

Ontario Employment Law During the Hiring Process

WIN Course 6, Part 2 - Lesson 3

So an employer who decides to hire an employee needs to be aware of the fact that the hiring process is governed by the Ontario Human Rights Code. And what this Code essentially says is if you are an employer and you're hiring someone you have to make sure that you make that decision based on bona fide occupational job requirements, not based on their race, religion, ethnic origin, disability, age, marital status. There is a list of 16 prohibited grounds of discrimination so as an employer, when you are hiring an employee, you choose the employee that suits the job best, but it has to be based on real bona fide occupational requirements. You cannot make the decision based on someone's background, where they come from; you make the decision based on competencies. That way you won't have any difficulty with the Ontario Human Rights Code.

So the Human Rights Code starts to take effect from the time that you start to think about you need to hire someone. It applies to the title of the job. It applies to the job description that you post. And it's very important to include very specific competencies in the job description that are necessary for that job. So often you'll see requirements for a job, and then preferred or would be nice - other factors that can be taken into account. An employer should be very specific that none of the competencies that are required for the job have anything to do with any of the 16 prohibited grounds of discrimination.

So when creating a job posting, and you want to put in "Canadian experience" as a requirement, for an example, it may be that you are using those words because you want the employee to have ability to work on a team; you want them to have excellent English skills, both oral and written. It may be that you want them to have the soft skills that they are able to communicate easily with people. Then say so! Don't say "Canadian experience" because that refers to the fact that they come from another country, and that person, who is a job applicant, cannot be refused a job because of their place of origin. You have to stick to the competencies. So if you want someone who has excellent English oral and written skills, say so, and you can test that. You can use an interview setting; you can use a simulated job setting; whatever the level is that's required for the job, you can ask for that.

So if a health professional is going to be working with the public all day, and dealing with sensitive and important issues, it's probably going to require superior English skills because you have to communicate easily with the people who are coming in. Someone who's not dealing with the public every day may not need superior oral and written skills; it may be sufficient that they have good English proficiency. So be specific, and make sure that you're not discriminating on the basis of the fact that someone does not speak English as a first language, that they come from another country. You have to test the English level today and it has to be appropriate for the job posting.

There's a second component of law that applies when you're hiring an employee, and that is common law. And that means that there are decisions made by judges that are used as precedents in deciding whether or not an employer is treating an employee fairly. So an example would be there is a duty, the judges have said, is owed by an employee to every employer - a duty to be honest, a duty to be diligent, a duty to be respectful and loyal, and if it turns out, for example, that a resume given by a job applicant has an error in it, and it's important to the job - the fact that that degree or credential or qualification is a necessary part of the competencies for the job - if you've made a mistake as an employee you need to make sure you tell the employer. But an employer who finds that there is something that has been overstated or misstated in a resume will likely have grounds for termination of employment, because the person wasn't completely honest in the way they represented their competencies.

So an important part of the hiring process is the interview, and the Ontario Human Rights Code actually governs what questions you can and can't ask. It doesn't mean that you can't ask any question you want, but they must be related to a specific bona fide occupational requirement of the job. An example: you may think that because you will want someone to work evenings that you would prefer to hire someone who doesn't have children because there may be difficulty with childcare. So you may want to ask, "So are you married? Do you have children?" Those may seem like very friendly questions; those can result in a complaint to the Ontario Human Rights Tribunal, because in fact what you're asking is "What is your marital status?" And if you make a decision not to hire that person because they answered [that] they're married, that's grounds for a complaint under Human Rights Code. Instead you should talk about the real question, which isn't "Are you married?" or "Do you have children?" The real question is: "Can you work evenings? Can you work weekend? Can you travel?" Ask specific questions that are real, and they have to be requirements that you can prove are necessary to do that job.

The best evidence you can have of what your relationship is with an employee is to have a good employment contract which sets out all of the details of your expectations and what the requirements are for the employee. The contract may be a defined term contract for a specific period of time, but most often it will be an indefinite term; you start work next week, and you'll continue to work until the employer no longer needs the employee, or until the employee does something that would allow the employer to terminate for just cause. An employment contract should always be up-to-date and reviewed annually to make sure that it is accurate, and represents the current situation that you require in your workplace. Each employee who signs an employment contract will then have a document that sets out what their rights and obligations are to you. It's a valuable piece of evidence that documents all of the rules that you have established for your employees.

As an employer, if you are having a contract prepared for employees to sign, if you're thinking of including a non-competition clause, or some restriction on where that employee can work after they stop working for you, make sure that it's specific; make sure that it is limited to what is really necessary. For example, a non-competition clause that says an employee cannot work for a competitor for five years after they stop working for you, would not be considered reasonable, and probably would not be upheld by the courts. However, non-competition clauses are common in employment contracts; just make sure that it's concrete and specific and necessary.

The hiring process is a very important part of creating the employment relationship. Because when you hire someone that means that you have made a decision to create a relationship with them. It means that you are responsible for training them so that they can do the job that's required, for properly supervising them, and providing them with the feedback that they need in order to do the job properly. Quite often employers may say, well "This person is incompetent" after having work being done for a period of time. Well if the employee's incompetent, who hired them? Who hired someone who is not capable of doing the job? That would be the employer. So as an employer you must be careful when you're choosing your employees to make sure that you choose employees that have the skills that are necessary, and have the drive to learn, and then once they are hired you in fact have an obligation to make sure they have all the training that's required for them to do that job well.

So we have government laws, and common law, which is the judges' decisions that we use as precedents that set certain rules. In Ontario, during

the hiring process, both apply, but primarily it's the Human Rights Code that you need to be familiar with, and you have to be aware of the fact that if there's a complaint made against an employer by someone who applied for a job and didn't get it, and they believe that it was because of discrimination for one of the 16 prohibited grounds, the employer has to answer that complaint, and may have to appear in front of the Ontario Human Rights Tribunal. The Tribunal can order compensation to be paid to that person, and in fact they have a wide range of powers now, which mean that as an employer, it's better to take the time and learn about the human rights components before you hire and to avoid having to appear in front of the Ontario Human Rights Tribunal which may make decisions and order an employer to do things that an employer really had no idea would be possible.