

THE MANITOBA
HUMAN RIGHTS
COMMISSION



LA COMMISSION DES
DROITS DE LA PERSONNE
DU MANITOBA

Pre-employment inquiries: You can respect human rights in hiring

What you can do What you can ask

Guidelines for employers on
pre-employment inquiries and
The Human Rights Code (Manitoba)

Introduction

This guide is the Manitoba Human Rights Commission's interpretation of provisions of *The Human Rights Code* with respect to "pre-employment inquiries." It is subject to their specific language of *The Code*, and to interpretations by adjudicators and the courts.

What is *The Human Rights Code*?

The Human Rights Code ("*The Code*") is Manitoba's provincial human rights law, which protects individuals and groups in Manitoba from discrimination. It is administered by the Manitoba Human Rights Commission.

What is discrimination in employment?

Discrimination in employment under *The Human Rights Code* is treating a person or group differently, to their disadvantage and without reasonable cause, on the basis of a protected characteristic, such as ancestry or age. Failure to reasonably accommodate a special need that is based on a protected characteristic, such as disability or religion, is also discriminatory.

The Code prohibits unreasonable discrimination in all aspects of employment, including hiring, regardless of whether or not the discrimination is intentional.

How does *The Code* apply to employment?

The Code applies to all aspects of employment, including:

- recruitment practices (for example, job postings, advertising, application forms, and interviews);
- working conditions (including fringe benefits, wages, lay-offs, suspensions, dress codes, employee benefit plans, training, and seniority);
- promotions and dismissals; and
- employment agency referrals.

What are the “protected characteristics” under *The Code*?

Protected characteristics or grounds under *The Code* are ancestry (including colour and perceived race); nationality or national origin; religion or creed; ethnic background or origin; age; sex (including pregnancy and gender identity); gender-determined characteristics or circumstances; sexual orientation; marital or family status; source of income; political belief; and physical or mental disability.

Unreasonable discrimination on the basis of a criminal record can also form the basis of a complaint.

Who does the prohibition against discrimination in employment apply to?

All persons using employment application forms or making pre-employment inquiries in Manitoba are subject to *The Human Rights Code* (with the exception of those who fall under federal jurisdiction). Examples include:

- employers that fall under provincial jurisdiction;
- recruiters operating in Manitoba;
- any employment agency, service, educational institution or third party requested by an employer to refer candidates, with or without a fee;

- any trade union, occupational association, or employer's organization in which membership is a prerequisite to carry on a trade, occupation profession;
- the Government of Manitoba, crown agencies, municipal governments, school divisions, planning, health and social services, health authorities and community councils; and
- most agencies engaging people for unpaid or volunteer work.

Under *The Code*, employers may be held responsible for the actions of their employees.

How can I ensure equality of opportunity when I hire?

To ensure equality of opportunity in your hiring process, focus on the essential duties of the job and evaluate the individual qualifications of each applicant without relying on group generalizations or stereotypes.

Special needs of applicants which are based on protected characteristics, such as disability or religion, must also be reasonably accommodated. For example, if an applicant advises you that they cannot attend a job interview on the date you have scheduled because it falls on a day of religious observance, reasonably accommodate their request for alternate arrangements, to the point of undue hardship.

The Human Rights Code prohibits discrimination in employment unless it is based upon “bona fide and reasonable requirements or qualifications for the employment or occupation”.

What are “bona fide and reasonable occupational requirements or qualifications”?

“*Bona fide* and reasonable occupational requirements or qualifications” are requirements or qualifications for the job that are required in good faith and are reasonably necessary to the safe and efficient performance of the employment or occupation.

Use your application and hiring process to select persons on the basis of genuine qualifications that are relevant to job performance. When you consider whether an applicant can meet *bona fide* and reasonable occupational requirements or qualifications for the employment, keep in mind that you must first reasonably accommodate special needs which are based on disability, religion or other protected characteristics under *The Human Rights Code*, to the point of undue hardship.

What about the application form?

Questions on the job application form can raise concerns under *The Human Rights Code*. If information requested on your employment application form might reveal the age, sex, ancestry, marital or family status, or other protected characteristic of an applicant, make sure that the requested information is necessary to a determination of whether or not the applicant has the necessary skills and abilities to carry out the essential duties of the job.

A requirement that all applications for employment must be submitted online also raises potential human rights concerns. Such a requirement can create barriers for persons whose disadvantaged social condition or disability makes accessing and using computer and internet technology very difficult or not possible.

What are my rights as an employer?

Employers have the right to define qualifications necessary for satisfactory job performance provided that these standards are *bona fide* and reasonable occupational requirements or qualifications.

