

# CANADIAN Employment Law Today

## Background screening rules changing for Ontario retirement homes in 2014

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**Long-term care** homes in Ontario have been subject to background screening requirements since 2011 when the Long Term Care Homes Act was amended.

As of Jan. 1, 2014, s. 64 of the Retirement Homes Act, 2010, (RHA) will come into force and impose similar obligations on retirement homes. The new screening requirements are significant and apply broadly, which is not surprising given the purpose of the legislation.

For most homes in the province, compliance will require changes to the way in which they recruit and hire staff and volunteers, whether directly or through a staffing agency.

### Screening before hiring staff or accepting volunteers

The amendments to the RHA require that all staff and volunteers undergo screening measures prior to being hired or accepted to work in a licensed retirement home.

The screening measures must be conducted by a police force within six months before the retirement home hires the staff or accepts the volunteer to work in the home. It is therefore not an option for an individual to be hired or accepted and then undergo screening. To address this, it will be important that any employment offer or volunteer arrangement be in writing and conditional on background screening results. It is also advisable to clearly state that the individual can commence work only after the results of the screening are received and considered.

The amendments specifically require that a background check include a “vulnerable sector screen” to determine the person’s suitability to be a staff member or volunteer in a retirement home.

A “vulnerable sector screen” is a search of the RCMP National Repository of Criminal Records, Pardoned Sex Offender Database and other police databases. The information disclosed is extensive and can include the following: criminal record (adult and young offender, including summary offences), outstanding charges, findings of not guilty by reason of mental disorder, probation, prohibition and other judicial orders in effect,

convictions or pending charges under the Child and Family Services Act, apprehensions or contact under the Mental Health Act, and suspect/culprit information where the release of such information will not hinder any ongoing investigation.

Notably, the protocol for applying for a vulnerable sector screen, as well as the information disclosed — including forms, cost and timing — is not consistent across the various police services. Each jurisdiction has its own protocols, so it is important for home administrators to understand and comply with the different regimes. The key common denominator is that the individual about whom the screen is requested provide consent to release the information.

### **Declaration of new and existing staff and volunteers**

In addition to the screening described above, every staff member or volunteer who applies to work — or who already works — in a retirement home must provide the home with a signed declaration disclosing the following information for the period since the individual's last police background check, or if no background check has been conducted, since Jan. 1, 2014:

- Every offence with which the individual has been charged under the Criminal Code, the Controlled Drugs and Substances Act, or the Food and Drugs Act and the outcome of the charge.
- Every order of a judge or justice of the peace made against the person in respect of an offence under the three acts identified above, including a peace bond, probation order, prohibition order or warrant.
- Every restraining order made against the individual under the Family Law Act or Children's Law Reform Act.

The staff member or volunteer must provide this declaration to the retirement home “promptly” each time he has been made aware a charge or order has been laid or made, or the individual has been convicted or a charge otherwise disposed of.

### **To whom so the requirements apply?**

Every staff member, volunteer and agency worker is subject to the new requirements unless expressly exempted under the RHA or its regulations.

This also includes an individual working in a retirement home under an agreement with a staffing agency, if that individual provides direct care to residents. In those cases, while the staffing agency may take steps to ensure its staff are screened in compliance with the legislation, the ultimate responsibility to ensure compliance remains with the retirement home. Accordingly, a home will want to consider reviewing and amending its agreements with staffing agencies to include terms that reflect the agency's ongoing compliance with the RHA's screening

requirements, to fully and promptly disclose to the retirement home all information gathered in advance of any placement, and to allow for periodic audits of the agency's screening protocols.

The benefits and extent of such compliance measures should also be carefully balanced with the risk that the home and agency may be found, for example, to be "co-employers" in the context of a union application for certification or other employment-related legal claims.

## **Exceptions**

The new screening requirements do not apply to three categories of staff and volunteers. Namely, an individual who:

- “• occasionally works in a retirement home performing maintenance and/or repair services if the individual:
  - provides maintenance or repair services under a contract with the home;
  - is monitored and supervised by the home in accordance with written policies that the home has prepared to monitor and supervise persons who provide occasional maintenance or repair services; and
  - does not provide direct care to residents;
  
- is a member of the College of Physicians and Surgeons of Ontario, the College of Nurses of Ontario, or the Ontario College of Pharmacists; or
  
- is under 18 years of age.”

