

GUIDANCE

DBS checks

Healthcare organisations often require medical devices companies to conduct background checks before they allow the company's employees (e.g. sales representatives) to enter their premises.

This note provides guidance on the types of DBS checks that can be carried out with reference to scenarios that may arise and the level of check which is permitted.

! This guidance provides general information about DBS checks and applies it to a few simple scenarios that may be relevant to ABHI members. Our conclusions may not be suitable to your circumstances and this guidance should not be considered as a substitute for legal advice. This guidance states the law as it is on the date indicated at the end of this document. If the underlying legislation is amended after this date, this guidance may no longer be correct.

Companies can only carry out a DBS check for an individual working in an "eligible" position

The law permits companies to carry out DBS checks only for those individuals who work in an "eligible" position. There are potential legal consequences for any company that carries out checks on individuals who work in positions that are not eligible. It is the responsibility of the company to ensure that they are entitled to submit a DBS application.

! Excessive checks that go beyond the eligibility criteria could result in breaches of data protection law and even possible criminal liability for the company. If a healthcare organisation requests a check for a position you believe to be eligible, you should ask them for justification by reference to relevant legislation.

The level of check must be appropriate to the position

The types of DBS checks that can be undertaken in England and Wales and the eligible positions are as follows:

Type of check	Information it reveals	Eligible positions
Basic check	Unspent convictions and conditional cautions.	There is no eligibility requirement for a basic level DBS check.
Standard check	Spent and unspent convictions, cautions, reprimands and final warnings.	The position must be included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975/1023 as amended (ROA). The DBS published a Standard Check Eligibility Guide, which lists eligible positions. ¹
Enhanced check	The same information as a standard check <u>plus</u> any information held by local police that's considered relevant to the position.	The position must be included in <u>both</u> the ROA and in the Police Act 1997 (Criminal Records) Regulations 2002/233, as amended (PA Regs).
Enhanced check with a check of the barred lists	The same information as an enhanced check plus whether the applicant is on the adults' barred list, children's barred list or both.	The position must be eligible for an enhanced level DBS check as above and be specifically listed in the PA Regs as able to check the barred list(s).

¹ <https://www.gov.uk/government/publications/dbs-check-eligible-positions-guidance>

Basic or Standard checks will be sufficient in most scenarios:

No.	Scenario	Level of DBS check	Justification
1.	A company representative has the opportunity to come into contact with patients in public areas of a hospital while unsupervised.	Basic	<p>The only check that is available to the company is the basic check.</p> <p>The list of positions in the ROA includes:</p> <p><i>"any employment which is concerned with the provision of health services and which is of such a kind as to enable the holder to have access to persons in receipt of such services in the course of his normal duties."</i>²</p> <p>According to the Guidance by NHS Employers, "provision of health services"</p> <p><i>"relates to the provision of care concerned with maintaining the physical or mental health of patients. It may also include other non-clinical services/activities which support the provision of care and where, individuals carrying out those services/activities have access to patients as part of their normal duties. For example, receptionists, porters, cleaners, domestics, and key holders (in high secure services). This excludes roles that would only involve limited or no access to patients."</i>³</p> <p>Even if company representatives are "concerned with the provision of health services" in this scenario, they are unlikely to have "access" to persons in receipt of health services, following Guidance by NHS Employers:</p> <p><i>"¹For the purpose of DBS checks, we would advise that 'access' does not include positions which only allow individuals to have limited contact with patients (for example, no more opportunity than a visitor to the hospital site). This is intended to exclude staff who merely need to pass through patient areas to get to their normal place of work."</i>⁴</p>
2.	A company representative advises a healthcare professional (HCP) on use of a product as part of a care package, and is not delivering patient care.	Basic	<p>The same considerations as set out for Scenario 1 apply.</p> <p>In this scenario, the company representative is more likely to be "concerned with the provision of health services". However, (s)he still is unlikely to have "access to persons in receipt of health services".</p>
3.	A company representative has the opportunity to come into contact with patients in	Standard (adults)	<p>The same principles as set out for Scenario 1 apply. In this scenario, it is likely that the representative will have "access" to persons in receipt of health services under the ROA, and so the position would be eligible for a standard check.</p> <p>Note that:</p> <p>! The position may be eligible for an enhanced check, if</p>

² ROA, Schedule 1, Part II, paragraph 13

³ <https://www.nhsemployers.org/case-studies-and-resources/2018/08/dbs-eligibility-tool>

⁴ <https://www.nhsemployers.org/-/media/Employers/Publications/Employment-checks-NEW-April-2016/Criminal-record-checks-final-March-2017.pdf?la=en&hash=F91CFA97DB3388C45F28CF347B1C660BACBA86B1>

