

Managing Recruitment, Succession and Retirement

1. RECRUITMENT

There are two general categories or types of pitfalls for employers in the recruitment process. The first relates to the requirements of the *Human Rights Code* which prohibits discrimination in employment advertising and hiring, based on any of the prohibited categories such as race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age. In this category, employers may find themselves facing a human rights complaint either over their advertising or by individuals who believe they were denied a job because of one of the prohibited reasons noted above.

The second category of pitfalls relates to situations in which an employer has either 'over sold' or over promised the employee position or security of employment, or lured an employee away from another secure job. In both cases, an employer may succeed in recruiting the individual they want but if the reality of the position does not live up to the promises, or the employer is forced to lay that person off shortly thereafter, the employer will be liable for claims damages based upon misrepresentation and/or constructive dismissal.

With these two general categories in mind, the following are our tips for employers when dealing with recruitment.

1.1 Advertising

- (a) Before you advertise, know the requirements of the job you are trying to fill, the qualities an ideal candidate will possess, the remuneration you are prepared to offer and whether a fixed term or indefinite term is most appropriate. If you later reject applicants for the position, you will be able to note specific and non-objectionable reasons why that applicant was not suitable. If you believe the position is temporary or project specific, it is best to disclose that from the beginning.
- (b) Avoid stipulating skills that are not essential for the job as they may directly or indirectly discriminate against the applicant. It is not uncommon for employers to stipulate that a driver's license is required for the position, even though a drivers license is only 'desirable' or would be used infrequently. However, unless the position is that of a truck driver, cab driver or similar position, you should not refer to this because there are a number of reasons why a person may not have a drivers license (such as disability or they have lost their license due to criminal convictions), which are also prohibited grounds of discrimination.

- (c) Be wary of using adjectives which imply you are targeting a certain type of applicant in violation of the *Human Rights Code*. For example, use of the terms “energetic” or “youthful” implies you are looking for a young person for the position which could be viewed as discrimination based upon age.
- (d) Avoid extremely detailed job descriptions. A basic description of the position and requirements should be sufficient, and will reduce the likelihood the description will include future (uncertain) promises which you are unable to live up to. Promises which are problematic include ones relating to promotion opportunities and/or future salary increase opportunities, security of employment or promises of ‘long term’ employment, and bonus compensation plans if they are subject to change or discretionary).
- (e) Consider whether or not your company or business sector is stable or likely to undergo major change or even a buy out in the future. Then look at the advertisement and consider whether or not it could later be used against you in claims for constructive dismissal or damages for negligent misrepresentation.

1.2 Applications

- (a) If you use a standard application form, only ask for information that is essential to the selection and hiring process and decision making. For example, requesting the applicant’s marital status or date of birth in an application form is no longer acceptable as it implies you are screening your applicants on the basis of their age or marital or family status. (After the person is hired, you will require and are entitled to ask for personal information if related to managing their status as employees or for benefits purposes).
- (b) Be wary of using any application form created in the United States. They do not have the same human rights laws, and in some cases, they also have statutes which require certain data be gathered that in Canada would be unlawful (ethnicity, race, religion, criminal convictions).

1.3 Interviews

- (a) It is recommended that employers conduct interviews with two or more interviewers present to provide a third person witness to the questions asked and conduct of the interview (in case it later becomes an issue).
- (b) As per the advice noted above in advertisements, interviewers should be careful about how they represent the job and ‘future’ opportunities.
- (c) A pre-set list of questions that are asked of everyone will assist an employer to avoid allegations of discrimination - whether because different

candidates were treated differently or because the question directly or indirectly elicited answers that disclosed certain protected grounds, and such grounds were not directly related to a *bona fide* occupational requirement.

