

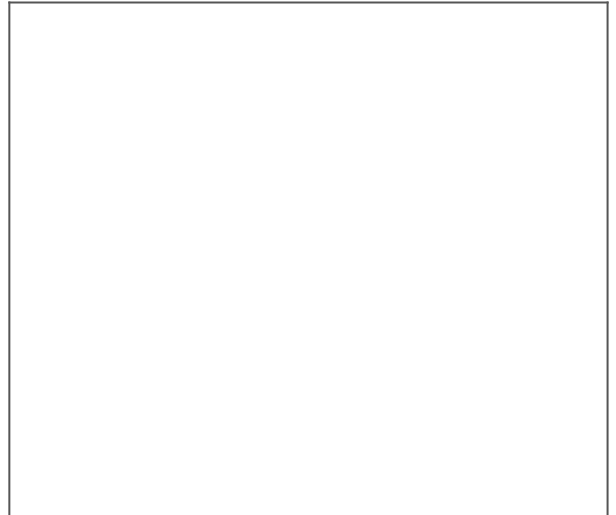
Hiring During The Covid-19 Pandemic

published 04/16/2020

Hiring during the COVID-19 pandemic

Despite many employees being laid off during the COVID-19 pandemic, some industries are seeing an increase in demand, which requires additional staffing to meet these demands.

Hiring amidst the COVID-19 pandemic, although necessary, presents a myriad of pre-hiring considerations for employers to ensure both the health and safety of their staff and the general public, while also remaining onside with human rights legislation and privacy considerations.



Pre-Employment Questions

Employers that are presently hiring or considering hiring have likely been deemed as an essential service and therefore their continued operations are permissible at this time (with varying guidance, depending on the business). In consideration of this, it is important that these employers take heed of the guidance from Public Health, which may require additional considerations as part of their pre-employment inquiries in ensuring both the health and safety of staff and the general public.

With that said, employers must remain cognizant of the pre-employment questions that they pose, as they cannot ask questions which might suggest discrimination pursuant to one of the protected characteristics in *The Human Rights Code* (the “Code”). The Code states that employers cannot discriminate against applicants on a number of protected characteristics, including, for example:

- Disability;
- Ancestry, including colour and perceived race;
- Nationality or national origin;
- Family status;
- Age; or
- Ethnic background or origin.

To date, the Manitoba Human Rights Commission has not offered guidance as to whether it considers COVID-19 to be a disability pursuant to the Code. Human rights commissions in other Canadian jurisdictions have recently indicated that they are taking the position that COVID-19 constitutes a disability and differential treatment of employees with the virus (or are perceived to have the virus) will constitute impermissible discrimination. This would be in contrast to the case of the flu, for example, which is generally not considered to be a disability which triggers protection under human rights legislation. A human rights adjudicator has yet to rule on this issue. Accordingly, until an adjudicator has ruled on this issue, there is a risk that discriminatory treatment of individuals who have contracted COVID-19 would be deemed to be prohibited discrimination.

With this in mind, the prudent approach is for employers to ensure that their pre-employment inquiries relate to a bona fide occupational requirement of employment, and not a form of discrimination. This is commonly referred to as the “BFOR” test. To meet the BFOR test and avoid claims of potential discrimination, an employer must demonstrate that:

1. the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

In the circumstances of COVID-19, depending on the industry and the specific position in issue, an employer will likely be able to demonstrate that the purpose of COVID-19 related inquiries is rationally connected to the safe performance of the job and the safety of the staff of the organization as a whole.

In light of the foregoing, here are a few examples of questions that employers may be justified in asking as a pre-employment inquiry:

- Do you have COVID-19?
- Have you travelled (internationally or domestically) within the past 14 days?
- Have you had contact with people who have or may have COVID-19 within the past 14 days?
- Have you had contact with people who have returned from travel within the past 14 days?
- Are you experiencing any flu-like symptoms?
- Are you otherwise required to self-isolate under a public health directive?

The type of questions that an employer might pose will likely vary as additional guidance is provided from Public Health and the Manitoba government.

Employers must also ensure that these pre-employment questions are implemented in a manner that does not constitute indirect discrimination. For example, implementation of pre-employment questions that only apply to candidates of specific ethnic origin will constitute a violation of *The Human Rights Code* (in the absence of any specific evidence suggesting that the individual employee may have been exposed to COVID-19).

A best practice is to ask these questions only after an individual candidate has been selected (based on merit) and the employer has made a conditional offer of employment. This ensures that an employer is not making its initial hiring decision based on a potential discriminatory ground; rather, the issue becomes when will the new employee be able to start work.

Privacy Considerations

In addition to the above-detailed considerations, it is important that employers also consider the privacy of applicants and of existing employees regarding the collection, use and disclosure of personal information (including personal health information) when asking COVID-19 related health questions.

In Manitoba, private sector, provincially regulated businesses are not subject to any privacy legislation regarding the collection, use and disclosure of employee personal information during the course of the employee-employer relationship. However, Manitoba, private sector, federally regulated businesses are subject to the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) regarding the collection, use and disclosure of employee personal information.

Regardless of what legislation may apply to applicants and employees, there are key privacy principles that ought to be adhered. A non-exhaustive list of key principles are listed below:

- Consider whether consent or providing notice to the collection, use and disclosure of personal information is required or whether an exception applies. The answer to this question will depend on which privacy legislation, if any, applies to your business. For example, PIPEDA provides that a business may collect, use or disclose personal information without a person’s consent if the collection, use or disclosure is necessary to “establish, manage or terminate an employment relationship.” It is not entirely clear what “managing the employment relationship” would include, but it is likely that it would include the collection of personal information (which includes personal health information) to comply with provincial health orders and guidance to protect one’s work force, employees, and customers.

If you cannot rely on an exemption, an employer will need to provide notice and possibly obtain consent. The form of consent (express or implied), the sensitivity of the information at issue, and the reasonable expectations of the individual will need to be taken into account.

- Employers should only collect the minimal amount of personal information that is reasonably necessary for the stated purpose. In the current circumstances, an employer has the obligation to take reasonable steps to protect its employees such as adopting screening procedures for applicants and current employees. Care must be taken not to collect more personal information than is necessary to achieve the purpose (i.e. to protect the workplace).
- Personal information collected at the outset of the employee-employer relationship must be kept confidential and not disclosed except on a need to know basis, as would be the case with any other personal information collected about employees.
- Employers must implement security safeguards appropriate to the sensitivity of the information

collected.

- At or before the time of collection of personal information, employers should make clear the following:
 - why they are asking applicants for COVID-19 related personal information;
 - what, if anything, will be done with the personal information being collected; and
 - how long the personal information will be retained, if at all.
- Once the stated purpose is fulfilled and the personal information is no longer required, it should be disposed of in a safe manner.

If faced with a request for the collection, use and disclosure of personal information pursuant to an order issued in the context of a public health emergency, employers should obtain the request in writing from the relevant public health authority. This request and the specific legislative authority cited should then be communicated to applicants and employees.

Please contact [**businessdevdept@tdslaw.com**](mailto:businessdevdept@tdslaw.com) to connect with a lawyer on this topic.

DISCLAIMER: *This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.*

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.