

## TABLE OF CONTENTS

<i>About the Authors</i> .....	iii
<i>Dedication</i> .....	v
<i>Acknowledgements</i> .....	vii
<i>Preface</i> .....	ix
<i>Introduction</i> .....	xi
Chapter 1: The Personal Interview .....	1
1.1 Executive Summary .....	1
1.2 Introduction .....	1
1.3 Human Rights Considerations .....	2
a) Prohibited grounds of discrimination .....	2
b) Questions during the interview process .....	3
c) Human rights commission policies .....	4
d) A note on overqualification .....	5
1.4 Negligent Misrepresentation .....	5
a) The law of negligent misrepresentation .....	5
i) A duty of care based on a special relationship .....	6
ii) A representation that is untrue, inaccurate or misleading .....	6
iii) The misrepresentation must have been made negligently .....	7
iv) The employee must have reasonably relied on that misrepresentation .....	7
v) The reliance must have been detrimental in that it caused damages .....	8
b) Avoiding negligent misrepresentation .....	8
c) Special note re British Columbia .....	8
1.5 The Personal Interview as a Means of Background Checking .....	9
a) Train interviewers .....	9

## Table of Contents

b)	Ensure good background preparation	9
c)	Draft a standard set of interview questions	9
d)	Confirm information on the applicant's application form or résumé	9
e)	Ask about information that does not appear on the applicant's application form or résumé	10
f)	Observe the applicant's demeanour	10
g)	Take notes of the interview	11
h)	Explain the employer's background checking policy	11
i)	Ask for information that will be disclosed in a background check	11
j)	Retain interview notes for the appropriate period of time	12
Chapter 2: Reference Checking		15
2.1	Executive Summary	15
2.2	Introduction	15
2.3	Theory of Reference Checks	16
2.4	What Could Happen if you do not Check References? . . . .	16
	a) Business cost	16
	b) Legal liability	16
2.5	Ways of Obtaining References	17
2.6	Problems with Reliability of Reference Checks	18
2.7	Steps to Take Before Contacting the Referee	18
	a) Obtain applicant's consent	18
	b) Obtain name of referee from all past employers	19
	c) Ensure the referee has sufficient experience with the applicant	19
	d) Contact a cross-section of referees	19
	e) Identify referees not named by the applicant	19
	f) Decide who should conduct the reference check	20
	g) Understand the requirements of the job that the applicant has applied for	20
	h) Ensure consistency	20
	i) Prepare a list of questions	20

## Table of Contents

j)	Check back at least five years and three jobs . . . . .	21
k)	Confirm negative information about the applicant . . . . .	21
l)	Do not give information to the referee . . . . .	22
m)	Obtain consent before contacting the applicant's current employer . . . . .	22
2.8	When Speaking with the Referee . . . . .	22
2.9	A Note on Employment Verification Checks . . . . .	23
2.10	Reference Letters . . . . .	24
2.11	Human Rights Considerations . . . . .	25
a)	Generally . . . . .	25
b)	New Canadians . . . . .	26
<b>Chapter 3: Education and Professional or Trade</b>		
	<b>Certification Checks . . . . .</b>	<b>29</b>
3.1	Executive Summary . . . . .	29
3.2	Introduction . . . . .	29
3.3	Education Fraud on Résumés . . . . .	29
3.4	Why Verify an Applicant's Education or Professional Certification? . . . . .	30
a)	Misrepresentation of educational achievements is not uncommon . . . . .	30
b)	Reduce the risk of negligence claims . . . . .	30
c)	Business reputation and employee morale . . . . .	31
d)	Protect against future costs . . . . .	31
3.5	Whose Education or Professional Qualifications Should be Verified? . . . . .	31
3.6	Canadian Cases Involving Misrepresentation of Education or Professional Qualifications . . . . .	32
3.7	What Should be Verified? . . . . .	37
a)	Degrees or diplomas from colleges or universities . . . . .	37
b)	Professional certifications or licences . . . . .	37
c)	Trade certifications or qualifications . . . . .	37
3.8	When to Verify an Applicant's Education or Professional Certification . . . . .	38

