Immigration & the HR Program: Citizenship Discrimination Risks & How to Manage Them



399,000+
The number of job vacancies in the private sector at the end of 4Q 2017, an all-time high
Source: Canadian Federation of Independent Business

The economy is growing and there are plenty of jobs; the problem is that there aren't enough skilled Canadians to fill them. Accordingly, employers are relying increasingly on skilled workers from abroad. While hiring immigrants is great in the long run, it also forces employers to navigate the complex immigration regulatory system and run the risk of penalties for non-compliance.

Consequence: Employers must carefully vet foreign workers not only to verify their skills and legal eligibility to work in Canada but also assess their adaptability to Canadian work conditions. And this pre-employment vetting is a minefield for discrimination. Here's a look at the pitfalls and how to avoid them.

Citizenship Discrimination Risks

Human rights laws ban employment discrimination on the basis of citizenship, nationality, ethnicity or place of origin. Deliberately refusing to hire applicants because they're immigrants is an obvious violation. The problem is that discrimination may be so subtle that you can engage in it without meaning or even realizing it.

One of Canada's largest energy companies just learned this lesson the hard way. Recognizing that requiring employees to be Canadian citizens would be discriminatory, the company required simply that they prove their eligibility to work in Canada on a "permanent basis." A foreign engineering with a postgraduate work permit denied employment on the basis of the rule claimed citizenship discrimination.

The Ontario Human Rights Tribunal agreed, finding that the permanency requirement was a means of distinguishing between eligible and ineligible applicants based on citizenship and incorporating it into the screening process was a form of direct discrimination. The Tribunal also ruled that the rule wasn't justified as a bona fide occupational requirement because it didn't serve any safety or other legitimate business purpose. So, the Tribunal said it would award the student damages unless the company settled the case within 45 days [*Haseeb v. Imperial Oil Limited*, 2018 HRTO 957 (CanLII), July 20, 2018].

2 Ways to Manage Citizenship Discrimination Risk

Policy Audit: The first way to protect your organization is to purge your hiring policies, job ads and application forms of anything that even remotely suggests discrimination against non-Canadians. Red flags to look out for include requiring applicants to have:

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

Interview Questions to Avoid: 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. The 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 Citizenship Discrimination: The Questions You Can & Can't Ask During the Hiring Process

CAN'T Ask	CAN 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?	• 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?

The 5 Items You Can't Request

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.