

Criminal history screening of global job applicants

HIDDEN DANGERS EMPLOYERS SHOULD KNOW

By Lester Rosen¹



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Global HR Practitioner Handbook
VOLUME 3

Lisbeth Claus, Editor-in-Chief

ISBN-10 098893292X
ISBN-13 978-0-988329-2-0

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IN A NUTSHELL

What's the issue?

Globalization=increased complexity in meeting due diligence standards for hiring employees worldwide.

Why is this important?

Criminal background checks are key to ensuring workplace safety in the global workplace.

What's the global HR takeaway?

Global HR must be vigilant when conducting the criminal history clearance of candidates in different parts of the world.

Remember this:

Every country may be an adventure, but a good understanding of the issues and an expert guide will save you nearly every time.

ABSTRACT

This global HR module reviews the potential problems that impact the reliability of Criminal Clearance Certificates from an international perspective. It is intended to increase awareness for global HR practitioners of the issues and challenges surrounding obtaining Criminal Clearance Certificates from different countries for employment background check purposes. Leading practices for meeting due diligence standards are proposed.

LEARNING OBJECTIVES

Upon completion of this global HR module, you should be able to:

- Increase awareness of the issues and pitfalls surrounding Criminal Clearance Certificates from different countries
- List common problems related to international Criminal Clearance Certificates
- Adopt leading practices for meeting due diligence standards when using Criminal Clearance Certificates

DISCLAIMER: The information contained in this module is NOT intended as legal advice but offered for general educational purposes only. Note that the situation in any particular country can change without notice. Hence, it is of utmost importance that employers consult with an attorney or expert in the field if they have questions about criminal records in a particular country.

Introduction

A paramount duty of organizations is to meet the due diligence standards for a safe and productive workplace, both for the employees and for their customers. Employers—whether based in the U.S. or worldwide, and wherever they operate—must ensure a safe workplace. In the United States, conducting criminal history checks on job applicants and employees is considered one key method of providing a safe workplace. Both for profit and non-profit organizations alike must be especially vigilant to protect children and other vulnerable individuals from abuse by employees or volunteers. In a report on record check reliability, the Australian Health Practitioner Regulation Agency conservatively estimated that 300 out of 5,000 background checks would return a positive for criminal history.² Employers that fail to screen effectively place themselves at great risk. Although criminal record checks are a crucial tool, a check's effectiveness depends on the availability and reliability of the records being searched. If the search is based on unreliable records, an employer can be lulled into a false sense of security.

The rise of a global workforce has further compounded the difficulties for employers to meet what is considered standard due diligence in the US. In 2010, the U.S. census showed 23.1 million foreign-born persons in the U.S. civilian labor force.³ From 1970 to 2010, the percentage of foreign-born workers in the U.S. had risen from 4% to 16%. In some sectors such as information technology (IT) entry-level positions, foreign workers are estimated to comprise nearly 50% of new hires in the U.S.⁴

Not only does record quality vary from country to country, but some countries place legal restrictions on the access and use of criminal record history in the employment process that employers could unknowingly violate. In addition, the process to check an applicant's record may be cumbersome and seemingly inefficient. Some countries consider criminal history to be a matter of public record and useable for employment screening purposes. Other countries have specific paths set up for producing an employment purposed criminal record check. Most countries have a mechanism for the individual to obtain their own criminal history, referred to here as the Criminal Clearance Certificate (CCC). When the CCC is easier to obtain, it is understandable that employers may be tempted to rely on it. A CCC is either a copy of an individual's criminal record or a statement that an individual does not have a criminal record. The police in many countries provide CCCs. However, in many others a justice ministry is in charge of providing the document. CCCs are issued after a check of criminal records either on a local or national scale. What CCCs may be called vary across countries and may go by the name of police certificates, good conduct certificates, judicial record extracts, or something else entirely when translated from the local language to English.

The main reason governments provide CCCs is for citizens to obtain a visa or for immigration purposes. They may also be required for other purposes such as the adoption process, and in a few countries, a specific CCC is available for employment purposes. Certificates obtained through consulates are primarily for visa/immigration purposes. Because CCCs are provided primarily for visa and immigration purposes, the use of CCCs may be stated as restricted from being used in purposes unrelated to obtaining a visa or that the use of the CCC for purposes such as employment screening may be undefined. Employers and nonprofit organizations need to be aware of and follow the laws of the releasing country or face legal implications or liabilities. Even when a country does not expressly forbid the use of a CCC beyond visa obtainment, visas released at consulates are still primarily for visa obtainment purposes, and deviation from such purposes could result in legal issues or lack the rigor necessary to meet the standards of due diligence. Certificates for employment purposes may require applicants to apply directly for the certificate, although in some countries, the certificate is available to third parties with proper documentation. This may provide a better alternative than a police or court search. Some countries allow a CCC to be used for multiple purposes, but place restrictions on a third party's ability to obtain the document, allowing applicants to get a CCC but banning anyone else from doing so. Failure to provide such documentation would result in sub-standard options as the only alternatives. Employers need to be aware of what exactly a country's CCC indicates and understand its allowable uses. If a country has alternative methods for reviewing an individual's criminal history for employment purposes, then the CCC may not be the best (or even allowable) option for assessing that candidate. Employers can then determine whether to use additional or alternative screening methods to preserve a safe work environment and protect the bottom line.

