

## Feature

# Avoiding Discrimination in the Hiring Process

*What questions can employers ask?*

The *Ontario Human Rights Code* (the "Code"), and similar human rights legislation in other jurisdictions, protects job applicants by prohibiting discrimination in the hiring process. The *Code* expressly prohibits job applications, interview questions or advertisements for positions that directly or *indirectly* classify applicants based on a prohibited ground. The legislation creates a legal minefield for hiring managers when recruiting and interviewing potential candidates.

The protections provided by the *Code* to job applicants are broad. Employers can be caught by surprise when served with a human rights complaint as in most cases, the employer did not intentionally discriminate in the hiring process. Here are the answers to some common questions about human rights in the hiring process as well as tips to defend against potential claims.

*What are the prohibited grounds of discrimination in the hiring process?*

In Ontario, the "prohibited grounds" of discrimination in employment are race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. These same grounds apply to discrimination in the hiring process.

Employers are not permitted to advertise a position or create an application for employment which directly or indirectly classified or indicates qualifications by a prohibited ground of discrimination. Further, employers are prohibited from asking questions at an interview or in an application form concerning a prohibited ground of discrimination.

*What information should not be collected on an employment application?*

It is fairly common to see questions about an applicant's age, citizen and gender on a job application form. These questions that directly ask about a prohibited ground are inappropriate and are prohibited by the *Code*.

Application forms should not collect information which could indirectly result in prohibited grounds being questioned on an application form. For example, it is recommended that the forms not include a gender identifier (such as "Mr.", "Mrs." or "Miss"). The Commission also cautions against asking for a photograph of the applicant as it will disclose to the employer the applicant's gender, race and other prohibited grounds. Many people also find it surprising that the Commission advises against requesting a copy of the applicant's driver's license — even if a requirement of the job is to drive. Instead, this information should be requested afterwards as part of a conditional offer of employment.

*What about criminal offences? What information can we request?*

It is common for an employer to want to know about an employee's history — including whether or not the employee has been involved in any criminal activity in the past. Generally speaking, the only permissible question that can be asked of a candidate is whether the candidate has "ever been convicted of a criminal offence for which a pardon has not been granted?" You are not permitted to ask generally about whether or not a candidate has been convicted of any offence, generally, about time spent in prison.



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## Member's Quarterly

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*Do I need to accommodate individuals with disabilities in the hiring process? How can I do so if I cannot ask questions about whether or not an individual has a disability on an application form?*

Employers should offer and provide accommodation to job applicants in the application and interview process to avoid allegations that the process is discriminatory. The Commission recommends that employers offer accommodation to all candidates who need it when inviting them for an interview or to complete a pre-employment test.

It is considered best practice to indicate on job applications and promotional materials that an employer is willing and able to accommodate individuals with disabilities on request from candidates in all aspects of the hiring process. A person who needs accommodation is responsible for advising of this need in enough detail, and co-operating in consultations to enable the employer to respond to the request before the interview or testing. Employers need to make all efforts to accommodate an applicant in the hiring process — up until the point of “undue hardship.”

*Turning to the interview, are there any best practices to avoid discrimination complaints arising from the interview itself?*

The questions asked and the comments made by an interviewer during the hiring process are very important. When an inappropriate question is asked or when an offensive comment is made during an interview, an inference may be made by an unsuccessful applicant that a decision not to hire the individual was made due to the answer to an inappropriate question. A discrimination complaint can be made — and can be successful — even if there was no intention to discriminate. According to the Commission “The fact that improper questions have been asked is sufficient to prove discrimination, even if the applicant is ultimately given the job.” This can be terrifying to employers.

Care needs to be taken to ensure that interviews only solicit information about qualifications and job requirements needed for the hiring decision. Draft your interview questions before bringing in any candidates. Review your draft questions with the Commission’s guide on interviewing and making hiring decisions (available online). Finally, ensure that the individuals conducting the interview “stay on script”.

*How does an employer defend against allegations of discrimination in the hiring process?*

If a job applicant is not selected for a position and alleges that it was for discriminatory reasons, it will be up to the employer to demonstrate that there was a non-discriminatory reason for not hiring the individual — particularly if the individual selected for the position that is not protected under the *Code*. There are a few simple things that employers can do to assist their lawyers in defending a complaint:

- (1) Provide training to employees responsible for interviewing new candidates on discrimination in the hiring process. Keep copies of the training materials on file.
- (2) Interview in diverse teams if possible. Interviewing in teams that reflect the diverse groups within an organization has been shown to help reduce unconscious bias in hiring. Interviewing in teams also ensures that there are multiple employer witnesses to the interview in the event of a future discrimination claim taking place.
- (3) Keep copies of interview questions and notes from the interview. These documents will become important evidence at a hearing.
- (4) Develop objective criteria to rank candidates based on non-discriminatory criteria. This will assist at a hearing in demonstrating why one candidate was chosen over another.

Following these tips should help your organization defend against a human rights complaint in the future.

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