



Legal Hiring for an
Inclusive Workplace

Interviewer Guide

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Behavioural Descriptive Interview (BDI) Questions

BDI questions are used in job interviews to help determine if applicants have the necessary skills and competencies. They identify behaviours related to effective job performance.

The rationale is that past behaviour is a good indicator of future behaviour. BDI questions create a pattern that takes all applicants through the same performance topics with specific questions that focus on each applicant's past experience. Each question also focuses on a desired competency area such as: communication, time management, problem solving, creativity and leadership.

BDI questions can be developed by using these stems to start each question:

- Describe a situation in which ...
- Tell me about a time when ...
- What was the (most rewarding, most difficult, most interesting) ...
- How have you assisted in ...
- What roles have you played in organizations which ...
- Give me an example of ...

To avoid discriminatory interview practices, remember to link BDI questions to the job description by designing them based on specific competencies that were outlined in the job posting or advertisement. You can also use probes to gather additional information as long as you use the same probes for all of the applicants you interview.

Below are some examples of BDI questions that are linked to the job competencies outlined in the enclosed posting for a **Senior Sales Associate with Exceptional Sales and Marketing**.

- Tell me about a time when you participated on a team project. What was your role in that project and your contribution to the team?
- Describe a specific situation when you worked with a difficult team member.
(Probe: What was the outcome and is there anything you might have done differently given this experience?)
- Describe a leadership role that you have fulfilled one of your previous positions.
- Give me an example of how you were able to develop customer loyalty in a previous sales position.
- What was the most interesting position you have held?
(Probes: Describe what was the least and most challenging about that position.)
- What was your biggest mistake and what did you learn from it?
- Tell me about a situation where you had to solve a difficult problem.
- Describe a situation in which you found a creative way to overcome an obstacle.

- Tell me about a time that you identified a need and went above and beyond the call of duty to get things done.
- Tell me about a time when you had to analyze information and make a recommendation.

General Interview Questions

There are some general questions that employers will want to ask related to the requirements of the job that may not lend themselves to BDI questions. They would include but not be limited to topics such as: professional development, related experience and education, hours of work, travel requirements, physical demands

- How do you think your previous experience and education have prepared you for this job?
- How have you developed yourself professionally in previous positions and what professional development do you think you might need for this position?
- Can you describe your current or most recent position?
- Why do you want to work here?
- Do you prefer to work by yourself or with others?
- This job requires you to travel to other locations regularly, are you able to attend off-site locations?

Additional Information for Job Interviewers

Job Applicants with Disabilities

If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer undue hardship.

Pre-employment - Medical Information

Any medical assessment to verify or determine an individual's ability to perform the essential duties of a job, should only take place after a conditional offer of employment is made, preferably in writing. This gives an applicant with a disability the right to be considered exclusively on her or his merits during the selection process. It is advantageous to both the employer and prospective job applicants if the employer were to disclose information on any specific and *bona fide* medically related requirements of a position at an early stage of the recruitment process.

Example: A Police Services Board may stipulate in a recruitment advertisement that applicants must meet a minimum vision standard without corrective lenses to qualify for selection as long as it is a *bona fide* occupational requirement and accommodation is provided.

Driver's Licence Requirement

Keep in mind a driver's licence contains personal information about an individual which could lead to the classification of a job applicant according to a prohibited ground of discrimination. Therefore, unless a driver's licence is required to enable a person to perform the essential duties of a job, it should not be requested in an application form or during an employment interview.

Example: A driver's licence contains information about a person's date of birth. Requesting a job applicant to provide a photocopy of his/her driver's licence would yield information about the applicant's age, which would be discriminatory.

Similarly, information on a driver's licence could yield information about whether or not an applicant has a disability. This in turn could lead to the classification of applicants as members of a group identified by a prohibited ground of discrimination.

If driving is an essential duty of the job, a question relating to whether or not an applicant is licensed to drive, and/or the type of vehicle the applicant is licensed to drive, would be appropriate. This can include the addition of the following item on the application form or job advertisement.

This position requires the successful candidate to have a valid driver's licence. The successful candidate would have to provide proof that s/he has a valid driver's licence upon being hired.

Requesting Job-Related Sensitive Information

(refer to Human Rights Code in your Province or Territory)

The following types of information should only be requested if they are *bona fide* requirements because of the nature of the job. Due to the sensitive nature of this information, only request it after making an offer (preferably in writing) of employment:

- driver's licence (may reveal disability, age, sex and gender identity)
- birth certificate (may reveal age, sex and gender identity)
- work authorization issued by Immigration Canada (contains information on date of arrival in Canada)
- educational or professional credentials (may reveal information on place of origin)
- Social Insurance Number (may contain information on date of arrival in Canada and residency status)
- information about health or age necessary for pension, disability, superannuation, life insurance and benefit plans [may reveal disability, age, sex (pregnancy) or gender identity]
- police record checks (may reveal information about a person's mental health)
- psychological testing, if legitimately required for assessing ability to do the job
- next-of-kin or person to be notified in case of emergency (may reveal family status, marital status, sexual orientation)
- insurance beneficiary (may reveal family status, marital status, sexual orientation)
- accommodation needs.

Keep any such information confidential.

a) Accommodation in terms of physical demands and other essential duties

Once a conditional offer of employment is made, a person can be asked to review the essential duties of the job and tell you if they need accommodation to perform the essential job duties. The employee does not have to disclose disability-related or other needs or medical information that do not relate to the essential duties of the job.

Employees should not be singled out for questioning based on their appearance – instead, ask all employees the same questions about accommodation. Link the request for information to the employer’s accommodation policy, and indicate that accommodation requests may be related to one or more *Code* grounds. Clearly advise employees why this information is being collected – such as to help you accommodate any identified *Code*-related needs to the point of undue hardship.

Example: An employer has a form that it asks its employees to fill out after being hired. On this form, it asks, “Do you consider yourself to be disadvantaged in employment by reason of any persistent physical, mental, psychiatric, sensory or learning impairment?” While it is not inappropriate to ask for this kind of information after hiring, the question itself is hard to understand, the words used seem negative and it is not clear why such a question is being asked, as there is no mention of accommodation. The end result is that employees who do have disabilities tend to answer “no” to this question, and start their jobs without appropriate accommodation.