The purpose of this global HR module is to review potential problems and pitfalls that impact the reliability of CCCs from an international perspective. First, we review problems related to international CCCs such as false negatives and coverage issues, false positives, fair use and privacy laws, and efficiency concerns. Then, we suggest leading practices for meeting due diligence standards. For illustrative purposes, we use international examples about the specific reliability issues faced by different countries. With over 240 political entities,⁵ this module is obviously not a review of the CCC issues in every country. Instead, the intent is to increase awareness of the issues and pitfalls surrounding obtaining CCCs from different countries for employment purposes. Every country is its own adventure, requiring thorough research to navigate all the unique twists and turns. As a result, each political entity will necessitate a varying level of caution. This global HR module simply serves as a cautionary notification, along with leading practices and general recommendations to minimize risk on a case-by-case basis.

International criminal clearance certificate check problems

In 2007, Canadians were shocked to learn that the record of pardoned sex offender Graham James did not show up under the common police record check used by many sports organizations.⁶ At the time, under Canadian law, sex offenders could petition the National Parole Board for a pardon. If granted, a sex offender's records would be kept separately from Canadian Police Information Centre (CPIC) records. In two years alone, the National Parole Board granted 1,513 sex offender pardons. Many Canadian organizations rewrote their volunteer policies to require higher-level checks (known in Canada as "vulnerable sector checks") to ensure that similar pardoned sex offender records would not be overlooked. This is just one example of how record checks that appear to be comprehensive can have a hidden problem that potentially places children at risk of victimization.

Although they vary across countries, problems with international CCCs fit into four general categories: false negatives and coverage issues, false positives, fair use and privacy issues, and efficiency. CCC coverage differs widely across countries. Some CCCs may not be comprehensive enough to determine whether an applicant is a good hire. In addition, coverage issues can cause false negatives to occur. A false negative is when an applicant's CCC fails to list an individual's criminal history (i.e., the CCC says that they are clean when in fact they are not, or lists only some of the individual's criminal history but not all of the relevant information). False negatives pose a danger as they can cause employers to have a false sense of security and mistakenly hire a person who could cause harm. False negatives are especially dangerous in jobs involving access to vulnerable persons. The second category consists of false positives, which are the inverse of false negatives. False positives occur when a CCC shows a criminal history not associated with the individual (e.g., a record that does not belong to an applicant or a judgement of innocence that was shown as guilty). Even though false positives may appear to be less dangerous, they still cost the employer valuable time and money. It may cause them to lose a very good employee and the individual may be also harmed reputationally or in other ways. The third category involves the fair use of the provided CCCs and other legal issues implicated in the process, such as privacy protection. Every country has its own myriad systems of laws and regulations that, if infringed, could lead to significant repercussions such as criminal charges. The final category is the overall process efficiency of obtaining a CCC. A CCC may indeed be accurate, but a long and complicated process will render it useless (see figure 1).

Figure 1: Categories of international criminal clearance certificate check problems

- 1 Problems related to false negatives and coverage
- 2 Problems related to false positives
- 3 Fair use and privacy laws
- 4 Efficiency

1 Problems related to false negatives and coverage

The crimes covered by CCCs vary widely across countries. A helpful resource for employers to understand where to find or how to obtain a CCC check is a document prepared by the Home Office in the UK entitled, *Criminal Record Check for Overseas Applicants*.⁷ However, just because a CCC is available does not mean that it is necessarily useful or complete. Some CCCs are comprehensive and provide too much information, including non-conviction information, while other CCCs have coverage that is limited or provided limited results. Failure to understand a CCC's depth of coverage could result in hiring untrustworthy applicants. In addition, employers can be misled into a false sense of security and forgo alternative or supplemental methods, believing them to be unnecessary. As seen in the example of the pardoned sex offender in Canada, employers electing to use a standard record check would have been unable to discover whether an applicant was in fact a “pardoned” sex offender. Employers that lacked knowledge of what Canada's standard CCC covered could have unwittingly hired an applicant with a sex offense history and placed the organization at risk of negligent hiring if the hired applicant were to injure another employee, a customer, or a member of the public.

Several issues impact CCC coverage —many of which are not readily apparent—and employers can be lulled into a false sense of security if not cautious. Because of the degree of danger present, false negatives and issues related to coverage will be greatly expounded upon here. False negatives and poor coverage can be caused by—although not limited to—the following: decentralized records, lack of identifiers, data entry errors, data entry backlogs, the timeframe of the database, referential integrity, limitations to conviction search ability, and corruption. Each source of contamination of the CCC is discussed in greater detail below.

