

## ***Recruiting Update: Requiring Canadian Experience Constitutes Discrimination According to the Ontario Human Rights Commission***

Statistics Canada reported that between 1991 and 2006, “the proportion of immigrants with a university degree in jobs with low educational requirements (such as clerks, truck drivers, salespersons, cashiers, and taxi drivers) increased.” It is statistics such as these and anecdotal evidence it has gathered that has led the Ontario Human Rights Commission (“Commission”) to develop a policy aimed at eliminating the ‘Canadian Experience’ barrier during the recruiting process (“Policy”). ‘Canadian Experience’, which may mean different things for different employers, is seen as a barrier by the Commission since it is often difficult to get ‘Canadian Experience’ if ‘Canadian Experience’ is required to get a job in the first place.

According to the Policy, a strict requirement for ‘Canadian Experience’ is *prima facie* discrimination (discrimination on its face) and can only be used in very limited circumstances. The onus will be on employers to show that a requirement for prior work experience in Canada is a *bona fide* requirement, which can often be a difficult task.

By way of background, discrimination under the Ontario *Human Rights Code* (“Code”) can be direct: for example, an employer may refuse to grant a job to someone because of prejudices related to the person’s place of origin. But the Code also prohibits discrimination that results from requirements, qualifications, or factors that may appear neutral but which have a negative effect on people identified by the Code. This is often called “adverse effect” or “constructive” discrimination. A job advertisement, a specific hiring practice, or an accreditation process that limits the opportunity of people without ‘Canadian Experience’ can have an adverse impact on recent immigrants, according to the Commission. Further, a distinction based on where a person acquired their work experience may indirectly discriminate based on Code grounds such as race, ancestry, colour, place of origin, and ethnic origin.

The Commission provides that for an employment or accreditation requirement such as having ‘Canadian Experience’ to be found to be legitimate or “bona fide”, an employer must show that they have made the requirement as inclusive as possible and that they have taken steps to accommodate applicants covered by the Code. This would mean assessing people on an

individual basis, and would include considering non-Canadian experience and other qualifications.

While the Commission's Policy is not law, Section 45.5 of the Code states that the Human Rights Tribunal of Ontario ("HRTTO") may consider policies approved by the Commission in a human rights proceeding before the HRTTO. Where a party or an intervenor in a proceeding requests it, the HRTTO *shall* consider a Commission policy. This means of course that employers must consider these policies as if they were indeed law.

In terms of guidance for employers, the Commission has put forward some best practices which include:

*Employers, representatives of employers, and regulatory bodies should:*

- Review job requirements and descriptions, recruitment / hiring practices, and accreditation criteria to make sure they do not present barriers for newcomer applicants.
- Consider all relevant work experience - regardless of where it was obtained.
- Frame job qualifications or criteria in terms of competencies and job-related knowledge and skills.

*Employers, representatives of employers, and regulatory bodies should not:*

- Require applicants to have prior work experience in Canada to be eligible for a particular job unless it is a clear bona fide requirement.
- Discount an applicant's foreign work experience or assign it less weight than their Canadian work experience.
- Require applicants to disclose their country of origin or the location of their work experience on the job application form.
- Ask applicants questions that may directly or indirectly reveal where their work experience was obtained.
- Ask for local references only.

Please contact e2r Solutions® should you wish to discuss your organization's recruitment practices or if you have general questions about human rights legislation.

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