Some employees may need accommodation to meet the job’s essential physical demands. The employer is entitled to expect that, with accommodation, an employee will be able to do the essential job duties, as long as these duties are *bona fide*. Employers sometimes use physical demands analyses to assess an employee’s ability to perform the physical requirements of the job. These should, however, be used with care since they are often developed with an able-bodied person in mind. Analyses should be designed or re-designed so that they are not exclusionary, and accommodation should be built into the analyses themselves.

b) Medical tests

In the past, employers often screened out applicants with disabilities based on medical information on application forms, or from pre-employment medical exams. The Commission takes the position that requiring such information as part of the application screening process violates subsection 23(2) of the *Code*.

Medical assessments to verify or determine a person’s ability to perform essential job duties should only take place after a conditional offer of employment is made, preferably in writing. This allows an applicant with a disability the right to be considered exclusively on her or his merits during the selection process.

Information on medical tests may have an adverse impact on people with disabilities. Therefore, employers should only get information from medical testing on the applicant's ability to perform the essential job duties and any restrictions that may limit this ability. The applicant must give the employer enough information to help them provide accommodation.

The employer may be placed in a vulnerable position if he or she directly receives any information about an applicant's medical condition. This information leaves open the possibility for an allegation to be made that later decisions made by the employer, such as to hire someone else, or to discipline or terminate the employee, were based on that information.

Therefore, it is the view of the Commission that to protect the employer from allegations of discrimination, as well as the applicant or employee from discriminatory practices, medical information should remain with the physician and away from an employee's personnel file. When needed by the employer, the employee's physician can share relevant information (for example, restrictions in the ability to perform essential duties), while excluding information that may identify a disability.

Some companies make sure that such information is kept separate from employment decisions by having designated staff, such as nurses, responsible for safeguarding any medical information that may be provided by an employee's doctor and facilitating accommodation. Requirements under privacy legislation may apply to receiving, storing and disposing of employee medical information. For information on privacy legislation, see Appendix B - "Human rights in the workplace: which laws?" (<http://www.ohrc.on.ca/en/human-rights-work-2008-third-edition/appendix-b-%E2%80%93-human-rights-workplace-which-laws>)

The following checklist sets out an employer's obligations when putting medical testing in place:

1. Have job applicants been notified of testing before they start the job?

Where medical testing is appropriate, the employer should notify job applicants of this requirement at the time the job offer is made. Make clear to the applicant when and why such testing might be needed.

2. Is there an objective basis for testing?

The employer should make sure that the medical testing is needed and appropriate. To decide when testing is needed, employers, where applicable, should consider the following questions, among others:

- a) Is the testing justified objectively in terms of job performance? Is there a rational connection between testing and job performance?
- b) Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by the disability will adversely affect the safety of co-workers or members of the public?

3. Have arrangements been made for competent handling of test samples?

Medical testing must be performed by qualified professionals and the results analyzed in a competent laboratory. Also, employers are responsible for making sure the samples taken are properly labelled and protected at all times.

4. Have the results of the test been reviewed with the employee?

Procedures should be put in place for the physician to review the test results with the employee concerned.

5. Are the test results kept confidential?

To protect the confidentiality of test results, all health assessment information should remain exclusively with the examining physician and away from the employee's personnel file. Such information should be safeguarded in accordance with applicable privacy legislation and practices.

For more information, see the discussion of bona fide occupational requirements in Section IV-2 – “Setting job requirements.”

c) Psychometric and psychological testing

Employers sometimes use tests that assess psychological or personality profiles of job applicants. The use of these and other behaviour profiles as part of a screening process before hiring raises concerns about human rights violations. Such tests should never be administered before a conditional offer of employment, and even then should be approached with caution.

Subsection 23(2) of the *Code* prohibits the use of an employment application form or a written or oral inquiry that directly or indirectly classifies an applicant on the basis of a prohibited ground of discrimination. This also applies to psychological profiles and testing. The validity of behavioural testing as a tool to predict on-the-job performance may be subject to a complaint under the *Code*.

There are two major issues with the use of behavioural profiles. The first is whether using such a screening tool directly discriminates based on any of the *Code* grounds. Direct discrimination could happen if the behavioural profile test directly identifies or classifies an applicant on the basis of a prohibited ground of discrimination. A test, for example, that asks about a person's religious beliefs is directly discriminatory and is not allowed.

The second issue concerns reasonable and bona fide behaviour profiles that might infringe the *Code* if they exclude a group of persons who are identified by a prohibited ground – for example, if members of certain ethnic groups are accidentally yet consistently screened out by a test that favours other cultures.

Any test should be a reasonable and bona fide method of assessing an applicant's ability to do the job. Otherwise it should not be used. Tests should be tailored to actual job duties. Take care to make

sure that tests take into account the diverse ways people can successfully perform jobs and that appropriate accommodation is provided. There is an obligation to accommodate the needs of the

group the person is a member of to the point of undue hardship, while considering the cost, outside sources of funding and any health and safety requirements.

Avoid testing that seeks to assess personal interests, attitudes and values. If these tests are legitimately needed to assess ability to perform a job, use them with great care to make sure they do not favour certain cultures or genders. Many such tests are outdated and may have been created based on stereotypes or biases relating to *Code* grounds. Before giving a test to current or potential employees, research how the test has been created and assess whether it is reliable, up-to-date, valid and complies with the *Code* and any guidelines or practices established by professional organizations such as the Canadian Psychological Association. This will be relevant if a complaint is filed. Even if a test is fair, an employer will need to put in place measures to minimize the impact of unintentional bias on the part of persons scoring candidates' answers. One option is to have more than one person score each candidate.

d) Pre-employment drug and alcohol testing

It is a legitimate goal for employers to have a safe workplace. One method sometimes used by employers to achieve that goal is drug and alcohol testing. In recent years, human rights issues related to drug and alcohol testing have become increasingly prevalent in Canadian workplaces, especially those affiliated with companies operating in other jurisdictions such as the U.S. However, such testing is controversial and often gives rise to claims of discrimination.

Drug or alcohol dependency as a disability

Under the *Code*, drug and alcohol dependencies - as well as perceived dependencies - are a form of disability. Persons with disabilities, or persons who have had disabilities, are protected against discrimination in the workplace or in a hiring process.