## Table of Contents

a)	When advertising and upon receipt of a job application or résumé .....	38
b)	During the job interview .....	38
c)	After a conditional offer of employment is accepted .....	39
3.9	Cautionary Note: Screening Applicants Solely on the Basis of Overqualification .....	39
3.10	How to Verify an Applicant's Education or Professional or Trade Certification .....	41
a)	Contacting educational institutions .....	41
b)	Contacting professional associations .....	42
c)	Confirming trade certifications .....	42
3.11	Privacy Considerations: Education and Professional Certification Checks .....	43
3.12	Strategic Considerations: Education and Professional Certification Checks .....	43
	Chapter 4: Credit Checks .....	47
4.1	Executive Summary .....	47
4.2	Introduction .....	47
4.3	Why Check a Person's Credit? .....	48
4.4	Why Not to Check a Person's Credit .....	49
4.5	When to Conduct a Credit Check .....	49
4.6	How to Obtain a Person's Credit History .....	49
4.7	Credit Reporting Statutes in Canada .....	50
4.8	Provincial Rules on Credit Reporting .....	51
a)	British Columbia .....	51
b)	Alberta .....	51
c)	Saskatchewan .....	51
d)	Manitoba .....	52
e)	Ontario .....	52
f)	Quebec .....	53
g)	Nova Scotia .....	53
h)	Prince Edward Island .....	54
i)	Newfoundland and Labrador .....	54
4.9	Privacy Considerations in Credit Checking .....	54

## Table of Contents

4.10	Human Rights Considerations . . . . .	55
	a) Sample Consumer Credit Report . . . . .	56
	Chapter 5: Psychometric Testing . . . . .	59
5.1	Executive Summary . . . . .	59
5.2	Introduction . . . . .	59
5.3	What is Psychometric Testing? . . . . .	60
5.4	Why Conduct Psychometric Testing? . . . . .	60
	a) Obtain additional information about the applicant . . . . .	60
	b) Better performance . . . . .	60
	c) Employee retention and cost savings . . . . .	60
5.5	Types of Psychometric Testing . . . . .	61
	a) Cognitive or intelligence . . . . .	61
	b) Behavioural . . . . .	61
	c) Personality . . . . .	61
5.6	When to Conduct Psychometric Testing? . . . . .	62
5.7	Choosing Psychometric Tests . . . . .	62
	a) Determine the skills or traits to be measured . . . . .	62
	b) Look for tests intended to measure the relevant skills or traits . . . . .	63
	c) Consider the administration of the test . . . . .	63
	d) Cost . . . . .	63
5.8	Law on Psychometric Testing . . . . .	64
	a) Human rights obligations . . . . .	64
	i) Job relatedness . . . . .	64
	ii) Adverse impact . . . . .	64
	b) Employer conduct after discovering employee's psychological profile . . . . .	66
5.9	Criticisms of Psychometric Tests . . . . .	67
	a) Reliability of test . . . . .	68
5.10	Practice Tips . . . . .	68
	a) Ensure that psychometric testing is only part of the hiring process . . . . .	68
	b) Consistency . . . . .	68
	c) Confidentiality . . . . .	69
5.11	Further Information . . . . .	69