Decentralized records—occur when informational sources connected in some way are kept separately. Regional governments (e.g., states, provinces, and municipalities) may keep their criminal records separate from the national records. For example, an employer working with children may believe a CCC indicates that an applicant is safe, but in reality the applicant

has a lengthy record (e.g., records related to domestic violence) stored at a local police department that was never entered into the national system that could have been obtained.⁸

Generally, record decentralization is not an issue because information can always be requested. However, the risk that a record may be missed increases exponentially for every additional record system searched. Although many countries do have a centralized record system, several (e.g., Brazil) do not. In the U.S. alone, thousands of criminal history indexes are maintained separately from each other.⁹ The most common divide is a split between national and local records. Some countries even go so far as to include a municipal level of records. To screen effectively for criminal history, the comprehensiveness of the check must be determined. Some nationwide checks only apply to certain crimes defined at the national level, and ignore crimes defined at the regional level. For example, in Brazil a “federal level check”, which sounds like it may cover the entire country, only applies to federal crimes and not to regional crimes. If a records check only covers crimes at the national level, then local records checks should be sought.

Even though national checks may appear comprehensive, gaps are still common. For example, in the U.S. the National Crime Information Center (NCIC) is often used in a national level check. However, the NCIC database is far from comprehensive. One study found that, even when the NCIC was combined with state repositories to search for criminal history reasonably expected to have been recorded, the search missed applicant criminal history approximately 30% of the time.¹⁰

Some countries still rely heavily on paper records. For example, in India one source of criminal history records are still maintained by police—and, obviously, much more susceptible to corruption and vulnerable to decentralization. Paper records lack the accessibility and permanence provided by a database. Paper records require more human effort to store, collect, and maintain—increasing the probability of human error. Employers that know how the state records are stored can mitigate risk by taking precautions and using additional methods to screen applicants when necessary.

Data entry errors—information is only as good as the integrity of its data sources. Although seemingly intuitive and applicable to all information stored in databases, it is important for employers to realize the general and specific limitations that are present in CCCs. International databases used in the CCC process are undoubtedly plagued by general database integrity problems. Databases, being electronic storage repositories, require that a human worker first enters the information. Human error and the entering of incorrect information can thus result. A study by the American Medical

Informatics Association (AMIA) on human error can serve as a proxy for estimating database error rates in CCCs. The AMIA study found a 3% error rate of impossible/inconsistent data.¹¹ It can be surmised that if such errors plague medical records where accuracy is highly important, criminal databases are likely to be plagued with a similar rate of error. Moreover, data errors can be caused by factors that are country specific. For example, an Indian study looked at error rates in rural areas with multiple spoken languages and found higher significant rates of error than the AMIA study.¹² It can be extrapolated from the study that countries like India, where multiple languages are spoken, could have a higher increased rate of errors compared to countries where a single language is dominant. Ultimately, despite being electronic, databases are still built and maintained by people. As with everything that is human made, databases will never be free from human error.

Data entry backlogs—records can be searched only when they are first entered into the database. Although seemingly obvious, employers need to realize that the databases searched for the issuance of a CCC may have a significant backlog of records that have not yet been entered. Records are not necessarily entered in real time into a database. Instead, records are commonly sent to a record center in batches to be entered later. In these cases, records can accumulate faster than administrative staff can enter the information and result in a record backlog. In Canada, the backlog for the main database, the Canadian Police Information Centre (CPIC), has climbed upwards to 18 months. The Royal Canadian Mounted Police (RCMP) has come under increasing fire for the state of its database—the same database used to generate CCCs.¹³ As of 2012, 415,000 individuals with a combined 1.5 million convictions had not been entered into CPIC. This places employers at risk of hiring an applicant that has recently committed a crime. In Australia, a records backlog of close to a year resulted in 40 people with criminal history backgrounds being cleared to work with children while their assessments were pending.¹⁴ To avoid a similar fate, employers must understand that a database is a snapshot in time, not a record over time.

The timeframe of the database—a country's previous records system and its ability to transfer those records to an electronic format will impact the breadth covered by the timeframe. Databases typically only cover a certain timeframe. In some countries, databases may cover 10-year period. India is in the process of setting up a national database and is transferring its records to an electronic format. Nevertheless, the process is ongoing and less than half of India's records have been transferred so far. In other countries, the database's breadth is too extensive whereby political crimes are included as regular crimes. In South Africa, for example, apartheid era crimes are included in its database.¹⁵

Referential integrity—is another cornerstone of database utility. Referential integrity is a database mechanism which ensures that references between data are indeed valid and intact.¹⁶ To search a database, a user must first query the information by entering a piece of information (e.g., name and birthdate) and ask the database to pull all records related to the entered keywords. Properly designed databases will be able to search the entirety of their records and pull all of the information that relates to the query. However, databases with poor referential integrity can produce errors, as not all of the information will be referenced when a search is conducted. The enforcement of good referential integrity through effective database design and user interface controls is a cornerstone of data management best practices. Good data management practices will minimize problems and create a foundation where by queries return accurate answers. Unfortunately, many countries lack the skills and discipline to create the necessary structures that can minimize referential issues. Poor management practices fail to build robust IT systems. As a result, searches will miss records and false negatives will occur.

