



EQUAL EMPLOYMENT OPPORTUNITY IN RECRUITMENT: MANAGEMENT GUIDE

1. INTRODUCTION

The aim of the Equal Employment Opportunity (**EEO**) in Recruitment Management Guide is to provide guidance on recruitment. Specifically, that job applicants are treated fairly and equitably, without prejudice or bias, and the short-listing, interview and selection processes carried out objectively with the intent of finding the best person to fill the position.

The Management Guide provides an outline of an employer's legal obligations including:

- Avoiding unlawful discrimination;
- Recruitment and short-listing of candidates without prejudice or bias; and
- Offers of employment, reasonable adjustments, and flexibility.

This document is written for **Human Resource employees and managers only** and is not intended for distribution amongst broader staff.

2. LEGISLATION

It is unlawful to discriminate on the basis of a number of protected attributes including age, disability, race, sex, intersex status, gender identity and sexual orientation in employment. Australia's federal anti-discrimination laws are contained in the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*.

The *Age Discrimination Act 2004* protects people from age discrimination in the workplace, including those interviewed or selected for a job.

The *Disability Discrimination Act 1992* protects people from disability discrimination and provides an obligation to make reasonable adjustments in the workplace to accommodate an individual's' disability.

There are also State-based anti-discrimination laws that make it unlawful to discriminate on the basis of protected attributes.

Additionally, Workplace Health and Safety laws apply in all States and Territories. An employer together with its employees have certain duties



regarding safety under this legislation and other relevant legislation in the State or Territory where they work.

3. AN EMPLOYER'S LEGAL OBLIGATIONS

Legal obligations start with the pre-employment processes and include:

- Ensuring recruitment decisions are not made for discriminatory reasons (i.e. refusal to recruit is not based on age, gender, etc);
- Considering whether reasonable adjustments may be necessary in the workplace for the recruitment of staff with a disability (physical or psychological); and
- Ensuring employees can perform their work safely.

Employers are additionally required, so far as is reasonably practicable, to provide a safe and healthy workplace for employees.

It is not against the law to not employ someone for a position if they are unable to perform the inherent requirements of the job because of a disability. However, employers will need to ascertain what are the essential parts of a role that a person has to be able to do in the job in order to make this judgment.

The 'inherent requirements' of the job are the key physical, cognitive and psycho-social demands of a role. They are characteristics or essential requirements of the employment, as opposed to peripheral requirements.

The risks in not managing the legal risks in the recruitment of employees are not only a breach of legislation but may also result in workers' compensation claims, general protections, or unlawful discrimination claims.

4. LEGAL RISKS – AGE DISCRIMINATION

Age discrimination may occur during the recruitment process.

Stereotypes about older workers can influence the decisions that employers make during the life cycle of an employee, including recruitment, promotion, training, retirement, and redundancy.

Organisations that take steps to tackle age discrimination can help attract, motivate, and retain good staff. It also enhances reputation as an employer of choice.

Age discrimination happens when someone is treated unfairly or denied an opportunity because of their age. Discrimination can be direct or indirect.

Direct discrimination occurs when a person is treated less favourably because of their age than someone in another age group would be treated in the same situation.



For example, it could be direct age discrimination if a person is not recruited because it is assumed that, because of their age, they would not be able to adapt to new technology or learn new skills.

Indirect discrimination occurs when there is a rule or policy that is the same for everyone, but which has an unfair effect on people of a particular age.

For example, it could be indirect discrimination if a job advertisement requires 20 years of experience if this is not necessary to do perform the job. It could mean that younger workers are not considered for the role.

5. WHAT CAN EMPLOYERS DO TO MANAGE THESE RISKS?

As best practice, employers should promote the principles of equality and diversity in all its dealings with employees, workers, job applicants, clients, customers, suppliers, contractors, recruitment agencies and the public.

It is a legal requirement that employment decisions are not made for discriminatory reasons. This means that individuals are recruited for a role because they are the best person for the job regardless of sex, gender history, marital status, pregnancy, family responsibility, sexual preference, race, age, impairment, or religion.

Employers can take a number of steps to ensure a fair and unbiased recruitment process. The following are examples of best practice for employers during the recruitment process.

JOB ADVERTISEMENTS

Consideration should be given to the tone and the wording of the job advertisement, and where the job is advertised.

For example, the Company should aim to develop a strategy that reaches a diverse pool of job applicants where possible, and avoid using discriminatory language or requirements.

If applicable, ensure recruitment consultants are fully briefed on requirements and have a good understanding of equal opportunity and anti-discrimination principles.

POSITION DESCRIPTIONS

It is best practice to ensure that advertisements, position descriptions and recruitment activities are positioned to attract candidates from diverse backgrounds and will appeal to employees of all ages, of both men and women alike, and those returning from parental leave.



