THE HIRING PROCESS

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The purpose of this paper is to provide you, as an employer, with practical advice regarding legal issues you will need to consider when hiring employees. An employer can be in complete control of the hiring process. With some planning, and recognition of the human rights considerations which might apply, it should be possible to avoid the legal pitfalls that some employers face when undertaking the hiring process.

A. THE EMPLOYER'S (ALMOST) COMPLETE DISCRETION

In the private sector, in a non-union environment, the employer has wide latitude in hiring decisions. There is no government body that will review hiring decisions on grounds of fairness or due process. An unsuccessful candidate can not sue simply because he or she thinks they were better than the candidate that was ultimately hired.

If an employee is going to make a complaint about your hiring process, it will likely be some form of human rights complaint. An employer's main concern should be making sure that the selection process does not breach the *Human Rights Code*, either intentionally or inadvertently.

In non-union environments, hiring decisions can generally only be reviewed on basis that there has been a breach of human rights legislation. An employer will generally only have to justify a hiring decision if there is an allegation that the decision was based on some ground that is prohibited by the *Code*.

All provincially regulated employers are governed by the B.C. *Human Rights Code*. The sections of the *Code* relevant to hiring are sections 11 and 13.

British Columbia Human Rights Code

13.(1) A person must not
(a) refuse to employ or refuse to continue to employ a person, or
(b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1)

(3) Subsection (1) does not apply
(a) as it relates to age, to a bona fide scheme based on seniority, or
(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

In private sector unionized environments, in addition to human rights legislation, the collective agreement will often further restrict the employer's discretion. Job posting provisions, seniority provisions and other restrictions are often found in collective agreements. In such case, the employer will be required to abide by the restrictions in both the *Human Rights Code* and the collective agreement.

B. PRE INTERVIEW PLANNING

The purpose of pre-interview planning is for the employer to put its mind to the issues that might arise during the hiring process. Your first task is to determine what skills, as an employer, you want or need from a candidate. Then you need to consider the "prohibited grounds" listed in section 13 of the *Code*, and determine if the required skills are, or could be discriminatory.

Whether job requirements are discriminatory is not always obvious. The really blatant grounds of discrimination should not come as a surprise to most employers. Most employers are well aware for example, that they can not discriminate on gender or religious grounds. Unfortunately, sometimes employers will discriminate indirectly without stopping to consider the consequences of some of their job selection criteria.

For example, many employers do not consider whether physical requirement for a position could discriminate against the physically disabled. Similarly, any specific scheduling requirements might discriminate on religious grounds, if that scheduling interferes with religious attendance or conduct requirements.

If job requirements discriminate, employer must show that the requirements are a "**bona fide occupational requirement".** Determining a **bona fide occupational requirement** is a 3 stage test:

1. Is the employment practice or standard implemented for a purpose rationally connected to the performance of the job;

2. Is the standard or practice adopted in the honest belief that it was necessary to fulfill the work related purpose; and

3. Is the practice or standard reasonably necessary to accomplish the work related purpose.

   To prove "reasonable necessity", the employer must show that it is impossible to accommodate the employee and others sharing his or her characteristics without imposing undue hardship on the employer.

C. ADVERTISING

1. Legislation

While there is a specific section of the *Code* that deals with advertising, the prohibited grounds of discrimination are the same as in section 13 of the *Code.*

> ***British Columbia Human Rights Code***
>
> 11. A person must not publish or cause to be published an advertisement in connection with employment or prospective employment that expresses a limitation, specification or preference as to race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age unless the limitation, specification or preference is based on a bona fide occupational requirement.

Essentially, if you can not use particular discriminatory criteria to select a candidate, you can not mention those criteria in the advertisement either.

2. Process of Placing the Ad

While there are no regulations dictating where an employer must advertise, an employer needs to be aware that the choice of publication will influence the types of applications that the employer will receive. Simply put, if you advertise only in men's magazines, only men will apply.

If an employer chooses to advertise in publications that only appeal to a very narrow section of the population, over time this may limit workplace diversity. Most employers generally consider advertising in mainstream media to be relatively safe.