Example: An employer refuses to promote an employee because of the perception that the employee has an alcohol dependency. Because of this perception and resulting action by the employer, the person's right to equal treatment under the *Code* may have been infringed.

Example: A person who had a drug or alcohol dependency in the past, but who no longer suffers from an ongoing disability, is still protected by the *Code*.

i) Basic principles:

Drug and alcohol testing is at first glance discriminatory under Canadian human rights law. Employers can, however, justify discriminatory rules if they can meet the three-part test discussed earlier under

Section IV-2 – "Setting job requirements – Make sure that job requirements are reasonable and made in good faith"

Applying the three-part test to drug and alcohol testing, consider the following questions, where applicable:

1. Is there an objective basis for believing that job performance would be impaired by drug or alcohol dependency? In other words, is there a rational connection between testing and job performance?
2. Is there an objective basis for believing a specific employee's unscheduled or recurring absences from work, or habitual lateness for work, or inappropriate or erratic behaviour at work are related to alcoholism or drug addiction/dependency? These factors could demonstrate a basis for "for cause" or "post incident" testing provided there is a reasonable basis for drawing these conclusions.
3. Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by alcohol or drug abuse or dependency will adversely affect the safety of co-workers or the public?

Drug and alcohol testing that has no proven relationship to job safety and performance has been found to be a violation of employee rights.^[41] A relationship or rational connection between drug or alcohol testing and job performance is an important component of any lawful drug or alcohol testing policy. The policy must not be arbitrary in terms of which groups of employees are subject to testing.

Example: An employer operating a shipping company only tests new or returning employees for alcohol but not other employees. This would not be justifiable. At the same time, testing employees in safety sensitive positions only (for example, truck drivers and fork-lift operators) may be justifiable.

ii) Pre-employment testing is a form of medical examination:

Testing for alcohol or drug use is a form of medical examination. In general, employment-related medical examinations or inquiries, conducted as part of the applicant screening process, are prohibited. Alcohol or drug testing is allowed in restricted circumstances on the job. See Section IV-9k) – “On-the-job drug and alcohol testing.” Before employment, such testing must comply with the following principles:

1. Pre-employment medical examinations or inquiries at the interview stage should be limited to determining a person's ability to perform the essential job duties.
2. To use a testing program before hiring, the employer must be able to show that pre-employment testing provides an effective assessment of the applicant. It has long been the Commission's view that employers should not do pre-employment testing that does not actually measure impairment. Recent court decisions state that pre-employment safety-certification drug testing by urinalysis may be acceptable in some cases, as long as accommodation is provided following positive test results. The extent to which pre-employment testing is acceptable is a matter before the courts. Employers should proceed with caution.
3. Where drug or alcohol testing is a valid requirement relating to essential job duties, the employer should notify job applicants of the need to undergo this testing when they make an

offer of employment. Employers should make clear to applicants the reasons why such medical testing is needed.

4. The employer's drug and alcohol policy should allow for accommodating people who receive positive test results.
5. If applicants or employees request accommodation to enable them to perform the essential job duties, the employer must provide individual accommodation unless it is impossible to do so without causing undue hardship.

e) Gender identity-related information

Gender identity is a personal characteristic that may or may not be known to others. While most people are not concerned about others knowing their gender identity, this may not be the case for transsexuals and transgenderists.

An employer or service provider who legitimately requires and collects personal information that either directly or indirectly identifies a person's sex must ensure the maximum degree of privacy and confidentiality of the information. This is because the designation of sex on documents such as a birth certificate or driver's licence may be different from a person's gender identity. This applies in all situations and cases including employment records and files, insurance company records and medical information. The information might be needed to enable an employee or individual to claim or register for benefits or for other purposes.

To protect the person's privacy, all such information should remain exclusively with designated staff and be locked in a filing system. An employer or service provider who fails to properly safeguard information about a person's sex or gender identity may be found to have infringed the *Code* if the employee is subjected to discrimination because of his or her gender identity.

f) Police record checks

Persons with mental illness, or who have had a mental health crisis in their lives, may have been taken to hospital by the police under the authority of Ontario's *Mental Health Act*. The records resulting from these non-criminal police contacts may have a lifelong impact when people apply for employment or a volunteer position.

The Commission recognizes that organizations and police forces have a responsibility to protect the public and maintain safety. However, if not conducted and used properly, police background checks can lead to human rights concerns.

Organizations are increasingly asking job applicants and volunteers to consent to police background checks. In some cases, these are necessary to protect people who may be vulnerable, such as for positions that involve working with children, elderly people or persons with certain types of disabilities. In other cases, the checks may not be needed, but rather preferred as an additional screening tool. Either way, the provisions of the *Code* apply if the check has an adverse impact on persons with mental disabilities who have had prior non-criminal police contact. It is therefore very

important for individuals and organizations requesting background checks to understand the human rights implications of this information.

Section 23 indicates that a person's suitability for a job or a volunteer position should not be based on assumptions related to *Code* grounds, such as mental illness. A key human rights concern arising from police background checks is that information about contacts related to the Ontario *Mental Health Act* are stored, including voluntary and involuntary transfers to medical facilities.

Also, sections 11 and 17 of the *Code* make it clear that even neutral requirements that do not appear to target any individual or group may still have an unintended discriminatory effect. Police background checks may have an adverse impact on racialized persons or persons with mental illness who may disproportionately have encounters with police because of racial profiling or discrimination.

Example: A racialized man is charged with causing a disturbance, even though other White youths engaged in worse behaviour are not. He cannot afford a lawyer, so he pleads guilty without raising his allegations of racial profiling. When he applies for a job that requires a criminal records check, this incident will be flagged and he may be viewed as ineligible for the job.

Because of the potential for an adverse human rights impact, police background checks should only be requested of individuals where it is a reasonable and *bona fide* requirement because of the job or volunteer position being applied for. While an organization may prefer to have as much information as possible about someone, human rights concerns prevail.

An organization that wants to run a background check must be prepared to justify the need using the test set out by the Supreme Court of Canada for assessing whether a policy, practice or requirement is reasonable and *bona fide*. See Section IV-2a(i) – “Test for *bona fide* requirement.” An organization that can show a legitimate need for conducting a background check should only request a check after it has made a decision to offer a candidate the job, conditional on a satisfactory outcome of the background check. In other words, such checks should be the last step in a recruitment process. They should be a final measure to make sure a candidate is suitable. See also the Commission's [Draft Policy on Mental Health Discrimination and Police Record Checks](#), posted on the Commission's website for consultation as of February 11, 2008, and any final version that may be later approved by the Commission.