Legal limitations to conviction search ability—spent convictions, expunged records and lack of storage for lower tier convictions present additional search problems. Spent convictions are convictions which, by law, lapse after a period of time and cease to exist.¹⁷ Generally, the amount of time depends on the imposed sentence, not on the type of offense. Hence, the more serious the conviction, the longer the period until the conviction becomes spent.¹⁸ For example, in the U.K. convictions with a sentence of more than two and a half years will never become spent, while convictions between six months to two and a half years will become spent after a period of 10 years.¹⁹ Similar to spent convictions, expunged records are sealed arrest and conviction records. Jurisdictions with expunged record laws allow individuals to request that their record be expunged. Once an expungement request has been granted, the record will no longer be searchable in a criminal record check. The jurisdiction will grant the request depending on criteria it has set. For example, in Washington State (USA), a person can request that a misdemeanor record be expunged if: (1) more than three years have elapsed from the sentence; (2) there are no pending criminal charges; (3) another conviction has already been vacated; and (4) no anti-harassment or protection order has been issued in the past five years.²⁰ However, an expungement cannot be issued for offenses involving violence, sex, driving under the influence (DUI), or qualifying domestic violence. Another search problem is that some countries do not store criminal records that are classified as lower tier level crimes. In Canada, there are three tier levels of crime: indictable, hybrid, and summary. Summary offenses, considered less serious than indictable offences since they involve shorter prison sentences and smaller fines,²¹ are not stored in the Canadian national database (CPIC)

if the individual is not fingerprinted. Employers relying solely on Canada's national database may be unable to discern whether an applicant has ever received a summary only conviction.

Corruption—is a major threat to record integrity as it leads to a high prevalence of forgery of government documents. It is important for employers to understand the level of corruption present in the country in which a CCC is obtained. By understanding the level of corruption, employers can determine the level of additional screening methods needed to counteract effects potentially caused by corruption. Many countries have endemic rates of corruption, as illustrated by the Corruption Perceptions Index (CPI) compiled annually by Transparency International. Countries are ranked using metrics associated with corruption. One shocking metric, indicating whether people had ever paid a bribe, found rates in some countries of over 50% of the respondents admitting to paying a bribe. In contrast, the U.S. has a much lower rate, with only 7% saying they had paid a bribe.²² This is likely due to the U.S. Foreign Corrupt Practices Act which prohibits bribery of foreign government officials.

2 Problems related to false positives

False positives occur when a search shows some criminal history when an applicant is in fact innocent, the record does not belong to the individual, or if the record is not reportable. They are problematic and common. The U.K. Daily Mail reported that 20,000 people were falsely labeled as having criminal records.²³ Employers who fail to guard against false positives can face several repercussions. First, false positives cause perfectly qualified candidates to be rejected, preventing employers from selecting the best talent. They can also cause great reputational harm to the individual who is falsely determined to have a criminal history. False positives impose unnecessary costs to employers as more record screening will have to be conducted. Lastly, false positives increase the risk of litigation. A qualified applicant will likely be unhappy when falsely rejected and may attempt a claim of unlawful discrimination based on any number of discriminatory factors (such as age, race, gender, religion, national origin or disability). False positives can also result when an applicant shares identifying information such as a birthdate with a person who has a criminal record. The problem of shared information is quite common as few names are unique. People in a particular country or a particular culture frequently have the same or similar names. Extended families usually share a common last name.²⁴ To avoid errors, more information is needed to differentiate records. However, police records may not have enough personally identifying information. In some cases, a name check is the only search information used to query records in a database. A name check substantially

raises the risk of a false positive and is considered a poor standard for modern biometrics. The best processes are those that use a wide variety of information to conduct a record search. Processes that make use of fingerprints, birthdates, national person identification (ID) numbers and names will make false positives less likely to occur.