You may want to consider advertising in publications that target traditionally disadvantages groups. While provincial legislation does not provide hiring quotas of any kind, your workplace will often be well served if you make the effort to encourage diversity in the workplace.

In union environments, the opportunity to advertise any position may also be restricted by posting requirements set out in the collective agreement. In such case, there may be an obligation to advertise internally first. Similarly, the employer may be restricted from hiring from "the outside" unless no internal candidate is suitable. The terms of the collective agreement will determine the scope of any restrictions upon the employer in this regard.

3. Content of the Ad

As a general rule, as an employer, you should keep the following in mind when placing an advertisement for any position:

1. Avoid criteria unrelated to job – there will be a presumption that any criteria referred to will be used to make your candidate selection. If you can not use certain criteria to make your selection, do not make reference to it in the ad.

2. Stick to actual requirements (skills) needed for the position – personality traits or requirements can be dealt with during the interview stage. For the advertisement, employers should just indicate needed skills.

3. Use gender neutral language – you do not want to inadvertently suggest that you are looking for a candidate of a particular gender.

4. Never ask for photo along with application – photos are unnecessary, and there will be a presumption that it will be used for improper screening. Prohibited criteria like gender, ethnicity or age are readily apparent with a photograph.

5. Avoid misleading statements about job or company – any additional information in the advertisement might be construed as an inducement to enter into the employment relationship. This might lead to the employee alleging that representations in the ad form part of the employment contract itself.

6. Consider unintended consequences - will the ad or job requirements have the unintended effect of screening out minorities / disadvantaged persons?

D. PRE – INTERVIEW SCREENING

Pre-interview screening is the process by which an employer decides who will be interviewed for a position. It is always prudent to base screening decisions on legitimate (preferably objective) job criteria.

In some cases, you may get so many applications that you can not possibly interview every candidate who meets the selection criteria. In such cases selecting which applicants to interview will become somewhat arbitrary. If rejecting candidates has to be arbitrary, look for unintended patterns of discrimination and ensure that the list of interviewees is a representative sample of those who applied for the position.

In unionized environments, it is relatively simple for the union to question the employee selection process. Since there is always a chance that the union will seek an explanation

for why particular employees were hired instead of others, it is a good idea for unionized employers to:

1. Be able to prove applicant does not meet criteria. This is easier to do if you use objective criteria in the selection process;

2. Ensure all interviewees are clearly superior to rejected candidates; and

3. Keep documentation on the decision of who to interview, since the decision could ultimately be the subject of a grievance.

Finally, unless it is clear that you will only be contacting applicants who you wish to interview, send rejection letter. This will avoid any confusion as to whether an applicant is still in the process of being considered for a position.

Any rejection letter should be kept simple. It is generally suggested that the employer not provide reasons for rejecting the applicant. When an employer provides reasons, it might be seen as an invitation to the applicant to challenge the reasons for the rejection. The purpose of a rejection letter is not to justify your decision, but to simply advise the candidate that they have been unsuccessful in their application.

Sample Rejection Letter

Dear Mr. Smith:

Thank you for your letter expressing interest in a position with the Victoria Widget Company.

After carefully considering your qualifications and experience, we find that we do not have an appropriate position for you at this time.

We thank you for your interest in the Victoria Widget Company, and wish you the very best with your job search.

Yours truly,

Victoria Widget Company Ltd.

E. THE INTERVIEW PROCESS

1. The Interview Structure

There are two basic types of interviews: the structured, and the unstructured interview.

A structured interview is a process where each candidate is asked the same questions and if applicable, given the same skills test to complete. A structured interview ensures that all candidates are treated exactly the same during the interview process, and can provide empirical evidence that one candidate is stronger than another. Its disadvantage is that the interview is often rigid, and interviewers may feel that they do not really "get to know" the candidate.

An unstructured interview is a process where the interviewer will simply talk to the candidate to try to get an impression about the individual. Interviewers are often most comfortable with this process, but it leaves the employer with little empirical evidence to demonstrate that proper process was followed.