<http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/6-requesting-job-related-sensitive-information>

Interviewing and Making Hiring Decisions

This section describes the human rights issues that commonly arise in interviews, some of the types of questions that may or may not be asked, and how to make hiring decisions that do not contravene the *Code*. Supervisors, managers and human resources staff who are responsible for making hiring decisions must be trained and educated to identify and eliminate discrimination, harassment and barriers to advancement for persons protected by the *Code*.

a) Employment agencies/search firms

An employer cannot use an employment agency to hire people based on preferences related to race, sex, disability or other *Code* grounds. This is specifically prohibited in section 23(4) of the *Code*. Employment agencies cannot screen applicants based on discriminatory grounds, and are not allowed to keep a record of client "preferences" of this kind. When using an employment agency or search firm, employers should make sure that the agency or firm is aware that they are an equal opportunity employer and wish to see a broad range of candidates.

b) The hiring process must be fair

An employer should aim for a fair process that focuses on each candidate's ability to perform the essential job duties. A best practice is to have a multi-person panel conduct formal interviews. Ideally, the interview panel should reflect the diversity available in the organization. They should develop set questions in advance, and ask all applicants the same questions. The questions should be based on the job's essential duties and bona fide requirements. Before interviews start, create an answer guide showing the desired answers and a marking scheme. Then, each member of the interview panel can record and score each candidate's answers against this guide.

This kind of approach will help employers avoid making decisions based on subjective considerations such as whether the person exhibits "confidence" or is viewed as "suitable." Employers who rely on these kinds of subjective assessments are vulnerable to claims of discrimination. Without objective criteria, an employer will have trouble explaining why some candidates were or were not qualified for the job if a human rights complaint is filed.

Example: A woman is denied access to a job normally held by men. Even though she has previously done the job, she is viewed as not having the skills to do the job. The employer did not develop or rely on objective assessment criteria, so it was unable to show that its decision was not based on discriminatory stereotypes.

Similar considerations apply to written tests that applicants are asked to complete during a hiring process. The tests given to all applicants should be identical and scoring should be done based on an objective marking scheme determined before answers are graded. Any written test should also be based on the job's essential duties and *bona fide* requirements.

For both interviews and written tests, the process should be the same for all candidates and determined in advance, subject to accommodation needs. For example, a hiring panel may decide that all candidates can be prompted if their answers in an interview do not correspond to the question asked. Or, in a written test, the employer may indicate that answers will be assessed based only on the information the candidates provide. If so, the candidates should be told to make sure that they address all parts of each question. Employers cannot ask some candidates questions they do not ask other candidates.

Example: An employer asks racialized candidates whether they would be able to deal with racial slurs while it does not ask this of other applicants. This was found to be discriminatory. Instead, the employer might have asked all candidates how they would deal with difficult clients or challenging customers.

How far an applicant goes in a hiring process should not depend on informal assessments by individual interviewers. Staffing decisions based on informal processes are much more likely to lead to subconsciously biased decision-making. For example, conducting an interview by chatting with the applicant to see if he or she shares similar interests and will “fit” into the organizational culture may present a barrier for persons who are or appear to be different than the dominant norm in the workplace. If this is used as a starting point for deciding whether candidates will be seen by senior decision-makers, this creates a major barrier to persons protected by the *Code*.

Example: A firm’s hiring process for students is to have them all interviewed individually by a number of associates and partners. Interviewers are not given a set list of questions or hiring criteria. Instead, each candidate’s resume is used as a starting point for a free-flowing discussion of topics of interest to the interviewer, such as which school the person studies at and where they play golf. At the end of the interview, candidates are ranked based on how well they “fit” the firm’s image. Ultimately, access to the senior decision-makers depends on the candidate being assessed as a good fit by the previous interviewers. This type of process is extremely vulnerable to claims of discrimination.

Deviating from the usual hiring process can indicate discrimination even if a person excluded because of a *Code* ground would not have been the successful applicant in the absence of discrimination.

Example: A person shows up for an interview in a wheelchair and is told that she need not attend the interview. The failure to individually assess this applicant is discriminatory even if she could not perform the essential duties of the position with accommodation and is less qualified than the successful candidate.

c) Offer and provide accommodation for the interview or test

Employers must accommodate applicants’ needs related to Code grounds for any part of the interview or hiring process, including tests. The employer must provide appropriate accommodation subject to the test of undue hardship. See also Section IV-8 – “Meeting the accommodation needs of employees on the job” for more information on the principles involved.

The Commission recommends that employers offer accommodation to all candidates who need it when inviting them for an interview or test. A person who needs accommodation to take part in an

interview is responsible for advising of this need in enough detail, and co-operating in consultations to enable the employer to respond to the request before the interview or testing. There is no set formula for accommodation. Each person's needs are unique and must be considered individually.

Example: A government employer invites 30 candidates to come in to write a written test for a position in the Communications department. Candidates are told in advance that they will have one hour to read some materials and write two short documents similar to those they would be asked to do on the job, such as a brief or a press release. They are asked to identify any needs for accommodation. One person identifies a need for a computer with screen-reading software, and another asks for more time to do the tasks. The employer has enough time to ask for more information, if needed, and to plan to meet these needs so candidates can be fairly assessed on their abilities.

Example: An employer has scheduled candidates for interviews. When one person is told of her interview time, she says she is unavailable due to caregiving responsibilities, and asks for another time. The manager in charge of hiring then says that if she cannot attend, she will no longer be considered for the job, as there are many other candidates who are interested. Although the applicant has not specifically requested “accommodation because of family status,” if a complaint was filed, this employer would be seen to have failed in its duty to accommodate to the point of undue hardship.