- (d) Avoid questions that do not directly relate to the job as they may directly or indirectly discriminate against the applicant (i.e. maiden name, date of birth, membership to clubs/organizations, dependents, number of children, child care arrangements, whether your spouse has found a job in town, whether the applicant prefers “Miss” or “Mrs.”, family working for the company, or specific health questions. With respect to the latter, it is perfectly acceptable to ask if the applicant has any health issues which would prevent them from performing the job.)
- (e) As per the advice noted above, be careful as to the promises you make if you know the applicant already has a secure job. At the very least, such employees will assume the new position will be long term which means that absent an employment contract in which you agree to limit notice or severance, you will be held liable for significant notice or severance even for short term employees.
- (f) Do make notes with respect to the interview (procedure followed, answers received and observations about the applicant), and retain the notes for at least one year for applicants who were not successful or turned down your offer of employment, and indefinitely for applicants who were hired, for as long as they are employees. Not only is this is good practice, but is required pursuant to section 35(1) of the *Personal Information Protection Act*. That section is designed solely for the benefit of the applicant so he or she is given reasonable opportunity to obtain a copy of the information that was used to make a decision regarding that person’s employment application.

1.4 Reference checks

- (a) Often overlooked, reference checks can result in useful information regarding a candidate. If you ask for references, whether in the application form or during the interview, because of our privacy laws, it is best to confirm the applicant’s consent to contact the referees and to discuss the information provided by the applicant/interviewee to verify the information.
- (b) If your reference checking is contracted out to an independent company, ensure the consent includes permission to disclose the information to the independent company, and for that company to contact the referees.
- (c) Do make notes about who you spoke with and the information received, and as noted in section 1.3(f), maintain a record for at least 1 year for unsuccessful applicants.

- (d) More and more employers are turning to social networking sites such as Face Book to search for information regarding their job applicants. While there may be a presumption that the applicant intended the public (and prospective employer) to have the information, that may not be so if friends who had access to that person, had lower privacy settings than the applicant. Thus, our advice is to be cautious about use and disclosure of information you obtain from these sites.

1.5 Decision making

- (a) Do make notes about how you arrived at your decision to hire or not hire an applicant in case your decision is challenged or you are accused of discrimination.
- (b) Do retain copies of your notes, the application form and resume for each applicant. Any personal information collected and used to make a decision about the applicant must be retained for a period of one year [see section 1.3(f)]. For successful applicants, an employer may keep the information until it is no longer required to establish, manage or terminate an employment relationship (*Personal Information Protection Act*).
- (c) Do communicate your decision to each applicant. It is not necessary to go into specific detail nor do you want to humiliate or embarrass an applicant, but it is good practice to offer brief, objective reasons why that person did not get the position. Often this step will forestall any accusations that the hiring decision was made for discriminatory reasons.
- (d) If you are considering rejecting an applicant because he or she is “too experienced” or “over qualified”, examine what it is you are really concerned with and whether those concerns can be dealt with using more objective standards or conditions. Otherwise you risk a complaint that you were discriminating based upon age.
- (e) If during the interview process, you did make specific promises to the successful applicant (or negotiated terms different than what was initially offered in the advertisement), always reduce those promises in writing, preferably in your offer letter or even better, employment contract.

1.6 Probationary Periods

A probationary period gives employers a chance to determine if the successful applicant really has the skills required for the position and attitude required to ‘fit in’ with the organization. Many employers mistakenly believe that (a) they can terminate an employee for any reason if they terminate the employee before he or she has worked for 3 consecutive months, and (b) if an employee is terminated within that time period that they will not have any liability to the employee to give them reasonable notice of the termination, or pay in lieu of notice.

These misunderstandings are based on the fact that pursuant to the *Employment Standards Act*, there is no requirement that an employer give an employee notice or pay in lieu of notice if the employer wishes to terminate the employee before 3 consecutive months of employment have passed. What employers do not realize is: (a) the *Employment Standards Act* provides only a minimum standard or protection which means the employee may be entitled to much longer reasonable notice based on his or her age, position or promises made (directly or indirectly) during hiring, and (b) if a probationary period was clearly agreed to and there is no dispute as to whether severance was owed (subject to *Employment Standards Act* minimums), employers are still required to justify the dismissal as a good faith assessment of the employee's suitability for the position.

Given these difficulties, and the effort required to have enforceable probationary periods, it has been our experience that probationary periods are more trouble than they are worth, and may set up a false sense of security to those making the hiring decisions. However, if as an employer you want to take advantage of having the employee 'audition' for the role, here are some do's and don'ts.

