



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Summary of Fair Hiring Practice Guidelines¹

NOVEMBER 2014

Legal Obligations

The Law Society wishes to promote fair hiring practices of students, lawyers and paralegals pursuant to the Ontario *Human Rights Code* (*Code*),² the *Rules of Professional Conduct*³ or the *Paralegal Rules of Conduct*.⁴ The Law Society of Upper Canada provides *Fair Hiring Practice Guidelines* (*Guidelines*) to assist firms⁵ in reviewing their interview and hiring practices.

Firms should remember that Sections 6.3 (Sexual Harassment)⁶ and 6.3.1 (Discrimination)⁷ of the *Rules of Professional Conduct* or Rule 2.03 (Harassment and Discrimination) of the *Paralegal Rules of Conduct* and the *Code* apply to hiring processes.

The *Code* establishes the right to be free in the workplace from discrimination based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. The *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* prohibit discrimination on the same grounds, and the principles of the *Code* apply to the interpretation of those rules.

Discrimination can be the result of an intentional or unintentional action or omission. Intent is not a prerequisite to a finding of discrimination under the *Code*. Discriminatory conduct in any aspect of the hiring process contravenes the *Code* and may constitute professional misconduct.

¹ The Guidelines are adapted from the Ontario Human Rights Commission, *Human Rights at Work 2008 – Third Edition* (Toronto: Ontario Human Rights Commission, 2008), online: <<http://www.ohrc.on.ca/en/book/export/html/4260>>.

² *Human Rights Code*, RSO 1990, c H19, online:

<http://www.elaws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm#BK6>.

³ *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000, as amended based on the Federation of Law Societies Model Code of Professional Conduct, effective October 1, 2014), online:

<<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>>.

⁴ *Paralegal Rules of Conduct* (Toronto: Law Society of Upper Canada, May 29, 2007, as amended based on the Federation of Law Societies Model Code of Professional Conduct, effective October 1, 2014), online:

<<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486158>>.

⁵ The term “firm” is used to include all employers of students including law firms, sole practitioners, company legal departments, government departments, ministries and legal clinics.

⁶ Section 6.3 (Sexual Harassment) was formerly known as Rule 5.03.

⁷ Section 6.3.1 (Discrimination) was formerly known as Rule 5.04.

The Law Society recommends the following hiring practices:

1. Advertising

As possible, positions should be advertised openly.⁸ Informal recruitment practices may exclude individuals from groups not already represented in the firm and those who may not have social contacts with lawyers or paralegals.

2. Job Description

When a position is advertised, there should be a written job description and candidates should be given consistent information about the job requirements. The job description should focus on the actual work performed and the necessary skills. In noting the qualifications, avoid referring directly to grounds under the *Code* that may prevent or discourage people from applying for the job.

Example: Job descriptions that indicate a preference for a lawyer or paralegal with Canadian experience may limit applications from recent immigrants, and could result in discrimination based on race, place of origin or ethnic origin

3. Job Requirements

The job requirements should be adopted for a purpose that is rationally connected to performing the job, adopted in good faith and in the belief that it is necessary to fulfil a legitimate work-related purpose and reasonably necessary to accomplish the work-related purpose.

Example: If the job requires someone to travel extensively, it is appropriate to indicate that this is a requirement of the job, but usually not appropriate to require that the person have a valid driver's license. An applicant may be asked whether he or she will be capable of doing the essential elements of the position, such as travelling, but it could be a violation of the *Code* to request that the person hold a valid drivers' license.

4. Screening Applicants

Screening applicants should be based on the job description and requirements and not, directly or indirectly, on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Example: If résumés are used to develop a list of candidates who will or will not be granted an interview, firms are encouraged to develop and use a checklist based on the job description to help in the résumé-evaluation process.

5. Interview Process

Employers should aim for a fair process that focuses on each candidate's ability to perform the essential job duties. Interview questions should be valid and relevant to the job, and should aim at determining the applicant's qualifications or ability to perform the essential duties of the job. Inquiries related to the candidate's ability to perform the essential duties of the job may be asked. Firms are encouraged to use a standard list of questions related to the job description. It is preferable, wherever possible, that at least two interviewers participate in each interview.

⁸ Please note that some hiring decisions are often made through unsolicited lateral applications received from recruiters and candidates directly. These hiring decisions could be made in a competitive recruitment environment in which timeliness is a key factor. In such circumstances, it may be impractical to publicly advertise the opportunity. Additionally, a number of firms have as a practice the hire back of summer or articling students and also receive numerous unsolicited applications. In those cases, it is unlikely that firms will advertise the positions broadly, as there is no need for it.

Duty to accommodate during the interview process: The duty to accommodate applies to all the enumerated grounds of the *Code* and applies during the interview process. Employers have an obligation to reasonably accommodate candidates with disabilities if they need it during the interview or test screening process.

