. Smaller companies do not usually carry out such checks. However, background checks can only be executed if authorized by the applicant.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Macau are education and past employment checks.











Macau

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing
- 3. Which of the above background checks are employers permitted to carry out on applicants?

Subject to the applicant's prior written consent and other conditions (see question 6), all of the above are permitted.

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above background checks are expressly prohibited, but all are subject to certain conditions.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All background checks in Macau are only permitted if certain conditions are satisfied.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to all background checks, the employer must obtain written and unequivocal consent (i.e., a written consent form) from the applicant for data protection purposes, and the checks can only be carried out if they are lawful, necessary, adequate, for a determinate purpose, and connected with the activity of the employer.

The documents supporting the collection of personal data (the written consent form) must contain information regarding: (i) the identity of the controller (the natural or legal person, public entity, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data) and of its representative, if any; (ii) the purposes of the processing; and (iii) other information such as the existence and conditions of the right of access and the right to rectify, provided they are necessary, taking account of the specific circumstances of collection of the data in order to guarantee the data subject that it will be processed fairly.

There are also specific points to note in relation to the following particular checks:

Health checks/medical screening

Although Macau law does not specifically address this issue, the collection of information regarding the health status or pregnancy of an applicant is considered prohibited, except when it is absolutely necessary to assess the aptitude of the applicant for a particular job/role or when the performance of certain functions may affect the wellbeing of the applicant.











Macau

Drug and alcohol testing

Although Macau law does not specifically address this issue, drug and alcohol testing would, in principle, follow the same rationale as health checks and medical screening and, therefore, would only be allowed if absolutely necessary to assess the aptitude of the applicant for a particular job/role or when the performance of certain functions might affect the wellbeing of the applicant.

Union membership and political views

These checks can only be carried out as long as non-discrimination, and special security measures, are assured (e.g., control of access to the data, control of data support, control of data usage, etc.). Such checks also need to be authorized in advance by the Macau Data Protection Bureau.

Credit/financial checks

If an employer wants to check an applicant's credit/financial status, the employer must have written consent from the applicant and request prior authorization from the Macau Data Protection Bureau.

Further to the above, the applicant has the right to: (i) be informed about the data collected; (ii) access the data collected; (iii) object to the data collection at any time; (iv) not be subject to automatic individual decisions made in connection with the data collection; and (v) be compensated for any damages suffered in connection with the data collection.

Any data collected as a result of background checks can only be kept for the period of time necessary to achieve the purposes of the data collection.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained from background checks can only be used for the purposes for which it was obtained and must not be used in a discriminatory way.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No. The checks can be carried out at any time as long as the applicant consents to them.













Macau

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

No.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The entitlement to work in Macau in circumstances where the applicant does not hold a Macau ID card is governed by the Macau Migration Authorities. It is not possible to hire and employ a non-resident worker in Macau without prior authorization from the Migration Authorities. To employ non-resident workers, employers must first obtain authorization to hire non-local workers (such authorization is subject to the non-availability of local workers to perform the same functions; is limited in time; needs to be previously authorized; cannot promote inequalities between local workers and non-resident workers, etc.). If such authorization is granted to the employer, the Migration Authorities will give permission to the non-resident prospective employee to stay in Macau as a worker and work for that employer.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes. Members of the board of directors and supervisory board of credit institutions, as well as the managers of branches, must register their respective appointments with the Macau Monetary Authority (AMCM) prior to commencing their duties. The application for registration includes a detailed professional curriculum and a certificate of the criminal record or equivalent document acceptable to AMCM, regarding the person or persons in question. Some insurance intermediaries' positions are also subject to prior authorization from AMCM based on, among other documents, detailed professional curriculum and a criminal record certificate.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

If an employer uses a third party vendor to carry out background checks, the applicant must be informed, and the obligations established between the employer and the third party vendor must be governed by a written contract.













If the third party vendor is outside Macau, the processing of personal information should only be undertaken in countries or territories with an adequate level of protection for the rights of individuals in relation to the processing of personal information. The level of adequacy should be assessed by the Macau Data Protection Bureau before the transfer can take place.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

The employer must ensure that the personal data collected from the background checks is:

- processed lawfully and with respect for the principle of good faith and with respect for privacy and for other fundamental rights, freedoms and guarantees enacted in the Basic Law of the Macao Special Administrative Region, the instruments of international law and the legislation in force;
- collected for specified, explicit, legitimate purposes and for purposes directly related to the activity of the controller; and not further processed in a way incompatible with those purposes;
- adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- accurate and, where necessary, kept up-to-date; adequate measures must be taken to ensure that data which is inaccurate or incomplete, having regard to the purposes for which it was collected or for which it is further processed, is erased or rectified; and
- kept in a form that permits identification of their subjects for no longer than is necessary for the purposes for which it was collected or for which it is further processed.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

Macau Data Protection Law – Law 8/2005.

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted unlawfully, apart from the applicant's right to claim damages, the employer (depending on the rules violated) may be subject to the following sanctions: an administrative fine of up to MOP200,000; imprisonment for up to one year; or a monetary fine of up to 120 days (a day's fine is defined under Macau law as an amount ranging between MOP50 and MOP10,000, to be determined by the Court based on the offender's financial status and capability).

Contributed by: Isolda Brasil, MdME Lawyers

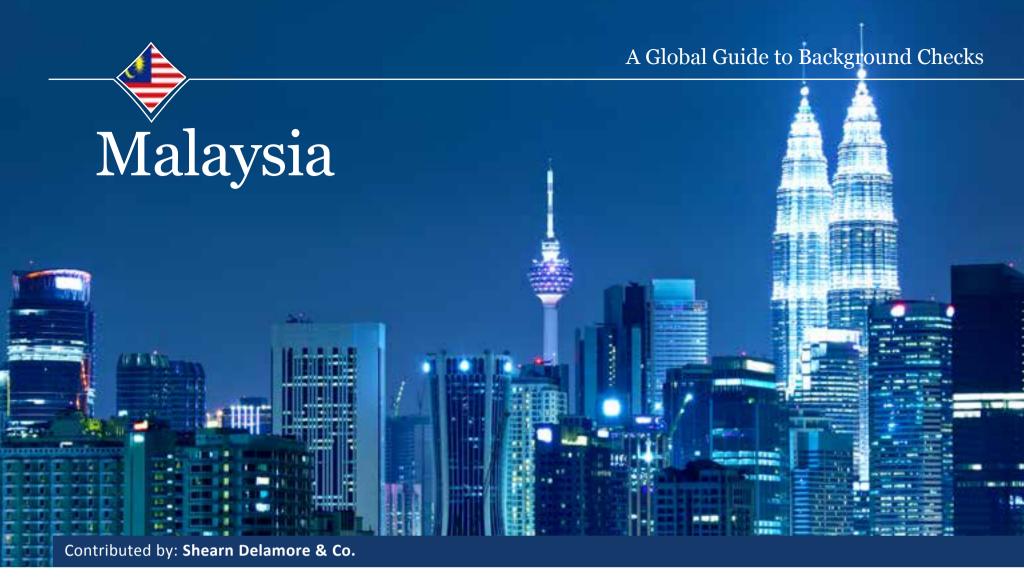












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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, it is standard practice in Malaysia for employers to carry out background checks on applicants. However, such checks are subject to the consent of the applicant and/or other conditions.

2. What types of background checks do employers typically carry out on applicants?

Background checks on education, past employment, whether the applicant is permitted to work in Malaysia and criminal records.











Malaysia

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing
- 3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above are permitted, subject to the applicant's consent (please see questions 5 and 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above are expressly prohibited, but please see question 5.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Pursuant to the Personal Data Protection Act 2010, an employer would require consent from the applicant before processing any personal data. Consent may be given orally, impliedly or explicitly.

The Act distinguishes general personal data from sensitive personal data. Sensitive personal data would require the applicant's explicit consent while other personal data may be consented to by any manner or form. From the background checks listed above, only information relating to the applicant's criminal records, health checks/medical screening and political views will be deemed sensitive personal data and therefore would require explicit consent from the applicant. The other background checks do not require explicit consent.

The Act, however, does not define "consent" or "explicit consent", nor does it prescribe any formalities in terms of the consent.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

The condition attached to background checks on the applicant's criminal records, health checks/medical screening and political views is explicit consent.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information must be used in relation to the employment and cannot be excessive to that purpose.











Malaysia

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Before a person commences employment, background checks can only be carried out in relation to information which is permitted under the Personal Data Protection Act 2010. This may include the checks as listed above, but may also include other information such as nationality, address, etc.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Background checks may be carried out on employees, but this must be guided by the principle that they should not be carried out excessively or unnecessarily or be unrelated to the purpose for which the data is processed.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The employer must ensure the applicant has the requisite permits and/or passes to work in the country. Requirements differ according to the nature of the employment. Generally, foreign workers are either skilled or unskilled, and the Ministry of Human Resource issues guidelines from time to time pertaining to the entry of foreign employees.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes. The nature of the background check should be suited to the nature of the employment. For example, employers in the financial services would typically check for a potential employee's bad credit records or finance-related offenses.