- (a) Ensure it is clearly understood between the employer and the employee before the employment begins that there will be a probationary period, during which time the employee may be terminated without notice or pay in lieu of notice (subject to *Employment Standards Act* minimums-see paragraph (c) below). It goes without saying that this should be documented.
- (b) Clearly define the criteria on which the employee will be measured. For example, "suitability" is difficult to measure so define what you are really interested in such as attitude, compatibility with co-workers, ability to follow direction, good attendance, adherence to company policies and work place rules, work output and efficiency, demonstrated ability to learn, ability to work in a team environment, etc.
- (c) Clearly define the length of the probationary period. It does not have to be 3 months however if longer, you will be required to pay the *Employment Standards Act* minimum severance amounts.
- (d) Keep records of how the employee is doing against the defined criteria. It is recommended that the employer have at least one performance review with the employee part way through the probationary period, and well in advance of making the decision on whether the employee is suitable or not. Provide feedback on shortcomings, and guidance on what the employee has to do to meet the expected standards.
- (e) Document all of the above, including the reasons for the decision to terminate the probationary employee.

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2. SUCCESSION PLANNING AND OTHER CHANGES TO EMPLOYMENT TERMS

Succession planning, includes planning for position vacancies, retirements, employee development, and changes in business goals, strategies and environment. Done well, a succession plan will inevitably result in a stronger organization because you will have built flexibility within your organization for existing employees to assume other roles created due to vacancies or changes in direction, ensured that key tasks will be performed at all times, and you will have created a powerful retention and recruitment tool.

In an earlier paper, we have discussed the concept of constructive dismissal and why it is important that your employees consent to material changes in their position, combination of duties, status, or place of work. When these changes accompany a promotion or raise in salary, employees usually consent to the changes, however not all of the changes necessary will constitute promotions nor will employers be able or willing to increase compensation in exchange for the changes. Lateral moves for example, provide a company with the benefit of increased depth of skills but could constitute constructive dismissal if the employee is not on board. Even a series of small changes can over time result in material change and then if the employee objects, employers will be vulnerable to constructive dismissal actions.

Finally, even if an employee does agree to the changes, there must be some fresh consideration for the promise. That can be in the way of increased salary, better health or retirement benefits, incentive pay in which the employee's total earnings could increase if all targets are met, stock options, training opportunities, or participation in special projects that the employee would not otherwise have had a chance to do. It should be noted that a promise of continued employment (versus lay off) is not considered to be adequate consideration for negative changes to an employee's terms and conditions, although as discussed below, you can unilaterally impose changes with notice.

If your business is facing economic challenges which require a reduction in payroll costs, you may be looking at flattening the levels of management, building additional capabilities within existing employees, reductions in salaries or benefits, as well as laying off employees. Under those circumstances employers will have few tools to incent employees to agree to the changes you may be looking for. In that situation, you will want to look at one or more of the strategies discussed below to achieve the changes your business requires.

2.1 "Working" Notice of Termination of Current Position Followed by New Employment Offer

While an employer cannot unilaterally make a material change in an employee's terms and conditions of employment, it can provide advance notice (equal to the reasonable notice an employee would be entitled to if terminated without cause) of the change in employment terms on such future date. If the employee does not agree to the

change(s), he or she can be terminated on that future date without further notice or pay in lieu of notice.

There are some legal requirements for this to work:

- (a) the notice must be in writing and be clear that if the employee does not accept the new changes his or her employment would be terminated on that future date,
- (b) the employer may not change any material terms and conditions before that future date,
- (c) the notice should be clear that if the employee agrees to the changes, they will come into effect on the future date, and
- (d) the employer must in fact terminate the employee on the future date if the employee does not accept the changes. (Any continuation of employment either to continue discussions or on the assumption the change is in effect will in fact negate the working notice and ensure continuation of employment based on the previous terms.) .

2.2 “Working” Notice of Termination with offer of Bonus to stay to end of Working Notice Period

Provided:

- (a) an employer has clearly notified the employee of the future date his or her employment will end,
- (b) there are no material changes to the terms and conditions of employment or in the case of a winding up of a business or department, the changed duties are consistent with an orderly wind up, and
- (c) the advance notice constitutes ‘reasonable notice’ of termination,

then an employee is required to work during the notice period and at the conclusion, is not entitled to further severance or notice. Further, if the employee quits before the working notice period has expired, no further severance or notice is due to the employee. This however can create some difficulties for an employer who wants to ensure the employee stays working through to the end of the notice period or for a specific period of time.