3 Fair use and privacy laws

Even if a CCC is valid and reliable, countries may place limitations on how CCCs can be obtained or used. For example, many countries require that non-citizens use a different process than the one used by local citizens. France allows French born citizens to apply online, while non-French born citizens or non-citizens must apply through mail. Some countries, such as Singapore, will provide CCCs only to its non-resident citizens who can demonstrate the regulatory requirement for the document. Some countries allow only the applicant to request a CCC. Other countries restrict the use of CCCs to certain types of positions (e.g., positions that work closely with vulnerable persons). Employers must also beware of privacy laws that may restrict the access of criminal history. Many European Union (EU) countries will not release the criminal history records of its citizens to third parties. Countries such as France restrict employers from asking applicants about their criminal history unless the information is highly relevant to the job. The EU Directive on Data Protection²⁵ also places restrictions on the transfer of information, requiring that safety mechanisms are put into place when personal information is transferred to countries with inadequate privacy laws (such as the U.S.).²⁶ Employers that violate European privacy laws can face both criminal and civil liability. Other countries have set up formal mechanisms for a CCC to be used as an employment-screening tool. In the Netherlands, the Ministry of Justice reviews the request and, based upon the specific employment position, will filter out information based upon the employment requirements in the issued CCC.²⁷ Using alternative systems could be seen as violating the intent of the Netherlands and result in potential legal problems.

Note regarding an update on the issue of privacy and transfer of data from the European Union (EU) to the United States (U.S.): The EU recently invalidated the Safe Harbor program, although there are continued discussions on how to effect such transfers of data.²⁸

4 Efficiency

Even if a CCC check is accurate and legal, the search may still be impractical. Some police record checks can take months to complete. Long, inefficient processes cost the employer time and resources to manage and coordinate the record check. Turnaround time is the length of time it takes to start and complete a record check to issue a CCC. In some countries, turnaround time

is less than a week, but can last months in others. Countries that require a lot of personal information to conduct a search will require employers to spend time gathering all of the required information first. Processes that allow only the applicant to request a record check will depend on how the fast applicants complete all of the steps by themselves. Processes requiring fingerprints involve additional work on the part of the subject to go to the police station to be printed. Furthermore, mistakes on applications can cause delays and requests then become snagged in the middle of the process.²⁹ Processes involving multiple agencies will compound both the time and complexity of a process. The more complicated a process is, the more likely an error could occur, and the integrity will be jeopardized and require that the process be restarted. Many international processes only allow applicants to request one record search. A highly complicated system may confuse applicants and cause mistakes to occur. For example, each state in Mexico has its own unique process for requesting CCCs.³⁰ Some countries have limits as to where requests can be made. Such limitations may require applicants to travel a great distance to request a record check. Although police records may be the only viable choice in some countries, several countries have an alternative process that accurately screens for criminal history and is also much faster than a standard police record check. Employers who understand the available viable alternatives will save significant amount of time and money.

International examples

The following international examples (Australia, Brazil, Canada, India, the Philippines, and South Africa) illustrate how the common problems previously discussed manifest themselves in actual countries and some of the respective strengths and weaknesses of each system.

For U.S. employers, the use of criminal records is subject to additional considerations such as EEOC limitations on the unfair or potentially discriminatory use of such records.

Australia

To compare countries, a benchmark is required. A benchmark is a system where a CCC is able to meet the standards of due diligence. Australia can be used as a standard to measure all CCCs by.

Procedurally, Australia has an online application that uses a point system in determining the amount of personal information that must be submitted. Name checks are processed in about 15 days, while fingerprint checks take 30 days.³¹ Australia's system smoothly integrates federal and

local agencies in its CCC process. For jobs outside of Australia, applicants request a CCC from the Australian Federal Police. For jobs in Australia, applicants make requests at their local police service. Even though each state has its own process, criminal records in the Commonwealth of Australia have been centralized. However, Australia relies primarily on a name check and limits the use of fingerprints. Name checks lack the accuracy of checks that use fingerprints and have a higher chance of causing both false negatives and positives. Australian records are up to date and centralized, which minimizes false negatives and maximizes coverage. The system for requesting a CCC is also efficient and provides employers with a certificate in a reasonable amount of time. Australia has set up its CCC to be used for employment purposes and should be considered to meet due diligence standards as overall, the CCC possesses both quality and reliability, making it useful for employment background screening purposes.

Brazil

In Brazil, CCCs have poor coverage, and a high likelihood of causing both false and positive negatives. Brazil's police records are decentralized at the federal and state levels. Brazil's federal records only cover violations of federal law while state records only cover state law violations. Furthermore, each state database is maintained separately. The amount of decentralization in Brazil makes it likely that a crime record may be missed due to the poor coverage of records. To ensure full coverage, an employer must receive a CCC from each state in which an applicant has resided. In addition, an employer should also require applicants to provide CCCs from Brazil's Ministry of Justice to see if applicants are involved in any pending litigation, as criminal convictions in Brazil are not recorded until appeals have been exhausted. Although most criminal cases are generally resolved in a timely manner, those with the means can clog the court system for a long period of time. Although it lacks a specific statutory framework for privacy, there is generally applicable legislation that provides for privacy rights.³² Corruption is another major problem in Brazil. Corruption has had a long history in Brazil, and despite reforms it remains a consistent problem.³³ Employers must take precautions and carefully evaluate all documents that come from Brazil. Ultimately, a CCC from Brazil is insufficient by itself to meet the standards of due diligence. The best option for employers is to use nationwide criminal searches that include both federal and state level court repositories available through a Brazilian agent who has been licensed by the Ministry of Justice. Such a search is currently the most comprehensive search available in Brazil today.³⁴

