



Conducting an Effective Interview: Dos and Don'ts During the Hiring Process from a Human Rights Perspective

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1. Introduction

In most circumstances, by the interviewing stage, the employer has already obtained some relevant job-related information from the employment application and the candidate's resume. Most employers, however, want to supplement the application process with at least one interview in order to determine if the applicant has the appropriate qualifications for the position, is suitable for the position, and will be compatible with other employees in the company.¹ Meeting the potential candidate in person provides the employer with the opportunity to assess his or her suitability for the particular position.

While it is important for employers to be able to ask a number of questions during the interviewing stage, employers must be aware of the myriad of issues that could arise and result in violations of their statutory and common law obligations, including those in relation to privacy law, negligent misrepresentation, inducement of candidates during the interview process and the *Human Rights Code* (the "Code"). This paper focuses on this latter aspect, human rights issues arising during the hiring process, and an employer's obligations under the *Code* at this initial stage of its relationship with a prospective employee.

2. Obligations Under the Code

Employment interviews are subject to the requirements of human rights legislation. The *Code* ensures that applicants are not discriminated against on any prohibited grounds. Therefore, in the job application or the interview process, employers must be careful not to directly or indirectly ask any questions that fall under the prohibited grounds of the *Code*.

Section 5(1) of the *Code* prohibits discrimination in employment on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. Several of these terms are defined in section 10 of the *Code*.

Many interviewers may not be aware that certain seemingly innocuous questions might infringe the *Code*.

¹ Randall Scott Echlin & Christine M. Thomlinson, *For Better or For Worse: A Practical Guide to Canadian Employment Law*, 2d ed. (Aurora, Ont.: Aurora Professional Press, 2003) at 17.

The following discussion is intended to assist interviewers with examples of permissible and prohibited questions based on enumerated grounds under section 5(1) of the *Code*:

Race/Colour/Ancestry/Place of Origin/Ethnic Origin

Questions regarding birth place, nationality of ancestors, spouse or other relatives; Canadian citizenship, landed immigrant status, permanent residency, naturalization, place of origin and request for proof of Canadian citizenship are prohibited questions.² So is a request for social insurance numbers or SINs, (since it can reveal information about place of origin or citizenship; you may ask for this information, however, once you have made a conditional offer of employment), birth or baptismal certificates and the name and location of schools attended are prohibited questions.³ Furthermore, questions about, or relating to, membership in organizations which are identified by a prohibited ground of discrimination (e.g. an “Anglo-Canadian” organization) are prohibited.⁴

However, questions regarding membership in a group served by a “service organization,” if membership in the group served can be justified as required to do the job, are permissible questions.

Section 24(1)(a) of the *Code* provides that a “service organization” is a religious, philanthropic, educational, charitable, fraternal or social institution or organization that primarily serves the interest of people identified by race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability. These organizations may give preference in the hiring to members of that group provided that such a preference is a reasonable and *bona fide* qualification due to the nature of the employment.⁵

For example, a denominational school may make inquiries relating to creed (i.e. membership in a particular religion) if the job involves communicating religious values.⁶

Do not ask: Any direct questions relating to the candidate’s national or ethnic origin.

Do ask: Are you eligible to work in Canada?

Do not ask: Any questions such as which primary and secondary schools the applicant attended.

Creed

Questions regarding religious affiliation, religious institutions attended, religious holidays, customs observed, willingness or unwillingness to work on a specific date which may conflict with the requirements of a particular faith (i.e. Saturday or Sunday Sabbath Days), requests for character references that would indicate religious affiliations and names of schools attended (this could also indicate religious affiliation) are prohibited questions.⁷

However, if the employer serves a particular religious group and creed is a reasonable and genuine qualification because of the nature of the employment, questions regarding creed are permissible.⁸



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² David A. Ryan & Kimberly A. Parry, ed., “Do Your Application Forms and Employment Interviews Meet Human Rights Standards?” (2007) 28 Employment Law 101 at 116. See Philip H. McLaren, *Employment in Ontario*, 2d ed., (LexisNexis Butterworths, August 2007) at 1.30.

³ Ibid.

⁴ David A. Ryan & Kimberly A. Parry, ed., “Do Your Application Forms and Employment Interviews Meet Human Rights Standards?” (2007) 28 Employment Law 101 at 116.

⁵ Philip H. McLaren, *Employment in Ontario*, 2d ed., (LexisNexis Butterworths, August 2007) at 1.33.

⁶ Ibid at 1.34.

⁷ Ibid at 1.30.

⁸ Ibid at 1.21.

Do not ask: Do you observe religious holidays that require you to take time off the job?

Citizenship

Questions about or relating to the applicant's citizenship that do not fall within the exceptions provided in other sections of the *Code* are prohibited.⁹ Where citizenship or permanent residence is required to foster participation in cultural, athletic, educational or trade activities which are restricted to Canadian citizens and permanent residents, or where an organization requires a senior executive position to be held by a Canadian citizen or someone who intends to obtain citizenship, questions relating to citizenship are permissible.¹⁰

Do ask: Are you eligible to work in Canada?

Do not ask: Where are you from?

Do not ask: Your name is very interesting, were you born here?

Sex

Questions regarding plans to get pregnant or use of birth control, and questions regarding surname (or birth name), form of address (i.e. Mr., Mrs., Miss, Ms.), and relationship to person to be notified in case of emergency or insurance beneficiary (name can be provided but not their relationship) are prohibited questions.¹¹ On the other hand, questions regarding or relating to gender, if it is a reasonable and genuine requirement for a particular job, such as employment in a shelter for battered women, are permissible questions.¹²

Do not ask: Are you planning to get pregnant in the near future?

