



## Mistakes to avoid when hiring staff

We know that hiring is by no means an easy task, but while you are on the hunt for the ideal employee, there are certain errors you can avoid making. Under Australian employment law, you owe not only your employees but also your potential employee's various obligations. It's worth considering some of them now as it will cost much more time and money to rectify the mistake.

### Australian employment law

When hiring staff, it's critical to ensure that all candidates are provided with an equal opportunity. This means an employer should carefully consider the content of job advertisements, the questions candidates are asked during an interview, and the selection criteria for the position. Some of the common examples of 'What Not to Ask' include:

1. How many children do you have?
2. Are you married?
3. Do you plan on having children soon?
4. That's a pretty necklace, are you a Christian?
5. What is your background? Or which country are your parents from?
6. Gosh, the Greens certainly gave the Liberals a trashing at last weekend's election. What do you think of the whole thing?
7. How old are you?

Under the *Fair Work Act 2009 (Act)*, it is open for a disgruntled unsuccessful candidate to seek recourse against a prospective employer if they believe a decision to not to hire them was made based on their:

- race;
- sex;
- sexual preference;
- age;
- physical or mental disability;
- marital status;
- family or carer's responsibilities;
- pregnancy;
- religion; or

Phone: 1300 368 041  
Fax: (03) 8660 3399

**MELBOURNE OFFICE**  
Address: Level 1, 112 Wellington Parade  
East Melbourne VIC 3002



- political opinion.

If a prospective employee brings an application under the Act based on one of the above attributes, it is up to the prospective employer to prove that the above attributes did not form a part of the decision-making process. That is, a candidate could make a successful claim even if the attribute only formed a small part of the decision.

State and federal specific discrimination legislation also exists, which can be more extensive than the *Fair Work Act 2009*.

### Indirect discrimination

On the surface, the above concepts may seem simple - do not discriminate against candidates. However, you need to be mindful of having an unintentional or unconscious bias towards certain types of candidates.

For example, the Queensland Anti-Discrimination Tribunal found that Virgin Blue's recruitment process was skewed towards younger candidates. Virgin Blue's assessors, who were predominantly under 25, were held to have an unconscious predisposition to selecting candidates of a similar age.

When using a selection panel in the recruitment process, you should do your best to ensure that panel members possess wide-ranging attributes. If possible, this may include having both males and females, younger and older people, as well as ethnically diverse panel members or recruitment team where possible.

### Medical History

Even though you should generally be wary of bias to certain types of candidates, you are allowed to ask applicants questions about their past or present illnesses and injuries. The question, though, must be directed towards assessing whether the applicant can carry out the inherent requirements of the position. It is unlawful to ask candidates questions about their medical history, which does not go towards assessing whether a candidate can carry out the inherent requirements of the position.

However, questions like "have you suffered an injury to your back?" may not go far enough in assessing whether a candidate can carry out the inherent requirements of the role. You should, therefore, not be quick to exclude a candidate who provides an affirmative answer to such a question. You need to go further and ask the candidate for further details about their injury and any ongoing impact of it.



### Police checks

It is also open for you to seek information from candidates about their police history. Once again, though, you need to ensure that the records relate to the requirements of the role. Some State Discrimination Acts prohibit discrimination based on irrelevant criminal records or spent convictions, and it is also open to a prospective employee to make a complaint of discrimination based on a criminal record under the *Australian Human Rights Commission Act 1986* (Cth).

### Deceptive and misleading conduct

Lastly, it is important to stay away from making promises or representations during the recruitment process that cannot be kept. For example, be wary of making statements such as “We are booming, you will have a job for life, you will make \$100 000 a year within 12 months...” if the candidate gives up another opportunity to take up that offer, but you don’t then offer the candidate a position, or they don’t make \$100 000 a year, then it is open for the candidate to make a misleading and deceptive conduct claim under Australian Consumer Law.

### Top Tips:

To summarise, the top tips for avoiding hiring traps that could land you in hot water include:

- Carefully consider the language and content of job advertisements.
- Consider whether the selection criteria relate to the inherent requirements of the position.
- Plan and review as many of the interview questions as possible before going into the interview.
- Ensure interview questions are relevant to the selection criteria.
- Critically assess the roles physical tasks – For example, weights lifted, frequency of standing and sitting, etc.
- Be mindful of having an unintentional or unconscious bias.
- Avoid making promises during the interview.
- If using a selection panel or group to interview staff, ensure that members have wide-ranging attributes.

**If you have any questions about your hiring process or what to look out for when please don’t hesitate to contact the ARA Employment Relations Advisory Team on 1300 368 041.**

**The ARA’s Employment Relations Advisory Team provides a free telephone consulting service for members on all employment matters and offers free online resources such as contracts and templates, as well as member rates for legal services specialising in Employment matters.**

Phone: 1300 368 041  
Fax: (03) 8660 3399

**MELBOURNE OFFICE**  
Address: Level 1, 112 Wellington Parade  
East Melbourne VIC 3002