Malaysia

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Third parties are allowed to process personal data on behalf of employers, but this is subject to the processors offering guarantees of technical and organizational security measures in order to protect the loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction of personal data.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer that collects information relating to an employee during the background check process must abide by several principles:

- Personal data can only be processed with consent. Sensitive personal data can be processed, but only with express consent. Processing of personal data cannot be for any unlawful purpose and must not be unnecessary or excessive.
- Personal data cannot be disclosed for any purpose other than the purpose for which it was collected.
- An employer shall, when processing personal data, take practical steps to protect the personal data from any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction.
- The personal data processed for any purpose shall not be kept longer than is necessary for the fulfillment of that purpose.
- An employer must take reasonable steps to ensure that the information is accurate, complete, not misleading and kept up-to-date by having regard to the purpose.
- The applicant shall be given access to his or her personal data and shall be able to correct that personal data where it is inaccurate, incomplete, misleading or not up-to-date.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

Personal Data Protection Act 2010.

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

An employer found to be in violation of the Personal Data Protection Act 2010 may be liable to a fine not exceeding MYR300,000 or to imprisonment for a term not exceeding two years or to both.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

It is common for employers in Myanmar to conduct background checks on potential hires, although the level and extent of background checks may vary from employer to employer.

The method of recruitment may be a factor that affects the level and extent of background checks conducted. Employers may recruit employees through several avenues. They may submit an application to the relevant Township Labour Office, which will collate and provide a list of candidates meeting the specified requirements together with the supporting documents submitted by such candidates. Employers may also recruit employees through employment agencies, advertisements or known contacts.

2. What types of background checks do employers typically carry out on applicants?

Routine background checks include verification of personal particulars, education and employment history checks, criminal records checks and social media/internet searches.











Myanmar

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

There are no laws expressly stipulating the type of background checks that employers are permitted to carry out on prospective hires. There are also no laws prohibiting or regulating the conduct of the above background checks as there are no specific cross-sector data protection laws or anti-discrimination laws. However, the checks that employers typically carry out are highlighted in question 2.

4. Which of the above background checks are employers not permitted to carry out on applicants?

As indicated in question 3, there are no laws prohibiting or regulating the conduct of the above background checks by employers on prospective hires.

Employers generally do not carry out the following checks: handwriting, union membership, political views and credit/financial checks.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

None. However, not all of the above background checks are required by all employers as part of their standard background checks. Some employers may require certain background checks to be conducted if they need to verify certain information or particulars due to the nature of the position.

Depending on the requirements of the position, an employer may carry out health checks/medical screening. Drug and alcohol testing is generally not carried out, but may be required if an applicant has given the employer grounds to consider undertaking this check. Taking fingerprints is uncommon in Myanmar and is only required for certain positions (e.g., in certain government departments).

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Not applicable.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

There are currently no laws imposing such limitations. However, as Myanmar is a common law jurisdiction, there is a possibility that, in the future, Myanmar may recognize certain principles and obligations which exist under common law, although this is untested in Myanmar courts (for example, the tort of breach of confidence).











Myanmar

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

As there are generally no laws prohibiting or regulating the conduct of background checks by employers on prospective hires or existing employees, the above answers would not be affected by the timing of the background checks. It is, however, more common in Myanmar for background checks to be undertaken before the decision to make an offer of employment.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

As indicated above, there are generally no laws on conducting background checks by employers on prospective hires or existing employees.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

An employer needs to check the original identification document of a prospective hire to satisfy itself that he or she fulfills the minimum legal age to work.

If the prospective hire is a foreign national, the employer should also check that he or she has a valid business visa or stay permit to work in Myanmar.

In addition to the above, in practice, an employer will typically check certain original documents of a prospective hire to satisfy itself that he or she is qualified to apply for the position. Photocopies of such documents would be retained in the event that the employer decides to employ the prospective hire.











Myanmar

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

As there are generally no laws prohibiting or regulating the conduct of background checks by employers on prospective hires, there is no difference in the background checks that can be carried out on the different categories of workers above. In practice, however, the level of background checks would be most stringent on full-time workers.

SECTORS

14. Do background checks differ in different sectors?

While there are generally no laws prohibiting or regulating the conduct of background checks by employers on prospective hires, the level and type of background checks conducted across different sectors could vary from employer to employer.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

There are no express permissions or restrictions on outsourcing the carrying out of background checks to third party service providers.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No. However, as indicated in question 7, there is a possibility that, in the future, Myanmar may recognize certain principles and obligations which exist under common law.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

As indicated in question 3, there are no specific cross-sector personal data protection laws.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

There are no restrictions or laws regulating background checks by employers on prospective hires.

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

Not applicable.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes. Background checks are regularly undertaken by employers in New Zealand during the recruitment process.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks are checking references and qualifications, and undertaking credit checks and criminal record checks. It is also fairly common for pre-employment drug tests, and/or medical examinations, to be undertaken, depending on the nature of the role. Note that credit checks are only warranted where the position involves significant financial risk.











BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

Education and past employment records, criminal records, credit/financial checks, health checks/medical screening, social media/internet search, fingerprinting, handwriting, and drug and alcohol testing.

Under the Privacy Act 1993, the collection of personal information must not be unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned. Except for a very limited number of roles, it is arguable that fingerprinting and handwriting checks would be unreasonably intrusive, and the onus would be on the employer to justify why such checks were relevant to the applicant's suitability for employment. Fingerprinting and handwriting checks are extremely rare.

Please see question 6 for further information about conditions which may need to be satisfied before such checks are carried out.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Political views and union membership. Under the Human Rights Act 1993, political opinion is a prohibited ground of discrimination. This means that it is unlawful for an employer to "refuse or omit to employ" an applicant based on his or her political views. Under the Employment Relations Act 2000, employers are also prohibited from discriminating against employees based on their union membership or non-membership.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All of the above background checks listed in the response to question 3, except social media and internet searches where the information is publicly available. Also, credit checks are only warranted where the position involves significant financial risk.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Under the Privacy Act 1993, personal information about applicants must be sought directly from the candidates, or their authorization should be sought to obtain information from a third party. This means that the applicant's authorization needs to be obtained for all of the background checks listed in the response to question 3, unless the information is publicly available, for example, an internet search or <u>public</u> social media profile search. In relation to the latter, as a matter of best practice, it is recommended that employers notify applicants that an internet search or public social media profile search is to be undertaken.











In relation to particular checks:

Credit checks

The Credit Information Privacy Code 2004 predominantly governs the collection and use of credit information by "credit reporters" (agencies that carry on a business of reporting information relevant to the assessment of the creditworthiness of individuals). Rule 11 of the Code provides that a credit reporter may only disclose credit check information to a prospective employer if the disclosure is authorized by the individual concerned and is for a position involving significant financial risk.

Criminal records

An employer must apply to the Ministry of Justice in order to obtain a criminal background check for a prospective employee and can only do so with the individual's written consent. Under the Criminal Records (Clean Slate) Act 2004, individuals who have minor convictions, that did not attract custodial sentences and were committed at least seven years ago, are provided with a "clean slate" and may state that they have no criminal record where asked. It is an offense for an employer to ask a candidate to disclose a criminal record when that person is entitled by law not to do so.

Education and past employment records

Employers should ensure that an applicant has provided express authorization for them to contact their referees directly. Past employers are unlikely to provide new prospective employers with previous employment information without the applicant's consent, and if they did so, they would be in breach of the Privacy Act 1993.

Health checks/medical screening

Any information sought must be relevant to the position for which the applicant is applying. An employer cannot ask for information about an applicant's general health, but can ask for information about any health condition that is likely to affect his or her ability to safely or effectively perform the role for which he or she is applying. An employer cannot discriminate on the grounds of an applicant's disability. Under the New Zealand Bill of Rights Act 1990, every person also has the right to refuse medical treatment.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Yes, there are limitations under the Privacy Act 1993 and the Human Rights Act 1993. Under the Human Rights Act 1993, it is unlawful for an employer to "refuse or omit to employ" an applicant based on one of the following prohibited grounds of discrimination: sex, which includes pregnancy and childbirth, marital status, religious belief, ethical belief, color, race, ethnic or national origins, which includes nationality or citizenship, disability, age, political opinion, employment status, family status and sexual orientation.

Employers are unable to use any information they obtain in a discriminatory manner. It is unlawful for an employer to use or circulate a job application form or ask any question of or about a job applicant which indicates that the employer intends to discriminate on one of the above prohibited grounds.

If applicants feel they have been discriminated against during a recruitment process, they can make a complaint to the Human Rights Commission.

Information obtained on social media sites often contains personal details about an applicant's age, sex, religious belief, marital status, family status, color, race and sexual orientation. If an employer takes any of the above information into account in deciding whether to employ the applicant, this could give rise to a claim of unlawful discrimination under the Human Rights Act 1993.











OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Yes. There are additional safety checks by way of a police vetting service for positions in organizations that are responsible for providing care to children, the elderly or other vulnerable members of society. Police vetting can reveal information about interactions with the police that have not resulted in a conviction, including driving demerit points and family violence information.

9. Are there restrictions or limitations on the scope of these checks?

Only approved organizations have access to the police vetting service, at the discretion of the police. To be an approved organization, the employer will generally need to be a government agency or be involved with the care or education of vulnerable members of society.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No. Personal information must always be collected in accordance with the Privacy Act 1993 and should never be used for discriminatory purposes. Background checks can be completed before an offer is made (and conditional upon satisfactory results). When the background checks are carried out after the decision to make an offer of employment, the offer should be expressly conditional upon a satisfactory background check being completed.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Yes. There are limitations on an employer's ability to undertake ongoing checks on existing employees. Such checks would need to be justifiable and incorporated into employees' employment agreements.

It is arguably not permissible to require ongoing credit checks as this would potentially be in breach of the Credit Information Privacy Code 2004 (which expressly allows credit checks in a pre-employment context only).