## **Human rights considerations**

Once a retirement home has received the required information, how that information can be used to make employment decisions is not as straightforward. On the one hand, retirement homes will want to carefully assess the information with a view to protecting the home's community, including residents, staff and visitors. On the other hand, human rights legislation makes it illegal for an employer to make a decision in employment on the basis of certain protected grounds. For example, it is illegal to refuse to hire an individual because of a disability — which may include mental illness — unless the disability cannot be accommodated by the employer to the point of undue hardship — a very high standard to meet.

Accordingly, all information gathered in accordance with the screening provisions of the RHA must be considered and acted upon in accordance with prevailing human rights law. Failure to do so can expose a retirement home to a claim of discrimination the Human Rights Tribunal of Ontario or the civil courts.

Consider the following two examples.

- In Ontario, it is not discriminatory to refuse to hire or continue to employ an individual on the basis the

individual has been charged with a criminal offence, regardless of whether the charge is related to the nature of the employment. It is also not discriminatory to refuse to hire or continue to employ an individual on the basis of a conviction under the Criminal Code, unless the individual has been granted a pardon. In other words, the general rule is that it is likely discriminatory to refuse to hire or continue to hire an individual on the basis of a conviction under the Criminal Code for which there has been a pardon.

However, there are exceptions to this general rule. Refusal to hire an employee based on a pardoned criminal conviction may be justified where having a clean criminal record is a bona fide qualification for the job, and the essential functions of the job cannot be altered without creating undue hardship.

These are rarely simple analyses and must be undertaken on a case-by-case basis considering the nature of the job, the individual at issue, and the operations of the retirement home as a whole.

- Disability is a protected ground under human rights legislation. Mental health issues have been recognized by the Human Rights Tribunal and courts as a disability. Should a police background check reveal contact with the police under the Mental Health Act, and this information results in a decision by a retirement home to not hire or continue to employ an individual, this could result in an allegation the home discriminated against the individual on the basis of a disability. Once again, an individualized analysis must take place each and every time.

### **Best practices and practical considerations**

Compliance with the RHA's new requirements mean changes to the way in which retirement homes recruit and hire staff and volunteers, whether directly or through a staffing agency. As January 2014 is around the corner, now is the time to review current practices and make appropriate changes. To this end, consider designing and implementing a compliance and training protocol tailored to the organization. Topics to address should include the following:

**Assign responsibility.** Assign an individual or team whose responsibility it will be to ensure compliance with the new screening requirements.

**Contact police service agencies.** Ensure the individual or team is familiar with the screening protocols of each relevant police services agency as those protocols currently exist and may change from time to time. Contact the various agencies to introduce the retirement home and make the appropriate connections. Where it is necessary for the retirement home to register with a police agency, consider doing so proactively in advance of Jan. 1, 2014. Similarly, where the retirement home must submit a letter to a particular police agency, have template letters ready to go.

**Human rights and privacy awareness.** Ensure the individual or team referred to above is trained on how to receive, review, act on and protect the sensitive personal information gathered through the screening process.

This will include regular training on prevailing human rights and privacy law.

**Budget for associated costs.** Consider whether the home will assume the cost of screening potential employees and volunteers, and make budgetary provision for same.

**Communicate with and educate existing and potential staff and volunteers.** Prepare communications and consider learning sessions to educate current and potential staff and volunteers about the impending law, its purpose and how it will affect them and the retirement home community, now and into the future. Where the home has a relationship with a union, consider the utility of engaging the union in this process.

**Review and amend agreements with staffing agencies.** Consider amending agreement with staffing agencies to include terms that reflect the agency's agreement to ongoing compliance with the RHA's screening requirements, to fully and promptly disclose to the retirement home all information gathered in advance of any placement, and to allow for periodic audits of the agency's screening protocols. These steps should be carefully balanced with the risk that the home and agency may be found, for example, to be "co-employers" in the context of a union application for certification or other employment-related legal claims.

**Regular declarations.** Given the requirement that staff and volunteers "promptly" declare certain occurrences (described earlier), consider the benefit of requiring each staff and volunteer to sign a declaration every six months. This regular declaration would not relieve the staff member or volunteer from the obligation of disclosing "promptly" should there be an occurrence. However, it may demonstrate the retirement home's due diligence and send an important message to the community.

**Make offers conditional.** Ensure any offer of employment or to volunteer is in writing and conditional on satisfactory background screening results, and that no employee or volunteer be hired or accepted, or permitted to commence work in a home, prior to receipt and consideration of the screening results.

**Start the screening process now.** Given that the screening process can take several weeks or months, consider starting to screen applicants as soon as possible rather than waiting until January 2014.

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