

ARTICLE OF INTEREST

A Legal Guide - 7 Golden Rules of Hiring

1. Present the Job Honestly

When vacancies are advertised you and your recruitment consultant will want to present the position in the most attractive light possible. However, the Trade Practices Act prohibits a corporation from engaging in conduct that is misleading or deceptive, or that is likely to mislead or deceive.

Example:

In a recent case, a leading stock broking firm was found to have engaged in misleading and deceptive conduct when it told an applicant for a senior role that the terms of his employment would not change when the employer's business was acquired by another company. The applicant relied on these representations by taking steps to leave his job as quickly as possible. The court found that the employer had breached the Trade Practices Act, rendering it liable for damages and costs.

Golden Rule

When you are advertising and recruiting be completely honest; don't exaggerate the role simply to secure the best candidate.

2. Recruit Fairly

An employer must not discriminate unlawfully in relation to job selection criteria, employment offers, or employment terms. It is discriminatory to treat one job applicant less favourably than another on the basis of age, gender, disability, pregnancy or potential pregnancy, race, religion, political opinion, medical or criminal record, marital status, sexual preference, union activity or physical features.

Golden Rule

Consider all job applications, short list and make job offers on the basis of skills, experience and qualifications in relation to fair selection criteria only.

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3. Screen Candidates by Relevant Criteria

Employers often seek information about prospective employees by conducting pre employment checks. It is unlawful to refuse to hire an applicant on the basis of his or her medical or criminal record, unless the refusal is based on the inherent requirements of the position.

Example

A man seeking work as a school cleaner was denied a job on the basis of his criminal record, which showed a history of volatility and violence, particularly after drinking.

The denial was held to be justified, because of the risk of the man displaying aggressive and violent behavior around school aged children.

Golden Rule

Before requiring criminal record or medical checks, ensure that the results are genuinely relevant to the position being filled.

4. Application Forms

An employment application form can list the duties of the role and ask the applicant about any pre existing illness or injury, which the applicant is aware of and could reasonably foresee being affected by those duties.

If the application form correctly refers to and complies with relevant provisions of work cover legislation, an employer can avoid workers' compensation liability in relation to an exacerbation of a pre existing injury, which the employee did not disclose.

However, if the applicant does disclose such an injury, you must not discriminate against him or her on the basis of that injury, unless it means that the applicant could not safely perform the inherent requirements of the role.

Golden Rule

Written application forms should set out the physical requirements of the position, request disclosure of all relevant pre existing injuries, correctly cite the legislative provision that requires the applicant to disclose this information, and state the consequences of failing to make full disclosure.

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5. Job Interviews

Questions in job interviews that focus on any unlawful ground of discrimination can themselves be found to be discriminatory.

Questions should focus on whether the candidate can perform the requirements of the role, for example whether a candidate can work back late at short notice, if that is a requirement of the role, and not on irrelevant factors such as the candidate's childcare arrangements.

Example

In a recent case, a female candidate with extensive relevant experience was asked a number of questions pertaining to her marital status and her intention to have children. These questions were found to be discriminatory as they were not relevant to the role.

Golden Rule

For consistency, a set of questions should be developed and asked of all job applicants, which allow for an assessment of the applicants suitability against the job selection criteria. This will help avoid discriminatory questions.

6. Making an Offer

When making an offer, always make it clear to the applicant that the offer is conditional on some yet to be completed event, such as a reference check or the results of a medical test.

If an employer makes an unconditional offer to a candidate but later wants to withdraw that offer, the withdrawal must occur before the candidate accepts the offer, otherwise the candidate can claim that a binding contract of employment had been formed and sue for the breach of that contract when employment does not eventuate.

Example

A man applied for a job as an aircraft handler, performing engineering and maintenance duties. At one of his interviews, he was asked to perform a typical task required of an aircraft handler, to see whether it would aggravate a previous wrist injury. He performed the task, and was offered employment.

On arriving for his first day at work, he was told that he would not be employed because he had failed a medical test. It was found that the employment relationship had already been created and, also, that the

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employer sought to terminate the employment based on the man's impairment (his wrist injury) and that this was discriminatory.

Golden Rule

Do not make an unconditional offer of employment unless you have all the information you need to be able to make the offer – if you don't have that information and want to make a conditional offer, ensure that the applicant clearly understands the conditions that apply to the offer.

7. Contract of Employment: Probationary Period

The primary purpose of an employment contract is to avoid any later dispute as to the terms of employment.

A contract sets out an employee's benefits, but can also impose conditions on the employment, such as a probationary period. Employees cannot issue unfair dismissal proceedings relating to the termination of the employment during, or at the end of, a probationary period, provided that the probationary period is agreed before employment starts, is set out in writing and signed by the employee. However, if the probationary period is unreasonably long, it will not be enforced.

Golden Rule

It is essential that new employees be given a written contract of employment, even if it is in the form of a letter of offer that sets out the terms and conditions that will govern the employment relationship.

The contract must be as clear as possible to avoid later disputation. A written contract of employment benefits both the employer and employee, and should always be used when employing a new person in a business. Always use a written contract where you wish to apply a probationary period, and ensure that the period is reasonable.

By Arnold Bloch Leibler Lawyers & Advisors

A Note from Logic Recruitment

If you are in any doubt about any aspect of your recruitment procedures, please seek legal advice.

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