BEST PRACTICES FOR ENSURING A NON-DISCRIMINATORY HIRING PROCESS

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The hiring process can be a human rights minefield. Not only do employers have to focus on finding and selecting the right candidate, they also need to ensure that they do not do, or say anything that would or could be construed as discriminatory based upon protected grounds. They must be mindful of this throughout the entire process, from posting, to drafting job descriptions, preparing application forms, conducting interviews, carrying out the relevant background checks and ultimately making an offer of employment. Each step presents its own challenges.

While each piece of human rights legislation is somewhat different, the core protected grounds are generally the same. Within Ontario, they are currently as follows:

- age;
- ancestry, colour and race;
- citizenship;
- ethnic origin;
- place of origin;
- creed;
- disability (which includes treatment);
- family status (which includes child and elder care obligations);
- marital status (including single status);
- gender identity and gender expression;
- record of offences (in employment only);
- sex (including pregnancy and breastfeeding); and
- sexual orientation.

For a list of the protected grounds in other jurisdictions in Canada see table: Prohibited Grounds of Discrimination in Employment.

It is important to note that the interpretation of the protected grounds continues to evolve as societal norms change. For example, in recent years, family status has been deemed to include child and elder care obligations, disability confirmed to include the use of medicinal marijuana and drug and alcohol addiction, creed has been argued to include veganism, and disability deemed to include miscarriage. The protections afforded by human rights legislation will continue to evolve, and employers must be aware of this and careful not to inadvertently breach those rights.

Employment decisions cannot be based on any of these factors unless it can be shown to be a *bona fide* occupational requirement or the employer can prove that accommodation would create undue hardship which is not easy to do. It should go without saying that hiring decisions should not be made based upon protected grounds. However, employers must ensure there is not even a perception that inappropriate factors were considered.

The hiring process should focus on each candidate's ability to perform the essential job duties and employers should ensure it is not influenced by protected grounds. For that reason, the individual responsible for selecting an applicant should only be provided with information clearly relevant to the decision-making process and nothing else. Otherwise, there may be a suspicion that the decision was based, at least in part on a protected ground.

Before the hiring process begins, employers should make clear to applicants that any disabilities or medical issues will be accommodated during the hiring process. This can be accomplished in several ways:

- information can be included on the application form;
- information can be posted on the employer's website or in the job postings; and
- applicants can be contacted directly, over the phone or by letter/e-mail.

If accommodation is requested, employers should consult with the applicant and make adjustments to the hiring process in order to best suit their needs, within the limits of their legal obligation to accommodate. They do not have to accede to the candidate's preferred form of accommodation, so long as the method they provide is reasonable.

Job Descriptions and Job Advertisements

When designing job descriptions, organizations should ensure that any prerequisites do not inadvertently relate to protected grounds (and, of course, ensure that they do not intentionally do so). For example, a requirement in a job description that the individual work on Sundays may disqualify people of certain religions; employers should consider whether such a requirement is *bona fide* or whether they have some flexibility and ability to accommodate. It is not sufficient to simply say that "we have always done it this way" or "it would be too expensive to accommodate"; there must be evidence of a genuine assessment of the ability to accommodate.

Job advertisements or postings can also inadvertently contravene human rights legislation. Obviously, stating something along the lines of, "No black candidates will be considered" is offside. However, requiring or precluding candidates that live in a specific neighbourhood may also be, if it can be established that such criteria will have the effect of discriminating against protected groups. As has often been confirmed, employers cannot do indirectly what they are not allowed to do directly.

Care should be taken when drafting any hiring documents to avoid any inference that the decision will be based upon a protected ground, unless it can be shown to be a *bona fide* occupational requirement.

Application Forms

When preparing application forms, organizations should avoid requesting any information not relevant to the position. Fortunately, the trend of asking for photographs is largely behind us. Other "standard questions" remain, however. Unless information such as an individual's age, place of birth or gender is clearly related to the job requirements, and can be justified as such, then it is extraneous information that can be dangerous, as it can form the basis of a human rights complaint.

If an applicant is forced to indicate on an application form that they are, for example, 63 years old, and they are subsequently not hired for entirely unrelated reasons, it's not difficult to imagine that they might feel as though their age was a factor. They could then bring a human rights claim and allege they were discriminated against on the basis of age.

Practically speaking, it would then fall upon the employer to prove a negative: that age was not a factor, at all, in the decision. The law is clear that if a prohibited ground is even a small part of the reason for the decision, then the human rights code has been breached. As a result, the best way an employer can protect itself against a human rights claim is not to have this information. By way of example, there is nothing wrong with an employer asking an individual if they are legally entitled to work in Canada. However, there is no reason for an employer to ask where they were born. Generally speaking, employers should consider any question, whether it is on an application form, during an interview, or at any other point in the hiring process, and ask whether it relates to a reasonable and genuine requirement for employment. If it does not, there's probably no reason to ask it.

Job Interviews

The interview stage presents a new set of challenges, as the employer will now be interacting face-to-face with the prospective employee. As a result, it will be impossible not to learn of certain personal characteristics, such as the individual's skin colour, approximate age or visible disability. That said, the employer should continue to minimize the risk of acquiring extraneous knowledge. Like with the application form, employers should avoid any questions that might directly or indirectly relate to protected grounds.

It is often tempting for an interviewer to engage in idle chit-chat such as questions about marriage, children and place of birth. While innocent, such questions typically relate directly to prohibited grounds. Once the interviewer becomes aware of such information, it is all too easy for an unsuccessful applicant to allege that the employer did not hire them because of it. The employer will then be forced to prove a negative -- that their decision was unrelated to the protected ground in question.

Hiring Decisions

It should go without saying that hiring decisions should not relate, in any way, to grounds that are protected by human rights legislation. Both direct and indirect discrimination will constitute a breach of human rights, though not all discrimination is unlawful. For example, choosing not to hire applicants that wear an article of blue clothing would be discrimination of a sort (and not particularly effective in selecting the best candidate), but is

not a breach of human rights legislation. Employers should discriminate when they hire: they should choose the strongest candidate. However, they should avoid discriminating or appearing to discriminate based on protected grounds. That is why, as a general comment, the writer always reminds employers that in the course of hiring process, they don't want to know any more about the applicant than they need to. This applies at all stages of the process, and should force employers to consider what information is truly necessary in order to allow them to reach their decision.

Employers want to avoid making decisions that discriminate based on prohibited grounds and also to avoid appearing to do so; otherwise, they may have to defend a human rights claim. Of course, there will be times where discrimination on the basis of protected grounds will be justified on the basis of a *bona fide* occupational requirement. If the employer intends to rely upon such a defence, they should be sure to document the rationale fully and clearly and be prepared to demonstrate that no accommodation is feasible.

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