Canada

The Canadian process for a regular CCC requires applicants to provide a set of fingerprints to the Royal Canadian Mounted Police (RCMP). Applicants have the option of providing scanned fingerprints to the RCMP. Scanned fingerprints will have a much faster turnaround time than regular ink fingerprints. The RCMP processes the scanned fingerprints and runs a check through the Canadian Police Information Centre (CPIC). If the check shows no criminal history, the RCMP sends a CCC approximately three business days later. Regular ink fingerprints will take approximately 22 weeks to process. Any record—whether obtained through scanned fingerprints or not—that shows criminal history will be further investigated and increase turnaround time to several additional weeks. As mentioned previously, the RCMP's record backlog is a major problem plaguing Canada's CCC process. The RCMP's backlog has reached 18 months.³⁵ All CCCs issued will be unable to indicate whether applicants have a criminal history within that 18-month lag period. In addition, because CPIC is a fingerprint database, a CPIC check applies only to indictable and hybrid offenses since people are not fingerprinted for summary offenses. Therefore, a CPIC check will be unable to show whether someone has a summary offense. Furthermore, the RCMP will not provide a vulnerable sector check for employers outside of Canada. However, under the Canadian Privacy Act,³⁶ applicants can request that all records be held by government agencies. A privacy act request will provide information equal to a vulnerable sector check, but the request is contingent on both an applicant's willingness and participation in making the request. Employers are not allowed to receive the records. Applicants will have to provide the records (or evidence of no records) to their prospective employer. Overall, despite a modernized system, Canada's process is inefficient and carries a significant risk of missing criminal history due to the record backlog. A CCC from the RCMP is insufficient by itself to meet due diligence standards. Until the RCMP makes progress on its record backlog and creates a system that provides vulnerable sector checks to organizations outside of Canada, employers need to supplement the CCC obtained from the RCMP with other criminal records searches through the provincial and local police services.

India

India's CCC process is confusing as Indian citizens residing outside of India must apply to the local Indian consulate, and each consulate has its own set of rules and procedures. Although the process at all of the consulates is the same and the variations minor, failure to adhere to a consulate's process could result in delays. For example, the Indian consulate in Australia has its own application and will not accept other CCC applications.³⁷

India CCC validity is plagued by many problems such as endemic corruption, decentralized records and poor technology. Corruption indexes have consistently ranked India high in corruption.³⁸ Although India is attempting to build a federal database, the database remains unfinished and the majority of records have yet to be uploaded. Many local departments suffer issues related to IT connection and training that will increase the likelihood of data entry errors. According to the NCRB's website, just over half of records have been digitized. In addition, many police stations have not received the hardware for entering records nor has the staff received training. Many stations lack network connectivity and enter records directly into the national database.³⁹ Lastly, the National Crime Records Bureau (NCRB) only tracks the principal offense and some criminal history may be left unrecorded, including crimes such as rape.⁴⁰ Due to India's corruption issues and unfinished national database, employers are advised to seek alternative means for screening applicants for criminal history rather than relying on India's CCC.

The Philippines

In the Philippines, applicants can either apply online or at a National Bureau of Investigation (NBI) clearance outlet. If an applicant resides in the Philippines, then the applicant's fingerprints can be scanned at an NBI outlet. Applicants outside of the Philippines must use an additional form signed by the nearest consulate providing fingerprint copies to NBI. The NBI processes the CCCs quickly and applicants who go to an NBI outlet will get a CCC immediately, while mailed applications take about eight business days to process.⁴¹ However, the quick turnaround time only applies when no criminal history is found. A positive for criminal history will significantly increase the wait time. Despite having a modern system, forgery is a major risk as it is a common practice in the Philippines.⁴² Forged documents are even sold openly and advertised in Manila's open markets. Police have had little success in shutting down the forgery industry. While the NBI updated its facilities to use fingerprint-scanning technology instead of the standard ink and paper process and has quick turnaround time, the NBI's new process has been plagued with problems and long service delays should be expected.⁴³

