

Hydrating The Hiring Process: Managing Regulatory Liability For Employers In Highly-regulated Industries



Conducting proper background checks can help employers minimize the costs of hiring mistakes.

Failing to verify the credentials, references and other information of employment applicants is risky. Careful due diligence during the hiring process can not only ensure that employers hire the best candidate, it can also help mitigate potential exposure to liability.

While background checks are important for employers in all industries, they are particularly valuable in safety-sensitive and highly regulated industries. A recent conviction under the *Safe Drinking Water Act, 2002* (SDWA) provides a costly reminder that employers may face regulatory liability, including charges and fines, as a result of failing to verify employee credentials during the hiring process.

Ontario's drinking water legislation

The SDWA regulates the treatment, testing and distribution of drinking water in Ontario. The SDWA requires that operators of drinking water systems follow specific requirements in the operation of drinking water systems and testing of drinking water. One of those requirements is that employees who work as operators of municipal systems and regulated non-municipal systems must hold a valid operator's certificate according to the requirements of *O. Reg 128/04, Certification of Drinking Water Operators and Water Quality Analysts Regulation*.

The Ontario Water Wastewater Certification Office (OWWCO) administers the certification program for the Ministry of the Environment, Conservation and Parks (the Ministry), including classifying systems, certifying operators and approving training courses. A database of licensed operators and operators-in-training is available on its [website](#).

Regulatory liability and the hiring process

In a recently reported [conviction](#), the Corporation of the Town of Orangeville pled guilty to two charges under the SDWA:

1. As the owner of a municipal drinking water system, failing to exercise a level of care that a reasonably prudent person would be expected to exercise with respect to the system.
2. Operating a municipal drinking water system without a valid operator's certificate.

Orangeville was fined \$100,000 plus a mandatory 25 per cent victim fine surcharge. The financial penalty could have been avoided if the municipality simply verified an employee's credentials during the hiring process.

In 2019, Orangeville posted a job listing for the position of Water Works Operator 1. A candidate applied for the position indicating that they held a valid operator-in-training certificate. During initial screening, the human resources department noted that the certificate could not be validated on the OWWCO database, but the candidate was still selected to proceed through the interview process. The employer did not take steps to verify the candidate's certification during the interview process, upon extending an offer of employment, or at any time thereafter.

The new hire did not ultimately obtain a proper operator-in-training certificate until six months after starting employment, despite the fact that all operator certificates are required to be displayed at the workplace. It appears the issue was not discovered until the Ministry conducted an inspection of the workplace. A subsequent investigation resulted in charges and the convictions.

The Ministry vigorously enforces the requirements of the SDWA. In other cases, individuals have been charged and convicted of misrepresenting their own credentials and of operating a municipal drinking water system with an expired certificate. In the case of the expired certificate, the municipal owner of the drinking water system was also charged and convicted of operating a system without a valid operator certificate. Orangeville's conviction appears to be one of the first cases where a financial penalty has been imposed directly on the municipal employer for failing to verify credentials during the hiring process.

Best practices during the hiring process

Employers should take note of this case and the heightened requirements that apply in highly regulated industries. While the municipality's conviction and \$125,000 fine is an extreme example of potential employer liability when credentials are not verified, implementing robust systems for verification during the hiring process is necessary regardless of the industry. Other industries and positions may require certifications, such as equipment operator licenses, certifications for regulated skilled tradespeople or employees working with vulnerable individuals.

Generally, employers should consider the following best practices in their hiring processes:

1. Proceed cautiously. Employee recruitment is competitive and employers often move quickly to hire their preferred candidate. It is important to take the time for the proper due diligence and background checks.
2. New employees should sign employment contracts that have been drafted and recently vetted by an employment lawyer. Employment laws change frequently, particularly when it comes to termination entitlements. Outdated contract templates may not be enforceable and will likely not adequately protect your business.
3. Do not extend a written offer of employment before presenting the employment agreement. The preliminary offer could be considered a binding contract in itself and the subsequent agreement might not be legally enforceable.

4. To be enforceable, the employment agreement must be delivered to the employee and signed before the employee starts working.
5. The best time to verify credentials and references is after the employment agreement has been presented and accepted, but prior to the employment start date. The employment agreement and employment should be conditional on the satisfactory results of the background check and credential verifications.
6. The background check should be appropriate for the actual position with the collection of personal information limited to what is reasonably required for the role. The company's hiring representatives should be made aware of the specific credentials for each role before asking an employee to provide personal information.
7. Ensure that the request for a background check does not infringe on privacy or human rights laws. The candidate's consent is required for certain background checks, such as credit history, driving records and criminal background checks. Further, any personal information collected should be limited to what is reasonably required, such data should only be used by those who need to know the details for the hiring process and the data must be protected by adequate safeguards. Employers should not ask personal questions during the hiring process regarding any of the protected grounds of human rights legislation (for example: age, marital status and ethnicity).
8. Prepare an established list of questions in advance of the interview. The questions should clearly reference any required credentials and avoid topics that could breach human rights or privacy laws. If necessary, subject matter specialists should be consulted to determine the required credentials.

Gowling WLG takes a multi-disciplinary approach to support our clients. Our employment lawyers can assist by drafting employment contracts and developing a proper hiring diligence process. Our environmental lawyers can help assess the necessary regulatory requirements for your organization's activities and defend against charges under health, safety and environmental legislation, including the *Safe Drinking Water Act, 2002*.

by [Jessica E. M. Boily](#) and [Jordan Epstein](#)
Gowling WLG