NEATHOUSE PARTNERS

Recruitment Guidance

There are several key points to consider from an employment law perspective when undertaking a recruitment exercise, and this document is intended to provide you with some advice on some key areas to consider.

Of course, your nominated legal advisor here at Neathouse can assist you with any specific queries you may have and can provide additional detail to any of the points covered in this document. If you do have any questions, please do contact your advisor.

Protecting the employer: paper trail and training

Good practice throughout the recruitment process should help avoid litigation.

By ensuring you keep evidence of this good practice, you should be better placed to show that the business took reasonably practicable steps to prevent unlawful discrimination or harassment should a complaint or subsequent tribunal claim be raised.

As an employer recruiting, you should ensure that the recruitment process is documented so that there is a paper trail in the event of any complaint or litigation.

It should be remembered that these documents, which should reflect the decision-making process in relation to the particular applicant, will be disclosed in any tribunal proceedings and so should be written clearly and objectively.

Every selection decision, from shortlisting to appointment, is equally important and recommends that employers keep records that will allow them to justify each decision, and the process by which it was reached.

These records should also demonstrate that a selection decision was based on objective evidence of the candidate's ability to do the job satisfactorily, and not on assumptions or prejudices about the capabilities of certain groups of people sharing protected characteristics.

Health Questions

The position regarding what questions relating to someone's health differ pre and post an offer of employment, with pre-employment health questions (so during the recruitment process) being prohibited under the Equality Act 2010 and so unlawful, unless they are for a prescribed reason, these being:

1. **To identify reasonable adjustments** – To establish whether the applicant will be able to comply with a requirement to undergo an assessment (e.g. an interview or other process designed to give an indication of the applicant's suitability for the work concerned) or to establish whether you (the potential employer) will have to consider making reasonable adjustments to assist the applicant in the assessment;
2. **Intrinsic to the role** – Establishing if the applicant will be able to carry out a function that is intrinsic to the work concerned;
3. **Monitoring** – Monitoring diversity in the range of persons applying to the employer for work;
4. **Positive action** – Asking whether a person is disabled so they can benefit from any measures aimed at improving disabled people's employment rates. A main example of this would be the guaranteed interview scheme, whereby any disabled person who meets the essential requirements of the job is offered an interview; and
5. **An Occupational requirement** – If you had a requirement for the applicant to have a particular disability, and so being able to establish whether the applicant has that disability.

As advised, the questions you can ask in a recruitment process pre an offer being made are limited in comparison to what you can ask once you have made an offer of employment, which can at that stage be more detailed and specific.

A post offer form could be more detailed, and this is aimed at assisting you as an employer with identifying whether an employee is disabled and may require reasonable adjustments to be made.

The relevant medical questionnaires are attached to your initial welcome email for your reference but can of course be discussed further with your legal advisor.

From a practical sense, unless it is imperative for you to ask these questions, then our advice would be to not ask these questions.

The reasons for this are that number one, it is legally restricted unless it falls into one of the categories mentioned, but number two, once you have asked these questions, and an applicant has disclosed a condition etc, then should you reject that applicant for a reason completely unrelated to this, there is an obvious argument that the applicant can raise to suggest that the reason they were rejected was for disclosing this information.

This could lead to disability discrimination claims, and so can create difficult issues for the business, which could be completely avoided, especially if you don't need to collect that data at that time.

Another point to note is that there is no obligation on an individual to have to disclose a medical condition, even once in employment. Obviously if you are unaware of a medical issue, then you cannot be expected as an employer to make reasonable adjustments as you had no knowledge of this, however an employee cannot be penalised or subjected to a detriment for having failed to disclose this earlier.

Data Protection – General Data Protection Regulations

Under the GDPR, there is a requirement to be transparent with individuals regarding their data, i.e. what data you are requesting, for what reason, why and for how long you are retaining this data, and how it is being stored. This would all be covered off in the Privacy Notice, which we can provide you as part of your contract of employment review.

There are however the same obligations regarding the recruitment stage, as you will be holding and processing an applicant's data. We can also provide you with a Privacy Notice for the recruitment process also.

Equal Opportunities Monitoring

Employers are entitled (and in some circumstances required) to monitor the composition of those who apply to and of those who are working for them. Unless the employer is relying on an exemption (see Exceptions: occupational requirements and positive action, above), monitoring information about a job applicant is rarely needed for the actual recruitment decision.

Therefore, again as explained with health questions, if this is not required, you may want to take a view on whether you need to ask such questions.

The practice has therefore developed of asking candidates for this information in a separate anonymised document (at the application stage and sometimes again at the interview stage) so that the employer can monitor the diversity of applicants and interviewees if necessary.

Information on an applicant's racial or ethnic origin, physical or mental health, religion or similar beliefs and sexual life is special category data under the GDPR and Data Protection Act 2018 but provided it is anonymised, it will cease to be such data as the data subject is not identified.

Equal opportunities monitoring forms should be separated from application forms prior to the shortlisting process so that the information provided by applicants has no influence on the process.

While employers should ensure that equal opportunities monitoring forms are not shown to the shortlisting or interview panels, it should review each stage of its recruitment process, using the monitoring information it has received from the applicants for the job.

The review should consider whether any stage of the selection process might have contributed to any significant disparities between the success rates for different groups of people sharing protected characteristics. If so, the employer should investigate further and take steps to remove any barriers.

You have been provided with a monitoring form as part of your initial welcome email.

Right to Work Checks

In addition, it is a legal requirement to check that the individual has the right to work in the UK. This does not need to be done at the initial interview stage but would need to be undertaken prior to them starting work for you.

This should be undertaken for every employee, and failure to do so can risk criminal sanctions if you are employing staff without the right to work.

Further advice can be obtained from your advisor regarding this, however specific niche Immigration queries would fall outside of employment law and so may fall outside the scope of our service. In this scenario you may therefore need to be directed to an Immigration specialist but Neathouse will of course assist you as much as we can with this matter.

Shortlisting/Making an Offer

Obviously if you have several applicants you may need to shortlist, and at the end of the process hopefully make an offer.

If a complaint was to be raised by another unsuccessful applicant, so long as you can objectively justify the reasoning behind this, as advised this should support your decision.

If you were to ever get a complaint or similar, please do contact your advisor at Neathouse for support with this matter.

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