South Africa

The process of getting a CCC in South Africa is both straightforward and relatively quick. South Africa has outlined all of the steps required on its International Relations Department website. The South African Police Service (SAPS) will need fingerprints to run a record check. Even though there is no official application, SAPS requires that applicants provide a letter that meets specific requirements (e.g., given name, birthdate). South Africa has a sample form available for use. A single CCC is all that is needed

due to the centralization of records. Once an application letter and set of fingerprints has been received, a CCC will arrive approximately 30 days later. However, the current process will be changing in the near future as South Africa will be outsourcing all CCC requests to a private agency. Endemic corruption is the primary problem in getting a CCC in South Africa. Employers or agents acting on an employee's behalf that fail to be vigilant may be tempted to offer a payment to a South Africa official to accelerate the process and run afoul of the Foreign Corrupt Practices Act (FCPA)⁴⁴—if they are U.S. companies—or the Bribery Act⁴⁵—if they are U.K. companies. South Africa has tried to mitigate corruption problems by centralizing all record requests at the SAPS Criminal Record Centre headquarters. However, SAPS has a long history of corruption,⁴⁶ including a corruption conviction of its former national police commissioner.⁴⁷ Furthermore, SAPS' forensic and record departments are understaffed and have high rates of turnover. South Africa also has a records expungement process that allows sex offenders to apply.⁴⁸ Although the expungement process is complex, the rate of applications has been growing. The application and success rates of record expungement requests in South Africa, for the period of 2009 to 2011, showed that 73% of the applicants were able to successfully expunge their records.

Leading practices for meeting due diligence standards

Although the challenges for obtaining a valid and reliable CCC in different countries around the world seems daunting, a wide variety of strategies and tactics exist that employers can use to both minimize their risks and meet the required due diligence standards when it comes to using a CCC for an international background checks. Leading practices to deal with false negatives and poor coverage, false positives, legal concerns and process complexity are summarized in figure 2 on page 125.

Reducing false negatives and the effects of coverage issues—there are two important things employers can do to reduce false negatives and mitigate the effects of coverage issues: use name check references and consult with international experts. Reference checking, although not foolproof, is an effective, simple way to screen criminal history and employer neutrality or untruthfulness. Reference screening also reduces the impact of infringing on privacy laws. Unlike in U.S., employers in other countries will often provide truthful answers to reference checks since the liability for defamation is low.

Figure 2: Leading practices for using criminal clearance certificates as employment background check

False negatives and coverage issues	<ul style="list-style-type: none"> – Check references – Rely on international background screening experts
False positives	<ul style="list-style-type: none"> – Determine the level of screening and data required before a records search is conducted – Use multiple sources of information in the search – Inform applicant if any appeal process is available – Ensure applicant has reviewed the certificate – Allow applicant to explain the result if it's not clear what kind of crime was committed
Legal concerns	<ul style="list-style-type: none"> – Ensure complete transparency throughout the screening process – Consult legal experts on international and local privacy laws – Ensure that all information is kept private and confidential – Allow applicants to keep all original documents
Process complexity	<ul style="list-style-type: none"> – Develop an internal process to handle the potential events that may occur – Keep in constant communication with the applicant throughout the process – Monitor the process to discover ways to improve – Consult with local experts if alternative or faster methods are available

While reference screening will not be appropriate by itself for all positions, it should be used in conjunction with other screening methods—especially for positions involving work with children. The large risk of false negatives and coverage issues, coupled with the intricacies of each country, often require that background screening experts with international and/or specific country experience should be consulted. Although local experts residing in the country may seem the obvious choice, employers should first verify their legitimate international background screening expertise before engaging in business with self-proclaimed experts. This is particularly important in countries with prevalent corruption. The best experts will not only be familiar with a specific country, but will also know which local experts or agencies can be trusted. The National Association of Professional Background Screeners (NAPBS)⁴⁹ lists reputable global firms specializing in global background checks.

Handling false positives—employers should follow a number of practices when handling false positives. First, before conducting international screening, employers should determine the level of screening and data

required for specific positions. Positions that involve close interaction with children and other vulnerable persons need to be subjected to the highest levels of scrutiny. Positions that require a high degree of honesty, such as those in the financial services and technology industries, should also have a high level of screening. However, positions with a high level of supervision, low interaction with vulnerable persons, and where there is less of a concern for honesty could be screened at a lower level. Many countries limit their record checks to positions that highly interact with vulnerable persons. Using high-level checks for all positions, regardless of differing characteristics, is unnecessary, burdensome, costly and potentially legally risky. Employers should review what information will be used in a records search. Using limited information increases the likelihood of a false positive. Searches using fingerprints along with other forms of information will have the lowest risk of causing a false positive. Name check only searches should not be used due to the high risk of a false positive. Employers should ensure that all provided information is accurately and comprehensively prepared. They should factor in linguistic differences by providing transliterations of names. If a positive result occurs, employers should first check the information that was provided to find whether the information sent was flawed.⁵⁰ Second, employers should always use additional screening methods to lower the risk of false positives. This is done by using multiple sources of information in the search. Examples of other screening methods include effective interview questions,⁵¹ lie detection techniques,⁵² and reference checks.⁵³ These filter out applicants with criminal records that were undetected by a record check. Moreover, the less expensive screening methods may filter applicants before methods that are more expensive need to be used. A third leading practice in handling false positives is to inform the applicant of any available appeals process. Many countries have an appeals process where record results can be challenged. If the individual is a US resident, they are protected by the Fair Credit Reporting Act (FCRA) even if their screening results are obtained from another country. Employers should inform applicants that in the event a positive result occurs, an appeals process is available. Fourth, employers should ensure that applicants are able to review the record search results beforehand. Applicants will be best at spotting discrepancies in the results and fixing possible errors in the record. Furthermore, if the positive is actually true, applicants will likely opt out by removing themselves voluntarily from the hiring process. Finally, some CCCs only indicate whether a positive result occurred and provide no further elaboration on the nature of why the positive result occurred. In such circumstances, employers should allow applicants to explain the nature of their records and decide whether the risk outweighs the benefits in hiring. Although not as dangerous as false negatives, false positives still cost time and money. Moreover, a false positive