## Table of Contents

Chapter 6: Medical and Fitness Testing .....	71
6.1 Executive Summary .....	71
6.2 Introduction .....	72
6.3 What is Pre-Employment Medical or Fitness Testing? .....	72
6.4 Why Conduct Pre-Employment Medical or Fitness Testing? .....	73
6.5 Risks with Pre-Employment Medical and Fitness Testing .....	73
6.6 Overview of the Law on Pre-Employment Medical and Fitness Testing .....	74
a) Historical evolution of the law on discrimination .....	74
b) Human rights commission policies on pre-employment medical and fitness testing .....	76
6.7 What Questions May an Employer Ask During the Hiring Process? .....	77
6.8 When Should An Employee Undergo Pre-Employment Medical Testing? .....	78
6.9 What Methods Should Be Used for Pre-Employment Medical or Fitness Testing? .....	79
a) Qualified medical professional .....	79
b) Issues relating to consent .....	79
i) Consent to the examination .....	79
ii) Consent to the release of information .....	80
iii) Confidentiality .....	80
6.10 What Process Should be Followed on Receipt of the Results of the Pre-Employment Medical or Fitness Testing? .....	80
6.11 What if the Employer is Uncertain About the Accommodation Being Requested? .....	81
a) Does the applicant have a disability? .....	82
i) Undue hardship .....	84
6.12 Strategic Considerations: Reducing the Risk of Human Rights Complaints .....	85
a) Be consistent .....	85
b) Beware the limits of technical expertise .....	85

## Table of Contents

6.13	Case Examples . . . . .	85
6.14	Cases on Pre-Employment Medical and Fitness Testing . . . . .	86
	Chapter 7: Police Records Checks . . . . .	101
7.1	Executive Summary . . . . .	101
7.2	Introduction . . . . .	102
7.3	Why Check a Person’s Police Records? . . . . .	103
	a) Legislative requirement to perform a criminal records check . . . . .	103
	b) Reduce the risk of liability for negligence . . . . .	103
	c) Reduce the risk of vicarious liability . . . . .	103
	d) Business reputation . . . . .	104
7.4	Asking Job Applicant if He or She has a Criminal Record . . . . .	104
7.5	When to Obtain a Police Records Check? . . . . .	105
7.6	Three Levels of Police Records Checks . . . . .	106
	a) Police Criminal Records Check . . . . .	106
	b) Police Information Check . . . . .	107
	c) Police Vulnerable Sector Check . . . . .	108
7.7	How to Obtain the Police Records Check Results: Third Party Screening Company versus Sending Job Applicant to Police Station . . . . .	109
	a) Process using third-party background checking firm . . . . .	109
	b) Process where job applicant sent to the local police station . . . . .	111
	c) Pros and Cons: Background Checking Firm versus Sending Job Applicant to Local Police Station . . . . .	111
7.8	How to Obtain a Vulnerable Sector Check . . . . .	112
7.9	Limitations of the CPIC Search Results . . . . .	114
7.10	Provincial Mental Health Apprehensions . . . . .	115
7.11	Young Offender Records Check . . . . .	116
7.12	Jurisdictions in which Employers May Refuse to Hire an Applicant Simply Because he or she has	

## Table of Contents

a Criminal Record . . . . .	117
7.13 Jurisdictions in which Employers Must Show that the Criminal Record is Related to the Job . . . . .	118
7.14 Refusing to Hire a Person Because he or she was Charged, Even if he or she was Found “Not Guilty” . . . . .	126
7.15 Records of Provincial Offences . . . . .	127
7.16 Issues in a Unionized Environment . . . . .	127
7.17 Child Abuse Registry Searches . . . . .	128
7.18 Additional Resources . . . . .	129
 Chapter 8: Drug and Alcohol Testing . . . . .	 133
8.1 Executive Summary . . . . .	133
8.2 Introduction . . . . .	134
8.3 Why Conduct Pre-Employment Drug and Alcohol Testing? . . . . .	134
a) Safety, efficiency and absenteeism . . . . .	134
b) Legislative requirements regarding occupational health and safety . . . . .	134
c) Reduce the risk of criminal liability for occupational health and safety offences . . . . .	135
d) Reduce the risk of vicarious liability . . . . .	135
8.4 What is Pre-Employment Drug and Alcohol Testing? . . . . .	136
8.5 When to Conduct Pre-employment Drug and Alcohol Testing . . . . .	136
8.6 Overview of the Law on Pre-Employment Drug and Alcohol Testing . . . . .	136
a) Background . . . . .	136
b) Leading case: <i>Entrop v. Imperial Oil Ltd.</i> . . . . .	136
c) Accommodation . . . . .	138
d) Additional decisions on pre-employment drug and alcohol testing . . . . .	139
e) Labour arbitration decisions . . . . .	141
8.7 Human Rights Commission Policies on Pre-Employment Drug and Alcohol Testing . . . . .	142
a) Note Re: Cross-border trucking and bus operations . . . . .	152