If there is any possibility that the hiring decision might be questioned, it may be wise to make at least part of the interview a structured process. This will provide some evidence of the relative strengths and weaknesses of the candidates.

2. The Interviewer

Selecting who will do the interviews is an important matter for the employer to determine. Larger employers will have human resource professionals who are skilled in this process. For smaller employers, the interview may be done by the owner or a supervisor who will ultimately be responsible to direct the new employee. Whoever conducts the interview, regardless of their skill level, must be familiar with human rights legislation.

In union settings, in addition to knowledge of the *Human Rights Code*, all members of interview team must understand the appropriate test to be followed under the collective agreement. If for example, the collective agreement specifies relative considerations of seniority, skill and ability, or union member preference, the interviewers must understand how to apply these considerations prior to conducting the interview.

Team interviews are often beneficial in both non-union and union settings, since they provide corroboration for the interview process and decision.

3. Permissible Scope of Questioning

Questions should determine if the applicant can perform the essential functions of the job, and hopefully give the interviewer some insight into the candidate's personality, enthusiasm, ability to work with others and work ethic.

Problems can arise where in an effort to find out more about a candidate's personality, the interviewer asks questions that might focus on prohibited selection criteria.

For example, an interviewer asking about a candidate's children might just be trying to make conversation (which is permissible), but questions about dependents might also be viewed as an attempt to determine if a candidate is likely to ask for parental leave (which is not permissible).

Questions about physical abilities, unless those abilities are a bona fide occupational requirement, will often be discriminatory. For physical job requirements, an interviewer should ask objective questions like "Can you lift 20 lb boxes all day?", rather than questions like "Do you have a bad back?"

It is important to remember that improper questions may seem harmless, but will raise the presumption that the information will be used for an improper purpose

Examples of proper and improper interview questions are provided below.

Subject	Reasonably Safe	Avoid
Name	-applicant's full name -is any additional name information needed to check work record?	-name change -maiden name
Address	-place and duration of current address	-previous addresses
Age	-whether the candidate is of legal age to take the position	-date of birth -any age related questions
Sex		-questions about pregnancy, family plans, child care obligations -questions about using Mrs., Miss, Ms.
Marital Status	-if travel or transfer is part of job, ask if there is any impediment to meeting these requirements -tax and insurance info for dependents can be obtained after employment commences	-questions about marital status or intentions -questions about spouse's work, or employment

Subject	Reasonably Safe	Avoid
Family Status	-ask if candidate will be able to work the hours necessary, and if there are any restrictions on availability for overtime work	-questions about number of children or dependents -about child care arrangements -whether related to anyone at company
Ancestry	-ask if candidate is legally able to work in Canada -if Candidate is on a work visa, can ask for details of application, expiration	-questions about birthplace, country of origin, nationality of relatives,
Language	-inquiry into fluency in languages -proof of fluency of language needed for job	-mother tongue
Race & Color		Avoid all race related questions -eye and hair colour questions
Religion	-ask if the candidate will be able to attend work during the regular work schedule -availability for weekend work	Avoid all religious based questions
Criminal background	-can ask about criminal record only if you can demonstrate it is related to job -can candidate be bonded (if related to job)	-whether applicant has ever been arrested
Sexual Orientation		Avoid all questions on sexual orientation
Disability / Medical Information	-whether candidate can perform the physical requirements of the job with reasonable accommodation -whether candidate has any conditions that should be considered in selection -use quantitative questions	-height and weight questions -list of disabilities, limitations or health problems -whether applicant drinks or uses drugs -whether candidate has ever received psychiatric care, or had stress disability -whether candidate has ever been on WCB -whether candidate had ever taken disability leave -any questions about medical treatment

Disability / Medical Information	**Acceptable Inquiries:** -Can you carry a 20 lb box? -Can you distinguish colour for colour coded wires? -Can you perform the functions of this job with or without reasonable accommodation? -Describe / demonstrate how you would perform these functions -How well can you handle stress ? –What do you do to handle stress ? -Can you meet the attendance requirements of this job? -How many days leave did you take last year? -Do you have the required licenses to perform this job? **Unacceptable Inquiries:** -Do you have asthma (etc.)? -Do you have a disability that would interfere with your ability to perform the job? -Do you ever get ill from stress? -How many sick days did you take last year? -Why do you need that wheelchair? -Have you ever filed for WCB? -Have you ever been injured on the job? -Have you ever been treated for drug or alcohol problems? -What medications are you currently taking?