leads to the rejection of a qualified applicant that could have been an asset to the organization.

Reducing risk of legal concerns—employers can reduce the risk of legal concerns by adhering to a number of practices. First, employers should be completely transparent about their screening processes with applicants. Many countries require such full transparency. Even when not required, transparency will lower the risk that applicants will feel that their rights have been violated and file a lawsuit as a result. Second, due to the great complexity of the myriad of laws involved in different countries around the world, employers should consult with experts on international and local privacy laws. This will ensure that employers know with certainty how and at which level a screening can be legally conducted. Third, employers should keep all provided information confidential and maintain the highest standards of privacy. High standards will decrease the risk of privacy laws being violated and minimize the damage if an infringement does occur. Finally, employers should also allow applicants to keep all original documents provided in a record search. Copies can be made if allowed by the country involved in the search. If copies are not allowed, employers should have applicants sign an affidavit on the veracity of the provided information.

Handling inefficiency—even though employers may not have control over a country's record check operations, they can handle inefficiencies in a number of ways. First, employers should map and timeline all potential scenarios and develop a decision tree to decide when to make certain decisions. A fully mapped process will streamline decision-making and provide immediate information on which options are available. Failure to map out a process will result in redundancies (e.g., having to repeat research on CCCs) and delay response time. Second, employers should also keep in constant communication with the applicant throughout the process because many countries will only inform the applicant if a problem has occurred, and most problems can only be fixed by applicants (e.g., by sending additional information). Constant communication allows employers to remain agile to emerging problems and swiftly enact solutions when necessary. Third, employers must monitor the screening process to discover ways to improve it in terms of accuracy and efficiency. Finally, employers will inevitably need the assistance of local experts to discover the availability of alternative faster and legal methods in other countries. In some countries, local companies can be contracted to conduct record searches at a faster pace than the regular process. Local experts will also be the fastest at navigating their country's process by knowing the local language and customs. Although local experts are a valuable resource, employers should vet all experts before making use of their services.

The role of global HR

Global HR must be vigilant when conducting the criminal history clearance of candidates in different parts of the world. When done as part of an international background check, the CCC is not only complex but fraught with inaccuracies. However, there are countries where such a report is an indispensable tool. Therefore, global HR will need to rely on international background screening experts to navigate the complexities and legal issues inherent in conducting reliable criminal background checks around the world. Failing to do so will impact the quantity and quality of the talent pool. Although the CCC may seem a simple solution for screening international candidates, in reality there are risks and problems that employers need to watch out for. CCCs can be fundamentally inaccurate and fail to alert employers about past criminal history. On the flip side, some CCCs falsely identify applicants as having criminal history and cause employers to pass on otherwise qualified applicants. In addition, even when accurate, some CCCs can be improperly used and lead to the infringement of privacy laws, or the process to obtain a CCC is so highly inefficient that its usefulness is rendered moot. Fortunately, the use of good planning and expert consultation can prevent many of the problems discussed. Every country may be an adventure, but a good understanding of the issues and an expert guide will save you nearly every time.

Endnotes

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Criminal history screening of global job applicants

By Lester Rosen

GUIDED READING QUESTIONS

1. What is a CCC and why may global employers be tempted to rely on them when conducting criminal history checks on job applicants?
2. What are the major problems encountered when conducting international criminal clearance certificate checks?
3. What steps can global HR take meet due diligence standards when using Criminal Clearance Certificates as part of a background check?

TERMINOLOGY

You should be familiar with the following key terms used in this global HR module:

- False negatives
- False positives
- Fair use
- Spent conviction

ACRONYMS

AMIA: American Medical Informatics Association
CCCs: Criminal Clearance Certificates
CPI: Corruption Perceptions Index
CPIC: Canadian Police Information Centre
DUI: Driving Under the Influence
EU: European Union
FCPA: Foreign Corrupt Practices Act
FCRA: Fair Credit Reporting Act
ID: Identification
NBI: National Bureau of Investigation
NCIC: National Crime Information Center
NCRB: National Crime Records Bureau
RCPM: Royal Canadian Mounted Police
SAPS: South African Police Service