

# iGlobal Strategic Guidance Series 1: Recruitment

## *(1) Criminal Background Checks*



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Criminal Background Checks on potential employees are highly topical given the current political and terrorist environment. Your problem as a global employer is that some countries require them to be carried out in certain circumstances whilst many restrict them. In both cases legal issues arise, often under local privacy rules.

Many employers now routinely run criminal background checks on recruitment. However, a clear policy and an informed country by country approach is strongly recommended. It can, in some places (France, for instance), be a criminal offence to carry out a criminal background check.

We outline below the headline issues for Global HR and In-House Counsel and overleaf is a high level checklist on criminal background checks in 17 major business jurisdictions.

### Can you take a global approach to criminal background checks?

Data privacy and human rights laws in many jurisdictions prohibit or limit criminal background checks. Local variations make it difficult to take a single global approach. To do so may open you to claims in certain jurisdictions. Your risk is further increased if an applicant is refused a job because of an illegal background check. In France for instance, a criminal prosecution could result.

*iGlobal's view is that you should understand the risks and adopt an informed policy in the light of your commercial assessment of those risks on a country by country basis.*

### Are they really needed?

Many employers assume criminal background checks to be important and do not review whether they are really needed. Most countries limit making such checks to where they are clearly necessary for the role. For example, jobs related to security or finance where "honesty" and "integrity" are key to the role or those which involve working with children.

*iGlobal's view is that if a past criminal conviction has no real impact on the role or the business, it is an acceptable approach for employers not to conduct checks unless local law requires it.*

### Employee consent

Many countries require you to obtain the employee's consent to the criminal check. However, in the EU there is case law that any consent must be "freely given". Obtaining consent on recruitment is not considered "freely given" unless put in a stand-alone document with the employee having an absolute right to refuse without it affecting their job chances. Employers are generally not keen on this approach and few follow it. Most rely on a general consent clause in the

contract (some specifically state that a criminal check is being done), whilst others conduct the check confidentially.

*iGlobal's view is that if you believe a background check at recruitment is necessary you should obtain specific employee consent to conduct the search. This shows, at least, that a reasonable compliance process is in place.*

### Asking for disclosure

Some employers simply ask the employee directly whether they have any criminal conviction, but many countries limit this to where it is necessary for the role. In some countries you can ask the employee for a "certificate of good conduct" from the relevant authority. Note also that an employee can often refuse on grounds of privacy or where local rules protect them from disclosing criminal offences after a period of time, usually to help rehabilitation. For example, in the UK the general period is 3 years.

*iGlobal's view is that if a criminal background check is necessary and relevant for the role, you should ask the employee to disclose any past convictions provided this is permitted by local laws which may limit the employee's obligation to disclose.*

### Discrimination

You should take great care to avoid adopting a policy on criminal background checks that discriminates directly or indirectly on grounds of locally protected categories such as race, colour, religion or gender. For instance, carrying out checks for certain groups only.

*iGlobal's view is that you should understand the local legal position and establish a locally compliant approach.*

Country	Are they permitted?	Conditions and comments
Australia	Yes but limited	Employee consent is required and the information must be reasonably necessary in light of the role and the organisation. 'Spent' convictions must only be disclosed for certain roles – the roles differ across the Territories (e.g. in New South Wales, teachers, prison and police officers, child-related employment).
Belgium	Yes but limited	If the role requires a clean record you can request the candidate provide a certificate of good conduct ('certificat de bonne vie et moeurs/attest van goed gedrag en zedan') from the police.
Brazil	Very limited	Generally not permitted except for security roles in financial services.
China	Yes but limited	You should only ask the employee where necessary to protect your business or for specific sensitive roles, such as those in the legal profession. There are limitations on spent convictions.
France	Yes but limited	For highly regulated or sensitive work involving finance, security or children only you can require the applicant to get a 'Bulletin no. 3' from the police.
Germany	Yes but limited	You can only request an employee to disclose offences relevant to the role. E.g. motoring offences if hiring a driver.
India	Yes	There is no express legal requirement to obtain employee consent but many employers do anyway.
Italy	Yes but limited	You can only ask candidates to disclose previous convictions if the information is necessary for the specific role.
Japan	Yes but limited	Employee consent is required and the check must be reasonable. If the check is considered essential for the business it can be requested directly from the applicant with an explanation of the need.
Mexico	Yes	Employers can request a criminal record certificate from the proper authorities as a condition of hiring.
Netherlands	No (except for national security roles)	Checks are compulsory for jobs involving national security and they are carried out by the Dutch Intelligence Services. Criminal checks for other roles are not generally permitted. You can ask a candidate if they have a criminal record but they are under no obligation to answer truthfully. It is possible, however, to ask a candidate to supply a 'certificate of conduct' (verklaring omtrent het gedrag), if appropriate given the type of role applied for (e.g. teachers, child minders and taxi drivers). A certificate will either be given or refused and it will not disclose a criminal record.
Singapore	Yes but limited	Employee consent should be obtained although strictly it is not required if the check is "necessary" for the specific role. What is "necessary" may be arguable.
South Africa	Yes but limited	The applicant's consent is required and it should only be requested if a clean record is relevant to the specific role.
Spain	No	Criminal checks are not technically permitted by privacy rules. However, certain sectors (e.g. finance, transport and energy) require them.
Russia	Yes but limited	An applicant can be required to obtain a certificate from the Interior Ministry for senior roles where required by law such as in financial services.
UK	Yes	There are 3 levels of check available from the Disclosure and Barring Service: (i) standard, (ii) enhanced (for unsupervised work involving children); and (iii) enhanced for 'regulated activities' (e.g. work with vulnerable adults or children). 'Spent' convictions are only disclosable for specific roles, including doctors, nurses, midwives, dentists, lawyers, teachers, police, accountants and building society officers.

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