Where the applicant chooses to talk about his or her disability during an interview, or requests an accommodation, the employer may make inquiries about the applicant’s accommodation needs but not the diagnosis or disability. Interview questions should be limited to the applicant’s ability to perform the essential duties of the job. Interview questions beyond this scope should be made with great caution and care.

6. Selection Process

If references are checked, the questions should be confined to job related issues. In examining whether an applicant is qualified for the position, the employer may ask if the applicant will be able to perform the essential elements of the position. If an applicant will not be able to perform all or part of an essential job requirement(s) because of a personal characteristic listed in the *Code*, the employer has a duty to accommodate. It is only when the applicant cannot do the essential tasks of the job, once a reasonable accommodation has been provided, that the employer may refuse to hire on this basis. An accommodation must be made unless it would cause undue hardship.

The following is a list of questions or remarks that are inappropriate

Ground	The following are <u>inappropriate</u>	Examples of <u>inappropriate</u> questions or comments
Race/colour/ancestry/place of origin/ethnic origin/citizenship	<p>Questions about or relating to physical characteristics such as colour of eyes, hair, skin, height or weight.</p> <p>Questions about mother tongue.</p> <p>Questions about or relating to birth-place, nationality of ancestors, spouse and other relatives or Canadian citizenship.</p> <p>Offensive remarks of a racist nature and remarks about the race, ancestry or parents’ origin.</p>	<p>What country do you come from?</p> <p>What is your nationality?</p> <p>Where are your parents/grandparents from?</p> <p>Why don’t you have an accent?</p>
Creed/religion	<p>Questions about creed or religion, unless they are asked by a special interest organization such as a church.</p>	<p>What is your religion?</p> <p>Are you of religion x? I’m not.</p> <p>Would you have concerns working with people not of religion x?</p>
Sex	<p>Remarks of a sexual nature or sexist comments.</p> <p>Note: Questions about gender if gender is</p>	<p>Do you plan to have children?</p> <p>When do you plan to have children and how many?</p>

	<p>a reasonable and genuine requirement for a particular job, such as employment in a shelter for women escaping violence, may be appropriate. Other questions concerning the applicant's sex, including questions about pregnancy or child-bearing plans, are inappropriate.</p>	<p>Are you pregnant?</p> <p>Will you be taking maternity leave in the next 5 years?</p>
<p>Sexual Orientation</p>	<p>All questions about or relating to sexual orientation, or disparaging remarks about sexual orientation.</p>	<p>Your address is in the gay neighbourhood, are you gay?</p>
<p>Gender Identity or Gender Expression</p>	<p>All questions about or relating to gender identity or gender expression, or disparaging remarks about someone who is transgender.</p>	<p>Are you a real man/woman?</p> <p>Have you had the surgery?</p>
<p>Record of offences</p>	<p>Questions about record of offence are inappropriate, except those to determine whether the applicant has been convicted of a criminal offence for which a pardon has not been granted (those questions are allowed).</p>	
<p>Disability</p>	<p>Questions directly related to the applicant's ability to perform the essential duties of the job are allowed, but all other questions concerning the applicant's disability are inappropriate.</p>	<p>How come you are using a wheelchair?</p> <p>Have you been blind all your life?</p> <p>What is your medical condition?</p>
<p>Age</p>	<p>Questions about age are inappropriate unless age is a reasonable and genuine requirement to qualify for the position. (Age is defined as 18 years and older in the employment context in the Code)</p>	<p>At your age, how do you feel about having a shortened career?</p> <p>Why would you start a career in law at this stage of your life?</p> <p>Are you really sure you want to work this hard at this point in your life?</p> <p>Are you not 'too old to fit in'?</p>
<p>Marital Status</p>	<p>Questions about marital status are inappropriate unless marital status is a reasonable and genuine requirement for employment. For example, questions about or relating to marital status if the employer has a nepotism or an anti-</p>	<p>Are you single or married?</p> <p>How will you balance having kids, a husband and a job?</p>

	nepotism policy to grant or withhold employment or advancement in employment to a person who is a spouse of the employer or an employee may be appropriate.	
Family status	Questions about family status are not appropriate unless the employer has a nepotism or an anti-nepotism policy to grant or withhold employment or advancement in employment to a person who is a child or parent of the employer or an employee. In those cases, such questions may be appropriate.	<p>Do you have children?</p> <p>What is your father's occupation?</p>

It is the responsibility of all firms to ensure that their hiring processes reflect favourably on the profession, are free of bias or the appearance of bias, and adhere to the *Rules of Professional Conduct*, the *Paralegal Rules of Conduct* and the *Ontario Human Rights Code*.

To talk to the Discrimination and Harassment Counsel about a complaint:

Phone 1-877-790-2200 Fax 1-877-398-1100 E-mail assistance@dhcounsel.on.ca

For more information on the Discrimination and Harassment Counsel program, please visit <http://www.lsuc.on.ca/with.aspx?id=2147487009>