To avoid unreasonably restricting employment opportunities for a group or class of persons protected by *The Human Rights Code*, ensure that any standards, policies or rules that you adopt for the employment:

- 1) are rationally connected to the performance of the job;
- 2) are adopted in an honest and good faith belief that they are necessary to the fulfillment of a legitimate work-related purpose; and
- 3) are reasonably necessary to accomplish the legitimate work-related purpose.

If a standard, rule or policy that you are using might have a discriminatory effect, rely on an alternative approach that does not have a discriminatory effect. Examples include individual testing or a more individually sensitive standard. Also ensure that reasonable accommodation of any special needs, which are based on protected characteristics under *The Code*, has been made.

Employers have the right to use their discretion in selecting the most appropriately qualified person for the job, providing that the three points listed above with respect to relevant qualifications and requirements have been met. Employers also have the right to obtain information about an applicant which is relevant to the job, provided the questions do not elicit unnecessary information concerning characteristics protected by *The Code*.

How can I determine whether an applicant can do the job?

To evaluate whether an applicant can do the job, focus your inquiries on the skills and qualifications that are necessary to perform the essential duties of the job, keeping in mind the employer's duty to reasonably accommodate special needs based on protected characteristics.

If, for example, an essential duty of the position you are filling is that the employee start work at 6:00 a.m., ask the applicant if he or she is available to begin work at that time - not if they have children and what their childcare arrangements are. If an essential duty of the position requires experience driving a forklift, ask the applicant if he or she can drive a forklift, rather than, for example, focusing your questions on the reason an applicant uses a cane or other mobility aid.

Can I ask if an applicant can speak a certain language?

It is not a contravention of *The Code* to inquire as to whether an employment candidate has a level of proficiency in a given language, where such a level of proficiency is a *bona fide* and reasonable requirement or qualification for the employment or occupation.

Can I ask if an applicant is 18 years or older?

The prohibition against age discrimination does not apply to occupations which are restricted by law to persons over the age of majority, such as store clerks for liquor stores or emergency vehicle drivers. Where there is not a legislative requirement that a person be of the age of majority, employers cannot discriminate on that basis. If an applicant is under the age of sixteen, age alone is not a *bona fide* reason to refuse to consider him or her, if he/she has indicated an intention to obtain the proper work permit.

Can I require an applicant to complete a psychological test?

Pre-employment psychological testing may contravene *The Human Rights Code*, because both the form and content of the testing may, directly or indirectly, limit employment candidates based on their ancestry, ethnic background, sex, age, religion, physical or mental disability, or other protected characteristic. Where such a pre-employment test does result in a limitation or preference based on any protected characteristic, it will contravene *The Code*, unless the limitation or specification or preference is based upon *bona fide* and reasonable requirements or qualifications for the employment or occupation.

Can I ask if an applicant is related to anyone that we already employ?

A policy or practice which excludes relatives of existing employees from employment opportunities is sometimes referred to as an "anti-nepotism" policy or practice. Such policies or practices may lead to human rights complaints, as it is discrimination under *The Code* to unreasonably discriminate in employment on the basis of marital or family status.

Where a complaint alleges that an employer's reliance on an anti-nepotism policy or practice resulted in unreasonably discrimination on the basis of marital or family status, the onus will fall on the employer to show that it met the three-part test for employment standards as set out by the Supreme Court of Canada and discussed earlier in these Guidelines on page 5. (See also Manitoba Human Rights Commission Policy "Reasonable Accommodation: Bona Fide & Reasonable Occupational Qualification".)

The employer will be required to show that the anti-nepotism standard it relied on was rationally connected to

the performance of the job, was relied on in a good faith belief that it was necessary to the fulfillment of a legitimate work-related purpose and was a reasonably necessary standard to meet that purpose. The employer will also have to ensure that reasonable accommodation was made. (See also Manitoba Human Rights Commission Policy “Marital and Family Status – Anti-Nepotism Policies”).

Can I require that applicants take a drug or alcohol test?

Dependence on drugs or alcohol is a disability within the meaning of *The Human Rights Code*. Unreasonable drug and alcohol testing can result in discrimination against applicants or employees who have a dependency disability.

It is especially difficult for an employer to justify pre-employment alcohol or drug testing. Denying an applicant employment on the basis of the results of a pre-employment alcohol or drug test is unlawful unless an employer can show that the standard or requirement relied on is reasonably necessary for the employment or occupation and it has taken reasonable steps to accommodate applicants or employees with dependency disabilities.

Real and significant workplace safety concerns, where the nature of the employment is such that performance or safety concerns cannot be addressed as they arise, may establish a rational connection between a necessary qualification or requirement for a job and the use of pre-employment drug and alcohol testing. Good faith must be shown by the employer and such testing must be reasonably necessary in the circumstances. (Please see our “Drug and Alcohol Testing in the Workplace” guidelines for further information.)

