

CASE IN POINT: EMPLOYMENT STANDARDS

Make recruitment and hiring your organization's strength

A good hiring and recruitment strategy can work within legal limitations and liabilities to find employees who are the right fit

BACKGROUND

Casting the net for talent

IT'S IMPORTANT for employers to find workers who are the right fit for their organizations, in terms of both their qualifications and fit into the workplace culture. Good research while avoiding legal pitfalls that can come up during the recruitment and hiring process can go a long way to achieving the objective of finding the best talent out there.

Employment lawyers Leah Simon and Carissa Tanzola take us through some of the tips and strategies employers should keep in mind when bringing new individuals onboard.

| BY LEAH SIMON AND CARISSA 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. This article highlights tips to consider when developing a recruitment and hiring strategy.

Recruitment

How and where your organization posts job openings will influence the type of candidates who 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 hap-

pening of another event (such as 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 and 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-long 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

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Interest in pre-employment drug and alcohol testing increasing

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given a great interview, references should be checked to explore areas such as:

- What do former employers think of this candidate?
- Was the candidate technically sound, professional, dedicated and receptive to constructive feedback?
- Is this candidate a leader and a role model for other employees?
- What are the candidate's 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 those 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 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 or personal safety.

Human rights legislation in British Columbia, Ontario, Quebec, Newfoundland and Labrador, 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 B.C., 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 (such as under the Highway Traffic Act).

That said, refusal to hire a candidate based on a pardoned conviction or provincial offence may be justified where having a clean record is a bona fide qualification for the job, and 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.

The 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.



ABOUT THE AUTHORS

**Leah
Simon**



**Carissa
Tanzola**

Leah M. Simon and Carissa N. Tanzola are lawyers with Sherrard Kuzz LLP, a management-side employment and labour law firm in Toronto. Leah and Carissa can be reached at (416) 603-0700 (main), (416) 420-0738 (24 hour), or by visiting www.sherrardkuzz.com.