



# RECRUITMENT AND HIRING

*by Leah M. Simon and Carissa N. Tanzola*

The recruitment and hiring process presents opportunities and challenges for every type of organization. Great employees make a great workplace, but hiring the wrong person can be a costly mistake.

## **RECRUITMENT**

How and where your organization posts job openings will influence the type of candidates that apply. Canada has a diverse population and a workforce that reflects that diversity can be a significant economic advantage.

For example, an organization that relies heavily on word-of-mouth referral to fill an open position may inadvertently exclude candidates who do not share the same demographic characteristics of the organization's existing employee population.

## **THE ADVERTISEMENT**

Be honest and accurate but be careful not to discriminate.

If a position is contingent on the happening of another event (i.e. funding) disclose that to candidates upfront to manage liability.

In one court case, an applicant was hired without being told the job was contingent on the approval of funding. After the applicant accepted the new position he quit his previous job, sold his house and moved his family. He was then told funding had not been approved. The applicant successfully sued the employer for negligent misrepresentation.

Watch your language! Ensure the description of the job does not directly or indirectly discriminate on the basis of a characteristic protected under human rights legislation.

For example, an advertisement that seeks, "young energetic customer service representatives" discriminates against older candidates on the basis of age.

## **INTERVIEW IN PERSON**

Always exercise the right to meet a candidate in person to explore a range of topics including the candidate's related job experience ability to perform the essential duties of the position.

However, avoid asking questions that would solicit information about the candidate's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, gender identity or

disability. *Human Rights Codes* prohibit an employer from making a hiring decision on the basis of any of these characteristics.

Even if a decision not to hire a candidate is made entirely unrelated to one of these protected characteristics, the fact the employer gathered such information may expose it to a claim the decision was made illegally.

Sometimes it is difficult to avoid gathering this type of information because it comes up naturally during the interview process. For example, a candidate with a year gap in his resumé may voluntarily divulge he was off work because of a medical condition, or to take care of his young children.

The most effective way to mitigate the risk of a claim of discrimination at the hiring stage is to implement an interview questionnaire with standardized criteria against which all candidates are evaluated, and retain interview records for all candidates interviewed.

Should it be necessary to do so, these records may help an employer demonstrate its decision making process was based on objective criteria free of discriminatory considerations.

### **CHECK REFERENCES**

Surprising as it may seem, many employers do not check references before hiring a new employee. However, even if a candidate has provided an impressive job application and given a great interview, references should be checked to explore areas such as: what do former employers think of this candidate; was she technically sound, professional, dedicated and receptive to constructive feedback; is this candidate a leader and a role model for other employees; what are her strengths and weaknesses; why did the candidate leave her former employment; would a former employer rehire this candidate if given an opportunity?

Finally, remember a prospective employer is not restricted to checking references only with those referees offered up by the candidate. An employer may check references from any appropriate source.

### **THE DECISION TO HIRE**

Once the desired candidate is found, can an offer be contingent on the results of pre-employment drug or alcohol testing and/or a background check?

#### **Drug or Alcohol Testing**

Employers, particularly employers in safety-sensitive industries, are increasingly interested in a candidate's past or current drug or alcohol use.

In the majority of workplaces pre-employment drug and alcohol testing is not permissible, even when the position could involve health and safety risks. This is because refusing to hire a candidate on the basis of a positive test result potentially discriminates against the candidate on the basis of a disability (addiction) or perceived disability (assumed addiction).

A positive drug test also does not necessarily indicate that the candidate is unable to perform the essential duties of the position, nor does it predict whether the candidate will be impaired while performing work in the future.

### **Criminal Background Check**

A criminal record background check is traditionally sought where the position of employment is also a position of trust involving money, children, personal safety, etc.

Human rights legislation in British Columbia, Ontario, Quebec, Newfoundland, Prince Edward Island and potentially Manitoba (not yet determined) prohibit discrimination in employment on the basis of a criminal record. However, the scope of the prohibition varies.

In British Columbia, it is generally discriminatory to refuse to hire a candidate because the candidate has been charged or convicted of a criminal or summary conviction offence unrelated to the employment.

In Ontario, it is not discriminatory to refuse to hire a candidate on the basis the candidate has been charged with a criminal offence regardless whether the charge is related to the employment.

It is also not discriminatory to refuse to hire a candidate on the basis of a criminal record unless the candidate has been granted a pardon or the offence is in respect of a provincial offence (e.g. *Highway Traffic Act*).

That said, refusal to hire a candidate based on a pardoned conviction or provincial offence may be justified where: (i) having a clean record is a bona fide qualification for the job; and, (ii) the essential functions of the job cannot be altered without creating undue hardship.

For example, a trucking company may refuse to hire a candidate with multiple safety-related convictions under the *Highway*

*Traffic Act* on the basis of public safety.

Keep in mind information disclosed through a criminal check can expose an employer to a claim of discriminatory hiring. A report revealing several convictions for drug-related offences may result in an allegation the employer did not hire the candidate due to an actual or perceived drug addiction or mental disability (both protected disabilities under human rights legislation).

Best advice? Consider carefully what information is necessary (as opposed to nice to have) and only seek out and review that which is necessary.

### **PRACTICAL TIPS**

When hiring a new employee think carefully and critically about the recruitment process.

- Ensure the advertisement and any verbal representations about the job are accurate and free of direct or indirect discrimination.
- Conduct a face-to-face interview.
- Devise questions that solicit information necessary only to determine whether the candidate has the skills and abilities to perform the position.
- Avoid questions that might solicit information about protected grounds under human rights legislation.
- Check references.
- Conduct a criminal background check where appropriate but before doing so weigh the potential utility of the information against the risks associated with receiving it.

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## **New Work Refusal Rules under *Canada Labour Code***

*by Stephen Shore*

As a result of amendments to the *Canada Labour Code*, effective October 31, 2014, a worker employed by a federally regulated employer may no longer be able to refuse to perform work on the basis he or she believes the work involves potential hazards or could cause injury or illness at some point in the future.

Instead, a worker must be able to demonstrate the hazardous condition or activity could reasonably be expected to cause an imminent or serious threat to his or her life or health.

The requirement of “immediacy” and a “present threat” is anticipated to limit the number of work refusal disputes in a workplace.

The procedure for responding to a work refusal will also change, shifting greater responsibility into the hands of the workplace parties.

Currently, a work refusal triggers a Ministry of Labour investigation into the allegedly unsafe work and, if appropriate, the legitimacy of the worker's exercise of his or her work refusal right.

Post October 31, 2014, the employer must first conduct an internal investigation, with worker participation. If the parties can resolve the dispute, the process ends there. If there is no resolution, a referral must be made to the Ministry for further investigation.

As a result of these amendments it is important that federally regulated employers ensure their supervisors and managers are aware of the new rules and trained in how to respond to a work refusal. Employers should also review and update their internal investigation protocols to ensure compliance with the new requirements.