## Table of Contents

8.8	Which Employers Should Have a Pre-Employment Drug and Alcohol Testing Policy? .....	152
	a) What to consider .....	152
	b) Who should be tested? .....	152
	c) When should an applicant undergo pre-employment drug and alcohol testing? .....	153
	d) What methods should be used for pre-employment drug and alcohol testing? .....	153
	i) Alcohol .....	153
	ii) Drugs .....	154
	e) What do you do with a positive result? Accomodation in the context of pre-employment drug and alcohol testing .....	154
	f) Strategic considerations: reducing the risk of human rights complaints and upholding the policy .....	154
8.9	Possible Future Implications .....	155
	a) Developing case law .....	155
8.10	Additional Resources .....	155
Chapter 9: Immigration and Terrorism Checks .....		159
9.1	Executive Summary .....	159
9.2	Introduction .....	159
9.3	Employer's Obligation to Check if an Applicant is Entitled to Work in Canada .....	160
9.4	Who is Entitled to Work in Canada? .....	160
9.5	How to Confirm Entitlement to Work in Canada .....	161
	a) Workers with a Social Insurance Number .....	161
	b) Workers without a Social Insurance Number .....	161
9.6	Temporary Foreign Workers — Special Requirements ....	163
9.7	When Should the Employer Check Whether an Applicant is Permitted to Work in Canada? .....	164
9.8	Terrorism Checks .....	165
	a) Generally .....	165
	b) Terrorism regulations .....	166
	c) How is a terrorist check done? .....	166

## Table of Contents

9.9	When Should a Terrorism or Industry-Specific Security Check Be Done? .....	166
9.10	Potential Liability if Immigration and Security Checks Are Not Obtained? .....	167
	a) Immigration checks .....	167
	b) Terrorism checks .....	167
	c) Some human rights and privacy considerations .....	167
	Chapter 10: Internet and Social Network Searches .....	171
10.1	Internet Searches .....	171
10.2	Social Network Searches .....	172
	Chapter 11: Court Searches .....	175
11.1	Executive Summary .....	175
11.2	Court Decisions versus Court Records .....	175
11.3	Why Search Court Records? .....	176
11.4	What Should Employers Look for in a Court Records Search? .....	177
11.5	Searching Court Records in Jurisdictions Across Canada .....	177
	Chapter 12: Privacy Considerations .....	183
12.1	Introduction .....	183
12.2	Federally-Regulated Employers .....	183
12.3	Provincially-Regulated Employers .....	184
	a) British Columbia, Alberta, Quebec and the Territories .....	184
	b) Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland .....	184
	i) Special note on Manitoba .....	185
	ii) Personal health information — Ontario .....	185
12.4	Privacy Best Practices .....	185
	a) Consent .....	186

Table of Contents

b) Identifying purposes .....	186
c) Limiting collection .....	186
d) Limiting use and disclosure .....	187
e) Retention of information on unsuccessful job applicants .....	187
f) Safeguards .....	188
g) Openness .....	189
h) Access to information on job applicants .....	189
12.5 Retention of Records Used to Make a Decision — Special Rules .....	189
Appendix “A”: Sample Background Checking Policy and Procedure .....	193
Appendix “B”: Sample Background Checking Conditions to Include in Conditional Offer of Employment .....	203
<i>Index</i> .....	205