4. Candidate's Appearance

As an employer you can take an applicant's appearance into account, so long as this evaluation is not (unwittingly) based on prohibited grounds. For example "that person looks neat and professional" is a reasonable selection criteria. "That person looks old and tired" is age discrimination.

Upholding a dress code is permissible so long as the dress code is related to the company's business requirements, and does not discriminate on a prohibited ground.

Asking candidate if they would object to removing their body piercing, covering their tattoos (etc.) while at work is generally permissible, but employers should be careful if the body piercing or jewelry has religious or cultural significance, which the employer would have a duty to accommodate.

5. Interview Record Keeping

Employers should keep notes of any interviews, whether the questions asked were objective or subjective. You should ensure that these notes do not contain any references to selection on prohibited grounds.

Interview notes may be needed as evidence in a complaint hearing or grievance procedure, or may be used simply to trigger the interviewer's memory, if a complaint or grievance is filed later.

There is no specific legislation on record keeping requirements for interview documentation, but employers should consider:

1. There is a 6 month time limit under *Human Rights Code* to file a complaint;

2. There is a requirement under the *Personal Information Protection Act* to retain an individual's personal information for 1 year if the information is used to make a decision that "directly affects" the individual; and

3. In union settings, the collective agreement sets the time limits for an employee or the union to file a grievance.

It is usually good practice for an employer to keep interview notes and documentation for unsuccessful candidates at least until these time limits have expired.

An employer should also permanently keep interview information and resumes of candidates who you ultimately hire. In rare cases, employees have falsified employment information or overstated qualifications. This may provide cause for termination a particular employee in the future.

6. At-Interview Testing

Having candidates take skills tests at interview is acceptable if it is a proper measure of job function. Testing can often provide further empirical evidence to demonstrate which candidate is a stronger candidate.

While test results are particularly useful in a union hiring setting, the collective agreement will probably not let the employer rely solely on test results to select a candidate, since this might be interpreted as abdicating responsibility to determine best candidate.

7. Checking References

An employer should ensure that it has the candidate's permission to call references. The fact that references are listed in a resume probably implies consent, but it would be useful to confirm consent in any event.

As a general rule, you should not ask a reference anything that could not ask the candidate directly.

It is often useful for an employer to question why any employers are missing from a candidate's resume or reference lists.

An employer should keep a record of reference checks with the other interview information (indefinitely for employees that are hired).

As a practical matter, it is usually vitally important to actually check employee references. If a candidate does not want current or past employers contacted, it may be useful to advise the candidate that your company policy is to contact all past and current employers. You might offer to give the candidate a few days to contact those employers prior to your call. This will likely get further information from the candidate about why the call was to be avoided.

You should also be cautious where former employers are reluctant to give any information about the candidate. Some company "policies" prevent giving references, but this is often simply an excuse to avoid giving a negative response. Such policies are often overlooked by the immediate supervisors of the former employee, so it may be useful to try to contact them directly.

You might want to pay particular attention if a candidate has sued a former employer. While it is unlawful to discriminate against someone who has made a complaint against an employer under the *Human Rights Code* (section 43) or under the *Employment Standards Act* (section 83), no such legislative protection exists for candidates who have filed wrongful dismissal actions against former employers.

Lexicon of Inconspicuously Ambiguous Recommendations (LIAR)
by Robert Thornton – Lehigh University

To describe a person who is totally inept:
I most enthusiastically recommend this candidate with no qualifications whatsoever.

To describe an ex-employee who has problems getting along with fellow workers:
I am pleased to say that this candidate is a former colleague of mine.