Further, an employer would need a lawful purpose for ongoing checks on existing employees. Such checks could only be carried out where they are necessary and justified by the nature of the employee's role.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The Immigration Act 2009 provides that employers must not employ applicants who are not entitled to work in New Zealand. Employers are required to take reasonable precautions and exercise due diligence to ascertain whether an applicant is entitled to work in New Zealand.











Employers may request evidence of an applicant's eligibility to work in New Zealand, such as a passport, New Zealand driver's license, birth certificate or work visa.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes, some sectors will justify more comprehensive background checks being conducted than others, due to the nature of positions. For example, credit checks may be required in certain roles in the financial sector where the positions involve significant financial risk, or certain industries, such as the education and medical sectors, may require thorough police vetting.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No, provided that the applicant has authorized the information being collected by the third party and the intended use/transfer of the information.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Yes. Employers must not use the information in a discriminatory manner and must comply with the Privacy Act 1993.

Under the Privacy Act, when processing information collected for a lawful purpose, employers must:

- (a) ensure that employees are made aware of all intended recipients of their personal information and its intended use and transfer at the time it is collected;
- (b) ensure that the information is reasonably protected against loss, access, use, modification and disclosure;
- (c) provide individuals with a right to access their personal information and request corrections;
- (d) take reasonable care to check the information is accurate, up-to-date, complete, relevant and not misleading before using it;
- (e) not keep personal information for longer than necessary;













- (f) not use the information connected with one purpose for any other purpose, subject to the exceptions in the Privacy Act;
- (g) not disclose the information to any other person or body or agency, subject to the exceptions in the Privacy Act; and
- (h) not assign a unique identifier to the individual unless it is necessary to do so.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- New Zealand Bill of Rights Act 1990
- Privacy Act 1993
- Human Rights Act 1993
- Criminal Records (Clean Slate) Act 2004
- Credit Information Privacy Code 2004
- Employment Relations Act 2000

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

The Human Rights Review Tribunal (HRRT) can determine breaches of the Privacy Act 1993 and the Human Rights Act 1993. The HRRT can award damages, a declaration that the employer has breached the law, an order preventing repetition of the breach and an order to take action to rectify the breach.

Contributed by: Phillipa Muir & Carl Blake, Simpson Grierson

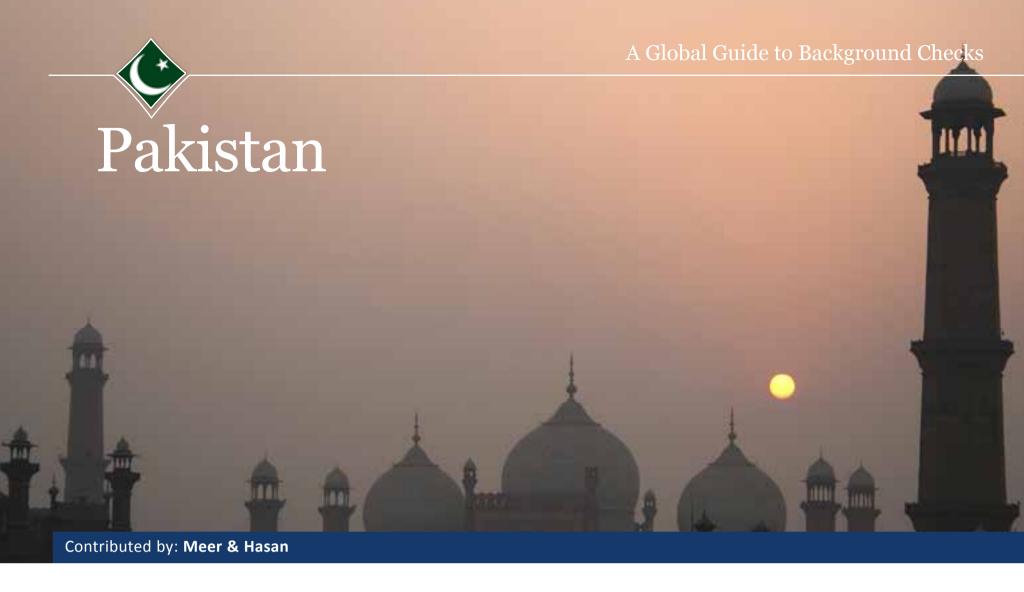












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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Background checks are not very common in Pakistan but the trend is picking up.

2. What types of background checks do employers typically carry out on applicants?

Background checks in Pakistan are generally limited to education and past employment checks, criminal records, social media/internet searches and health checks.

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Pakistan

BACKGROUND CHECKS ON APPLICANTS

• Education and past employment records

• Criminal records

• Credit/financial checks

• Health checks/medical screening

Social media/internet search

Fingerprinting

Handwriting

• Union membership

Political views

Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

There is no specific law governing background checks and any check may be carried out, especially once the consent of the applicant has been obtained.

4. Which of the above background checks are employers not permitted to carry out on applicants?

Please see above. Please note, however, that the Constitution of Pakistan prohibits discrimination on the basis of union affiliations and also political views. These checks should therefore be avoided.

In addition, there is no mechanism in Pakistan for an employer to check an applicant's credit/financial records or fingerprints.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Please see question 3.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

The only condition which an employer needs to satisfy before carrying out any background check is to ensure the applicant's consent has been obtained.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

There are no specific limitations. However, the information must be used strictly for the purposes for which it has been obtained, and adequate systems must be in place to protect the data.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.











Pakistan

9. Are there restrictions or limitations on the scope of these checks?

No.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Not applicable.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

There is no major difference. However, obtaining the consent of existing employees may be more crucial because the checks are less likely to be justifiable during employment.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The only requirement is to check that the employee has a valid National Identity Card and possesses the qualifications necessary for the job. All other checks are optional. If the employee is a foreign national, an employer is required to check that he or she is lawfully authorized to work.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

There are no legal restrictions/requirements; however, practice may vary from sector to sector. For example, in private security firms, an applicant's criminal record may be checked.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

The law in Pakistan neither permits nor prohibits the outsourcing of background checks.













Pakistan

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

There are no specific limitations. However, the information must be used strictly for the purposes for which it has been obtained, and adequate systems must be in place to protect the data.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

Constitution of Pakistan.

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

Not applicable.

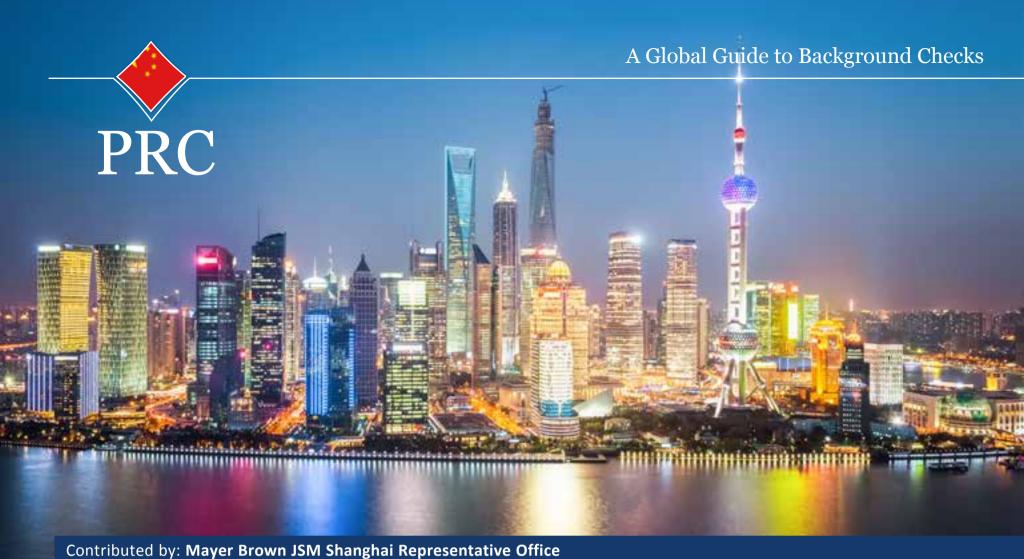
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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, employers in the PRC regularly carry out background checks on applicants. However, limitations do apply to the scope of background checks. Many checks are subject to the consent of the applicant and/or other conditions. Employers therefore often need to assess whether background checks are appropriate and proportionate in the circumstances and consider the implications of data protection and discrimination legislation.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in the PRC are education and past employment checks, and confirmation that the applicant has appropriate permission to work in the PRC.











PRC

BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing
- 3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above, subject to the applicant's consent and other conditions (please see questions 5 and 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above checks are expressly prohibited, but please see questions 5 and 6.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Criminal records, credit/financial checks, health checks/medical screening, social media/internet searches, fingerprinting, handwriting and drug and alcohol testing.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

In relation to all of the background checks above, the employer should obtain consent from the applicant for data protection purposes. The checks undertaken must be appropriate and proportionate to the relevant role and must not discriminate or discourage people from applying. Applicants should be given the opportunity to make representations if any of the checks produce discrepancies compared to the information they have provided.

There are also specific points to note in relation to particular checks:

Criminal records

Criminal records checks are not usually required for all employees and should only be requested where the need to protect the employer's business, customers or clients makes it appropriate. There are restrictions on who can be asked to disclose spent convictions.

Credit/financial checks

Credit/financial checks are not usually required for all employees and should only be requested where the need to protect the employer's business, customers or clients makes it appropriate.











