Background Checking: Where Does The Responsibility Lie?

The recent story of Thomas O’Riordan, the top city lawyer who boasted a host of fabricated qualifications to gain high-level positions, serves as a clear reminder of the need for rigorous background checking of employees. While it may seem like yet another dull administrative hoop to jump through, the importance to employers of verifying matters such whether a recruit has the right to work in a country or is suitably qualified for a role is obvious. An interesting question arises when one considers the position of recruitment agencies; clearly there is not quite the same incentive to screen candidates because the agency is not the ultimate employer and so it might be thought that the onus is on the employer to conduct adequate background checks. This seems to be the generally accepted position in respect of permanent placements and is a sensible conclusion given the length of the investment by the employer as compared with that of the recruiter. The picture becomes somewhat hazier, however, when a candidate is being placed in temporary or contract work.

A grey area for recruitment firms

As a matter of industry practice, recruitment agencies generally take responsibility for ensuring that candidates are adequately screened in the case of temporary or contract work. Again, this is the only sensible outcome - imagine you are a client looking for a temporary receptionist to fill in for four weeks. Which is more valuable to you: Recruitment Firm A which can offer you a candidate who seems suitable for the job but you will have to verify his identity and right to work status, as well as validate his references/qualifications; or Recruitment Firm B who will ensure that every candidate it places with you has been adequately checked? Due to the short nature of the contract, the client does not wish to concern itself with investigating such matters but just wants to have confidence that the person filling the vacancy is capable of performing the role (from both a competency and a legal perspective).

Unfortunately for recruitment agencies, if they wish to take on this task it means adding a significant additional step of administrative duties, particularly if the checks are to be conducted sufficiently thoroughly. As a cofounder of Onfido Background Checks, I spend a huge amount of time helping employers by educating them about the importance of carrying out these checks. The statistics are shocking: one of our clients has carried out hundreds of identity checks on its applicants, and we’ve found that around 7% of them cannot be identified from the documents and information provided. Similarly, references and qualifications should not be taken at face value - from our own records, a staggering 31% of applicants have provided false information about a degree, provided false employers or fabricated non-existent jobs. If a recruitment agency fails to pick up on such matters, its clients will turn elsewhere to find temporary or contract workers.

The legal standpoint

So clearly there is a great risk to business reputation, but where does the law stand in respect of recruitment agencies’ background checking obligations? As a matter of compliance, the most significant consideration is the legal obligation upon any employer to ensure that every worker has the right to work in the UK. The Immigration, Asylum and Nationality Act 2006, grants the UK Border Agency (UKBA) powers to fine employers £10,000 for each illegal migrant worker – a penalty which is potentially being doubled to £20,000 in the government’s latest Immigration Bill. You might now be asking how this can be relevant to recruitment agencies. Recruiting workers and, consequently, the legal position is unclear. Under employment law, temporary or contract workers still on the books of a recruitment agency could well be regarded as an “employee” of the agency rather than the client. It may come down to the precise nature of the contractual relationship between the agency, the worker and the client. What this means, however, is that recruitment agencies cannot view themselves as immune to UKBA penalties. A further consideration is that, irrespective of the employment status of the worker, an agency might incur contractual liability against a client if it turns out that a worker does not have the right to work in the UK and inadequate checks have been conducted. Of course, this will depend on the specific terms of the contract.

What does this mean in terms of ensuring compliance? In order to protect itself, a responsible recruitment agency must take steps to verify that every candidate has the right to work in the UK –this should apply even if the agency is placing permanent workers since this eliminates any risk should the worker later be found to be an “employee” of the agency. Furthermore, discrimination rules dictate that checking candidates’ right to work status must be conducted regardless of country of origin. Taking these essential steps should be sufficient to protect the agency from UKBA and/or contractual liabilities, safeguarding both the agency’s financial and reputational interests.

Understand the industries

In addition to right to work checks, there is of course a wide range of other checks that can be carried out on a candidate. Right to work checks are crucial because not only do they affect every UK employer, but are also a legal obligation. Some forms of background check are legally required depending on the industry, whilst others are not legal requirements but are strongly recommended. For many generalist recruitment firms, the fact that they place candidates into a variety of roles in a range of sectors means that it is important to have at least a basic knowledge of these recommendations. These checks can be classified into 3 basic categories: employers and recruiters have the ability to verify a candidate’s identity, history and suitability for a job role. Checking a candidate’s identity is the most fundamental form of check. This involves simply verifying that a candidate is who...
they say are; in other words, making sure that they are not using fake documentation to commit identity fraud. Identity checks, along with right to work checks, are crucial no matter what industry the candidate is applying to work in.

For those candidates applying to work in high-trust roles, checking an applicant’s history is important. For example, criminal history is required for anyone hiring an applicant to work with children or vulnerable adults, such as those who work in hospitals, schools and care homes. There is a legal obligation to carry out enhanced DBS (Disclosure and Barring Service) checks, formerly known as CRB or criminal record checks, on the applicant in these cases. Employers and recruiters may also wish to carry out checks on an applicant’s financial history, for example, to find out if they have any previous CCJs or bankruptcies. Surveys have shown that many employers believe that people with previous financial problems and bankruptcies are more likely to steal and commit fraud, which is an issue for high-trust roles like cleaning, where employees are left alone to work in residential or commercial property.

Finally, an employer or recruiter may want to carry out checks on an applicant’s suitability for the role. This includes checking that they have not embellished details about their education and qualifications, or provided fake references in order to try and boost their application. This is more important in high-skill roles where qualifications and references are crucial to the application process. The risk of not carrying out these suitability checks at the top level are huge, as was shown in May 2012, when Yahoo fired their CEO Scott Thompson after finding out that he had lied on his CV by claiming to have a computer science degree which was completely fake.

How to ensure best practice and legal compliance
Taking everything into account, it’s clear that the legal issues surrounding employment background checking are a grey area (with the exception of right to work checks), but that the reputational and business risks are well-defined. Generally speaking, the onus is on recruitment firms to carry out the required checks when placing candidates into temporary positions. However, it is crucial that the terms of recruitment are distinct and well understood in the contract between the recruiter and employer, as the uncertainty surrounding the legislation in this area means that legal cases will often boil down to the contractual agreement between the two parties.