

Pre-Employment Screening Considerations in Brazil

Pre-employment screening is an important tool that corporations all over the world use to protect the integrity of their operations, assets, customers and existing employees. US, EU and recent Brazilian corporate legislation make effective pre-employment screening an important mechanism in an effective corporate compliance program.

There is no doubt that in Brazil, screening candidates can create legal risks. However, there are also obvious and more serious risks in hiring unscreened candidates. We can all understand the downside of bringing someone involved in criminal activities into the workplace, but imagine the damage any convicted criminal could do to the reputation of your company if you hire him to a senior role? Consider the potential impact of a financial manager with a fraud conviction, or even that of a truck driver who is involved in drug smuggling?

Legal Risks

Let's take a closer look at the legal risks involved in performing background checks in Brazil, considering the applicable legislation and rulings from the labor courts:

During any recruitment process, it is clear that the company has rights, and candidates have rights. A balance needs to be established so that those rights converge to ensure a lawful, ethical, efficient, and solid legal hiring process .

For example; all candidates have the right to be treated fairly and with respect in an environment free from discrimination. On the other hand, companies have the right to select the best candidates they can find in the market; work with people the company deems to be best suited for an open position and to utilize any legal and ethical methods, means and resources to identify those candidates.

The Brazilian Constitution states that human dignity is one of the fundamental pillars of the Brazilian Republic, and there should be no kind of prejudice derived from *origin, race, gender, color, age* or any other form of discrimination. Moreover, the Brazilian Constitution says that in Brazil intimacy, life, honor and image are all inviolable.

Along these lines Federal Law nº 9.029/1995 states that; for hiring purposes; any kind of discrimination due to *gender, origin, race, color, marital status, family situation* or *age* is forbidden. It is also worth noting that the Brazilian labor courts are responsible for adjudicating all labor issues even if an issue occurs prior to the execution of an employment agreement.

All of the above-mentioned rules are applicable in every hiring process. However, there are limits to their application and that is fundamental to this discussion.

Case Law

It is undeniable that in Brazil the courts are heavily weighted towards the side of the employee. For example, the burden of proof regarding the facts brought up in almost all labor claims is shifted to the employer and there are many instances where labor lawyers have prevailed simply by using employee-friendly interpretations of the law.

However, a ruling from the (TST) Tribunal Superior do Trabalho (Brazilian Supreme Labor Court) helps us to follow the application of Brazilian law to the hiring process and to recognize this case as an important legal benchmark.

In 2012, the TST ruled on a civil case filed by the labor prosecutor of Sergipe (a state in the northeast of Brazil). The labor prosecutor had argued that the manner in which a major regional supermarket chain was handling a recruitment process to fulfill open cashier positions in its stores was illegal. The company had stated that it would review applicant criminal and credit records, as any successful candidate would have to handle large amounts of cash.

The labor prosecutor invoked all the constitutional and federal laws applicable and argued that the approach of the employer violated the candidates constitutional rights to privacy.

Before the labor judge (first instance)¹, the arguments of the labor prosecutor were accepted and the judge ruled that the company should be prevented from consulting a candidate's credit and criminal record. According to the decision, for each criminal and credit record check performed by the company it should pay the amount of US\$5,000.00 and the company should also pay US\$100,000.00 for collective moral damages.

The company appealed this decision, and the Regional Labor Tribunal reversed the lower court's decision. The prosecutor appealed this ruling and the Superior Labor Tribunal (TST), finally decided the case and maintained the Regional Labor Tribunal's decision. We mention below and highlight the reasoning from the TST to rule in favor of the company:

- a) The company has the right to recruit the best candidates for an open position;
- b) To "select" means separate, differentiate, pick and choose;
- c) The discrimination relevant to the law deals with a candidate's personal condition based on *gender, origin, race, color, marital status, family situation or age*;
- d) Everyone should be treated equally based on the law. However, that does not mean that there are no differences among human beings or that all human beings are equal;

¹ There are three levels of jurisdiction on labor matters: 1st level: lower labor courts; 2nd level: Regional Labor Courts; 3rd level: Superior Labor Court (the highest labor court in Brazil). When the matter involved constitutional issues, the case may also be finally decided before the Brazilian Supreme Court, which is the highest court in Brazil.