Can I request that applicants take a medical examination?

An employer may request that a job applicant take a medical examination after a written conditional offer of employment has been made, providing that:

- a) the examination assesses only those physical or mental conditions or abilities, which have been identified as *bona fide* and reasonable requirements or qualifications for the employment or occupation;
- b) everyone offered the same position undergoes the same medical examination (except where a person has requested accommodation of a physical or mental disability and a specific medical examination would assist in determining the appropriate accommodation);
- c) males and females receive the same medical examination, unless there is a reasonable requirement or qualification for the employment that affects only one sex;
- d) determinations based on the medical examination relate to the person's current ability and not past or possible future disability, unless a reasonable requirement or qualification for the job reasonably supports a different basis for assessment; and
- e) medical examinations and test results are interpreted according to current medical knowledge.

Can I require that applicants submit to a criminal record check?

Some criminal charges or convictions may be related to the ability to perform a job. Employers may seek information about applicants' criminal records in such circumstances. Unreasonable discrimination in employment on the basis of a criminal charge or conviction is, however, contrary to *The Human Rights Code*. Although "criminal record" is not a specific ground, *The Code* also protects some classes or groups of people on the basis of personal characteristics not specifically listed.

Whether a job applicant's criminal charge or conviction is a reasonable disqualification for the employment or occupation depends on the circumstances of each case. Employers should consider whether the behaviour that is the subject of the charge or conviction, if repeated, poses a significant threat to the employer's ability to carry on its business safely and efficiently. The circumstances of the charge or offense, including the age of the applicant at that time, the period of time that has elapsed since the conviction, what the applicant has done in that intervening period and whether a pardon has been secured in relation to the offence are all relevant considerations.

In a human rights complaint that alleges that an employer has discriminated against an applicant based on a criminal charge or conviction, the employer will have the legal responsibility to establish that the existence of the criminal charge or conviction was a reasonable disqualification.

What if the applicant has an outstanding criminal charge?

Justifying the denial of an employment opportunity on the basis of a criminal charge (as compared to a criminal conviction) may be particularly difficult. The reason is that the employer will often have insufficient evidence or information about the alleged criminal act to determine whether hiring the employee would be an unacceptable risk. To show that denying an employment opportunity on the basis of a criminal charge is reasonable discrimination, the evidence must show that the risk to the public, co-workers or the employer's business is so severe that the possibility of a conviction justifies the discriminatory business decision.

Can I request that an applicant submit to a police record check?

It would be very difficult for an employer to show that a police record check is a *bona fide* and reasonable requirement or qualification for an employment or occupation.

A police record check is a record of all contact that a person has had with the police and is much broader than a criminal record check. Records of contact with police may reveal information about non-criminal police contact that, if part of an employer's decision on hiring, may discriminate on the basis of protected grounds under *The Human Rights Code*, including mental disability and marital or family status.

What if we want to give preference in hiring to qualified persons from groups that have been disadvantaged in employment?

Section 11 of *The Code* permits affirmative action programs or other special programs that are designed to lessen conditions of disadvantage to individuals or groups, where the programs achieve, or are reasonably likely to achieve, that objective.

Pre-employment inquiries with respect to a protected characteristic do not contravene *The Code* where the information is required for the purposes of a special program, the applicant voluntarily provides such information, and it is used in a manner consistent with section 11 of *The Code*.

What about information obtained after an employee has been selected?

Information that is requested in good faith and is reasonably necessary for personnel purposes may be requested. Examples may include a photograph for identification/security needs, the number of dependents for income tax purposes, and age for employee benefit plan purposes.

Employers are encouraged to keep post-employment inquiries separate from pre-employment inquiries, and to ensure that all employment inquiries are job-related and necessary. Any information obtained after hiring must not be used as a basis for subsequent discrimination in working conditions, including wages, training, promotion, lay-off, and employee benefit plans.

NOTE: Those Manitoba employers who are subject to this province's *Freedom of Information and Protection of Privacy Act* and *Personal Health Information Act* must also be aware of the significant restrictions placed on the collection and use of personal information and personal health information by those statutes.

Who can I call?

For further information on these guidelines or *The Human Rights Code*, please contact the Manitoba Human Rights Commission in your area.

Winnipeg: 7th Floor - 175 Hargrave Street
Winnipeg, MB R3C 3R8
Phone: 204-945-3007
Fax: 204-945-1292

Brandon: 353-340 Ninth Street
Brandon, MB R7A 6C2
Phone: 204-726-6261
Fax: 204-726-6035

The Pas: 2nd Floor - Otineka Mall
P.O. Box 2550
The Pas, MB R9A 1M4
Phone: 204-627-8270
Fax: 204-623-5404

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Le présent guide est également disponible en français