Example: A person applies for a position online and is asked to take part in a telephone interview. The person sends an e-mail asking that the interviewer call via TTY or the Bell Relay Service as an accommodation in the interview process. In response, she is told that she is unsuitable for the position because the position involves making telephone calls to customers. The employer may be found to have failed in its duty to accommodate. Also, the applicant has been denied an opportunity to demonstrate her ability to meet the essential duties of the position. This is discriminatory.

d) Make sure interview questions comply with the Code

When inappropriate questions relating to *Code* grounds are asked in an interview, an inference may be made that a decision not to hire was influenced by such questions. Employers could face a finding of discrimination even if there is no intention to discriminate. The fact that improper questions have been asked is sufficient to prove discrimination, even if the applicant is ultimately given the job.

Example: A hiring manager interviewing a female applicant starts off by casually discussing his family and asking if she has any children of her own. Throughout the interview, the applicant is distracted, wondering if her family status is going to be an issue for the employer. This may be a violation of the Code, even if this information is not taken into account and the applicant is offered the job.

Take care to make sure that interviews are only to get information about qualifications and job requirements needed for the hiring decision.

Section 23(2) prohibits employers from asking questions that directly or indirectly classify or indicate qualifications by a prohibited ground of discrimination. On the other hand, section 23(3) permits asking questions at a personal interview about a prohibited ground of discrimination when

discrimination on such ground is permitted under the *Code*. This means that at the interview stage, the employer has more flexibility to ask questions about prohibited areas of discrimination, provided that the questions relate to exceptions and defences that are provided for in the *Code*. These exceptions relate to special service organizations, special programs and jobs whose requirements are linked to specific *Code* grounds.

i) Hiring based on Code grounds for a special program:

When an employer meets the requirements of a special program, they will be able to target and hire persons based on specific *Code* grounds. For more information on special programs, see Section IV-1c) – “Plan and implement a special program.”

At the interview stage, an employer can ask questions related to *Code* grounds to assess the applicant’s eligibility for a special program under section 14 of the *Code*. If a special program exists, it would be appropriate to ask relevant questions on a job application or in an interview to determine the candidate’s eligibility for participation in the special program. For example, an employer can ask questions relating to membership in a group experiencing hardship or disadvantage to determine if the person meets the provisions of a special program. Make sure to provide the person with information about the special program when asking these kinds of questions.

ii) Hiring based on Code grounds if a special employment exemption applies:

When an exemption under section 24 applies, an employer can hire persons based on specific *Code* grounds, as long as the requirement is reasonable and bona fide based on the nature of the job. In such situations, it would be appropriate to ask relevant questions on a job application or in an interview.

Example: A social service organization serving people who are deaf, deafened or hard of hearing may be allowed to prefer a community liaison officer who has a hearing disability.

The employer is allowed to ask questions relating to *Code* grounds in an interview, and to rely on them in making hiring decisions, if it meets the criteria for one of the following exemptions:

Special interest organization: Subsection 24(1)(a) allows certain special interest organizations to prefer hiring people based on their membership in certain groups. Special interest organizations might include:

- religious organizations that follow a particular system of faith and worship, such as a church or religious order
- philanthropic organizations that perform acts of benevolence, including many organizations that are registered as charities under the federal Income *Tax Act*

- educational organizations such as schools, colleges and other institutions that offer instruction and training of a moral, religious, vocational, intellectual or physical nature
- fraternal organizations formed for mutual aid or benefit but not for profit
- social organizations providing social or cultural benefits (for example, a cultural club serving a particular ethnic group).

For an organization to qualify for the exemption, it must also meet the following conditions:

- be primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability
- employs only, or gives preference in employment to, persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability
- the qualification must be reasonable and *bona fide* because of the nature of the job.

If these conditions are met, it may be permissible to hire someone who is identified or preferred based on a ground in the *Code*.

Example: A denominational school is hiring teachers and caretaking staff. Questions about religious membership would be permitted if the job involves teaching religious values to students. So such questions would be allowed for teachers, but not for the caretaking staff.

Reasonable and bona fide link to *Code* grounds such as age or sex: Subsection 24(1)(b) allows discrimination in employment when the grounds of age, sex, record of offences or marital status are reasonable and *bona fide* qualifications because of the nature of the job.

Example: A women's shelter advertises for support counsellors to women experiencing violence and states that applications will only be accepted from women. In this situation, the nature of the work would mean that gender could be a reasonable and bona fide requirement of the job.

Individual hiring for self, spouse or child who is "ill, aged or infirm": Subsection 24(1)(c) allows an individual to discriminate based on all prohibited grounds listed in section 5, if the primary duty of the job is to attend to the medical or personal needs of the person, of an ill child or an aged, infirm or ill spouse or other relative.

Example: A man hires a male live-in caregiver for his father who has severe disabilities. Despite receiving applications from several qualified women, his father would prefer a male attendant and this has been taken into account in the hiring process. This is permissible.

Nepotism or anti-nepotism policies: Subsection 24(1)(d) allows an employer to grant or withhold employment or advancement to a person who is the spouse, child or parent of the employer or an employee.

iii) Asking about the applicant's ability to do essential duties of a job:

In an interview, the employer can expand the scope of job-related questions to determine the applicant's qualifications or ability to perform the essential job duties. If, during an interview, the applicant asks for on-the-job accommodation for needs such as those relating to religion or pregnancy, these kinds of needs may be discussed at the interview stage. If the person identifies disability-related needs as an issue in an interview, disability and accommodation measures related to

the essential job duties can be discussed. Other than at an applicant's request, only discuss on-the-job accommodation after making a conditional offer of employment.

e) Making non-discriminatory hiring decisions

The decision-making process should be uniform, consistent, transparent, fair, unbiased, comprehensive and objective. Answers provided in an interview or written test should be scored against pre-set criteria that are based on the essential job requirements. Once a hiring decision is made, an organization should be able to document non-discriminatory reasons for hiring or not hiring each candidate.

Written records from the interview and the entire job competition should be kept for at least six months if no complaint about the process is made, and longer if a human rights claim is made (until the claim is resolved in the courts or before the Human Rights Tribunal). Unless there is a specific reason to destroy competition records, it is in an employer's interests to retain these documents as it will be better able to respond if a human rights claim is filed. Employees often choose not to "rock the boat" by filing a human rights complaint challenging hiring processes until after they have found another job or the final incident of discrimination, such as being fired.

Example: A Black employee with a disability applies for promotions in 2002, 2005 and 2006. When he returns from a disability leave in 2007, he is fired. The reason given is that he does not have management potential and cannot continue in his current position due to a company re-organization. He files a human rights complaint alleging discrimination in all three job competitions and his termination from employment. As long as his complaint is filed within the applicable deadline, all of his allegations would be examined.

