

Resume Detectives

29 August 2002 -- CareerOne

These days, screening a potential employee can involve anything from calling referees to requesting a criminal history check.

However, companies and recruitment firms must comply with strict rules on background checking.

Before the privacy legislation was introduced last December, an unsuccessful job applicant might be consoled with the phrase: "We'll keep your resume on file."

Nowadays, companies would need the written permission of the unsuccessful candidate to store their resume. Those not stored are usually destroyed. Written permission is also required to contact former employers and referees.

However, the privacy legislation has done nothing to dampen the enthusiasm shown by leading recruitment firms and employers for screening candidates.

Recruitment consultant Nicki Wood told CareerOne that her firm, IT&T Careers, has introduced a standard service for clients to arrange pre-employment criminal history checks.

Criminal history checks are already commonplace in a range of sectors including education, health, defence and the police force and Ms Wood predicts more sectors will follow.

"I could name various private sector companies that have made criminal background checks part of their standard recruitment process," Ms Wood says.

Sean Reidy, the head of the Criminal Law Committee of the Queensland Law Society, advises candidates to check the accuracy of any information gathered as part of a pre-employment check. Mr Reidy, of law firm Reidy & Tonkin in Brisbane, says he recalls a defamation case where a person was publicly and wrongly described as having a criminal record after being confused with another person of similar name and age.

"You would be prudent to ask for a copy [of the criminal history check] in case they have a person with an identical name or have made a mistake," says Mr Reidy. "You can't assume those records are actually accurate."

In the Q&A below, Joseph Catanzariti, a Partner with law firm Clayton Utz, deals with other important questions on what candidates can expect when applying for a job. Mr Catanzariti chairs the Law Society of NSW's Industrial Relations Committee.

While recruitment consultants and HR managers should be well versed in the "dos and don'ts" of candidate screening, line managers should also read the advice below carefully to ensure they don't expose their company to legal action if they manage their own recruitment needs.

Resume Checking

CareerOne: Can a resume check be done on a candidate without their permission? Should a pro forma document be used for obtaining permission?

Joseph Catanzariti: Resume checks should not be carried out without the candidates permission. This should be established with the candidate either during the interview process or on the application for employment.

Whilst consent may be obtained orally it is often obtained by asking the candidate to sign a written pro forma document. The document should list what type of information is being collected and the purpose for its collection. It should also state that the employer may contact any listed organisation or previous employer listed in the resume and an application form for the purpose of obtaining a reference and verification of qualifications.

C1: Does an employer have the right to contact organisations or referees not listed in the candidates application?

JC: No, an employer must disclose to an individual who it intends to contact for a character or employment reference and to verify qualifications. An individual who gives permission to an employer to make such inquiries limits this consent to the groups of people listed in the consent.

C1: Can an employer take any action against a candidate who lies in their resume or job application?

An employer can only take action against an employee who lied in their resume or job application, if the lie affects the individual's ability to perform the inherent requirements of the job.

For example, an employer may be able to take action against an employee who claimed to be a qualified solicitor in their application but are found not have completed a law degree. An employer may not be able to take action against an employee who lied about a previous knee injury in their application for the position of a call-centre operator.

C1:What happens to the notes made by a prospective employer in an interview or when making a reference check?

JC:The information must be securely protected until it is no longer required, after which it should be destroyed or de-identified. An individual has the right to access personal information kept by organisations and as such any notes made during the pre-employment stage can be accessed by an unsuccessful applicant.

If the employer intends to store personal information of unsuccessful candidates such as resumes for future reference, it must seek permission from the candidate to do so. An employer should advise the individual (as to) the purpose for which the information is being collected and stored, and the duration that the information will be kept. Whilst the information is stored, an employer is bound by the National Privacy Principles in the way it deals with the information.

Criminal history checks

C1:Can a criminal history check be carried out on a person without their permission?

JC: The Privacy Amendment (Private Sector) Act 2000 amended the Privacy Act 1988 to establish National Privacy Principles. Under this Act an organisation must not collect sensitive information about an individual unless the individual has consented to it, or the collection is required by law. Section 6 of the Act defines sensitive information as including information or an opinion about an individual's criminal record.

C1: Is there a standard form?

JC Whilst there is no standard form for requesting permission from job applicants to conduct criminal record checks, it is important that the application for employment form contain a term that expressly and clearly requests permission to conduct criminal checks.

C1: How can the information be used? Can it be shared with a third party?

The information must only be used to determine whether the criminal record will affect the applicant's ability to perform the inherent requirements of the job.

If there is no such evidence, use of the information for any other purpose is unlawful and reliance on the information in determining the application for employment may be classified as discrimination and therefore breach the Anti-Discrimination Act.

In other words, information about criminal records must only be used for the primary purpose of determining the applicants ability to perform the inherent requirements of the job.

It follows then that the information cannot be disclosed for any purpose other than the primary purpose of collection.

However, disclosure is allowed for a secondary purpose if it is related to the primary purpose of collection and the individual would reasonably expect the organisation to disclose the information for that secondary purpose. For instance if an employment application form requests an applicant to list (his or her) past criminal convictions, it may be said that an individual would reasonably expect the prospective employer to verify the information with the police.

However it would be unlawful to share the information with a previous employer when completing a reference check.

C1: What happens to the information after the candidate is employed or turned down for the job?

JC If the candidate is employed, the information can be kept in the employees' file. Section 7B(3) of the Privacy Act creates an exemption to employers from the Act in relation to current and former employees. The exemption only applies to acts or practices that have a direct connection with the employment relationship and employee record.

However, if the candidate is turned down for the job and the personal information is no longer needed, it should be destroyed or permanently de-identified.

C1: Are there any restrictions as to what the criminal history search can cover?

JC Yes, there are restrictions on what the criminal record search can cover. The Criminal Records Act (NSW) and the Spent Convictions Act (Cth) both establish respective Spent Convictions Schemes. These schemes impose no obligation on an individual to disclose information on past convictions that have since become spent. A prospective employer cannot ask an applicant to disclose spent convictions.

A conviction for an adult for a Federal Offence is considered spent if the punishment imposed was a prison sentence of no more than 30 months and the person has not re-offended in 10 consecutive years. In NSW the prison sentence has to be no more than 6 months.

C1: Can an unsuccessful candidate ask an employer if the reason for being turned down is related to the criminal record?

JC An employer can only discriminate against a prospective employee on the grounds of their criminal record if the criminal record affects the applicant's ability to perform the inherent requirements of the job. If there is no evidence to this effect, the criminal record cannot be used as grounds for refusing employment.

C1: Can an unsuccessful applicant ask for a copy of the criminal history check?

JC Yes. Under the National Privacy Principles, an organisation that holds personal information about an individual must provide the individual with access to the information on request. If the information is incorrect, an individual has a right to have it corrected.