Sexual Orientation

All questions about or relating to sexual orientation, including marital status (i.e. married, divorced, common law single or separated), spouse or partner, relationship to the person to be notified in case of emergency or insurance beneficiary (name can be given but not the relationship) are prohibited.¹³

Do not ask: Who do you live with?

Do not ask: Is your spouse or partner willing to transfer?

Age

Questions relating to age, including date of birth or request for birth or baptismal certificates, driver's licence or school transcripts, etc. that might indicate age are prohibited.¹⁴ However, if the employer serves a particular age group and/or if age requirements are reasonable and genuine to qualify for employment, questions about or relating to age are permissible.¹⁵ Furthermore, although you should avoid questions relating to age or date of birth, you can ensure that an applicant is 18 years of age or older.

⁹ Supra note 4 at 117.

¹⁰ Ibid.

¹¹ Supra note 5 at 1.21.

¹² Ibid at 1.30.

¹³ Ibid at 1.31.

¹⁴ Supra note 4 at 117.

¹⁵ Supra note 8 at 1.22.

Do not ask: I hope you don't mind, but how old are you?

Record of Offences

Questions regarding whether an applicant has ever been convicted of any offence (since this reveals a pardoned offence), has ever spent time in jail, has ever been convicted under provincial statute (*Highway Traffic Act*), or has been convicted of an offence for which a pardon has been granted, are prohibited questions.¹⁶

However, where the job requires driving (i.e. school bus driver), questions relating to record of offence may be asked to determine if the applicant has a record of convictions under the *Highway Traffic Act*.¹⁷ Furthermore, it is permissible to ask whether a person has ever been convicted of a federal criminal offence for which a pardon has not been granted.

Do ask: Have you ever been convicted of an offence under the *Criminal Code* which has not been pardoned?

Do not ask: Have you ever been arrested by a police officer or convicted of a crime under the *Criminal Code*?

Marital Status

Questions relating to marital status, including married, divorced, common law relationships, single or separated, surname before marriage, form of address (i.e. Mr., Mrs. Miss, Ms); questions about spouse, relationship to person to be notified in case of emergency or insurance beneficiary (name can be given but not the relationship) are prohibited questions.¹⁸ However, if the employer serves a particular group identified by marital status (i.e. single woman), and/or if marital status is a reasonable and genuine job requirement, questions regarding marital status are permissible.¹⁹

Do not ask: Are you married?

Do not ask: Does your husband mind you working?

Family Status

Questions relating to family status, including whether the person is married, divorced, is in a common law relationship, single or separated, maiden or birth name, form of address, children or dependents, child-care arrangements; questions about spouse, second income, relationship to person to be notified in case of emergency or insurance beneficiaries are prohibited questions.²⁰ However, questions regarding family status, if family status is a reasonable and genuine job requirement are permissible.²¹

It should be noted that section 24(1) (d) of the *Code* allows for an employer to grant or withhold employment or advancement in employment to a person who is a spouse, child or parent of the employer or an employee. Inquiries which would solicit information as to whether an applicant for employment is a spouse, child or parent of a current employee are therefore permissible.²²

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid at 1.23.

¹⁹ Supra note 4 at 117.

²⁰ Ibid.

²¹ Supra note 8 at 1.23.

²² Supra note 4 at 118. See *Code* section 24(1)(d).

Do ask: Will you be able to work the number of hours required in this job?

Do not ask: Do you have children?

Do not ask: How much time on average do you devote to your children on a daily basis?

Disability

Questions relating to disability, including questions regarding health, illness, mental disorders, physical and intellectual limitations, handicaps, or intellectual impairments, medical history, learning disability, injuries or workers compensation claims, medication, membership in a medical or patient association (e.g. Alcoholics Anonymous) are prohibited questions. Also, requirements that applicants undergo a pre-employment medical examinations, eligibility for, or possession of, a driver's license, unless there is a *bona fide* requirement (for example the position is for a bus driver), are prohibited questions.²³

Employers are required to provide reasonable accommodation, short of undue hardship, to any disabled employee. If, during the interview, the applicant requests accommodation for a disability-related need, those needs can and should be discussed.²⁴ Questions about disability-related needs should relate to the applicant's ability to perform the essential duties of the job. Any other disability related questions or requests, such as a request for a medical examination, should be raised only after a conditional offer of employment is made.²⁵

The offer of employment may be conditional upon a medical test designed to indicate the individual's ability to perform the job in a safe and satisfactory manner.²⁶ However, test subjects should not be treated as a class and each examination should be assessed on an individual basis.²⁷

Do ask: Is there anything which might prevent you from doing the job as we have described it?

Do not ask: How long have you been in a wheelchair?

Do ask: Is there any accommodation you may require?

Do not ask: Do you have a disability?

3. Conclusion

Although the interview process provides an excellent opportunity to determine the suitability of a proposed candidate for employment, a poorly conducted interview can lead to legal liability. Proper preparation, for an employer, before the interview, will include carefully crafting the questions to be asked at the interview and ensuring that all interviewers are aware of the types of questions that are prohibited. ■

²³ Supra note 8 at 1.23.

²⁴ Ibid at 1.32.

²⁵ Ibid at 1.33. See supra note 4 at 117.

²⁶ Supra note 1 at 26.

²⁷ Ibid.