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Employees' criminal backgrounds: what levers do french employers have to circumvent the sacrosanct principle of respect for privacy?

"Can I get a copy of a job applicant's criminal records?" or *"Can I dismiss an employee who has just been convicted of a criminal offense*?" These are some questions generally raised by managers of international groups that increasingly reach the ears of legal practitioners.

In North America, checking and using criminal record information of job applicants and employees is a common and widespread – if not a routine – practice, in particular since September 11, 2001 and the 2002 Sarbanes-Oxley Act[1]. In France, a strong cultural and legal barrier theoretically prohibits the employer from checking criminal record information and/or using this information to justify a disciplinary sanction or a dismissal. Yet, the employer may successfully go around this barrier that protects employees' privacy by notably relying on the proportionality principle, the company's legitimate interest and the substantial disruption generated within the company.

1. *"Can I get a copy of a job applicant's or existing employee's criminal records?"*

- General principle of prohibition for the employer to conduct criminal background checks on job applicants and existing employees

There is no specific provision of law in France stating specifically that it is prohibited to conduct criminal background checks on job applicants and existing employees. However, it results from a combined application of laws and principles that **collecting criminal records on applicants and existing employees but also requesting this information from applicants/existing employees is – by principle – illegal.**

Pursuant to Article 9 of the French Civil Code, "*Everyone is entitled to a right to respect for his/her private life*".

Pursuant to the French Labor Code (hereinafter "FLC"), employers may collect personal information from an applicant and from an existing employee only if the purpose of such collection is to assess the applicant's abilities to carry out his/her future duties or professional skills:

– Article L. 1221-6 of the FLC stipulates that the information requested **at the time of recruitment** must "*present a direct and necessary link with the position in question or to the assessment of professional ability* ";

– Article L. 1222-2 of the FLC stipulates that the information requested **during the employment relationship** must "*present a direct and necessary link with the assessment of his/her professional abilities*".

Pursuant to Article L. 1221-9 (specific to recruitment) and L. 1224-4 (during the employment relationship) of the FLC, no personal information concerning a job applicant or an existing employee can be collected by a system which has not been made known to the relevant job applicant or employee.

In the same vein, the French "Data Privacy Act" n° 78-17 of January 6, 1978 sets forth that the personal data concerning employees or job applicants "*must be collected and processed fairly and lawfully (…) for specified and legitimate purposes*".

In order to fight against discriminatory practices, Article L.1132-1 of the FLC strictly prohibits the exclusion of applicants from the recruitment process as well as sanctions/dismissal of existing employees "*because of their origin, sex, morals and habits, sexual orientation or "identity", family status or pregnancy, genetic characteristics, actual or supposed (non-) adherence to any ethnic origin, nationality or race, political opinions, trade-union membership or similar activities, religious beliefs, physical appearance, surname, health condition or handicap".*

On the same topic, Deliberation n° 02-017 adopted by the French Data Protection Authority (hereinafter "CNIL") on March 21, 2002 states that "*it is prohibited to collect personal data, either directly or indirectly, showing the racial or ethnic origins, political, philosophical or religious opinions, union affiliation, or information on health or sexual life*". By way of illustration, the CNIL conducted in 2011 investigations at several banks and discovered that those banks were used to consulting the French Central Bank's files to determine whether job seekers were suffering from debt problems or were banned from holding a bank account, in which case, job applications were rejected or put on hold. The CNIL required the targeted banks to put an end to such practices.

As a result and based on the mentioned-above provisions, the employer is, by principle, generally prohibited from accessing to any information concerning the criminal background of job applicants and existing employees as such information is part of their private life.

- *Exceptions to the general principle of prohibition provided by specific laws/decrees in specific sectors of activities*

By way of exception and for evident reasons linked to the safety of persons and goods, the French legislator

has adopted specific measures in certain sectors of activities (security/defense, banking/insurance). As such, private companies hiring employees on positions related to surveillance, premises security and cash transportation must verify the probity of those employees before hiring[2] and are, therefore, required to ask the applicant communication of the so-called "Extract/Bulletin n°3" of the criminal records[3].

It should be noted that third parties (notably the employers) can by no means have a direct access to criminal records. **Only the individual concerned may have access to such information, or the "*Préfet*" (administrative authority) upon request of the employer and for specific "regulated" jobs**.

