



Reminder: Ontario Process for Police Record Check Has Undergone Substantial Reform

August 21, 2019

Alex Lemoine

Outside of a few defined industries, most organizations are not obligated to obtain police record checks when screening employment candidates. However, depending on the nature of an organization's business, police record checks may be crucial.

In the recent past, there was no standardized framework for conducting police record checks. This landscape changed significantly when the [Police Record Checks Reform Act, 2015](#) (the "Act") came into force in late 2018.

The Act sets out a comprehensive and standardized approach governing police record checks in Ontario, including a 2-stage process for obtaining consent.

Below is an outline of the key provisions of the Act, along with practical takeaways for employers seeking to conduct police record checks.

Types of Police Record Checks

The Act provides for three categories of police record checks. Each category of police record check authorizes the disclosure of additional information. Briefly stated, the checks will include the following types of information:

- **Criminal Record Checks.** Will contain criminal convictions and findings of guilt under the [Youth Criminal Justice Act](#)
- **Criminal Record and Judicial Matters Check.** Will contain the information that is in a Criminal Record Check as well as outstanding charges, arrest warrants, certain judicial orders, absolute discharges, conditional discharges, and other records as authorized by the [Criminal Records Act](#).
- **Vulnerable Sector Check.** Will contain the information that is in a Criminal Record and Judicial Matters Check as well as findings of "Not Criminally Responsible" due to mental disorder, record suspensions (pardons) related to sexually-based offences, and non-conviction information related to the predation of a child or other vulnerable person (i.e., charges that were withdrawn, dismissed or stayed, or that resulted in acquittals).

Notably, outside the Vulnerable Sector Check, the Act specifically restricts the disclosure of non-conviction and non-criminal records (such as arrests where no criminal charges were laid) as well as mental health information.

The Process to Request a Police Record Check

The Act contemplates a two-stage process for employers to obtain a police record check:

1. The individual who is the subject of a police record check must provide his or her written consent (specifying which check is being consented to). The results of the police record check are then disclosed only to the individual who is the subject of the check.
2. After receiving the information, the individual has the opportunity to determine if the police record check is in compliance with the Act and decide if he or she consents to the further disclosure to the organization requesting it. Only after this secondary consent will the police record check be provided to an employer or prospective employer.

However, it should be noted that pursuant to the regulations, and except for Vulnerable Sector Checks, there are certain limited exemptions from this two-step process (including for certain background check providers).

Takeaways for Employers

1. **Obligations under the *Ontario Human Rights Code* (the “Code”)**
Police record checks can serve as a valuable tool for some organizations to scrutinize employees, prospective employees and volunteers. However, organizations need to be careful how they use them. Police record checks can be invasive and lead to unconscious discriminatory treatment. For example, the “Vulnerable Sector Check” includes disclosure of a criminal offence where the individual was ultimately found “not criminally responsible” due to a mental illness. Unfortunately, this could put employers in the unenviable position of acting on information in ways which could constitute discrimination under the *Code*.
Notably, in Ontario, an employer cannot discriminate against an employee on the basis of a “record of offences” which is defined under the *Code* to mean (i) an offence in respect of which a pardon has been granted, and (ii) an offence under a provincial law (for example a speeding ticket under the *Highway Traffic Act*). As such, employers should ensure that any check which will reveal an employee’s record of offences is being performed where there is a bona fide reason to perform the check (i.e. where it is required and directly relevant to the particular position the employee will hold). To help avoid the above issues, organizations should consider whether or not police record checks are a necessary requirement or if other tools for screening applicants (such as reference checks, client feedback, interviews) are sufficient.
2. **The Principle of Consent**
Similar to many other pieces of privacy legislation, the Act relies heavily on the principle of consent. In order to receive the information in a police record check, an employer may have to wait for a potential employee to provide consent twice. For employers, this could provide quite the dilemma. For example, it is not clear whether an individual’s refusal to consent to a police record check (or a particular level of examination) would be sufficient to withdraw an offer of employment. Given the speed at which most businesses move, the delay imposed by this process may be a significant impediment.
3. **Third Party Providers**
Employers using third party providers to conduct these checks should confirm that their providers are following the Act’s requirements, including that the appropriate employee consents are being secured. Employers may also wish to consider using third party providers

as it may alleviate the necessity for the second consent to be obtained.

4. **Privacy Obligations**

Employers who conduct police record checks may find themselves in receipt of information which is highly personal and confidential. Employers should ensure that this information is kept extremely secure and only used for its specified purpose. Notably, the Act specifically forbids the further disclosure of information received by an organization. Organizations (or individuals) who wilfully disclose the received information can be liable for a fine of up to \$5,000.

If you have any questions or concerns, please feel free to contact us for more information or guidance.

DISCLAIMER: This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at [.www.stikeman.com/legal-notice](http://www.stikeman.com/legal-notice)