PRC

Health checks/medical screening

It is generally unlawful to ask about the health of an applicant before offering him or her a job. Health checks are only permitted if there is an occupational requirement to justify one.

Social media/internet searches

Any media searches undertaken should be necessary, proportionate and transparent. If there is no justifiable reason for conducting media searches then they should not be done.

Fingerprinting

There is no law preventing the collection of fingerprints, however great care must be taken by the employer to ensure they do not risk breaching the data protection regime in the PRC. Fingerprinting is a controversial topic in the PRC and must be approached with caution. Special consideration must be given to the justification as to why fingerprinting is necessary and whether it is proportionate. Taking fingerprints is very uncommon in the PRC.

Handwriting

There is no law preventing the collection of handwriting, however, the collection of handwriting should be necessary, proportionate and transparent.

Union membership and political views

Employers should be cautious about collecting this type of data from applicants. It should not be used to influence whether an offer is made.

Drug and alcohol testing

These tests can be carried out, but only in limited circumstances; for instance, where working under the influence of drugs or alcohol could give rise to health and safety considerations (for example, where staff drive or operate machinery) or serious damage to the employer's business. The applicant would need to consent to the test. This test should only be carried out during employment if justified, necessary and proportionate and with consent.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used where relevant to the particular role and should not be used in a discriminatory way.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.













PRC

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Yes. Employers should not ask for details which relate to protected characteristics under the PRC labor law (e.g., nationality, gender, race, religion, disability, being a carrier of any epidemic pathogens or Hepatitis B) on an application form or before a job offer has been made. These questions should be asked as part of an equality monitoring form.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment but will need to be appropriate, necessary, proportionate and justified by reference to the employee's role.

ENTITLEMENT TO WORK

- 12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?
- (a) The employer must request, and the individual must provide, certain original documents to establish the individual's eligibility to undertake the work on the offer.
- (b) The documents that are required depend on whether the person is subject to immigration control.
- (c) The employer must check the validity of the original documents and satisfy itself that the individual is the person named in them.
- (d) Once the employer has satisfied itself of the validity of the documents, it must make copies of the relevant pages of the original documents provided in a format that cannot later be altered.
- (e) These documents are recommended to be retained for the duration of the individual's employment and for a further two years after employment has ceased (e.g., Article 20 and Article 30 of the PRC Regulation on Labor Supervision). For certain categories of employees (for example, expatriates working in the PRC), further checks will need to be carried out every twelve months.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.











PRC

SECTORS

14. Do background checks differ in different sectors?

The background checks that are carried out as a market practice will vary from sector to sector. For example, in the financial services sector, those individuals who are regulated can be required to disclose spent convictions (Article 21 of the Administrative Rules on the Qualification of Acting as Director, Supervisor and Senior Management in Insurance Companies).

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Where an employer proposes to use a third party to carry out background checks on its behalf, the notice to the applicant should make it clear that the employer will use a third party to carry out this processing on its behalf.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

An employer should:

- (a) only process personal information for the purposes collected and as necessary for the pre-employment screening, treating all personal information as confidential information and ensuring appropriate restrictions exist within the business to ensure only relevant departments/individuals can access the data;
- (b) ensure individuals are aware of and can exercise their right to receive a copy of the personal information held about them, rectify or update the information, request deletion of the data where it is inaccurate, outdated or irrelevant and opt-out/revoke authorization to the further processing of their information;
- (c) not retain the personal information for longer than is necessary for the purposes consented to;
- (d) take appropriate technical and organizational steps to protect personal data from unauthorized disclosure, damage or destruction;
- (e) produce a code of conduct for all staff processing individuals' personal information; and
- (f) undertake periodic audit reviews to check compliance with data protection measures.

SANCTIONS/ENFORCEMENT

- 18. What restrictions or laws exist to regulate background checks?
- PRC Employment Contract Law (2012)
- PRC Regulation on Employment Service and Employment Management (2008)











PRC

- PRC Law on Employment Promotion (2007)
- PRC Regulation on Protecting Personal Data of Telecommunications and Internet Users (2013)
- PRC Trade Union Law (2009)

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are conducted unlawfully, actions for damages or distress could be brought. Criminal offenses may be committed in relation to background checks.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, it is common practice in the Philippines for employers to carry out background checks on applicants. However, Republic Act No. 10173, or the Data Privacy Act of 2012 (the "Data Privacy Act"), now regulates the collection of personal information.

2. What types of background checks do employers typically carry out on applicants?

Companies in the Philippines commonly carry out checks on education and past employment records, criminal records, social media/ internet and require applicants to undergo health checks/medical screenings. Employers also usually require applicants to submit their Social Security System ID Number, Tax Identification Number and birth certificate.











BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing
- 3. Which of the above background checks are employers permitted to carry out on applicants?

Employers may carry out any of the above (but please see questions 4, 5 and 6 in relation to particular checks).

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the checks mentioned above are expressly prohibited.

Fingerprinting and handwriting checks are impractical in the Philippines, as no Philippine database is available for these two checks.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

A number of conditions apply to background checks (please see question 6).

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

The information requested during the background check process must be necessary and related to the fulfillment of a contract, for compliance with a legal obligation, to respond to a national emergency, to comply with the requirements of public order and safety, to fulfill the functions of a public authority, or must be necessary for the purposes of the employer's legitimate interests.

Background checks excluding education and past employment records, criminal records and health checks/medical screening

In relation to the background checks excluding education and past employment records, criminal records and health checks/medical screening, the employer needs to obtain the consent of the data subject.

Sensitive personal information

In the case of sensitive personal information, such as political views, union membership and fingerprinting, the processing of information must be provided for by existing laws and regulations, must be necessary to protect the life and health of the data subject, and must be necessary for the protection of lawful rights and interests of natural or legal persons in court proceedings, or for the establishment, exercise or defense of legal claims, or when provided to government or a public authority.











Social media/internet searches

In relation to social media or internet searches, such searches must be necessary and proportionate with the purpose of the employer in checking any media presence of the applicant. There must also be a justifiable reason for conducting such media searches.

Drug testing

Drug testing is regulated by law (Republic Act No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002). Such tests may be carried out, provided that the drug use could have adverse and far-reaching effects on the employer, such as reduced productivity, an adverse impact on customer relations and physically dangerous situations. Under the Comprehensive Dangerous Drugs Act of 2002, officers and employees of public and private offices may be required to undergo random drug testing as provided for in company policies. Like every other test, it must be carried out with the applicant's consent and must be necessary and justified.

Credit/financial checks

Credit/financial checks are regulated by Philippine law, as bank deposits and certain investments are mandated by law to remain secret and credit standing may only be accessed by authorized entities.

Criminal records

Criminal records are usually disclosed by the applicants when they are required to submit police clearance and/or court clearance.

Pre-employment medical examinations

Labor rules require pre-employment medical examinations to be carried out on newly-hired employees or during application for employment.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained during background checks should not give rise to any form of discrimination against the applicant. The information must be used in such a way that is connected to the particular job vacancy.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Social Security System ID Number, Tax Identification Number and birth certificate.

9. Are there restrictions or limitations on the scope of these checks?

None, subject to the provisions of the Data Privacy Act.











TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No. The Data Privacy Act applies at all times.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

No. The present legal framework does not distinguish between the personal information gathered prior to employment and that gathered during employment. The Data Privacy Act generally applies to all forms of background checks, save for the gathering of publicly available information.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employers have to check both the age and the citizenship of the employment applicant. Persons under 15 years of age should not be employed, except when employment is necessary in public entertainment or when the employment is in a family business.

If the applicant is a foreign national/"alien", the employer needs to check whether or not the applicant holds an Alien Employment Registration Certificate (AERC) for resident aliens or an Alien Employment Permit (AEP) for non-resident aliens.

Employment in public utilities is also limited to Filipino citizens by virtue of Commonwealth Act No. 108, as amended by Presidential Decree No. 715, otherwise known as the Anti-Dummy Law.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes. The Data Privacy Act does not apply to information about any individual who has worked for the government. Since government officials and employees occupy a position of public trust, the law requires that certain information about their employment be disclosed to the public. It also does not apply to information necessary for banks and other financial institutions to comply with Republic Act No. 9160, or the Anti-Money Laundering Act and other applicable laws. Information pertaining to covered monetary transactions made by an individual may also be disclosed even without the consent of the concerned individual.













OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes, provided that the background check is carried out lawfully. Since the Data Privacy Act governs all acts intended to gather personal information, an employer that requests an unlawful background check can also be made liable.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No. The Data Privacy Act applies equally to anyone who personally conducts or outsources background checks. Hence, the Data Privacy Act provides that anyone who carries out, or instructs another to carry out, a background check shall be responsible for personal information under his or her control, including personal information transferred to a third party for processing.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Section 12 of the Data Privacy Act provides that the processing of personal information shall be permitted only if not otherwise prohibited by law and when at least one of the following conditions exists:

- (a) the data subject has given his or her consent;
- (b) the processing of personal information is necessary and is related to the fulfillment of a contract with the data subject or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) the processing is necessary for compliance with a legal obligation to which the personal information controller is subject;
- (d) the processing is necessary to protect vitally important interests of the data subject, including life and health;
- (e) the processing is necessary in order to respond to a national emergency, to comply with the requirements of public order and safety, or to fulfill functions of a public authority which necessarily includes the processing of personal data for the fulfillment of its mandate; or
- (f) the processing is necessary for the purposes of the legitimate interests pursued by the personal information controller or by a third party or parties to whom the data is disclosed, except where such interests are overridden by fundamental rights and freedoms of the data subject which require protection under the Philippine Constitution.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Republic Act No. 10173 (Data Privacy Act of 2012)
- Republic Act No. 1405 (Law on Secrecy of Bank Deposits, enacted in 1955)
- Republic Act No. 6426 (Foreign Currency Deposit Act of the Philippines, enacted in 1974)











- Republic Act No. 8791 (The General Banking Law of 2000)
- Republic Act No. 9160 (Anti-Money Laundering Law of 2001)
- Republic Act No. 9510 (Credit Information System Act, enacted in 2008)
- Articles 26 and 32 of the Civil Code of the Philippines (enacted in 1950)
- The Bill of Rights in the Philippine Constitution

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

Employers may be imprisoned or fined under section 25 of the Data Privacy Act and under relevant laws.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Employers in Singapore generally carry out background checks in relation to job applicants. This area is not governed by legislation and only undertaken as a matter of practice.