For those regulated jobs, listed by Decree[4] (e.g. security staff in public transportation, municipal police officers, workers in airports), the employer requires the "Préfet" to investigate in the so-called "STIC" database ("*Système de traitement des infractions constatées*"/Criminal Offences Processing System) which is the national database designed to record data collected from procedures established by the national police authorities in the context of their law enforcement assignments.

- *Situations where a legitimate interest may authorize the employer to request from the applicant or existing employee information on his/her criminal records*

There may be certain circumstances where an employer may consider that in view of the context and of the specific nature of the position, he has a legitimate interest to obtain information on job applicant's or existing employee's criminal records.

In those cases, the employer, setting out its legitimate interests, can request the job applicant at the recruitment's stage or the employee during the employment relationship to provide him with the "Extract n°3" of his/her criminal records.

This Extract n°3 can only be applied for by the applicant/employee himself/herself. The latter may refuse to provide such criminal records. The employer has no means to force the individual to deliver the information.

The employer can thus decide to remove the applicant from the recruitment process or to dismiss the employee who refused to deliver a criminal record. However, by taking such a decision, the employer will never be protected against the risk of legal action by the applicant or the existing employee who will argue that he/she was removed from the recruitment process or dismissed because of his/her refusal and who will claim damages.

Indeed, the refusal of the applicant/employee to deliver the criminal record does not constitute as such a valid ground for non-hiring or for dismissal.

It should be noted that French case law tends to consider that there are others means to control the integrity of an employee (e.g. asking references to previous employers etc.).

2. *"Can I refuse to hire a job applicant or sanction/dismiss an existing employee who has been convicted of a criminal offense?"*

If the employer obtains a copy of a criminal record or is informed by other means (testimonies, declaration of the concerned applicant/employee etc.) that the applicant/existing employee has been convicted in the past, he could decide to refuse to offer employment to the job applicant or dismiss the existing employee.

Such decision is, however, subject to the proportionality principle set forth in Article L. 1121-1 of the FLC that stipulates "*No one may restrict the rights of individuals or individual and collective liberties if the means is not justified by the nature of the job to be performed or is not proportionate to the goal sought*".

- As regards the applicant, the employer must prove that the particular position at stake requires specific professional qualities such as integrity and probity and that the existence of criminal convictions renders the individual unable to carry out his/her future duties as there are absolutely incompatible with the nature of the position sought (e.g. bank teller, cashier etc.);
- As regards the existing employee, the employee in question was recently convicted and this particular criminal record poses an unacceptably high risk if he or she remains employed in a particular position. The most common cases are the ones of a jewel seller or a bank teller, cashier who was recently convicted for robbery or theft. In a quite recent decision dated September 26, 2012[5], the Labor Chamber of the *Cour de Cassation* upheld the validity of the dismissal of an employee who had been convicted to 8 years of imprisonment for the rape of a 15-year old minor because the behavior of relevant employee in his private life had generated an indisputable and substantial disruption within the company. The circumstances were, however, quite specific since the 15-year old girl was the daughter of an employee working on the same site as the dismissed employee. Many colleagues of the victim's mother were shocked and the disruption within the company was such that that a physiological support unit had to be put in place.

In any cases, the burden of proof relies on the employer.

The judge will appreciate at his/her sole discretion if the assumed criminal conviction is indeed incompatible with the nature of the position and, if not, the employer could be liable for substantial damages.

Finally, it should be noted that the employer may also face criminal sanctions in the event of proved discrimination (up to 3 years of imprisonment and/or a fine up to 45,000 Euros).

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[1] The Sarbanes–Oxley Act of 2002 on public company accounting reform and investor protection is a United States federal law that sets new standards with respect to accounting and financial transparency. This

legislation was enacted in reaction to the Enron's bankruptcy and aims at imposing more transparency in the governance of public companies.

[2] Act n°83-629 dated July 12, 1983 completed by a Decree n°86-1058 dated September 26, 1986.

[3] This is a "certificate of good standing" giving details on any conviction recorded in central records or stating that there is no such conviction.

[4] Decree n° 2005-1124 dated September 6, 2005

[5] Labor Chamber of the *Cour de Cassation*, September 26, 20012, n°11-11.247