

CANDIDATE SCREENING – HOW FAR IS TOO FAR?

Richard Sheldon, Counsel, Appleby (Guernsey) LLP

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In the modern world where it has never been technologically easier to monitor and track the actions of employees it feels counter intuitive to be writing an article that starts from the premise that we shouldn't attempt to find out every possible detail about a potential candidate. However, with the implementation of the General Data Protection Regulation (GDPR) and equivalent legislation in both Guernsey and Jersey, for those businesses that do undertake pre-employment screening this will need to be reassessed in light of the new laws.

Probably the three key areas of screening are:

- Criminal records and background checks;
- Medical screening; and
- Social media screening.

For many employers, requiring a criminal record or background check on a prospective candidate is recruitment 101, especially for those working in finance or safeguarding. At the most basic level this would include taking up references from a former employer. For more in depth screening, for example, to check if someone had a criminal record this would clearly be permitted in circumstances where there is a legal obligation to undertake such checks. For most employers however, there will not be a legal requirement for such recruitment screening, and their requirement for this information is merely company policy. In such circumstances employers must ask whether a search is necessary and proportionate for the role. If it is then the first decision should be whether a declaration from the employee will suffice? If not and a check is appropriate, then

consideration must be given to the level of check. For the vast majority of roles this should be limited to unspent convictions, the key exceptions to this being those who work with children and vulnerable adults, as well as for lawyers.

Medical screening takes many forms but can range from a full medical or medical questionnaire to be completed by a prospective candidate. Under the GDPR in order to lawfully process an individual's medical data which amounts to special category data (formerly known as sensitive data), this requires explicit consent which can be withdrawn. Furthermore the position will be further complicated with the imminent arrival of disability discrimination in Jersey (due in 2018), and the likelihood that Guernsey will follow suit and introduce similar legislation in the near future, as employers will be in a position whereby they cannot take a decision not to recruit an individual based on their health grounds unless it can be objectively justified. Whether this legislation follows the UK Equality Act which only permits such screening to take place after a conditional offer has been made will be interesting to see.

Probably the most contentious aspect of pre-employment screening is where an employer (usually covertly) seeks to screen a prospective employee's social media profile as part of the recruitment process. Official European GDPR guidance has taken a hard line on the ability of employers to undertake such screening. The guidance states that employers should not be using social media profiles to screen applicants unless: (i) there is a legal ground to do so (such as a legitimate interest); (ii) the social media profile is business-related; and (iii) the information collected is absolutely necessary and relevant to assess the candidate's ability to do the job. It is therefore arguable that screening a candidate's LinkedIn profile could be justified since this is a professional forum used in the business arena, whereas it will be far more difficult for employers to justify screening a candidate's Facebook, Instagram or Twitter profiles, as it is not obvious how this would satisfy the criteria listed above.

The introduction of GDPR will certainly make employers think again to ensure they are compliant with the new rules. In addition to deciding what form of screening they will undertake, employers will also have to provide this information to a candidate as part of a data privacy notice at the point of first contact which will include their right to object. Like in so many different areas, GDPR is a game changer in how employers go about their recruitment, as it will force businesses to be up front about what they are doing with a candidate's information and won't allow them to justify the kind of checks many do today.

This article has been written by:

Appleby (Guernsey) LLP

Richard Sheldon

Counsel

+44 (0)1481 755 904

rsheldon@applebyglobal.com

Richard Sheldon is Counsel in the Dispute Resolution and Employment department at Appleby. A copy of this column is available on the firm's web site at applebyglobal.com