

SECTION: General

Effective date: February 27, 2004

SUBJECT: PRE-EMPLOYMENT INQUIRIES AND S.14 (4)

Purpose:

This policy is intended to assist in the understanding and application of *The Human Rights Code* ("*The Code*"). Where there is any conflict between this policy and *The Code*, *The Code* prevails.

Context:

As set out in s.14(4), it is a contravention of *The Code* to use or circulate an application form, or to ask a question of an employment applicant which, directly or indirectly, expresses a limitation or preference that is based on any of the protected characteristics under *The Code*, or requires the applicant to provide information about any protected characteristic, unless such a limitation, preference or inquiry "is based upon bona fide and reasonable requirements or qualifications for the employment or occupation."
(See also Policy # G-4)

Protected characteristics under s.9(2) of *The Code* are ancestry (including colour and perceived race), nationality or national origin, religion or creed, ethnic background or origin, age, sex (including pregnancy), gender, sexual orientation, marital or family status, source of income, political belief, physical or mental disability and social disadvantage.

Educational Information:

The Commission will consider pre-employment inquiries with respect to an employment applicant's date of graduation from elementary school, high school or equivalent as possible evidence of discrimination in employment on the basis of age.

The Commission will consider pre-employment inquiries as to the location of the elementary school or high school attended by an employment applicant as possible discrimination on the basis of a protected characteristic set out in s.9(2), such as national origin, ethnic background or ancestry. Pre-employment inquiries as to the location of, or date of graduation from, post-secondary education and training may not be discriminatory where the date and/or location of the education or training is an indicator of the relevance of candidate's ability to satisfy bona fide and reasonable requirements or the education or training to the employment, and may assist in assessing the qualifications for the employment or occupation.

Medical Examinations:

The Commission does not consider it to be discrimination to request that an applicant for employment take a medical examination after a written conditional offer of employment has been made, providing that:

- a) the examination seeks to assess only those physical or mental conditions or abilities, which have been identified as bona fide and reasonable requirements or qualifications for the employment or occupation;
- b) all persons offered the same position undergo the same medical examination, except where a person has requested accommodation of a physical or mental disability and a specific medical examination would assist in determining the appropriate accommodation;
- c) males and females receive the same medical examination, unless there is a reasonable requirement or qualification for the employment that affects only one sex;
- d) determinations based on the medical examination relate to the person's current ability and not past or possible future disability, unless a reasonable requirement or qualification for the employment supports a different basis for assessment and the principles set-out in *B.C. (Public Service Employee Relations Commission) v. B.C.G.S.E.U. ("Meiorin")*¹ are met; and
- e) medical examination and test results are interpreted according to current medical knowledge.

Drug and Alcohol Testing:

Pre-employment drug and alcohol testing is prohibited discrimination, unless such testing is based upon bona fide and reasonable requirements or qualifications for the employment or occupation. (See Policy # A-8 *Drug and Alcohol Testing*)

Age of Majority:

In accordance with s.14 (10) of *The Code*, The Commission does not consider it to be discriminatory to inquire as to whether an applicant has reached the age of majority, where the position applied for falls under a statute in force in Manitoba regulating the employment of persons under the age of majority.

Where an applicant for employment is under 16 years of age, the employer may inquire as to whether the applicant has obtained a permit in accordance with s.83 of *The Employment Standards Code*, or intends to obtain such a permit. (See Policy # I-8.)

Marital and Family Status:

¹ (1999), 35 C.H.R.R. D/257

The Commission will view pre-employment inquiries with respect to an applicant's marital or family status as possible evidence of discrimination, unless the requirement to furnish the information is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

The Commission will view pre-employment inquiries which may indicate an applicant's relationship to a person already employed with the employer as discrimination, unless there is a bona fide and reasonable requirement that the available position be filled by someone who does not have a specific degree of relationship to an existing employee.

(See also Policy # I-6 and A-1)

Disability / Religion/Pregnancy:

The Commission will not view as discrimination pre-employment inquiries with respect to an applicant's ability or availability to perform the essential duties of an employment. Employers are, however, required to reasonably accommodate employment needs, which are based on a characteristic protected under *The Code*, including physical or mental disability, religious belief and pregnancy. Where an employment barrier has been identified which is based on a protected characteristic under subsection 9(2), the employer is required to provide reasonable accommodation to the point of undue hardship.

(See also Policy # I-4, G-2, and G-3)

Language Proficiency:

It is not a contravention of *The Code* to inquire as to whether an employment candidate has a level of proficiency in a given language, where such a level of proficiency is a bona fide and reasonable requirement or qualification for the employment or occupation.

Psychological Testing:

Pre-employment psychological testing may contravene *The Code*. Both the form and content of the testing may directly or indirectly limit employment candidates based on their ancestry, ethnic background, sex, age, religion, physical or mental disability, or other characteristic set out in subsection 9(2).

Where such testing, directly or indirectly, results in a limitation or preference based on any characteristic set out in s.9(2), it will contravene *The Code*, unless the limitation or specification or preference is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

Special Programs:

Pre-employment inquiries with respect to a protected characteristic do not contravene *The Code* where the information is required for the purposes of a special program permitted under s.11 of *The Code*, the applicant voluntarily provides such information and it is used in a manner consistent with s.11. (See Policy # I-7)

Intersectionality of Grounds:

The Commission recognizes that some pre-employment inquiries may evidence differential treatment on an intersection of the characteristics set out in subsection 9(2). For example, questioning a young Indo-Canadian female applicant as to her plans with respect to having children may evidence differential treatment on the basis of sex, age, family status, pregnancy, ancestry, national origin and ethnic origin.

Application of Policy:

This policy is with respect to pre-employment inquiries as set out in s.14(4). The inquiries, directly or indirectly, express a limitation, specification, or preference concerning a characteristic specifically referred to in subsection 9(2).

Pre-employment inquiries with respect to criminal charges or convictions, or requests for criminal record checks, do not fall directly under this policy. (See Policy # I-12)

Similarly, "social condition" is not a characteristic listed under s.9(2), however pre-employment inquiries, which express, directly or indirectly, a limitation, specification, or preference concerning the "social condition" of an applicant, where such a limitation, specification or preference is not based upon bona fide and reasonable requirements or qualifications for the employment or occupation, may evidence differential treatment in employment.

APPROVED BY:

"Janet Baldwin"
Chairperson

March 3, 2004
Date