

CLIENT ALERT

February 23, 2021

1

RECRUITING YOUR WORKFORCE IN ONTARIO

by Eric Kay

Familiarizing yourself with and abiding by Ontario employment law are key to successfully recruiting, hiring and managing your workforce and employer liability. And those keys are applicable whether you are an existing employer in Ontario or entering into Ontario as a new place of business. Understanding the legal issues and requirements of recruiting your workforce is the first step.

Some employers may be tempted to use an “easy strategy” of independent contractor arrangements in place of employment relationships. American employers in particular may be nervous about operating without “at-will” employment of their workforce. But adopting this approach could in fact backfire and have adverse legal consequences if contractors are in fact found to be employees.

Workers rather than employees may be referenced in this article because employers in some cases have obligations not just to employees but to dependent and independent contractors in the workplace, including under some employment-related legislation.

What are the requirements relating to advertising positions?

In accordance with the *Accessibility for Ontario with Disabilities Act* (“AODA”), advertisements should note that employers will provide accommodations during the hiring process for candidates who have a disability.

Job advertisements should also comply with the *Ontario Human Rights Code* (“OHRC”) and should not contain statements, qualifications, or references related to a prohibited ground of discrimination, or imply any limitations, specifications, or preferences related to a prohibited ground of discrimination.

The OHRC prohibits actions that discriminate against people based on the following protected characteristics:

- age
- ancestry/colour/race
- citizenship
- ethnic origin/place of origin
- creed
- disability
- family status
- marital status (including being single)
- gender identity/gender expression
- record of offences
- sex (including pregnancy and breastfeeding), and
- sexual orientation.

What can employers do with regard to background checks and inquiries?

(a) Criminal Records and Arrests

The *Police Records Check Reform Act, 2015* (“PRCRA”) provides a comprehensive set of standards which govern how police record checks are to be conducted and the information that will be made available for employment purposes. Specifically, the three types of criminal record checks that an employer can now request are: (1) criminal records

checks, (2) criminal records and judicial matters checks, and/or (3) vulnerable sector checks.

The PRCRA imposes limitations on the information that an employer can obtain in response to a criminal record check request. The employer can only receive the requested criminal records check if the individual who is subject to the records check consents to disclosure of the results of the check.

Employers should be careful to only use the criminal records check for the purpose that it was requested or as authorized by law. Section 2(1) of the PRCRA outlines some of the permitted purposes including: (a) determining suitability for employment, volunteer work, a license, an office, membership in any body or to provide or receive goods or services; or (b) assessing an application to an education institution or program. An employer who wilfully misuses disclosed information for an improper purpose is in contravention of the PRCRA and may be found guilty of a provincial offence, resulting in a fine not exceeding \$5,000.

As a best practice, employers should wait to perform all background checks until a conditional offer of an employment or contractor position has been extended. Employers may request that an applicant consent to a criminal record check as part of a conditional offer of employment. Employers may not discriminate against applicants for convictions for an offence for which a pardon has been granted or a record suspension has been ordered, unless there is a *bona fide* occupational requirement.

(b) Medical history

The medical history of an applicant should not be considered in the recruitment and hiring process, except where there is a *bona fide* occupational requirement (i.e. a condition that may affect the applicant’s ability to perform the job safely and will threaten the safety of the applicant or others). Once a conditional offer of an employment or contractor position has been extended, further questions may be asked about the applicant’s medical history as part of their pre-employment medical testing; however, the questions must relate to conditions which are directly relevant to the specific duties of the position in question.

(c) Drug Screening

Under the OHRC, drug and alcohol testing are discriminatory, as addiction to drugs or alcohol is viewed as a disability. Subject to very limited exceptions, pre-employment and random testing are not permitted in Ontario. These exceptions generally apply to workers performing part of their work in the United States in States where drug screening is a requirement or permitted.