To describe a candidate who is so unproductive that the job would be better left unfilled:
I can assure you that no person would be better for the job.

To describe a job applicant who is not worth further consideration:
I would urge you to waste no time in making this candidate an offer of employment.

To describe a person with lacklustre credentials:
All in all, I can not say enough good things about this candidate or recommend him too highly.

To describe a candidate who is extremely lazy:
You would be very fortunate to get this person to work for you.

8. Medical Testing

Requiring medical tests is often permissible, but usually only after a candidate has been given a job offer. The testing must be directly related to job requirements.

Employers should also keep in mind that failed medical tests will in most cases trigger an obligation to accommodate the candidate.

9. Drug and Alcohol Testing

Drug and alcohol dependency is generally considered a disability, for which the employer has a duty to accommodate. The new CHRC policy prohibits any pre-employment drug or alcohol testing, although this is just a policy, and has no legislative effect.

Employers should be cautious in trying to implement drug or alcohol testing, since even if the employer can demonstrate the right to conduct a test, the real issue is whether any use can be made of the test result if the employee tests positive.

Refusing to hire a candidate on the basis of a failed test, without trying to accommodate the candidate, will usually be considered discrimination on the basis of a disability.

You must tailor consequences of the failed test to individual candidate. This requires that you balance workplace safety issues against the requirement that the candidate not be discriminated against because of a drug or alcohol dependence (which is considered a disability).

In determining the extent of the accommodation required, an employer may distinguish between safety and non-safety sensitive positions. It will usually be easier to justify testing in safety sensitive positions.

10. Criminal Record Checks

Background criminal record checking is permissible, if it is directly related to job applied for.

Section 13 of the *Code* prohibits discrimination on the basis of a conviction "…that is unrelated to the employment or the intended employment…". The question then, is whether the conviction is unrelated to the particular position.

As a practical matter, it may be difficult to get a test done unless employment involves working with children or adults at risk.

For information on criminal records see www.rcmp-grc.gc.ca/crimrec/finger_e.htm

11. Notifying the Unsuccessful Candidates

It is generally a good idea to ensure unsuccessful candidates are notified that they will not be hired.

Like with any rejection letter, it is usually best to keep rejection letter simple. Generally, you should not give reasons for the rejection, since it will invite the candidate to question those reasons. Again, the reason for the letter is to advise the applicant that they were not successful in getting the job, not to justify your hiring decision.

In a union situation, the employer may have to give some limited reasons, but should base the explanation specifically on requirements of collective agreement.

F. THE OFFER OF EMPLOYMENT

1. Practical Considerations

Since an offer and an acceptance creates a contract, an employer should never make a job offer until it is prepared to hire the candidate. Making tentative offers or "unofficial" offers is not recommended.

Once an offer of employment is accepted, the employer will only be able to sever the relationship by terminating the employment.

An employer should also never make any representations about the job that might not materialize, since any misleading representations could be actionable. Where for example, a pre-contractual representation is relied upon by the employee, an action for negligent misrepresentation may be possible despite the express terms of a subsequent employment contract.

2. An Employment Contract as the Offer

Generally, the best time to enter an employment contract with an employee is when you make the offer of employment. Instead of offering the candidate the position, and then trying to work out the terms of the contract, an employer would be well advised to present the candidate with a written offer of the terms and conditions under which it is prepared to employ the candidate.

An employment contract can provide protection to the employer in a number of areas. The most important protection is often a termination clause that allows the employer to replace the common law "reasonable notice" of termination with a formula that specifies the employee's notice entitlement.

The offer letter contract does not have to be complicated. Below is an example of a simple way to introduce an employment contract.

Sample Offer / Employment Contract Letter

Dear Candidate:

Re: Offer of Employment

We are pleased to offer you the position of _____ with **Victoria Widget Company Ltd.** (the "Company"). This enclosed letter sets out the terms and conditions upon which the Company is prepared to employ you. Your execution of this letter agreement constitutes you acceptance of the following terms and conditions:

[LIST TERMS AND CONDITIONS HERE]

If you are prepared to accept employment with the Company on the foregoing terms, kindly confirm your acceptance and agreement by signing the enclosed duplicate copy of this letter where indicated, and return one copy to us.

