



# European Employment Law ALERT

## Crackdown on 'Back-door' Criminal Record Checks

*By Ming Henderson and Razia Begum*

Under section 56 of the Data Protection Act 1998 (**DPA**), it is now a criminal offence for any person or organisation to require an individual to submit a 'subject access request' (i.e. the right for an individual to access any of their personal data held by third parties on payment of a fee, provided certain requirements are met) in order to obtain and provide a copy of their criminal record. This will not prevent employers and others from obtaining access to criminal records through legitimate means (for example, seeking disclosure officially through the Disclosure and Barring Service). The offence was created over a decade and a half ago but has only been brought into force on 10 March 2015.

### Wide application

The offence will have a broad application applying in the following contexts.

- **Employment:** employers may no longer require an individual to use their subject access rights to provide certain records (such as, police records) during the recruitment process or as a condition of hiring or continued employment.
- **Provision of goods, services and facilities to the public:** it is unlawful to contractually require certain criminal records as a condition for providing and receiving a service (for example, in insurance or housing).

The prohibition will apply to details which are obtained directly from the relevant individual or via a third party. In practice, this means that employers, service providers and third parties will also be held liable for any processing of personal data by their data processors.

Where the record is required by law or is justified in the public interest, the prohibitions under section 56 will, by exception, not apply. Guidance published by the Information Commissioner's Office, the independent regulatory body overseeing the DPA (ICO), provides practical situations. For example, the public interest exception cannot be used to justify the prevention or detection of a crime.

### Breach implications

In the event of a breach, the individual or organisation risks a criminal record, a criminal prosecution, a fine (ranging from £5,000 to an unlimited amount) and the potential for senior staff involved to face personal criminal liability.

As with other major data protection breaches, there is also the risk of reputational harm. The ICO has expressed that it will apply the rules strictly and has the power to "name and shame" those in major breach.

## Employer health check

Employers and organisations carrying out background checks on behalf of employers should review their current practices for compliance purposes. In practice, this may result in ceasing to make prohibited checks or amending documents used in conjunction with background checks, such as, application forms or consent forms.

If you would like further information please contact any member of our International Employment Law practice:

### IN THE UNITED KINGDOM/EUROPE



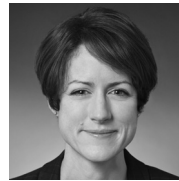
*Peter Talibart*

Direct: + 44 (0) 20 7763 2550  
[ptalibart@seyfarth.com](mailto:ptalibart@seyfarth.com)



*Ming Henderson*

Direct: + 44 (0) 20 7763 2553  
[mihenderson@seyfarth.com](mailto:mihenderson@seyfarth.com)



*Tessa Cranfield*

Direct: +44 (0) 20 7763 2517  
[tcranfield@seyfarth.com](mailto:tcranfield@seyfarth.com)

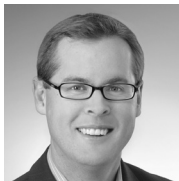
### IN CHINA



*Wan Li*

Direct: +86 21 2221 0688  
[lwan@seyfarth.com](mailto:lwan@seyfarth.com)

### IN THE UNITED STATES



*Darren Gardner*

Direct: +1 (415) 544-1018  
[dgardner@seyfarth.com](mailto:dgardner@seyfarth.com)



*Dominic Hodson*

Direct: +1 (415) 544-1017  
[dhodson@seyfarth.com](mailto:dhodson@seyfarth.com)



*Marjorie R. Culver*

Direct: +1 (212) 218-5546  
[mculver@seyfarth.com](mailto:mculver@seyfarth.com)



*Luke Edwards*

Direct: +61 2 8256 0401  
[lukeedwards@seyfarth.com](mailto:lukeedwards@seyfarth.com)



*Amber Millhouse*

Direct: +61 3 9631 0702  
[amillhouse@seyfarth.com](mailto:amillhouse@seyfarth.com)

### IN AUSTRALIA

[www.seyfarth.com](http://www.seyfarth.com)

Attorney Advertising. This European Employment Law ALERT is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP European Employment Law ALERT | March 19, 2015

©2015 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.