Employers must make sure that only information about qualifications and job requirements is considered when making hiring decisions. If an applicant has volunteered information relating to *Code* grounds during the hiring process, decision-makers should not consider this information. In these cases, employers should be very careful about assessing the candidates based on legitimate factors. The only time an employer can consider information related to *Code* grounds is when one of the *Code* exceptions applies.

When deciding whether to offer someone a job, employers should not take into account the fact that a candidate will not be able to start work on an anticipated start date due to a maternity, parental or disability leave. If the most qualified candidate is not immediately available, make alternate

arrangements to fill the position in the interim. As with other forms of accommodation, this would be subject to the undue hardship standard.

Example: A school board has a permanent vice-principal position available as of September. The top candidate is on a parental leave until January of the following year. Unless there is evidence of undue hardship, it would be discriminatory for the school board to decide not to offer this candidate the permanent position for this reason.

A decision-making process must not have the effect of excluding any group identified by *Code* grounds, whether overtly or covertly.

Example: An employer rejected a Black candidate for a job after meeting her. He was visibly shocked and turned her down flat, without even asking about her credentials. When asked what was wrong, he said something about maintaining the company image.

Example: An employer narrows down the pool of applicants from 10 to three who have Canadian experience. One of these candidates is awarded the job. The seven who were screened out because they did not have Canadian experience could file human rights claims alleging discrimination based on race and race-related grounds.

While required qualifications may legitimately change from time to time, take care to make sure that any changes to the decision-making criteria will not have discriminatory impacts on applicants.

Example: Applicants for tenure track positions at a university are normally assessed according to their history of publications, research grants and teaching evaluations. When assessing candidates, a selection committee decides not to apply these requirements and instead relies on the subjective assessment of “potential.” Ultimately, a new graduate who is White is hired for a tenure track position over a more accomplished racialized candidate who has been recognized internationally for his work at the university. This raises an inference of discrimination.

An organization should be able to provide a non-discriminatory reason for not hiring a person. Employers should avoid telling an untruth to spare an applicant’s feelings, as this may lead him or her to suspect that discrimination is in fact behind the decision not to hire. Even if a complainant is not the most qualified, discrimination may be found when he or she is given a discriminatory reason for the employer’s decision.

Example: An applicant scores 19th out of 20 in a fair job competition, and positions are awarded to the top 14 candidates. The employer tells the applicant that he was not a “good fit” to spare him from knowing that he actually scored second lowest on the competition. The applicant is led to believe that he scored well on the test but that he was not hired because of subjective considerations such as age or race. Even if the documents and other evidence support the employer’s case, the employer may need to spend time and resources defending against this complaint.

i) Discrimination in the hiring process:

In general, discrimination in hiring may be identified when a qualified person is turned down for a job that is then given to another person who is not similarly protected under the *Code*. However, discrimination in the hiring process may also be established even if a particular person protected by the *Code* would not have been the successful candidate without the discrimination. For example, if two candidates are equally qualified and the non-racialized person is selected, the organization will need to provide a non-discriminatory explanation for not hiring the racialized person if a human rights claim is filed. As well, discrimination may be found when a qualified candidate is protected under the *Code*.

Bias or stereotypes in the decision-making process may lead to eliminating candidates on the basis of grounds protected under the *Code*. The following list provides a few examples of hiring decisions that may be tainted by discriminatory considerations:

- **Rejecting applicants because they do not match the “company image” or “fit” the organization’s culture:** This could disadvantage persons identified by race and race-related grounds, older applicants, persons with disabilities or other people who are easily identified as not belonging to the dominant group.
- **Not hiring someone due to a perceived lack of “career potential”:** This requirement tends to adversely affect older applicants, especially where they are applying for “entry-level” type jobs.
- **Refusing an applicant who has “too much experience” or who is “overqualified”:** Turning away candidates who are “overqualified” may sometimes have an adverse effect on older candidates, people who are seeking to re-enter the workforce after lengthy absences (such as people with disabilities or who have caregiving responsibilities), and newcomers to Canada.
- **Assuming that a person is not suitable without fully assessing their qualifications:** Persons with disabilities may be affected by “social handicapping” when they are presumed to be unable to do the job, even though their disabilities are not relevant. This may also affect older candidates, women and racialized persons.
- **Eliminating applicants because their backgrounds contain gaps:** This can be a particular problem for older women who have re-entered the workforce after childrearing and have had to retrain. This may also be a barrier for persons with disabilities who were out of the workforce for an extended time for medical reasons.
- **Viewing an applicant as unsuitable because they needed accommodation in the hiring process:** When making hiring decisions, employers should not take into account whether a person has requested accommodation during the hiring process.
- **Perceiving that an applicant is trouble or will somehow be disruptive because they have objected to discriminatory comment or conduct in the interview:** It is reprisal for a qualified applicant to be penalized for reacting to discriminatory comment or conduct related to a *Code* ground in an interview. For example, an employer asks an applicant whether she is single. She says that this is not relevant and asks that the interview focus on her qualifications. As a result, she is viewed as not having “people skills” and is no longer considered for the job.
- **Taking into account discriminatory customer preferences:** If an employer believes that customers would object to a person being hired due to their membership in a group protected

by the *Code*, it is not allowed to take this into account in a hiring process. For example, it would be discriminatory for a manager of a small business office serving mostly White clientele to reject a Black candidate because he believes that customers would be uncomfortable being greeted by a racialized receptionist.

Employers should make sure that persons assessing or rating candidates are trained to identify and correct for bias based on age, social class, life experience and other personal factors that may affect how they view, and ultimately score, candidates.

Example: In an airline’s hiring process, all candidates were assessed on criteria such as “assertiveness,” “teamwork” and “ability to have fun.” Although these were age-neutral on their face, bias was introduced through the subjective views of the assessors, many of whom were under age 35. The assessors tended to choose candidates with the same age, social class and life experience as they did. Thus, workers over 35 years of age were disadvantaged compared to workers under age 35.

Employers should also make sure to review and assess the qualifications of all candidates equally. When a decision-making process is cut short, take care to make sure this is not linked to *Code* grounds, and it will not have a more severe impact on persons protected under the *Code*.