As background checks involve the collection, use and disclosure of personal data relating to applicants, employers must ensure that they comply with the data protection obligations under the Personal Data Protection Act 2012 ("PDPA").

Further, employers should take into account the Tripartite Guidelines on Fair Employment Practices ("TGFEP") and avoid asking for information that is irrelevant to the assessment of an applicant's suitability for a job as this may constitute a discriminatory practice.

2. What types of background checks do employers typically carry out on applicants?

The most common types of background checks relate to an applicant's employment record, educational background, criminal history and financial record/history. However, as criminal records are not publicly available, there may be practical difficulties in obtaining such information.











BACKGROUND CHECKS ON APPLICANTS

• Education and past employment records

• Criminal records

• Credit/financial checks

Health checks/medical screening

Social media/internet search

Fingerprinting

Handwriting

• Union membership

Political views

Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above. Generally, the above background checks are permitted as long as the conditions of the PDPA are complied with and the employer conducts the job application in a non-discriminatory manner.

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above background checks are expressly prohibited.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

All of the above.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

All of the above background checks excluding social media and internet searches

Generally, save where an exception applies, an employer would need the consent of the individual when conducting the above background checks.

In the context of conducting background checks for recruitment purposes, there is an exception under the PDPA that provides for the collection, use and/or disclosure of personal data without consent if it is "necessary for an evaluative purpose". This is defined as "for the purpose of determining the suitability, eligibility or qualifications of the individual to whom the data relates for employment or for appointment to office."

However, the exception only applies insofar as the personal data is "necessary" for the evaluative purpose, and, therefore, employers may not be able to justify conducting such background checks without consent if the personal information is not necessary for the purposes of the employment opportunity.

Separately, employers should restrict themselves to conducting the above background checks only when it is reasonable and relevant to the assessment of an applicant's suitability for a job. Under the PDPA, employers may only collect, use and/or disclose personal data for purposes that a reasonable person would consider appropriate in the circumstances (the "Purpose Limitation Obligation").

Similarly, the TGFEP stipulates that asking for information that is irrelevant to the assessment of an applicant's suitability for a job may be considered to be a discriminatory practice.











Employers should, therefore, assess the above background checks against the occupational requirements of the job and only conduct those background checks that are relevant and reasonable/appropriate in the circumstances.

Social media and internet searches

Employers will not need to obtain consent for background checks conducted via social media and internet searches, as personal information obtained from such sources is considered publicly available data and is not subject to the consent requirement under the PDPA.

Notwithstanding this, employers are still required to comply with the Purpose Limitation Obligation and avoid discriminatory practices when conducting background checks via social media and internet searches.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

Yes. Employers should avoid discriminatory practices and adopt an objective and fair selection criteria when making its recruitment decision. Therefore, any information arising from the above background checks that is not relevant to the assessment of an applicant's suitability for a job should not be taken into account when making the decision.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Yes, litigation searches are also permitted in Singapore.

9. Are there restrictions or limitations on the scope of these checks?

The restrictions/limitations outlined in questions 6 and 7 apply equally here.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No. However, in relation to the Purpose Limitation Obligation, employers are more likely to be able to justify such background checks if they are carried out after the decision to make an offer of employment is made, such as where the offer of employment is conditional on the applicant passing or satisfying the requirements of such background checks.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Yes. The conditions that have been set out in question 6 continue to apply. In this regard, the "evaluative purpose" exception is equally applicable to the assessment of the employee's suitability for promotion or continuance in, or removal from, employment or office.

However, employers should note that another exception under the PDPA applies to conducting background checks on existing employees. This is where the collection of such personal data through background checks is reasonable for the purpose of managing or













terminating an employment relationship between the employer and the employee. Where such an exception is relied on, the employer does not need the consent of the employee for the collection of the personal data, but will be required to inform the employee that such collection is taking place and the purposes for the same.

In relation to question 7, it should be added that it is a criminal offense for an employer to discriminate against any employee by reason of his or her union membership.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

In Singapore, employers are prohibited from employing any foreign employees who do not possess a valid work pass. Therefore, before hiring any foreign applicants or employees, employers must ensure that they possess a valid work pass. Consequently, an employer must also exercise the appropriate due diligence to ascertain whether applicants and/or employees are foreign nationals by checking their passport, document of identity or other travel documents.

In addition, if the employee is to work in relation to a licensed activity, the employer may also have to ensure that various other criteria, including "fit and proper" criteria as well as appropriate licenses, have been fulfilled/obtained.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No. However, with respect to the Purpose Limitation Obligation, employers should consider whether the extent of background checks required would differ in light of the differing occupational requirements for full-time, part-time or contingent workers, and make adjustments accordingly.

SECTORS

14. Do background checks differ in different sectors?

Yes. The level and extent of background checks will differ in different sectors. For example, in the financial services sector, certain financial institutions are expected to conduct due diligence measures on prospective employees, which will include background checks on their past employment and criminal records, including spent convictions. Further, there will be "fit and proper" criteria that may have to be complied with.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Yes. A third party vendor that conducts a background check on behalf of the employer may be considered a data intermediary. Data intermediaries are subject to a lesser range of data protection obligations under the PDPA. However, the employer will continue to











be required to comply with all data protection obligations under the PDPA as if it were processing the personal data itself and may be liable for any breach of the PDPA by the third party vendor.

Therefore, an employer seeking to engage a third party vendor to carry out background checks on its behalf should carry out the appropriate level of due diligence to ensure that the vendor is capable of complying with all obligations under the PDPA.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Yes. An employer processing personal data collected from background checks must comply with the following obligations:

- (a) unless an exception applies, an employer may only use and/or disclose the personal data for the purposes for which the individual has been informed and provided consent. If an employer wishes to use and/or disclose the personal data for a different purpose, fresh consent must be obtained;
- (b) an employer should make reasonable efforts to ensure that the personal data collected is accurate and complete;
- (c) unless an exception applies, the employer must, on request from the individual to whom the personal data relates:
 - (i) provide the individual with access to that personal data and information about the ways in which the personal data has been or may have been used and/or disclosed in the year preceding the request; and/or
 - (ii) correct an error or omission in the personal data relating to the individual that is in the possession or under the control of the employer;
- (d) an employer must anonymise or cease to retain the personal data once it is no longer necessary for a legal or business purpose, i.e., for the purposes of evaluating that individual's suitability for employment;
- (e) an employer must take reasonable security measures to protect the personal data from unauthorized access, collection, use, disclosure, copying, modification, disposal or similar risks; and
- (f) an employer must not transfer the personal data outside of Singapore without ensuring that the recipient provides for the personal data so transferred a standard of protection that is comparable to that under the PDPA.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Personal Data Protection Act 2012 data protection
- Employment of Foreign Manpower Act (Cap 91A) eligibility to work in Singapore
- Industrial Relations Act (Cap. 136) prohibition against discrimination of employee based on union membership
- Tripartite Guidelines On Fair Employment Practices guidelines and recommendations on fair employment and non-discriminatory practices













19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

Personal Data Protection Act 2012

Background checks which result in a breach of the PDPA may render the employer liable to sanctions, including financial penalties of up to SGD\$1 million. The Personal Data Protection Commission is the regulatory authority responsible for the enforcement of the PDPA, and has the power to initiate investigations on its own accord or following a complaint, and to impose the appropriate sanctions for any contraventions of the PDPA.

Separately, individuals who suffer loss or damage directly as a result of a breach of the PDPA can commence private action against the employer for civil remedies.

Tripartite Guidelines On Fair Employment Practices

Applicants and employees who feel aggrieved at perceived discriminatory practices can complain to the Ministry of Manpower ("MOM") and the Tripartite Alliance On Fair Employment Practices ("TAFEP"). The MOM and/or TAFEP may then contact such employers with a view to resolving the dispute and, if necessary, improving the employer's hiring or employment practices.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

While global companies in Korea do conduct background checks, this is not common for local companies, which generally only conduct checks on education and past employment. Any background checks that concern personal information require the applicant's consent unless required by law.

2. What types of background checks do employers typically carry out on applicants?

The most common background checks in Korea are education and past employment checks.











BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

All of the above, except certain criminal record checks and union membership checks, are permitted, subject to the applicant's consent and other conditions (please see question 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

Criminal record checks based on the criminal records information system are expressly prohibited under Article 6 of the Act on the Lapse of Criminal Sentences, and checks on union membership can be deemed an unjust labor practice under the Trade Union and Labor Relations Adjustment Act if conducted for the purpose of interfering with membership activities, irrespective of whether the individual has provided his or her consent.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Each of the permitted background checks (i.e., all of the above except for certain criminal record checks and union membership checks) technically require consent and some require additional conditions to be satisfied. However, please see question 6 for exceptions.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

Each of the permitted background checks mentioned above relate to checks on "personal information" or "sensitive information" under the Personal Information Protection Act ("PIPA"), except for credit/financial checks which are subject to the Use and Protection of Credit Information Act.