- e) A candidate's personal condition is different from a candidate's personal conduct/behavior;
- f) To differentiate people based on personal condition is unlawful; to differentiate people based on their personal conduct is lawful.

This set of arguments is hard to undermine and enforces the premise that screening candidates is not a violation of either the Brazilian constitution or other relevant laws when it is done in the right way. There are also other relevant factors to support this position:

- a) During the case the TST had access to the details of the selection process adopted by the Labor Division of the Attorney General Office (MPT) when selecting Labor Prosecutors. This process includes credit checks, criminal checks and a detailed review of the professional and personal conduct of all applicants. The TST reasoned that if the MPT utilized such criteria to hire their own employees, why should a private company be denied that right? Furthermore the TST also decided that examination of credit and criminal records should not be considered a violation of intimacy and privacy, if the records themselves are public.
- b) The TST ruled that by protecting candidates whose credit and criminal records were negative, the labor prosecutor was trying to protect a group of people who had not lived their lives according to generally acceptable standards. And it was not acceptable for a company to pay damages for a group of people who has chosen to break the rules in the first place.

Although this is not a binding precedent (meaning that other labor courts in Brazil may rule differently and even in opposition to this TST decision), it is clearly a case that will probably be a reference for labor judges in other proceedings.

The decision also connects companies to another important topic: legal compliance. There is recent legislation in Brazil related to compliance and anticorruption practices whose main purpose is to ensure that legal liability falls to corporate entities to maintain appropriate standards and safeguards. In Brazil, there are multiple laws on the books to fight corruption, but Federal Law nº 12.846/2013 (Brazilian Anti-corruption Law) is the first to focus on the liability of a legal entity.

The Brazilian Federal Anti-corruption Law is regulated by a Federal Decree, which provides criteria for the application of penalties to companies who fail to implement anti-corruption practices, and establishes minimum requirements to be incorporated into a compliance program. In addition, the CGU Controladoria-Geral da União (Brazilian Comptroller General) issued a guideline (Portaria nº 909), detailing what companies have to do in order to implement an effective compliance program.

One of the important requirements described in the law and the accompanying guidance is a demonstrated commitment by the company to the prevention of corrupt practices. It is

clear that an effective screening program is fundamental to this commitment. In addition, a solid pre-employment and third party screening program designed to mitigate the probability of fraud and other illegal practices would mitigate fines and other penalties in case of violations.

Many large companies in Brazil have accepted the value of pre-employment screening and operate successful and effective programs, which minimize legal risk while allowing those companies to hire the best-qualified candidates for open positions. Implementing a screening program in Brazil can also help multinational companies align their practices in Brazil with those applied by their colleagues in the US, EU and elsewhere.

What's involved?

Statistics show that almost 25% of job applications contain material discrepancies. These may be as minor as inflating a salary or misstating dates of employment. Data analyzed by Socrates Ltd has suggested that 4% of all Brazilian applicants have criminal records of sufficient significance to disqualify them as job candidates.

While 4% does not seem like a lot, it means that without an effective screening program 4 out of every 100 employees might have a criminal record of significance.

Below we've listed some recent client examples:

1. ***Open warrant for immediate incarceration found for applicant for country manager position:*** A dual US/Brazilian national applied from the US applied for a country manager position in Brazil. It was discovered that in his early 20s he had been convicted in absentia for vehicular manslaughter and leaving the scene of an accident in Brazil. He had an open warrant for his immediate arrest and incarceration for this felony.
2. ***Recent conviction for drug dealing:*** It was discovered an applicant for an outside sales position had been convicted less than twelve months previously for dealing in ecstasy and other illegal drugs. He had hidden the six months he had spent incarcerated by falsely claiming a short-term overseas assignment on his resumé.
3. ***Recent conviction for money laundering:*** A candidate for a finance position had a recent conviction for running an illegal foreign exchange operation and had been stripped of his broker credentials following an investigation by the Brazilian securities commission.

