

AVOIDING DISCRIMINATORY PRACTICES IN EMPLOYMENT INTERVIEWS



Employees are generally the most valuable asset of any company, but the idiom of one bad apple holds true as well. Companies need to be thorough in their selection process and often tough questions must be asked. Canadian employers have broad entitlements to make appropriate enquiries so as to assess the suitability of candidates for employment. However, those entitlements are not without limits.

Ontario law places constraints upon the hiring practices of employers primarily through the enforcement of the Ontario *Human Rights Code* (“Code”). The Code provides that everybody is entitled to equal rights and opportunities without discrimination in numerous social areas, including employment. The central provision of the Code as to equal employment falls under Section 5.1:

5. (1) *Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.*

Similar legal obligations arise throughout Canada. These Canadian requirements may in some cases appear broader than those found in the United States. However, European employers will generally find similarities between the application of the Code and local European legislation such as the *Allgemeines Gleichbehandlungsgesetz* (the German Equal Treatment Act, hereafter the “AGG”). As with the AGG, the Ontario Code applies not only to the inter-

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actions that employers have with their employees but also to those with employment applicants.

The primary purpose of the employment interview is to determine the applicant’s ability to perform the essential duties of the position. The expectation is that employers will structure their application forms and their interview practices so that their selection is based upon *bona fide* qualifications that are reasonably required to perform the intended job. All employment decisions are to be free from discriminatory considerations. This means that if any aspect of the hiring process is motivated by, or associated with, a discriminatory practice, the entire process is tainted.

Employers should always keep in mind that Section 23(2) of the Code prohibits employers from asking questions that either directly or indirectly classify or indicate qualifications by a prohibited ground of discrimination. While direct infringement is obvious, indirect infringements can be far more subtle. For example, questions as to work experience can run afoul of the Code if they appear to be aimed at determining the applicant’s national or ethnic origin.

Where *bona fide* requirements exist for the disclosure of personal information that could be used for discriminatory purpose, many employers consider it

a good practice to make those enquiries only following a conditional offer of employment. An example of this is where the job function requires security clearances or bonding, which necessitates the determination of whether the candidate had a record of offence under the *Criminal Code*. Given that “record of offences” is a protected basis under Section 5. (1) of the Code (see above), it is incumbent upon the employer to limit the pursuit of information to only that which is justified. The best practice would be to make an offer of employment conditional upon the provision of a criminal record check clearance, with an explanation of why that is a reasonable requirement for the job.

Another important factor for employers to note is that in the course of the job interview an employee may choose to disclose disability-related needs in regard to the performance of the job function. Employers are entitled to enter into those discussions in response to the employee’s disclosure. However, employers are cautioned to use care in limiting these discussions. The employer should not unduly dwell upon considerations surrounding an individual’s disability as it can create an aura within the interview and potentially lead to a complaint on the ground of disability if the person is not selected for employment.

It is often human nature to respond negatively when our activities are limited and, unfortunately, this can sometimes be the immediate response when discussing employment interview restrictions. However, companies should keep in mind that the hiring process often reveals as much about the employer as it does about the employee. A thoughtful approach which is considerate of

human rights can speak volumes and attract quality employees with the skills and abilities that are heavily sought after in the current competitive employment market place.

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