Under PIPA, "personal information" is broadly defined as information pertaining to a living individual which identifies a specific person with a name, address or other similar details (including information that, when combined with other information, also makes it possible to identify such a person). "Sensitive information" is defined as personal information concerning ideology, faith, labor union membership, political views or membership of a political party, health information or medical treatment, sexual orientation, genetic information, criminal records (e.g., sentencing, exemptions, suspended sentences, protective custody, probation, etc.). Similarly, "unique identification information" is defined as an individual's resident registration number, passport number, driver's license number or "alien" registration number.

In order to collect and use personal information, the employer must disclose the following to the applicants and obtain their consent prior to the collection and use of such information: (i) purpose of collection and use; (ii) specific items of personal information to be collected; (iii) time period for possession and use; and (iv) the applicant's right to refuse and any disadvantages from refusal. If











any of the above items change, the employer must acquire fresh consent from the applicant. For the collection and use of sensitive information or unique ID information, the same four items above must be notified and separate consent obtained for the collection and use of such sensitive or unique ID information.

However, there are two main exceptions, among others, to the notice and consent requirement for collection and use of personal information: (i) when the personal information is necessary for the execution of a contract with the applicant; and (ii) when otherwise required by law or necessary to comply with legal obligations under Korean law.

In the employment context, it is generally recognized that information such as name, gender, education and employment history is required for a company to enter into and maintain an employment contract, and therefore the collection and use of such information does not technically require notification and consent under PIPA as per the first exception. Further, collection and use of personal information in order to comply with social insurance programs or retention of employee personnel records in accordance with the Labor Standards Act would fall within the second exception and similarly does not require notification and consent under PIPA.

To collect personal credit information, the Use and Protection of Credit Information Act requires that the employer obtain consent from the applicant and also notify the applicant that his or her credit rating may be degraded at the time of such inquiry.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used where relevant to the particular role and should not be used in a discriminatory way. A separate additional consent is required if the obtained information will be used for any other purpose.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

Military service, marital status, date of birth and gender are some of the other common background checks in Korea. However, please see question 10 in relation to asking applicants for details which relate to particular protected characteristics.

9. Are there restrictions or limitations on the scope of these checks?

Notice and consent are required (please see question 6).

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Yes. Employers should only ask for the minimum information required, such as educational background and past employment history. Employers should not ask for details which relate to protected characteristics (e.g., age, nationality, sexual orientation, religion, etc.) and for female applicants, employers should be cautious about asking for information that is not required for the job (e.g., appearance, height, marital status, etc.).











BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out during employment but will need to be appropriate and necessary to maintain the employment relationship (please see question 6).

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The employer must request, and the individual must provide, certain original documents to establish his or her eligibility to undertake the work on offer. The employer must check the validity of the original documents, including the visa, and satisfy itself that the individual is the person named in them and that he or she has the right to work in Korea.

Individuals under the age of 15 are not permitted to work in Korea.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

The background checks that are carried out as market practice will vary from sector to sector. For example, in the financial services or education sectors, applicants can be required to disclose spent convictions.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

When background checks are outsourced to a third party, the employer must notify the applicants but explicit consent is not required. PIPA requires a written delegation agreement containing the details of the arrangement to be in place, together with the following: (i) purpose and scope of the delegation; (ii) limitations on the scope of such delegation (e.g., prohibition of processing of personal information for any purpose other than the delegated purpose, and limitations on sub-delegation); (iii) technical and managerial protective measures; (iv) matters regarding supervision management of personal information possessed in relation to delegating; and (v) provision on compensation for damages in the event of a breach by the delegate company.











The identity of the delegate company and the scope of the delegated work must also be disclosed in the employer's privacy policy, and the employer may be liable as if it were directly responsible for any breaches or unauthorized disclosure of personal information which occur by the delegate entity.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Yes. Please see question 6.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Personal Information Protection Act (2011)
- Labor Standards Act (1997)
- Use and Protection of Credit Information Act (1995)
- Act on the Lapse of Criminal Sentences (1980)
- Equal Employment Opportunity and Work-Family Balance Assistance (1987)
- Immigration Act (1963)
- Trade Union and Labor Relations Adjustment Act (1997)

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

The applicable sanctions differ depending on the legislation:

- Personal Information Protection Act: If personal information is collected and used without consent, the employer may be subject to an administrative fine of up to KRW50 million. In addition, for the collection and use of sensitive information or unique identification information without consent, the liable persons may be subject to criminal sanctions of imprisonment of up to five years or a criminal fine of up to KRW50 million. The employer may also be vicariously liable and subject to criminal fines up to the same amount, or be subject to a corrective order by the Ministry of Public Administration and Safety, the ministry that administers PIPA.
- Trade Union and Labor Relations Adjustment Act: If a background check regarding union membership is deemed to be an unjust labor practice, the employer may be subject to imprisonment of up to two years or a fine of up to KRW20 million.
- Use and Protection of Credit Information Act: If credit/financial information is collected and used without consent, the employer may be subject to criminal sanctions of imprisonment of up to five years or a criminal fine of up to KRW50 million.
- Act on the Lapse of Criminal Sentences: If criminal records are acquired or used in violation of the Act, the employer will be subject to criminal sanctions of imprisonment of up to two years or a criminal fine of up to KRW20 million.

Contributed by: Chun-Wook Hyun & Hoin Lee, Kim & Chang

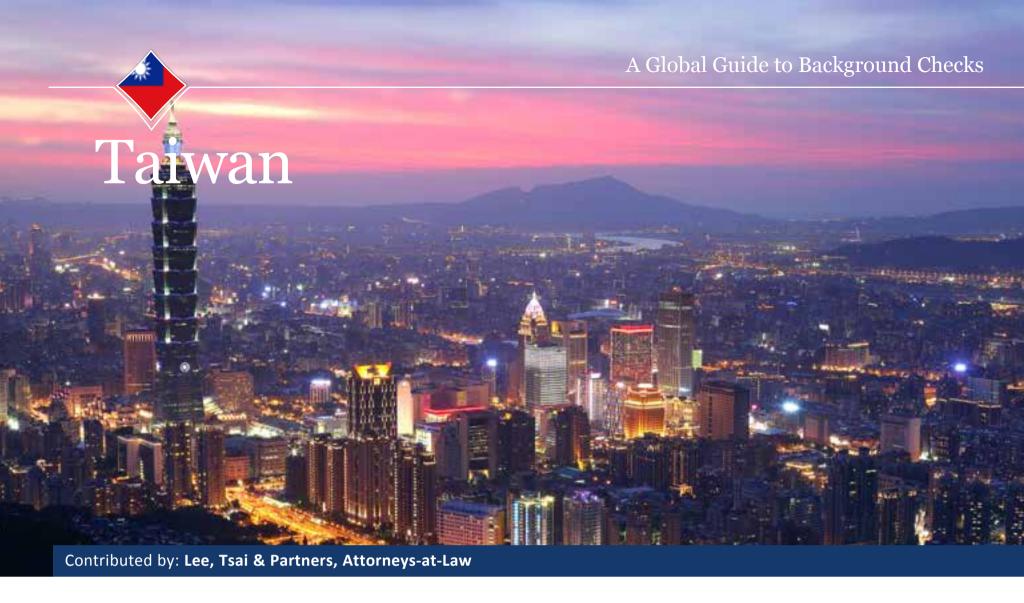












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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes, it is standard practice for employers to carry out background checks on job applicants in Taiwan. However, since the Personal Information Protection Act ("PIPA") came into force in 2012, employers have become more cautious with respect to the purpose and scope of background checks. Notwithstanding PIPA, the Employment Service Act ("ESA") prohibits employers from collecting personal documents unrelated to the employment concerned against the applicant's wishes. As a result, employers will usually acquire a written consent from the applicant and disclose the statutorily required notice items in advance (please see question 6).

2. What types of background checks do employers typically carry out on applicants?

Employers usually carry out background checks relating to education, work experience, military service, language ability, professional certificate/licenses, marital status and criminal records.











BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing
- 3. Which of the above background checks are employers permitted to carry out on applicants?

All the above background checks are permitted in Taiwan as long as the applicant's written consent is obtained.

4. Which of the above background checks are employers not permitted to carry out on applicants?

None of the above background checks are expressly prohibited.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain</u> <u>conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Except for handwriting, which is not considered to be personal information under PIPA, all the above background checks require either the applicant's consent or prior disclosure of statutory notices.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

For the above background checks (handwriting excluded), the employer should disclose the following items to the applicant when collecting his or her personal information: (i) the name of the agency collecting the personal information; (ii) the purpose of collection; (iii) classification of the personal information; (iv) time period, area, target and manner in which the personal information will be used; (v) rights of the applicant and ways to exercise such rights as prescribed in Article 3 of PIPA; and (vi) the effect on the applicant's rights and interests if he or she chooses not to provide his or her personal information. However, certain occupations, such as the private security service and taxi drivers, are exempted from the above statutory notice with respect to criminal record background checks, as individuals who have committed certain crimes are prohibited from serving as security guards and taxi drivers.