Example: Some candidates are viewed as undesirable because of their perceived race, ethnic origin, disability, sexual orientation, family status or other *Code* ground. The employer does not review their qualifications in as much detail as other candidates. The employer also decides to skip the reference check that is normally done. If proven, these changes from the normal process would lead to a finding of discrimination regardless of whether these candidates ultimately would have been successful if their qualifications were assessed fairly.

f) Specific concerns based on individual *Code* grounds

i) Age:

Under subsection 24(1)(a) of the *Code*, questions about age are allowed if the employer is a special service organization that serves a particular age group. Special service organizations are defined as religious, philanthropic, educational, fraternal or social in nature, serving mostly the interests of certain age groups. Employers can hire persons based on their age if age is a reasonable and *bona fide* job requirement.

Example: A youth group is hiring a social coordinator and the organization wishes to hire a person under age 25. The group may be able to do so, if it can show that this is a *bona fide* job requirement.

Even if an employer is not considered to be a "special service organization," it can still make distinctions based on age if age is a reasonable and *bona fide* qualification because of the nature of the job. If so, then the exemption under subsection 24(1)(b) of the *Code* may apply. No other questions or statements related to age are allowed.

Comments on the applicant's appearance and/or health or suggesting that the person may not fit into a youthful work culture may indicate discrimination on the basis of age and should always be avoided. The following types of statements can be reasonably be interpreted as euphemisms for age, or indirect ways of making inappropriate age-related comments:

- "Do you think you can handle this job?"
- "It takes a person who is full of vim and vigour."
- "We are looking to rejuvenate the workforce."

ii) Citizenship:

Employers can ask if a person is legally entitled to work in Canada. Avoid asking for information on nationality, place of birth or ethnic origin, even if these are required by the organization responsible for licensing the applicant's occupation. Other than three specific situations described below, employers cannot ask for information about citizenship.

- Citizenship requirements imposed or authorized by law
Section 16(1) of the *Code* indicates that questions about citizenship are allowed if a citizenship requirement is imposed or authorized by law for the particular job. If there is a legal requirement for citizenship, or other qualifications that have to be certified or acquired in this country, the law would have to be reasonable and non-discriminatory. Employers should note that compliance with laws from another jurisdiction does not entitle an employer to rely on section 16(1). See also i) – "Citizenship" in Section III-3 – "Grounds of discrimination: definitions and scope of protection."

Example: A Canadian employer requires all employees to hold only Canadian or American citizenship and asks about this in interviews. As this requirement arises only under U.S. laws, these types of questions would be viewed as being contrary to the Code.

- Promoting participation of citizens and permanent residents
Questions about citizenship or permanent resident status are also allowed in some cases under subsection 16(2) of the *Code*. An example is when a requirement of Canadian citizenship or permanent residence has been adopted to promote participation in cultural, educational, trade union or athletic activities to other citizens or permanent residents.
- Senior executives
Employers can also ask candidates for the chief or senior executive positions questions about their Canadian citizenship or residence. Subsection 16(3) of the *Code* allows these questions to be asked if the organization has adopted a requirement that such senior executives be Canadian citizens or live in Canada with the intention to get Canadian citizenship.

iii) Race and race-related grounds:

Questions about "Canadian experience" sometimes pose particular problems for recent immigrants, and may have an adverse impact on persons based on their place of origin, ethnic origin or race.

Employers should ask questions to assess whether candidates have trade or professional qualifications without asking about Canadian experience or stating that Canadian experience is preferred.

In an interview, employers should avoid asking questions or otherwise commenting on the applicant's:

- presence or absence of Canadian experience
- landed immigrant status, permanent residency, naturalization or refugee status
- place of birth
- affiliation with a particular "community" or where the applicant "comes from"
- membership in organizations such as cultural or ethnic associations
- name and/or the applicant's appearance
- name and location of schools attended.

Special service organizations that are religious, philanthropic, educational, fraternal or social may employ only people from certain racialized groups, if the organization serves mostly their interests. In these cases, employers can hire persons based on race, place of origin, ethnic origin. This exception does not, however, extend to citizenship and is only permitted if membership in the protected group is reasonable and *bona fide* because of the nature of the job.

Example: Recruiters for a social organization that mainly serves Aboriginal communities and seeks to hire an employment counsellor may prefer a person who is of Aboriginal ancestry. The organization may be able to do so, provided that it can show that this is a bona fide job requirement.

In an interview, questions may be asked about language abilities, even if those requirements might be indirectly linked to a person's racial background, as long as the language abilities relate to a *bona fide* job requirement.

Example: A financial institution is filling a customer service job for one of its branches located in an ethnically diverse area of the city. The position requires fluency in one or more of the languages the local population uses. Asking what languages the applicant speaks would be allowed if this is a bona fide job requirement.

One of the most common forms of discrimination that racialized candidates are exposed to in an interview situation is being asked "Where are you from?" or "What nationality is your name?" These questions single out the candidate based on race, place of origin or ethnic origin and would not likely be asked of a Caucasian candidate. They are therefore discriminatory. While an interviewer might intend no harm, or even be seeking to put a candidate at ease, these questions should always be avoided. Racialized applicants and tribunals routinely find these types of questions to be discriminatory. Where having knowledge of a particular country or language is a *bona fide* occupational qualification, the questions asked should clearly relate to the qualification.

Example: Instead of asking "Where are you from," the employer might refer back to the job description and state, "We are an Ontario-based NGO recruiting workers to provide services in

Zambia. As a field worker, knowledge and experience in local geography, politics or languages are essential given the short length of the contract. Please describe what knowledge and experience you would bring to the position.”

iv) Creed/religion:

In an interview, if an applicant requests accommodation for religious requirements in the workplace, the accommodation needs may be discussed. Otherwise, employers should discuss accommodation of religious needs in the workplace after making a conditional offer of employment.

Example: An observant Muslim who applies for a job that requires wearing a uniform may request accommodation for her religious requirement of wearing a hijab (a head covering).

Special service organizations that are religious, philanthropic, educational, fraternal or social may prefer to employ persons of a particular religion if the organization serves mostly the interests of that group. If the exemption in subsection 24(1)(a) applies, the organization would be permitted to ask questions about an applicant’s creed or religion.