We ask that you fully consider all of the above terms, and obtain any advice that you feel is necessary, including legal advice, before you execute this Agreement. We will not accept delivery of this Agreement from you today to ensure that you have the opportunity to consider these terms and to seek advice. Please advise us if you will accept our offer of employment on the terms specified, by ***[date].***

Yours truly,

Victoria Widget Company Ltd.

Accepted and agreed to this ___ day of _____, 2005. I have read and understand the terms and conditions of employment set out in this letter Agreement.

_____
Candidate

2.(a) Probationary Period

Depending upon the position the individual is hired for, it is often a good idea to make a probationary period a condition of employment. In order to have a probationary period, the parties must specifically agree to one. The courts will not imply a probationary period if one is not specified.

The 'unsuitability" standard that an employer has to meet in order to terminate a probationary employee without notice is much lower than the "cause" standard required for non-probationary employees.

> ***Sample Probationary Clause***
>
> The Company agrees to employ you for an indefinite term commencing November 1, 2005. The first three months of employment are a probationary period, during which time you and the Company can determine whether or not continued employment is mutually agreeable. During this probationary period, your employment is subject to termination at any time without cause, without notice or payment in lieu of notice.

2(b) Termination Clause

When terminating an employee without cause, the employee is generally entitled to notice under the *Employment Standards Act*, and "reasonable notice" at common law.

A properly drafted termination clause in an employment contract will replace the "reasonable notice" entitlement with a contractual notice entitlement.

That contractual notice entitlement can be far less than reasonable notice. There are two key points to consider when drafting a termination clause:

1. The notice of termination set out in the contract must not be less than the notice set out in the *Employment Standards Act* or the contract will be unenforceable; and

2. Courts may consider arguments about "fairness", "unconscionability', or "undue influence" when determining whether to enforce a contract.

Generally though, if the contract is properly drafted and entered into, the court will usually enforce it.

Sample Termination Clause

1(a) Either you or the Company may terminate your employment at any time without notice for cause, or upon notice as set out below without cause.

1(b) You may resign upon giving to the Company two weeks' prior written notice.

1(c) The Company may terminate your employment at any time without cause upon providing to you two week's notice or payment of two week's base salary in lieu of notice, plus an additional one week's notice or one week's base salary for each year of employment you have completed with the Company. (For example, if you were terminated after 20 years service, you would be entitled to 22 week's notice or payment in lieu of notice.)

1(d) It is agreed that in the event of termination of employment, neither you nor the Company shall be entitled to any notice or payment in excess of that specified in this section 1.

1(e) If the *Employment Standards Act* or other applicable legislation should provide for a period of notice that is greater than that set out in this section 1, the Company shall comply with that legislation and you shall be entitled to receive the notice of termination as prescribed therein.

G. OBLIGATIONS TO THE FORMER EMPLOYER

There are few impediments to fair competition between employers. It is generally permissible to recruit your competitor's employees, subject to a number of considerations. Those include:

1. Inducing breach of contract – if an employee is contractually bound to working for an employer for a particular term, inducing that employee to leave might trigger a claim;

2. Notice obligations – if the employee fails to give proper notice to the former employer, that employee may be subject to a claim;

3. Avoid receiving "stolen" information – if the employee is privy to confidential information from the former employer, and improperly uses that information, both the employee, and the new employer may be liable for damages. Even if the new employer is unaware that this information is being wrongfully used, if the new employer benefits from this information, a claim against that employer for unjust enrichment is possible; and

4. Non-competition obligations – find out before you hire whether the candidate is subject to any non-competition restrictions. If the employee is contractually prohibited to working for a competitor for a period of time, you may be subject to an action for damages, or an injunction application by the former employer.

Finally, you should beware of a candidate who is willing to breach an employment contract with a former employer in order to work for you. That employee will undoubtedly not feel bound by your contract either.