In those situations, some of the options available to an employer are to offer a bonus to the employee which will be payable if the employee stays working up to the end of the working notice period, and/or provide a partial working notice period and an enhanced severance package if the employee works to the end of the notice period.

3. RETIREMENT PLANNING

Since January 1, 2008, the definition of 'age' in the *Human Rights Code* no longer has an upper limit of age 65. Thus, employers may no longer require employees to retire at age 65, nor may they refuse to hire someone solely because an applicant is age 65 or older. In British Columbia's hot economy, employers are having difficulty hiring enough employees to meet their needs. Consequently, the elimination of mandatory retirement can be viewed as a sensible response to that reality. Given our current situation, particularly with the impending retirement of the baby boomer generation, it is anticipated that Canada will chronically short of employees. Certainly, where employees have acquired skills, knowledge and experience, and are otherwise able to perform the functions of their job, it makes no sense to force this group to retire at what many see as an artificial milestone. For this reason, a number of employers had already eliminated mandatory retirement.

On the negative side, where employers previously had some certainty regarding expected retirements of their employees, the elimination of mandatory retirement will result in significant uncertainty for managers tasked with human resource planning. No longer will employers know for certain when employees will retire, nor can they compel decisions on retirement dates.

As a first step, employers should be clear whether their objective is to encourage their employees not to retire, or to retire. Practically, many employers will find they have employees in both categories, and so it would be useful for employers to step back and consider the range of benefits, work accommodations etc. they are willing to provide for each circumstance, in advance of dealing with specific employees. Once the objectives are known, an employer can look at strategies to assist them to meet those objectives.

Employers can treat employees differently, depending upon whether you want to offer incentives to retire or stay working. Key to doing this however will be first to tie the different incentives to reasons that are rational and justified, and secondly put an agreement in place with the employee which confirms the retirement date, and the additional perquisites and/or changes in duties, hours of work etc. You are in essence creating new employment contracts for each of your older workers, so you will have to follow the previously noted rules for consideration and consent.

3.1 Strategies to Encourage Retirement

- (a) Encourage employees to plan for retirement. Often employees put off retirement because they are uncertain as to their financial ability to retire or simply don't know how to plan for such a drastic change in lifestyle. Retirement planning seminars encourage employees to think about and make decisions regarding planned retirement dates, which in turn assists employers who can then plan around those dates.
- (b) Phased in retirement. A graduated reduction in work time or duties, with the employee's consent, can be viewed as an incentive to encourage

employees who are nervous about the change in lifestyle associated with retirement.

- (c) Financial bonuses. Offering special pension top-ups, RRSP contributions, Registered Savings Account deposits, and other bonuses, benefits or other perquisites (all conditional on retirement) will appeal to employees whether or not they are concerned with their financial ability to retire.
- (d) Continued contact and office space/services. For some employees, the elimination of the social contact or the ability to have an office and office services discourages retirement. These issues can be addressed relatively inexpensively by an employer to encourage retirement.

3.2 Strategies to Discourage Retirement

All of the strategies noted above to encourage retirement, can also be employed to encourage valued employees to continue to work (i.e. to discourage retirement). Additional strategies include the following.

- (a) Improve or Re-configure Benefits. Obtain information from benefit carriers as to expected cost of benefit plans if benefits extended to employees aged 65 or older, so as to consider whether employer can afford to extend all benefit plans to these employees. (Currently, it is permissible to discriminate in providing *bona fide* benefits based solely on age). Obtain information from these carriers if there are different benefits that would particularly appeal to employees over 65.
- (b) Amend your company's pension policies and review pension plans. Both the Federal and Provincial governments have enacted legislation which have increased the ability of employees to collect a portion of their pension benefits while at the same time earning wages and continuing to contribute to their pensions. If you have a pension plan and/or pension policies, review them to see if there are any rules which encourage retirement and discourage continued earning of wages.

Nicole Byres

Managing Retirement, Succession and
Retirement
T. 604.643.3173 / nmb@cwilson.com

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