Traditional screening programs involve the checking of educational and professional qualifications and validating employment and personal references. The methods for these steps are well established and may be conducted internally or with the support of an external service provider.

In addition to the traditional measures described above, employers should review candidate applications for gaps, discrepancies and other issues that may be indicative of problems.

To these steps it is also advisable to add the following measures:

- **Criminal record inquiry:** Brazilian criminal records are kept in separate publicly accessible registries by the federal authorities and by the state authorities. Most “ordinary” crimes are recorded in state registries and federal violations e.g. money laundering and terrorism, recorded in a federal database. It is possible for an individual to request from the federal police, either online or in person, a certificate (*Certidão de Antecedentes Criminais*) which will attest to the fact that the individual has no federal criminal record. A similar opportunity to request a clearance certificate exists at the state level and some states also offer this service online. However it should not be assumed under any circumstances that a federal certificate indicates that an individual does not have a criminal record at the state level and vice versa. In addition, a state certificate covers only the single state from which the certificate was obtained. It is possible for corporations to perform criminal record checks internally, but the time and labor involved in exploring the data available in all the courts relevant to the applicant, might render the use of an external service provider economic and cost effective.
- **Credit inquiry:** The most utilized Brazilian credit reference agency SERASA has been in operation since 1969. In 2007 it was sold to the international credit reference agency Experian. In practice, SERASA is the most reliable source of credit related information in Brazil. A significant percentage of the data in the system pertains to corporations and not individuals. However, it is possible to perform an individual credit check using the system for anyone with a CPF number. A corporation may directly enter into a relationship with SERASA/Experian or engage a third-party screening service provider to perform credit checks. The use of credit checks to screen candidates should be limited to those in positions of authority and those with financial or cash-handling responsibilities.

Best Practices

- The screening process should be transparent to all job applicants and candidates should be required to sign a waiver form permitting the prospective employer to perform background checks. It is the experience of many large HR departments, that candidates who have falsified parts of their background and those with criminal issues, are discouraged from applying for jobs with companies with screening programs and who encourage candidates to sign these forms early in

the application process. This measure thus increases the quality of job candidates in the first place.

- Make sure that the screening criteria used for a particular position are reasonable and relevant. For example, as you would only consider the professional certification of an applicant important if it were relevant to the position, a credit enquiry might only be important for senior employees as well as those putting together financial data and those handling cash transactions.
- A screening program should enhance the compliance program of any corporation. Illegal methods should never be used to obtain data (for example hacking, spying or stealing). In addition, corporations should only access public records and other data that is available legally.
- Corporations should implement mechanisms to allow candidates to self-disclose issues and to ensure that while the screening process is objective, it is also considerate of mitigating circumstances.
- Corporations must ensure that data obtained during the screening process is properly protected and secured. US, EU, Brazilian and other laws governing data protection may all be applicable.
- Make sure that any data you obtain during the screening process is actionable.
- Corporations should perform due diligence on any third-party entity under consideration as a screening service provider.
- Any supplier based screening program should be regularly updated and the supplier should affirm that it understands and is in compliance with internal corporate policies and local and international laws.
- A screening program, like any other business process and compliance program should be continuously evaluated and improvement opportunities implemented.

In summary, a properly implemented and effective pre-employment screening program can:

1. Reduce the probability that a corporation will experience significant compliance issues.
2. Ensure that a corporation meets both Brazilian and international regulatory requirements, including local and international compliance requirements.
3. Ensure that the Brazilian subsidiary of any multinational enterprise is in compliance with global HR policies and procedures.
4. And most importantly; to create a safer and more secure workplace.

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Carvalho, Machado, Timm & Deffenti (CMTED) is an award winning Brazilian law firm with offices in the states of Rio Grande do Sul, São Paulo and Parana. **Socrates Ltd** is an international risk consultancy with offices in the UK, US, Colombia and Brazil. Together Socrates Ltd and CMTED work to mitigate the legal and operational risks facing our clients.

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