If testing is conducted, its primary purpose must be to measure impairment, as opposed to deterring drug and alcohol use or enforcing moral values. Even testing that measures impairment can be justified as a *bona fide* requirement only if it is demonstrably connected to performing the job (for example, if a worker occupies a safety-sensitive position and is involved in a significant accident or “near-miss”), and only then as part of a larger assessment of drug and alcohol addiction.

The Ontario Human Rights Commission has released a policy on drug and alcohol testing that is a useful reference for employers.

(d) Credit Checks

Although credit checks are permitted with an applicant's consent, it is best practice to conduct credit checks only where it would be reasonable to do so (e.g. for positions where the applicant will have access to significant sums of money or valuable merchandise). Consumer reporting legislation also sets out further consent requirements and prescribed procedures. Worth noting is that federally regulated employers are governed by the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"); therefore, such employers can request credit checks only where it would be reasonable to do so in accordance with the provisions of PIPEDA.

(e) Immigration Status

While employers can request proof from applicants that they are legally able to work in Canada as a condition of their employment, they are prohibited from inquiring into a prospective employee's ancestry, citizenship, ethnic origin or place of origin under the *OHRC*.

(f) Social Media

While employers may review an applicant's social media presence, social media checks during the recruitment and hiring stage can increase the risk of a discrimination complaint, particularly if the information gained from an applicant's social media presence may be connected to a protected characteristic under the *OHRC*. As best practice, employers should obtain an applicant's consent before reviewing their social media presence to ensure they comply with privacy legislation.

(g) Pay Equity

Ontario's Pay Equity Act, 1990 requires that employers develop a pay equity plan to ensure that there is no gender bias in compensation for women and men performing substantially the same job or different jobs of equal value. Employers should ensure that this plan is updated routinely to address changing circumstances.

To complement the equal pay for equal work provisions in the *Pay Equity Act*, Ontario introduced the *Pay Transparency Act* in 2018. Once declared in force, the *Pay Transparency Act* will impose additional rules upon affected employers which include, but are not limited to, requiring that public job advertisements include a salary rate or range, requiring the preparation of a "pay transparency report", and the inclusion of anti-reprisal measures intended to safeguard employees from being penalized or intimidated upon making inquiries about their compensation or disclosing their compensation to other employees.

(h) Employee Accommodations

All employers in Ontario have obligations under the *AODA* to notify applicants and employees about the availability of accommodations and provide such accommodations at all times, including during the recruitment process. Information about the availability of accommodations should be made part of an employer's regular job advertisements. Offers of employment must also contain explicit information regarding the employer's policies on accommodation.

The *AODA* mandates employers to create and maintain:

- an explicit written process for the development of a written accommodation plan for employees with disabilities; and
- a written return-to-work policy for employees that have been

absent from work due to illness or disability and require accommodation to facilitate their return to work.

Employers must advise their employees of the company's policies on supporting employees with disabilities and the availability of job accommodations for employees with disabilities. It is best practice to advise new employees of these policies during their orientation or training period and provide written resources. Upon request by an employee, an employer must also provide any information that is generally available to employees and any information an employee requires to perform their job in an accessible format. Finally, employers should demonstrate that they have considered an employee's disability, accessibility needs and accommodation plan, if applicable, when considering an employee's performance management reviews, career development and advancement and redeployment.

(i) Equal Wages for "Substantially the Same Work"

Employers must pay part-time, temporary, casual, seasonal employees, and temporary help agency employees the same wages as full-time employees if they are doing substantially the same work as full-time employees.

Key Take-Aways

When employers obtain the necessary employment law advice about recruiting, hiring and managing their workforce in Ontario, they will be better prepared from a business perspective and at less risk from a legal perspective.

Employment law is constantly evolving in Ontario, so please contact **Eric Kay** at ekay@dickinsonwright.com to discuss your general employment law needs or to obtain advice with respect to any particular employment law issue or problem.

DISCLAIMER: This publication is for information purposes only and its provision does not form a lawyer-client relationship or constitute legal advice.

ABOUT THE AUTHOR



Eric Kay is a Partner in Dickinson Wright's Toronto office. He can be reached at 416.777.4011 or ekay@dickinsonwright.com.