It is recommended that job advertisements and role descriptions should clearly set out the inherent requirements of the role including any or cognitive requirements, certifications, or licences.

For example, the physical inherent requirements for a bus driver may include:

- Constant sitting when driving bus;
- Constant bilateral use of upper limbs/hands to operate steering wheel and controls (gears and controls located on the right side of the steering wheel);
- Constant movement of neck and head to maintain vision of driving environment;
- Occasional unilateral upper limb use to position wheelchair access ramp (requires minimal force);
- Occasional static bending to operate wheelchair access ramp and luggage compartment;
- Frequent left upper limb reaching at shoulder height to extract tickets; and
- Frequent upper limb use to operate screen for producing tickets and changing destinations.

It is recommended that selection criteria be developed that is consistent with the actual job requirements and duties.

Best practice includes:

- Clearly distinguishing between the inherent requirements of the job ('essential' criteria) and the desirable criteria (those that will help to do the job);
- Determining whether formal qualifications and licences (driver's licence, etc) are essential to the job;
- Ensuring that certain skills such as length of experience, age, English language ability, etc – are essential for performance of the job and not arbitrary or based on stereotypes; and
- Being specific when describing the skills required, for example, "communication skills" could be detailed as "communication skills in dealing with a wide range of customers and customer responses".

SELECTION CRITERIA

Selection criteria should be reviewed for each role that becomes available, in respect to the specific qualifications, licenses, knowledge, skills and abilities applicable to that position.



All selection criteria must meet the legislative requirements of Equal Opportunity and Anti-Discrimination legislation.

Best practice provides that hiring decisions are based on a number of factors including:

- The applicant's relevant qualifications, certifications, licenses etc;
- The applicant's previous employment and experience, skill set, knowledge and potential organisational and team fit;
- The applicant's results relating from aptitude/psychometric testing (where applicable);
- The applicant's ability to obtain a satisfactory police check, pre-employment medical and, Working with Children Check (where applicable); and
- Reference checks.

It is unlawful for hiring decisions to be based on:

- The applicant's nationality, country of birth or travel history;
- The applicant's sex, gender identity or sexual orientation;
- The applicant's marital status or history, number of dependants or family situation;
- The applicant's age; and
- Any other factor that contravenes Equal Opportunity or Anti-Discrimination legislation.

SHORT-LISTING

It is recommended that a checklist of the criteria for the role be compiled and used objectively to comparatively assess the merits of each applicant. Once the priority list for selection criteria is created, this should be applied consistently to all applications.

Best practice provides for applicants to be short listed s firstly on essential qualifications and then on desirable qualifications. If appropriate, seek more information from applicants.

Best practice is for the recruitment decisions and the reasons for them to be documented.



INTERVIEW PROCESS

The legal duty for employers to make reasonable adjustments can arise at any point during the recruitment process, including the interview process. An employer should therefore check if any job applicants require specific arrangements to participate in the interview (e.g. physical access, etc).

To minimise the legal risk, it is best practice to ensure consistency and fairness in the interview questioning.

The selection panel is entitled to ask applicants whether they can meet the inherent requirements of the job (physical duties, etc). It is also appropriate to ask people with a disability if they require any adjustments to be made in order to perform the job.

It is unlawful for the interview panel to make assumptions about a person's ability to do the job based on physical characteristics. Invasive or irrelevant interview questions should not be asked.

It is recommended that the interview panel keep records of questions and answers. If the applicant is unsuccessful, personal information should not be retained on file unless it is directly relevant to the decision not to hire.

The same interview process should be used for all the candidates interviewed for a position, so that they can be compared objectively and without bias or prejudice.

PRE-EMPLOYMENT TESTING

Following a successful first interview, candidates may be required to undertake relevant testing related to the position. The following examples promote best practice (and in some instances are legal requirements) in ensuring a job applicant can safely perform their role:

- Police Check
- Pre-Employment Medical Check
- Online Safety Assessment
- Legal Right to work in Australia – i.e. Birth Certificate, Certificate of Citizenship or Passport with Visa details
- Working with Children Check (Driver positions)
- Current Statement of Demerit points (Driver positions)
- Current Drivers' Certificate (Driver positions)
- Psychometric testing

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- Drug and/or alcohol testing
 - Hearing testing

PRE-EMPLOYMENT ASSESSMENTS

Pre-employment assessments are aimed at ascertaining an employee's capacity to fulfil the inherent requirements of their role.

