

# Doing criminal record checks when hiring

EMPS, South Africa's oldest reference checking company, reported its highest level on criminal record hits in 3 years, at 7.6% for the month of March 2005. At least 7 out of every hundred candidates checked had a previous conviction.

Employers have become increasingly aware of the importance of knowing if an applicant has a criminal record. Employers have a legal duty to make reasonable inquiries about who they hire, and to provide a safe workplace. An employer who hires a person with a criminal record can be found liable for negligent hiring where the hiring decision results in harm, and it could have been avoided by a simple criminal record check. Checking criminal records demonstrates Due Diligence and is also an important preventative measure to protect against workplace violence.

One of the most effective tools an employer has is the use of an application form in the hiring process. An application enables an employer to directly ask an applicant if they have a criminal record. The advantage is that an employer can use a well worded application form to discourage applicants with something to hide, and to encourage applicants to be open and honest.

There are however some limitations involved. Employers should be careful to make sure that their applications are legally compliant. An employer may not ask about arrests or detentions that did not result in a conviction. An employer may not ask about pending cases, as South African law says a person is innocent, until proven guilty.

When an employer does come across a criminal record they should not automatically deny employment due to a criminal conviction, but should consider the nature and gravity of the offense, whether it is job related, and when it occurred.

EMPS generally recommends the following language for South African employers based upon the Basic Conditions of Employment: "Have you ever been convicted for a crime? Yes/ No, if yes, please briefly describe the nature of the crime(s), the date and place of conviction and the legal disposition of the case. This company will not deny employment to any applicant solely because the person has been convicted of a crime. The company however, may consider the nature, date and circumstances of the offense as well as whether the offense is relevant to the duties of the position applied for".

It is normally recommend that the application contain language that the conviction of a crime will not automatically result in a denial of employment. Automatic disqualification could be a violation of discrimination laws. However, an employer may deny employment if the employer can establish a business-related reason for the refusal to hire.

In addition, all applications should have language that the application is true and correct, and that any misstatements or omission of material facts in the application or the hiring process will result in disqualification, or termination of employment. Where an applicant has failed to honestly disclose the existence of a criminal conviction, then the employer's concern may be the lack of honesty involved. Negative information honestly disclosed in an interview and explained may well have no

effect, especially if the applicant otherwise has an excellent and verified work history. However, if the applicant is dishonest and the information is first revealed by a background check, then the failure to hire may be justified because of the false application or dishonesty in the interview. That is why it is important to have broad enough language in the application to cover all relevant offenses.

It is usually preferable to have completed the criminal check (as well as the entire background screening) before an employment offer is made or employment starts. An employer may offer or start employment conditioned on the background screening. However, once a person starts, an employer can be in a more difficult position in ending employment if the report is unsatisfactory to the employer. It is important to specify in a written offer letter that employment is conditioned upon the receipt by the employer of a background report that is satisfactory to the employer. The language must specify that the report must be satisfactory to the employer, so an employer is not put in a position of debating what constitutes a satisfactory report.

EMPS has just launched it's on-line reference checking portal. Go to [www.emps.co.za/empsreferencecheck/](http://www.emps.co.za/empsreferencecheck/) for more information. Registration is free.

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