

JOB APPLICANTS IN PORTUGAL: BACKGROUND CHECKS AND MEDICAL EXAMINATIONS - F CASTELO BRANCO

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The question of whether an employer can run background checks and require medical examinations from job applicants has been an issue in Portugal for some time. It becomes even more complex when we need to address the issue of whether the employer may then keep and use data gathered from job applicants at a later stage.

Employers, especially multinationals, often do not realise the implications that such issues may have when recruiting in Portugal. Many simply ignore them and use their standard international requirements and practices as far as background checks and medical tests are concerned.

This is an understandable impulse when we think that we need to make sure that they must hire the

best 'man' for the job and both background checks and medical tests, among others, are well-proven means of assessing employee suitability.

Despite different approaches in a number of European countries, namely the UK, where background checks are normal practice in these circumstances, Portuguese law expressly establishes that an employer cannot run background checks for job applicants, whether directly or through a third party, nor freely keep such information stored in a database.

The only information freely obtainable and that an employer may request is the applicant's criminal record.

Obtaining applicants personal information is otherwise only admissible when it is strictly necessary to assess the applicant's ability to perform his duties and the employer must provide such justification in writing.

The same applies to medical tests (including pregnancy tests) and the need to obtain or provide them to the employer upon application for a job.

However, the rule on medical tests has two exceptions. The employer is allowed to require them if they are intended for the protection and safety of the employee himself or third parties – fitness of the applicant to the job – and if the activity has special requirements – such as football players or airline pilots. In these cases, the employer must provide justification for requiring these tests in writing.

Alexandra Almeida Mota del bufete F. Castelo Branco, destaca que, según la Ley portuguesa, una empresa no puede organizar, o solicitar a una tercera parte, la comprobación del historial relacionado con un candidato respondiendo a una oferta de trabajo. Tampoco es legal guardar dicha información en una base de datos. En la opinión de la autora, a pesar de las diferencias entre las reglas portuguesas y las de otros países, la Ley lusa ha creado un equilibrio razonable entre las necesidades de los empresarios y la intimidad del individuo.

Concerning this issue, Portuguese courts have already stated that employees applying for certain jobs (eg airline pilots) cannot refuse to be submitted to some medical tests.

Additionally, in these cases, employers are entitled to refuse the application whenever they consider that the employee is not fit for the job based on the results of the medical tests.

Despite it being a very frequent matter in employment relationships, the issue of background checks and medical tests to job applicants is not discussed in Portuguese courts very often.

In fact, in most cases job applicants do not realise that the rejection of their application is mainly due to their background or to the result of their medical exams, as the employer does not provide them with any reasonable or detailed explanation for such rejection.

The other problem with background checks and medical tests is the maintenance of the data by employers once the applicant has the job.

Many employers would like to keep this information and possibly use it in other recruitment opportunities. However, such data processing is only allowed if the applicant has given his unequivocal consent and been provided with information regarding the content and purpose of the data collection and is afforded the possibility to correct, update and even delete the data.

If the data is not deemed sensitive (race, ethnic background, religious and political convictions and sexual orientation) and if such data is required to conduct the recruitment, within the limitations described above, employers may only keep it for as long as the recruitment process lasts and no longer.

Given this, Portuguese law seems to oppose or at least create some difficulties to some

internationally accepted practices, especially when trying to use international human resources (HR) recruitment policies in Portugal.

Nonetheless, we feel that Portuguese law has still managed to create a reasonable balance between the information needs of employers and the employees right to privacy.

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