

Impact of the criminal record reform on HR policy

Are you allowed to ask for an excerpt from a criminal record during a job interview? When is this authorised, and when is it prohibited? Does an employer's legitimate requirement to ensure the applicant's good standing not conflict with the protection of the latter's private life?

The Law of 23 July 2016, which entered into effect on 1 February this year, regulates an employer's options for requesting disclosure of excerpts from a criminal record in a more stringent manner, while imposing new conditions.

It is appropriate to distinguish between the employer's rights at the time of hiring from their rights during the working relationship. Furthermore, specific rights are provided for as part of the hiring process for jobs that require a driving licence, and for those that involve regular contact with minors.

The employer's rights during the hiring process

First of all, it is worth noting that the request for a criminal record as part of the hiring process must now be made **in writing, and be included in the job offer**. Furthermore, this request must be justified by the requirements of the work position. The request will involve issuing **Form No. 3**, on which sentences involving a prison term are recorded, specifically excluding sentences of less than 24 months with a suspension.

The period during which this document may be retained has been significantly shortened by the new law. Whereas the previous arrangements authorised an employer to retain the excerpt from the criminal record for a period of 24 months following the date when it was issued, the Law of 23 July 2016 now requires the employer to dispose of it **one month after the contract is signed**.

Furthermore, the Law also provides for requiring the employer to destroy the excerpt of the criminal record immediately where an applicant has not been selected.

The employer's rights during the working relationship

An employer may only demand the disclosure of **Form No.3** during the working relationship:

- if this disclosure forms part of the human resources management process, and is provided for by a specific legal provision;
- in the event that an employee is assigned to a new role.

In the first case, the employer will absolutely not be authorised to make such a request given the lack of legislation in this regard.

In the second case, the aim will be to ascertain the employee's good standing in relation to the specific requirements of the new position that is being offered to them.

The period during which the excerpt from the criminal record may be retained will be two months as from its issuance, unless provided otherwise by specific legal provisions. Once this deadline has expired, the excerpt from the criminal record must be destroyed.

Employers' rights regarding driving licences

In addition to the employer's rights that have just been set out, they will also be authorised to request the disclosure of **Form No. 4**, which includes sentences relating to driving bans.

However, this option is strictly regulated by the Law, which only authorises an employer to make this request if the following four conditions are all met:

- holding a valid driving license is an essential condition for the employee to conduct their professional activities;
- a clause in the employment contract must specify that holding a valid driving licence is required to conduct the activities;
- the request for the issuance of Form No. 4 must be submitted in written form, and must be specially justified by the specific requirements of the position;
- this requirement must be included in the job offer.

Employers' rights when hiring an employee for a job that involves regular contact with minors

This case involves **Form No.5** of the criminal record, which includes sentences for offences committed against a minor or involving a minor.

In the past, an employer who wanted to ensure the good standing of a future employee who would be in contact with minors was authorised to request the excerpt of the criminal record directly from the person concerned.

The new law offers an additional prerogative to District Authorities, which will be able to obtain direct disclosure of an applicant's Form No. 5 from the Criminal Records Department. To obtain disclosure, the person concerned must have given their consent beforehand. Furthermore, this will only concern job applications relating to teaching or to a residential school managed at the District level.

The criminal sanctions that apply in the event of non-compliance with these provisions

The new law introduces a significant array of sanctions by henceforth providing for prison terms in the event that an employer does not comply with the prescribed rules. In the past, no specific sanction applied, and only the legislation regarding the protection of personal data provided for certain penalties.

Henceforth, as from 1 February 2017, an employer who has not complied with the conditions specified by the new law will risk a prison term ranging between eight days and one year, and a fine ranging between €251 and €5,000. The sentences applicable to legal entities that have been found guilty of these offences will be doubled.

Likewise, the new law provides for a fine that may range between €251 and €3,000 (and between €500 and €6,000 for legal entities) in the event that the legal timeframes for retaining excerpts from criminal records are not complied with.

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