In addition, although it is not necessary to obtain written consent from the applicant for background checks due to the quasi-contract relationship between the employer and applicant for employment management purposes, if the background check item is not relevant to the execution of the employment contract, consent is required. Once again, certain occupations, such as the private security service and taxi drivers, are exempted with respect to criminal record background checks for the same reasons as stated above.

Background checks of criminal records, credit/financial checks, fingerprinting, health checks/medical screening and drug and alcohol testing that may be unrelated to the employment concerned shall require the prior consent of the applicant.











7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information acquired above should only be used for employment management purposes, specifically the selection of applicants. Otherwise, written consents are required. Under no circumstances should the information acquired be used in a discriminatory manner against the applicant (in accordance with ESA).

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

As long as the collection, processing and use of the information obtained from the background check does not violate PIPA or ESA, they are permitted in Taiwan.

9. Are there restrictions or limitations on the scope of these checks?

Please see question 6.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

Yes. According to the Occupational Safety and Health Act ("OSHA"), employers are required to conduct pre-employment physical examinations for employees at the time of employment, and employees must agree to undergo the examinations. Therefore, for the employers obtaining employees' personal information through such physical examinations after the decision to make an offer of employment, neither the notice of statutory items nor applicants' consent are required in accordance with law.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Yes. According to the Labor Standards Act ("LSA"), employers shall prepare and maintain an employee record card indicating the name, sex, birth date, place of ancestral origin, educational background, address, national identification card number, employment starting date, wage, labor insurance starting date, merits and demerits, injury and disease and other significant facts relating to each employee, and shall keep an employee payroll roster in order to record entries such as wages payable, the items of wage computation and the total sum of wage payment. Employers shall also prepare and keep employee sign-in books or time cards to record employee attendance on a day-to-day basis. Furthermore, general health examinations and special health examinations shall be conducted for current employees pursuant to OSHA. Thus, background checks for the above-mentioned items for existing employees shall be exempted from the notice of statutory items as well as written consents. Other than the above, the law on background checks is the same for applicants and employees.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employers need to check basic eligibility information required by law, such as age, nationality and health conditions, as well as any











other particular eligibility requirements required by law, such as criminal records for the private security service and taxi drivers.

For age, LSA first prohibits employers from hiring anyone under the age of 15. In the case of foreign applicants, ESA requires the employer to confirm that the foreign national is in Taiwan legally and that, other than in certain extenuating circumstances, the job for which the foreign national is being hired falls under the specific categories enumerated in Article 46 of ESA.

The OSHA also prohibits employers from hiring individuals to engage in a particular type of work that the individuals are physically unsuited for; thus the employers are required to conduct a physical examination of the applicant or employee. For certain occupations, as noted above, such as the private security service and taxi drivers, criminal record background checks are required as individuals who have committed certain crimes are prohibited from serving as security guards and taxi drivers.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes. For some sectors in which previous convictions represent an automatic disqualification, such as security guards and taxi drivers, employers do not have to obtain consent from, or make the statutory notices to, the applicant in conducting a criminal record background check.

Furthermore, for certain sectors which do not fall fully under the scope of OSHA and where the employer is not required to conduct pre-employment physical examinations, the employer will need to obtain consent from, and make the statutory notices, to the applicant if it wishes to conduct a health check/medical screening or drug and alcohol test on the applicant.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes. The third party commissioned to carry out background checks shall be considered the commissioning employer for the purpose of the statutory responsibilities and obligations in PIPA.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Generally no. According to PIPA, the outsourced third party shall comply with the same laws and regulations as those applicable to the commissioning employer. Thus, the background checks that can be carried out by the third party shall be the same as the employer.

However, when background checks are outsourced, the commissioning employer shall properly supervise the third party on the following matters:

- (a) the planned scope, classification, specific purpose and time period of background checks;
- (b) the proper security measures applied to the personal information taken by the third party;











- (c) other third parties, if any, further outsourced to by the outsourced third party;
- (d) notification to the employer and execution of the necessary remedial measures in the event that the third party or its employees violate PIPA and any other personal information protection related laws or regulations;
- (e) reserved instructions (if any) from the employer to the third party; and
- (f) the return of any instrument containing personal information, and the deletion of any personal information stored and possessed by the third party as a result of performing the outsourcing agreement, once the outsourcing agreement is terminated or rescinded.

In addition, the employer shall periodically confirm the implementation status of the third party and record the result of such confirmation.

The third party may only make the background checks requested by the employer; if the employer's instruction violates PIPA or other personal information protection laws or regulations, the third party shall notify the employer immediately.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

Yes. Employers shall process the information collected in accordance with the following rules:

- (a) The rights and interests of the applicants or the employees should be respected in collecting, processing or using personal information and the information shall be handled in accordance with the principle of good faith. The employer may not process the information beyond the stated purpose of collection.
- (b) Upon request from the applicants or the employees, the employer shall reply, offer the collected personal information for review by the applicant or the employee, or provide copies of the collected personal information.
- (c) The employer shall ensure the accuracy of the personal information, and correct or supplement it, as well as discontinue processing or using the information in the event of a dispute regarding the accuracy of personal information either ex officio or upon request from the applicants or the employees.
- (d) The information collected shall be deleted, halted for further processing or use ex officio or upon request from the applicants or the employees when the specific purpose for the collection of personal information no longer exists, the relevant time period has expired, or in the event of a violation of PIPA in the collection, process and use of that information.
- (e) Where the failure to correct or supplement personal information may be attributed to the employer, after such information is corrected or supplemented, the applicants or employees to whom the personal information was provided to shall be notified of such corrections or supplements.
- (f) When the personal information is stolen, disclosed, altered or infringed in other ways due to the violation of PIPA, the employer should notify the applicants or the employees after an inspection.
- (g) The employer which keeps personal information files should adopt proper security measures to prevent them from being stolen, altered, damaged, destroyed or disclosed.













SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

- Personal Information Protection Act (as amended in 2012)
- Enforcement Rules of the Personal Information Protection Act (as amended in 2012)
- The Specific Purpose and the Classification of Personal Information of the Personal Information Protection Act (as amended in 2012)
- Employment Service Act (as amended in 2013)
- Enforcement Rules of the Employment Service Act (as amended in 2014)

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If background checks are carried out unlawfully, according to PIPA and ESA, imprisonment or detention of no more than two years and/or a fine of no more than NT\$200,000 shall be imposed. Administrative fines of up to NT\$500,000 may also be imposed if the employer fails to take corrective measures within a specific period after being ordered to do so.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

The practice of carrying out background checks in Thailand varies widely among employers and may depend on the area of business or the particular position.

2. What types of background checks do employers typically carry out on applicants?

The types of background checks vary but may include verification of educational credentials and professional licenses, criminal records checks (of one or more jurisdictions), and a medical examination. Drug screening and other checks may also be carried out, depending on the circumstances.

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BACKGROUND CHECKS ON APPLICANTS

- Education and past employment records
- Criminal records
- Credit/financial checks
- Health checks/medical screening
- Social media/internet search

- Fingerprinting
- Handwriting
- Union membership
- Political views
- Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

The law does not explicitly authorize, or prohibit, background checks. However, employers often require health checks/medical screening, where it is necessary for the position, for insurance purposes, and/or for work permit purposes. For some employers, it is standard practice to carry out checks of educational credentials and qualifications, as well as to check past employment references provided by applicants. There are also some categories of employment where drug and alcohol testing is often carried out. In relation to social media/internet searches, it is likely that some employers carry these out informally.

Criminal records checks can be undertaken but they can take some time to complete (particularly if they involve multiple jurisdictions). Employers therefore often dispense with such checks, unless an employer has particular concerns which are specific to the position (e.g., if the position involves handling money or working with children).

4. Which of the above background checks are employers not permitted to carry out on applicants?

The law does not explicitly authorize, or prohibit, background checks.

Nevertheless, there are specific points to note in relation to particular checks:

Credit/financial checks

The Credit Information Business Act restricts the purposes for which members and service users can use credit information disclosed by the National Credit Bureau; consideration of employment is not among the permissible purposes. Nevertheless, if credit information is available (e.g., from a credit bureau overseas, which might be relevant when hiring a foreign national), an employer would not be prohibited by Thai law from checking such information. It would also be possible for an employer to ask an applicant to request a credit report and to submit it to the employer. Similarly, an employer could ask an applicant to disclose information on his or her bank accounts and/or securities holdings.

Union membership

Pursuant to the Labour Relations Act, employers cannot discriminate, or take negative action, against their employees who are union members or otherwise involved in organized labour. However, this would not prevent an employer from carrying out a check of whether its employees are union members, as the issue is, instead, what the employer does with that information. Moreover, the Labour Relations Act does not address pre-employment consideration of whether to hire an applicant (i.e., one who is not yet an employee).











Political views

At present, the interim Constitution does not address discrimination on the basis of political views. However, this was addressed in the 2007 Constitution, among various other attributes on which discrimination is not permissible. As a similar provision has appeared in a draft of the new Constitution, it is likely to again be addressed in the new Constitution, once approved. This would not necessarily mean that an employer could not carry out a check of an individual's political views. Rather, if this provision reappears in the next Constitution, the issue would be what the employer does with such information. Deliberations on the new Constitution are ongoing.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

The law does not explicitly impose conditions on employers carrying out background checks. However, some legal provisions may apply indirectly. For example, any disclosure of personal health information would require the consent of the data subject. The medical facility possessing such information would therefore require the data subject's consent before releasing it to the employer. Similarly, the Royal Thai Police require consent of the data subject to process a criminal records check.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

The applicant's consent would be required to lawfully submit a request for a Thai criminal records check and, as noted in question 5, the applicant's consent may be required in relation to health/medical information, including the results of drug testing.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The law does not impose explicit limitations on the use of information arising from background checks prior to hiring an employee. However, general provisions of law would be applicable. For example, having gathered the information, if the employer discloses it in a way that causes damage, the employer may be liable to the data subject in tort (e.g., civil liability). Depending on the circumstances, criminal charges may also arise (e.g., criminal defamation).