The pre-employment assessment is not a legal pre-condition to employing an individual, but instead it assists an employer with complying with their overall health and safety legal obligations to provide a safe workplace so far as is reasonably practicable. It is recommended that the pre-employment assessment:

- Ask whether the individual has any pre-existing injuries or conditions that prevent them from fulfilling the inherent requirements of their role or that put them at risk of an exacerbation/other risk to their health and safety; and
- In the case of organisations based in Victoria, Tasmania or Queensland, refer to the potential consequences of failure to disclose an injury or condition under workers' compensation law. For example, in Victoria, refer to specific consequences under section 41(2) of the Workplace Injury Rehabilitation and Compensation Act 2013 if false/misleading disclosure made (i.e. possible denial of workers' compensation if exacerbation of pre-existing injury/condition).

It may be necessary for job applicants to be medically assessed if there are potential health risks involved in performing the job.

Employers must ensure only information relevant to the position the applicant is applying for. Legally, such information must only be collected with the applicant's consent, and the applicant should be made aware if the information will be shared with a third party (eg an independent assessor). It may be necessary to seek advice on privacy obligations to ensure this is properly managed.

Employers must ensure strict confidentiality in seeking, receiving and storing medical information in line with privacy and other relevant legislation.

SELECTION OF PREFERRED CANDIDATE

The interviewers should reach a consensus on the selection of the preferred candidate by focusing on the selection criteria.

It is recommended that applicants be ranked according to performance against essential and desirable requirements. All information should be assessed



including the application form, interview, referee's reports, pre-employment testing etc.

It is recommended that employers obtain reference checks and develop a standard referee reporting form that matches the selection criteria.

To minimise allegations of discriminatory decisions being made, it is recommended that an employer make a record of the recruitment decisions made and the reasons for them.

If requested, it is good practice to provide constructive feedback to unsuccessful applicants on their performance against the selection criteria.

OFFER OF EMPLOYMENT

Before an offer of employment is made, it is best practice that documentation be gathered to confirm the following:

- The applicant has completed an application form and has been interviewed by the relevant people;
- The applicant has passed the relevant pre-employment checks;
- If the applicant is applying for a driving role, a Working with Children Check has been applied for and the applicant holds a current licenses; and
- Legal right to work in Australia has been verified and a copy provided.

Once it is confirmed that the documentation is in order, and the recruitment process is complete, a verbal offer of employment can be made to the prospective employee by either the manager of the relevant department, or by a Human Resources team member.

Upon acceptance of the verbal offer of employment, Human Resources can then complete the relevant contract of employment and send it to the new employee.

REASONABLE ADJUSTMENTS

Where pre-employment screening reveals that a job applicant has a disability that may impact their ability to fulfil the inherent requirements of the role for which they are applying, an employer has a legal obligation to consider if there are any reasonable adjustments that could be made to enable them to safely fulfil those requirements should they be employed.

Employers are legally obliged to make reasonable adjustments to allow a person with a disability to perform the role safely unless such an adjustment would result in 'unjustifiable hardship' to the employer.



It is a defence to a claim of unlawful discrimination if the reason for the discrimination is that the person cannot fulfil the inherent requirements of the role – the “inherent requirements defence”.

For further information on reasonable adjustments, see the Fitness for Work Management Guide.

RECRUITMENT FILE

It is best practice to establish and maintain a recruitment file for the storage of information relevant to the recruitment and selection process for the position.

NOTE TO EMPLOYER: where making modifications to the policy or management guide, please seek legal advice to ensure it meets minimum legal requirements.



CHECKLIST FOR EEO IN RECRUITMENT POLICY AND FRAMEWORK

The following checklist can be used to guide managers through an appropriate process as the implement the EEO in Recruitment Policy.

<p>Recruiting and sourcing candidates:</p> <ul style="list-style-type: none">• Confirm job advertisements, role descriptions and recruitment activities aim to attract wide pool of diverse candidates (i.e. different ages, genders, ethnic origin, etc)• Confirm job advertisements and role descriptions clearly set out inherent requirements of the role	<input type="checkbox"/> <input type="checkbox"/>
<p>Screening and short-listing of applicants:</p> <ul style="list-style-type: none">• Confirm diverse interview panel composition (males and females, mixed age groups, etc)• Outline different types of pre-employment screening and confirm the purpose to ascertain ability to fulfil inherent requirements of the role• Confirm selection criteria reviewed for each role according to the specific requirements of the role (including, qualifications, licenses, knowledge, skills and abilities applicable to that position)	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
<p>Offer of employment:</p> <ul style="list-style-type: none">• Confirm documents received from recruitment process and pre-screening tests that are required prior to making an offer of employment to a candidate• Where the prospective employee makes a request for flexible work, can the employer accommodate the request? [NB: There is no legal requirement to provide flexible working arrangements under the Fair Work Act until the employee has completed 12 months' continuous service, but is considered to be best practice to consider a request from a prospective employee.]• Confirm any reasonable adjustments that need to be considered if applicant has a disability that impacts their capacity to fulfil the inherent requirements of their role	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>