



Background screening is becoming increasingly commonplace throughout Europe, particularly in the United Kingdom. However, there are diverse legal and cultural considerations that companies should be aware of before implementing a background screening program in this particular country. This whitepaper will highlight the legal landscape and outline checks available.

## **Legal Landscape**

Employers need to understand the different laws that may impact background screening. In particular, data privacy laws and legislation focused on the rehabilitation of ex-offenders serve as a great starting place. The United Kingdom is currently comprised of England and Wales, Scotland and Northern Ireland.

## **Data Privacy**

Data protection in the United Kingdom is effectively in transition. The Data Protection Act 1998 (which implemented the EU Data Protection Directive 95/46/EC) was the controlling law until the passage of the General Data Protection Regulation (GDPR) in April 2016. However, following the Brexit vote the UK arguably needs to implement the provisions of the GDPR or it may risk an inadequacy finding similar to the United States. It is also unclear if the United Kingdom would participate in the EU-US Privacy Shield or how data transfers to and from the US to the UK would be treated.

Capital	London
Currency	Pound (GBP; £)
Population	65,110,000
Area	242,495 km <sup>2</sup>
Language	English
Time Zone	UTC GMT 0
Calling Code	+44

In the event the Data Protection Act 1998 remains in effect, the law is based upon eight crucial principles as it relates to the treatment of personal data which must be: 1) Fairly and lawfully processed, 2) Processed for a limited purpose, 3) Adequate, relevant and not excessive, 4) Accurate and up-to-date, 5) Not retained longer than necessary, 6) Processed in accordance with subject access rights, 7) Obtained securely and 8) Transferred to other countries only if adequacy from a protection standpoint is demonstrated or via the data subject's consent.

## **Rehabilitation of Offenders Act 1974**

In addition to data privacy laws, employers should be aware of other important legislation such as the Rehabilitation of Offenders Act 1974 (ROA). The ROA's purpose is to help ex-offenders find employment. Under the ROA, criminal convictions become "spent" after a particular period of time at which point the individual is considered rehabilitated.

The criminal records disclosure system has been challenged twice in the past few years. In the first, the Court of Appeal determined that Enhanced Disclosures violated Article 8 of the European Convention on Human Rights (ECHR) particularly regarding interference with the right to private



and family life.<sup>1</sup> Following this ruling, the government amended the ROA by reducing the amount of time that convictions appeared on Basic Disclosures (i.e., reduced the amount of time for convictions to become spent). Under this “filtering” scheme, any single convictions for non-violent offenses would be filtered from the individual’s record after 11 years or 5 ½ years if the individual was under 18 at the time. However, the amendments did not address the procedures for Standard and Enhanced Disclosures. In January 2016, the High Court issued an opinion<sup>2</sup> akin to the earlier ruling that the current criminal record disclosure scheme continued to violate Article 8 of the ECHR, particularly due to the fact that when an individual has more than one criminal conviction, all convictions remain disclosable no matter how minor. As of this document’s revision date, the government is considering whether an appeal is appropriate and/or what changes to the criminal records disclosure process would be appropriate.

Other important laws include (but are not limited to): Police Act 1997, Human Rights Act 1998, the Safeguarding Vulnerable Groups Act 2006, Safeguarding Vulnerable Groups (Northern Ireland) Order 2007, Protection of Vulnerable groups (Scotland) Act 2007 and Freedom of Information Act 2000.

## **Background Screening – Available Checks**

**Bankruptcy Records**

**Civil Records**

**Credit Report**

**Criminal (Basic Disclosure)**

**Criminal (Nationwide Database)**

**Directorship**

**Education**

**Employment**

**Global Search**

**ID Verification**

**Motor Vehicle Records**

**Passport Check**

**Professional License Verification**

**References**

In general, the most commonly conducted checks in the United Kingdom include reviewing an individual’s past education and employment history, checking professional references and conducting a criminal records check. Other checks, such as reviewing an individual’s credit history and motor vehicle records, are available; however, they tend to be used only when directly relevant to the position being filled and may not be suitable for every position in every industry.

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<sup>1</sup> See *R (T) v Chief Constable of Greater Manchester Police & others [2014]*. The Court of Appeal decision was issued in 2012 and upheld by the Supreme Court in 2014.

<sup>2</sup> See *R (on the applications of P and A) v Secretary of State for Justice [2016] EWHC 89 (Admin)*.



Additionally, there are numerous background check requirements for regulated financial positions that should be taken into consideration as necessary.

### **Education**

In the UK it is common to verify only the highest degree obtained by a candidate. Educational institutions will be contacted to verify dates of attendance, graduation date and degree information.

### **Employment**

It is common to verify the last seven years of employment for candidates in the UK. Employers will be contacted to verify the individual's title, dates of employment and if the candidate is eligible for rehire.

### **Criminal**

Criminal history information is considered to be "sensitive" data under the Data Protection Act 1998. Additionally, the Information Commissioner's Office (ICO) states in "The Employment Practices Code" (the Code) that criminal convictions should only be considered if relevant to the position being filled. Employers should reference that spent convictions do not need to be declared unless the position is covered by the Exceptions Order. The ICO also recommends that employers should limit criminal history requests to the top candidate whenever possible and should not force individuals to use subject access rights. Indeed, employers who force individuals to access information such as his/her criminal record (commonly referred to as "enforced subject access") are potentially committing a criminal offense under Section 56 of the Data Protection Act.

There are two ways to search criminal history: Basic Disclosure (recommended) and a Nationwide Criminal Database.

### **Basic Disclosure**

The Basic Disclosure is obtained through Disclosure Scotland and will contain all convictions unspent under the Rehabilitation of Offenders Act. The Police National Computer houses the records that comprise a Basic Disclosure which includes information from England and Wales, Scotland, Northern Ireland, the Isle of Man and the Channel Islands (Jersey and Guernsey). All employers have access to Basic Disclosures which require a specific consent form and take up to 14 days to be completed (as quoted by the Disclosure Scotland service).

There are additional disclosure types available – notably the Standard and Enhanced Disclosures – that will contain additional information such as relevant spent convictions, unspent cautions and sex offender notification requirements. Access to the Standard and Enhanced Disclosures is limited to particular position types and duties.



### **Nationwide Database**

The Nationwide Database is a proprietary product offering that searches information from publicly available court sources, local media sources, and regulatory and sanction sources. This check should not be interpreted as a true, comprehensive criminal records search akin to the Basic Disclosure, but offers a faster option for employers who want a less thorough search.

### **Motor Vehicle Records**

The motor vehicle records search will confirm the validity of an individual's Driver's License and endorsements.

### **Miscellaneous**

Other searches in the United Kingdom include: Civil Records, Bankruptcy Records, Credit Check, Directorship Search, Passport Check, ID Verification, Global Search (sanctions and watch lists), Professional License Verification and Professional References.

### **Drug Testing**

Drug testing is not commonly performed outside of the United States. As outlined in the Code published by the ICO, drug testing is considered to be "sensitive" data as it relates to an individual's physical or mental health or condition. The Code notes that drug and alcohol testing may not be justifiable unless there is a pertinent health and safety reason. For example, post-incident drug testing is more likely to be considered justifiable than random drug testing. Given the potential privacy implications, clients should consult with qualified legal counsel before implementing a drug testing program.

*It is important to note that the following is offered as general educational information and is not intended to constitute legal advice. Given the intricacies of the pertinent laws and regulations, consultation with qualified legal counsel is recommended.*