



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Policy on requiring a drivers license as a condition of employment

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to address legislative amendments resulting from the *Human Rights
Code Amendment Act, 2006*, which came into effect on June 30, 2008.)

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Contents

Purpose of OHRC Policies.....	3
Introduction	4
Where driving is not an essential duty of a job.....	4
Where driving is an essential duty of a job.....	5
1. Duty to Accommodate (section 17)	5
2. Record of Offences	6
Relevant Ontario <i>Human Rights Code</i> provisions.....	6
For more information.....	8

Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.^{*} The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.^{**} Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,^{***} applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.^{****}

^{*} The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

^{**} Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the OHRC.

^{***} In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

^{****} Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and*

Introduction

The Ontario *Code* states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Subsection 5(1) of the *Code* prohibits discrimination in employment on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

In addition, subsection 11(1) of the *Code* establishes that the right of a person is infringed where a requirement, qualification or factor exists that is not a prohibited ground of discrimination, but results in the exclusion or restriction of a group of persons who are identified by a prohibited ground of discrimination, unless the requirement or factor is reasonable and *bona fide* (*in good faith*).

Subsection 23(2) of *Code*, prohibits the use of application forms, or written or oral inquiries, which directly or indirectly classify or indicate qualifications of an applicant as being a member of a group that is protected from discrimination.

Where driving is not an essential duty of a job

A driver's licence contains personal information about an individual which could lead to the classification of a job applicant according to a prohibited ground of discrimination, contrary to subsection 23(2) of the *Code*. Therefore, unless a driver's licence is required to enable a person to perform the essential duties of a job, it should not be requested in an application form or during an employment interview.

Example: A driver's licence contains information about a person's date of birth. Requesting a job applicant to provide a photocopy of his/her driver's licence would yield information about the applicant's age, which would be contrary to subsection 23(2) of the *Code*.

Similarly, information on a drivers licence could yield information about whether or not an applicant has a disability. This in turn could lead to the classification of applicants as members of a group identified by a prohibited ground of discrimination.

Where driving is an essential duty of a job

For positions where driving is an essential duty of the job, a question relating to whether or not an applicant is licensed to drive, and/or the type of vehicle the applicant is licensed to drive, would be appropriate. The legitimate needs of the employer and the concerns of the applicant might be served by including the following statement on an application form or in a job advertisement:

This position requires the successful candidate to have a valid driver's licence. The successful candidate would have to provide proof that s/he has a valid driver's licence upon being hired.

Employers should determine which jobs within their organization involve driving as an essential duty. Applications for these positions should include a statement relating to the need for successful candidates to provide proof that they possess a valid driver's licence.

Subsection 23(3) allows for employers to ask applicants if they have a valid driver's licence during a personal interview for positions in which driving is an essential duty.

1. Duty to accommodate (section 17)

Subsection 17(2) of the *Code* requires an employer to accommodate the needs of a person with a disability in the performance of the essential features of a job, unless it could be demonstrated that the needs of the person cannot be accommodated short of undue hardship on the person responsible for accommodating those needs.

In some cases, an individual may be licensed to drive a vehicle with modified driving apparatus, because of a particular disability. For positions that involve driving as an essential duty, an employer would have a duty to accommodate the needs of a person with a licence to drive a modified vehicle only, short of undue hardship, to enable that person to perform the essential duties of the position. Undue hardship would include consideration of any costs or health and safety factors related to the accommodation.

Example: An employer may be able to accommodate the needs of a travelling salesperson with a mobility-related disability by purchasing and installing a set of hand-controls into a company car.

In some circumstances, the nature or degree of a person's disability might be such that the employer cannot accommodate the individual without incurring undue hardship.

2. Record of Offences

Where driving is an essential duty of the job, an employer may refuse to consider an applicant who has a poor driving record even though the *Code* protects persons who have committed a violation under the *Highway Traffic Act*.

Example: A company can refuse to hire a school bus driver who has accumulated too many demerit points.

At the same time, the *Code* does not protect persons who were convicted for careless driving under the *Criminal Code* and who have not been pardoned.

Relevant Ontario *Human Rights Code* provisions

- Section 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status or disability.
- Section 10 "Record of offences" means a conviction for,
a. an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
b. an offence in respect of any provincial enactment;
- Section 11 (1) A right of a person [under Part I] is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
a. the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
b. it is declared in this *Act*, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
- (2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
- Section 17 (1) A right of a person under this *Act* is not infringed for the reason only that the person is incapable of performing or fulfilling the essential

duties or requirements attending the exercise of the right because of disability.

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Section 23 (1) The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

(2) The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

(3) Nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such ground is permitted under this Act.

For more information

For more information about the OHRC or this policy statement, please visit our website at www.ohrc.on.ca .

Please visit www.ontario.ca/humanrights for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: ww.hrlsc.on.ca