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No other types of employment background checks are explicitly permitted. Some employers also carry out personality testing.

9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

The law does not draw a distinction between background checks carried out before or after a decision is made to offer employment. Rather, a key distinction would be whether or not an individual is in an employment relationship with the employer. Accordingly, a key point would be the making of an offer of employment that could be accepted by the applicant, thus initiating the employment relationship. Please see response to question 11.











BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

In principle, employers are not prohibited from conducting background checks, whether prior to or during employment. Whether a background check is carried out before or after employment has commenced, if the resulting information is used in determining, for example, an employee's bonus, promotion, or salary increase, this may, nevertheless, present risks for the employer. For example, the applicable terms of employment—whether existing in an individual employment agreement, the employer's work rules and regulations, a collective bargaining agreement, or employer policies—might restrict the criteria on which an employer can make these types of employment decisions. Similarly, an employer is prohibited from discriminating against its employees who are union members, employee committee members, or otherwise involved in collective bargaining activities. It is also important to keep in mind that if an employee were to refuse to consent to, or cooperate with, particular background checks, this would not justify termination for cause.

That said, it should be noted that some categories of employer often carry out certain types of background checks during employment. For example, capital markets employees are often asked to disclose their personal securities holdings and/or trades, so that their employers can meet their SEC regulatory obligations to prevent insider trading. Also, industrial employers frequently require their employees to undergo drug testing, typically annually as part of the annual medical check, but random checks are sometimes also carried out. Even more broadly, a wide range of employers conduct annual medical checks, and foreign employees are required to undergo periodic medical examinations, for work permit purposes.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

The law does not set out specific steps for an employer to take to ascertain whether an applicant or employee is legally entitled to work. However, the employer can be criminally liable for employing people illegally, under a variety of different laws. For example, the Alien Employment Act B.E. 2551 and the Immigration Act B.E. 2522 (as amended) prohibit the employment of foreign nationals who are not authorized to work.

Another example is the Labour Protection Act B.E. 2541 (as amended), which prohibits the employment of children under a certain age and in carrying out certain types of work. There are also sector-specific laws, such as the Securities and Exchange Act B.E. 2535 (as amended), that require the holding of particular licenses to carry out particular jobs.

Employers therefore need to carry out such checks as would be necessary to make sure that employees can lawfully be employed for the type of work envisaged. Age and Thai nationality can be determined from a valid Thai national ID card. In relation to employing foreign nationals, as work permits are employer sponsored, an employer would know whether the employee had been granted a work permit.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.













SECTORS

14. Do background checks differ in different sectors?

The law does not explicitly authorize background checks. However, in some sectors, businesses are subject to additional compliance requirements. For example, securities companies are required to prevent insider trading. In order to comply with such a requirement, employers commonly require their employees to disclose their securities holdings and/or trades, in order to identify insider trading.

OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Some businesses specialize in carrying out investigations, and in principle, an employer could hire such a company to prepare a report on an applicant, subject to the other restrictions outlined herein.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

No.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

The law does not impose specific limitations on the processing of information arising from background checks prior to hiring an employee. However, general provisions of law would be applicable. For example, if the employer discloses information in a way that causes damage, the employer may be liable to the data subject in tort (e.g., civil liability). Criminal charges may also arise, depending on the circumstances (e.g., criminal defamation). It is therefore advisable to obtain the consent of the data subject to the collection, processing, use, transfer, and disclosure of such information, both overseas and domestically.

SANCTIONS/ENFORCEMENT

18. What restrictions or laws exist to regulate background checks?

Although the law in Thailand does not address employment background checks specifically, general provisions of law would nonetheless be relevant, including provisions of the following legislation:

- The Civil and Commercial Code
- The Penal Code
- Credit Information Business Act B.E. 2545 (as amended)
- Labour Protection Act B.E. 2541 (as amended)
- Labour Relations Act B.E. 2518 (as amended)
- National Health Act B.E. 2550 (as amended)











19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

As noted above, if an employer discloses information in a way that causes damage, the employer may be liable to the data subject in tort (e.g., civil liability), and criminal charges may also arise, depending on the circumstances (e.g., a disclosure could amount to criminal defamation). In addition, if an employer made a negative employment decision based on an employee's union/collective bargaining involvement, this would be a criminal offense. If an employer disclosed employee health/medical information without the employee's consent, this would also constitute a criminal offense. Other breaches may also arise, depending on the circumstances.

In the case of a criminal offense, the potential penalties would depend on the provision of law breached. Typical penalties include fines and/or imprisonment. These can be imposed on the employer, as well as individuals who have the authority to act on behalf of the employer, such as directors and management personnel.

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OVERVIEW

1. Is it standard practice for employers to carry out background checks on applicants?

Yes. Employers in Vietnam regularly carry out background checks on applicants. The scope of background checks are not limited by law. However, the information required needs to be directly related to the execution of the labor contract and subject to the consent of the applicant.

2. What types of background checks do employers typically carry out on applicants?

The common background checks in Vietnam are education, professional qualifications, past employment and health checks.











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BACKGROUND CHECKS ON APPLICANTS

• Education and past employment records

• Criminal records

• Credit/financial checks

Health checks/medical screening

Social media/internet search

Fingerprinting

Handwriting

• Union membership

Political views

Drug and alcohol testing

3. Which of the above background checks are employers permitted to carry out on applicants?

As a matter of Vietnamese law, before entering into a labor contract, employers are permitted to require the applicant to provide them with information regarding name, age, sex, residency, education background, professional qualifications, health status and other information directly relating to the signing of the labor contract.

Certain background checks require the consent of the applicant (please see question 6).

4. Which of the above background checks are employers not permitted to carry out on applicants?

As discussed above, employers could request any information in respect of background checks if such requested information is directly related to the signing of the labor contract.

5. Which of the above background checks are employers permitted to carry out on applicants but <u>only if certain conditions are satisfied</u> (e.g., the applicant's consent needs to be obtained or other restrictions/limitations apply)?

Please see questions 3 and 4.

6. If certain conditions need to be satisfied for any of the background checks, what are these conditions and to which background checks do they apply?

The information required must be directly related to the execution of the labor contract.

The following background checks require the applicant's consent: criminal records, credit/financial checks, fingerprinting, handwriting, union membership, political views and drug and alcohol testing.

7. Are there limitations on how an employer is permitted to use information arising from the above background checks when making a decision as to whether or not to employ an individual?

The information obtained should only be used for the purpose of signing the labor contract.

OTHER BACKGROUND CHECKS

8. Are any other background checks permitted and/or standard practice in this jurisdiction?

No.











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9. Are there restrictions or limitations on the scope of these checks?

Not applicable.

TIMING OF BACKGROUND CHECKS ON APPLICANTS

10. Would the answers to questions 1 to 9 differ depending on whether the background checks are carried out before or after the decision to make an offer of employment?

No.

BACKGROUND CHECKS DURING EMPLOYMENT

11. Does the law on background checks differ if an employer wishes to carry out such checks on existing employees (as opposed to applicants only)?

Checks may be carried out on existing employees but this is subject to the consent of the employee, except where the collection of information is required pursuant to a decision of the competent authority.

ENTITLEMENT TO WORK

12. What steps do employers have to take to check that an applicant or employee is legally entitled to work in this jurisdiction?

Employers in Vietnam take the following steps to check that an applicant/employee is legally entitled to work:

- Request that the applicant/employee provides certain original documents to prove the applicant/employee's eligibility to undertake the job;
- Check the validity of the given documents and information by itself; and
- Make copies of the original documents since the employer is not permitted to keep the originals of the applicant's/employee's identity papers, certificates and qualifications.

FULL-TIME, PART-TIME, CONTINGENT WORKERS

13. Are there any differences in the background checks that can be carried out on full-time, part-time or contingent workers?

No.

SECTORS

14. Do background checks differ in different sectors?

Yes. Background checks may vary from sector to sector and the information required is subject to the decision of each employer.













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OUTSOURCING BACKGROUND CHECKS

15. Are employers permitted to outsource background checks to a third party vendor?

Yes.

16. If background checks are outsourced to a third party vendor, does this have any impact on the checks that can be carried out or the relevant data protection obligations?

Applicants/employees must provide their consent if background checks are outsourced to a third party vendor.

DATA PROCESSING

17. Are there restrictions or limitations on how employers process the information collected from background checks?

No. However, employment law provides that the information requested must be directly related to the signing of the labor contract.

SANCTIONS/ENFORCEMENT

- 18. What restrictions or laws exist to regulate background checks?
- The Civil Code No. 33/2005/QH11 dated 14 June 2005 of the National Assembly
- The Labor Code No. 10/2012/QH13 dated 18 June 2012 of the National Assembly

19. What are the potential sanctions against employers if background checks are carried out unlawfully and what is the mechanism for enforcement?

If an employer fails to comply with any of the requirements in relation to background checks, causing damage to the employee, the employer will need to compensate the employee for direct and consequential damages and losses.

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