Note that under section 19 of the *Code*, the constitutional rights and protections given to Roman Catholic schools are not affected by the *Code*.

v) Disability:

When an applicant’s disability becomes an issue during an interview, an employer is expected to canvas the need for accommodation measures. If this is not done and the applicant is not successful, this could lead to a complaint on the ground of disability.

If a person chooses to talk about his/her disability at an interview, an employer can ask about their accommodation needs and ability to perform the essential duties of the job with accommodation. Any questions beyond this scope should be made with great caution and vigilance as they may lead to a complaint on the ground of disability if the person is not hired. Avoid asking gratuitous questions such as “How did you end up in a wheelchair?” or “Have you been blind all your life?”

Questions about disability may be allowed by religious, philanthropic, educational, fraternal or social organizations that serve persons with disabilities. The exception in subsection 24(1)(a) of the *Code* applies provided that that having a particular disability is a reasonable and *bona fide* requirement because of the nature of the job.

Requests for a driver's licence number or a copy of the licence, when relevant to the job, should only be made following a conditional offer of employment. Other disability-related issues should not be raised until after a conditional offer of employment has been made. All other questions about an applicant’s disability are prohibited.

vi) Family status:

Where employees have significant caregiving responsibilities, their ability to travel regularly may be limited. Avoid assuming that an employee or applicant with children will not be interested in work that involves travel.

If travel is not a *bona fide* requirement, employees should not be denied opportunities because their caregiving responsibilities prevent them from traveling regularly or extensively. If travel is a *bona fide* requirement, and an applicant has said that he or she cannot travel often because of family status, this person should not automatically be screened out. If the person is otherwise qualified and suitable for the job, the employer may be expected to offer the person the job and provide accommodation to the point of undue hardship (for example, by recognizing related dependent-care expenses or providing appropriate supports).

An employer may grant or withhold employment or promotions from a person who is a child or parent of the employer or an employee. When an employer has a policy on this issue, inquiries about whether an applicant is a child or parent of a current employee would be allowed. However, such a policy must be applied consistently and without regard to the personal characteristics of the person being interviewed.

vii) Marital status:

Questions based on marital status may be asked if the organization serves a particular group of persons identified by their marital status. Questions about marital status are allowed if the employer is a religious, philanthropic, educational, fraternal or social organization that serves a particular group of persons such as single, divorced or other persons identified by their marital status.

The *Code* permits giving preference to persons based on their marital status, as long as marital status is a reasonable and *bona fide* requirement because of the nature of the job.

For other employers, marital status may also be a reasonable and *bona fide* requirement for a particular job. In these cases, questions about the particular qualification can be asked at the employment interview stage. No other questions about marital status are allowed.

An employer may grant or withhold employment or promotions to a person who is a spouse of the employer or an employee. When an employer has a policy on this issue, questions about whether an applicant is a spouse of a current employee or the employer would be allowed. However, such a policy must be applied consistently and without regard to the personal characteristics of the person being interviewed.

Example: A husband applies for a job with the company his wife works at. He passes the initial screening based on his application form, resume and a written test. He is invited to an interview. During his interview, he states that he would need accommodation related to disability to perform the essential duties of the position. The interviewer then asks him to confirm that he is in fact the spouse of an employee (information that was known even during the initial screening phase). When

the applicant does so, he is told that he is not eligible for the position because of an unwritten nepotism policy. This scenario raises an inference of discriminatory treatment based on the intersection of disability and marital status.

No other questions about marital status are allowed.

viii) Record of offences:

Employers are allowed to ask about and consider unpardoned *Criminal Code* convictions when hiring. It is discriminatory to consider information about pardoned *Criminal Code* convictions and provincial offences unless an exemption applies.

Where an employer can show that the requirement is reasonable and *bona fide* because of the nature of the job, the exemption in subsection 24(1)(b) applies, and an employer can choose not to hire based on record of offences.

Example: A school board has hired as school bus drivers only people who do not have convictions for careless driving. This requirement is reasonable and *bona fide*.

Questions to determine if an applicant is bondable are also allowed, if being bondable is a reasonable and *bona fide* requirement given the nature of the job. All other questions are prohibited.

ix) Sex (and pregnancy):

In some cases, because of the nature of the job, being a man or a woman may be a reasonable and *bona fide* qualification. In interviews, an employer can discuss this with the applicant. To hire based on sex, employers must be able to show that such a requirement is reasonable and *bona fide*, and that accommodation would cause undue hardship.

Example: An employer hired only male attendants for night shifts providing care to elderly residents with disabilities that make them aggressive. This is found to be discriminatory because it is based on a stereotype that women would be less able to deal with aggression. There are less discriminatory alternatives, such as providing female attendants with the needed training.

Organizations that are religious, philanthropic, educational, fraternal or social are allowed to prefer to employ only men or only women, if the organization serves mostly their interests and being a man or a woman is reasonable and *bona fide* based on the nature of the job.

The right to equal treatment in employment because of sex prohibits pregnancy-related questions during a job interview. For example, an employer cannot ask an applicant whether she is pregnant or whether she has or plans to have a family, unless it relates to a reasonable and *bona fide* job requirement. If the applicant raises the issue of accommodation for pregnancy-related needs, the accommodation needs may be discussed at the interview stage. At the interview stage, the employer may expand the scope of job-related questions, if needed, to learn the applicant's qualifications or ability to perform the essential duties with accommodation. However, it may suffice for an employer

to indicate that the accommodation process will be discussed following a conditional offer of employment.

Employers can refuse to hire someone based on pregnancy if they can show that this is reasonable, done in good faith and based on the nature of the job. However, to benefit from this exception, employers must show that the essential qualifications or requirements of the job cannot be changed or accommodated without creating undue hardship, considering excessive costs or health and/or safety risks. See also Section IV-2a) – Make sure that job requirements are reasonable and made in good faith.”

x) Sexual orientation:

Questions about sexual orientation are not allowed during an interview, even if the employer is a religious, philanthropic, educational, fraternal or social organization. This is because the ground of sexual orientation is not listed in subsection 24(1)(a). Questions relating to sexual orientation may be asked to determine eligibility for a special program. Otherwise, no questions about sexual orientation are permitted.

<http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/5-interviewing-and-making-hiring-decisions>