No.	Scenario	Level of DBS check	Justification
	clinical areas, such as wards, while supervised.		<p>the representative provides certain prescribed activities (set out below) <u>to an adult who receives a health or social care service.</u>⁵</p> <p>! The position may be eligible for an enhanced check with access to the DBS children's barred list, if the representative provides prescribed activities <u>to children.</u>⁶</p> <p>! If there is a risk that the company representative will be providing care, supervision, treatment, therapy, training, teaching, instruction, assistance, advice or guidance or similar activities to patients (prescribed activities), please refer to the section on enhanced checks below this table.</p>
4.	A company representative attends, while supervised, surgical procedures in operating theatres or similar environments such as Cath Labs.	Standard	The same considerations as set out for Scenario 3 apply: this position would only be eligible for a standard check, unless the representative engages in any of the prescribed activities.
5.	A company representative is attends meetings in 'sensitive' clinical areas, such as paediatric or Obs & Gynaecology wards, while supervised.	Standard	The same considerations as set out for Scenario 3 apply: this position would only be eligible for a standard check, unless the representative engages in any of the prescribed activities.
6.	A company representative is <u>unsupervised</u> in clinical areas but does not come into contact with patients.	Standard	<p>The same considerations as set out for Scenario 3 apply: this position would be eligible for a standard check, <u>unless</u>:</p> <p>(a) the representative engages in any of the prescribed activities – then the position may be eligible for an enhanced check (with access to the DBS children's barred list, if children are involved);</p> <p>(b) there will be absolutely no opportunity for contact with patients (for example, a service engineer who will be working in a decommissioned laboratory) - then the position will not be eligible for a standard check; only a basic check would be permitted.</p>

Please refer to **Guidance by NHS Employers⁷** for guidance on other possible scenarios.

All scenarios listed above assume that the company representative is NOT an HCP.

⁵ PA Regs, regulation 5B(1)(c)

⁶ PA Regs, regulation 5C(a)

⁷<https://www.nhsemployers.org/-/media/Employers/Publications/DBS/DBS-scenarios.pdf>

Positions that involve provision of certain prescribed activities may be eligible for enhanced checks:

Prescribed activity	Population	Frequency requirement	Level of DBS check
Any form of: (a) care or supervision, OR (b) treatment or therapy; OR (c) training, teaching, instruction, assistance, advice or guidance,	provided to adults in receipt of a health or social care service,	(i) at any time on more than 3 days in any period of 30 days; OR (ii) at any time between 2am and 6am and the activity gives the representative the opportunity to have face-to-face contact with the adult; OR (iii) at least once a week on an on-going basis, ⁸	may be eligible for an Enhanced check.
Any form of: (a) <u>unsupervised</u> : teaching, training, instruction, care or supervision, <u>unless</u> it is incidental to provision of such activities to adults; OR (b) advice or guidance that relates to physical, emotional or educational well-being, ⁹	provided to children,	(i) frequently; OR (ii) at any time on more than 3 days in any period of 30 days; OR (iii) at any time between 2am and 6am and the activity gives the representative the opportunity to have face-to-face contact with the adult, ¹⁰ OR (iv) regardless of frequency, if the activity is also provision of health care under HCP's direction or supervision, or relevant personal care, e.g. physical assistance or prompting, ¹¹	may be eligible for an Enhanced check with access to the DBS children's barred list.

Where there is a frequency requirement, the position would be eligible for an enhanced check, even if the individual representative would carry out such activities with a lesser frequency in any given hospital or with different groups of patients. This is because eligibility for a DBS check is determined by reference to the position, rather than by reference to the healthcare organisation / patient.

Requests for evidence of DBS checks should be approached with extreme caution

A company may be asked by a healthcare organisation to provide a DBS certificate for an individual representative. Such a request should be approached with caution; in accordance with the PA Regs, the certificate information must only be passed to those who are authorised to receive it in the course of their duties (i.e. a member, officer or employee of the employer) and it is a criminal offence to pass this information to anyone who is not entitled.

The company should also ensure that they handle all certificate information in line with data protection legislation.

Should you be asked to provide DBS certificate information (or if you wish to share certificate information), please obtain independent legal advice.

30 April 2019

⁸ PA Regs, regulation 5B(1)(c)

⁹ PA Regs, regulation 5C(a) and Safeguarding Vulnerable Groups Act 2006, Schedule 4, Part I, paragraph 2

¹⁰ Safeguarding Vulnerable Groups Act 2006, Schedule 4, Part I, paragraphs 1(1)(b) and Part III

¹¹ Safeguarding Vulnerable Groups Act 2006, Schedule 4, Part I, paragraphs 1(1)(b) and 1A