

Governments Can “Buy Canadian”, But Employers Can’t: Glenn Commandments



One of the first things our national leaders did when Trump imposed his tariffs was to urge Canadians to buy from Canadian companies. To back up the talk, the federal government initiated a Buy Canadian Policy ordering all departments, agencies, and Crown corporations to review their current contracts for opportunities to rid themselves of deals with American suppliers while tweaking their procurement criteria to prioritize awarding future contracts to Canadian firms. Many provinces and territories implemented their own Buy Canadian procurement policies.

We expect our government to lead by example. But in this case, companies that follow the government's lead are incurring major liability risk. While it may be acceptable as a national policy in the context of trade relations, deliberately favouring Canadians over Americans in employment may constitute discrimination banned by human rights laws. This applies to all employers, in both the public and private sectors.

Citizenship Discrimination Risks

Human rights laws ban employers from discriminating against job applicants and employees on the basis of citizenship, nationality, ethnicity, or place of origin. Deliberately refusing to hire job candidates because they're from the U.S. is an obvious act of discrimination. Although I haven't seen any actual cases where a Canadian company has deliberately adopted a "no Americans" hiring policy, there have been cases where companies got into trouble by favouring Canadian citizens over immigrants.

A leading example was a 2023 case involving one of Canada's largest energy companies. It was filed by a foreign engineering student who had stellar credentials and a 3-year postgraduate work permit but wasn't offered a permanent position without assurance of eligibility to work in Canada on a "permanent basis." Imperial Oil denied committing discrimination, noting that its citizenship policy made exceptions for some noncitizens. But the Ontario Court of Appeal wasn't impressed. Policies that discriminate on the basis of a prohibited ground are not saved on the basis that they only partially discriminate," it reasoned [[Imperial Oil Limited v. Haseeb](#), 2023 ONCA 364 (CanLII)].

"Canadian Experience" Discrimination Risks

A far more subtle form of illegal anti-American/anti-immigrant bias is basing hiring decisions not on Canadian citizenship but Canadian work experience. According to the Ontario Human Rights Commission, "a strict requirement for "Canadian experience" is *prima facie* discrimination (discrimination on its face) and can only be used in very limited circumstances" where an employer can prove that previous work experience in Canada "is a bona fide requirement" (BFOR). Making out a BFOR defence is extremely difficult.

How to Avoid Anti-American Discrimination Risk

The takeaway is to recognize that unlike government trade policy makers, Canadian employers aren't allowed to "Buy Canadian." Stated differently, employers can't deliberately favour Canadians over Americans in employment decisions the way governments can in foreign trade decisions. There are 3 things you should do to guard your company against national origin discrimination liability risks.

1. Perform Hiring & Recruiting Policy Audit

The first way to protect your company is to audit your hiring policies, job ads and application forms to ensure they don't include anything that even remotely suggests discrimination against non-Canadians. Red flags to look out for include requiring job applicants to have:

- Canadian citizenship.
- Proof of eligibility to work in Canada on a permanent basis.
- Canadian work experience.

2. Avoid Potentially Discriminatory Job Interview Questions

The second strategy is to recognize that simply asking job applicants about their Canadian work status and foreign experience may also be illegal—even if the sole point of the question is to ensure that hiring the applicant wouldn't be illegal. The problem with such questions isn't so much with the information they target as how they're phrased.

Rule: You're allowed to ask applicants if they're legally entitled to work in Canada, as well as other essential job qualifications, e.g., languages spoken, as long as you phrase the question narrowly and don't ask about citizenship, nationality, place of birth, etc.

Avoiding National Origin Discrimination: The Questions You Can & Can't Ask During the Hiring Process

CAN'T Ask

- Are you a Canadian citizen?
- Are you a permanent resident of Canada?
- Where were you born?
- What's your nationality?
- What's your racial origin?
- What's the nationality/birthplace/racial origin of your spouse, ancestor or other relatives?
- What's your native language?
- Where did you learn to speak English?
- What Canadian work experience do you have?

CAN Ask

- Are you legally authorized to work in Canada?
- Are you able to speak, write, read English fluently (provided that these skills are relevant to the job)?
- Are you able to speak/write/read other languages relevant to the job fluently?

3. Refrain from Requesting 5 Items

During the pre-hiring process, it's also illegal to ask job applicants to furnish information that may reveal other information about their citizenship, nationality, birthplace, etc., including:

- A birth certificate.
- A Social Insurance Number.
- Proof of Canadian citizenship.
- Proof of permanent residence status.
- Names, addresses, and attendance dates of schools attended.

However, you may ask for these things after you extend the applicant a conditional job offer as long as it's relevant to the job and/or essential to process the applicant's employment.