

RECRUITMENT PROCESS: SETTING POLICIES AND MANAGING LEGAL CONSEQUENCES

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Introduction

“Time spent on hiring is time well spent.” Robert Half

In a fast-paced world of talent acquisition and an intricate web of employment law, one mistake in the recruitment process can cost an employer their best candidate and an applicant their dream job.

The key to success? A well-structured recruitment policy, which will not only maximise legal certainty, but also opens up a world of opportunities.

Recruitment policies play a pivotal role in the world of employment. Regardless of whether you are an early stage start up or a well-established business, the significance of implementing a recruitment policy cannot be overstated. A well-structured recruitment policy sets the foundation for a fair, transparent, and non-discriminatory selection process. It mitigates the risks of the employer being exposed to discrimination claims, and gives each candidate a fair shot at being selected to fill a vacancy.

Every decision made during the recruitment process holds the potential for legal challenges. Practices that may seem innocuous could inadvertently lead to allegations of discrimination, bias, unfair treatment as well as breaches of data protection laws in the handling of applicant data.

The article considers some of the legal intricacies of recruitment, offering insights and guidance to ensure that your hiring practices are legally compliant and fair.

The Recruitment Process

Finding suitable personnel for an organization may seem like a straightforward process. The process typically includes job-posting on specific job portals or social media platforms, collecting CVs, evaluating and identifying several applicants, issuing invitations for interviews, shortlisting of candidates, conducting background checks, and culminating in the formal offer of an employment contract to the chosen candidate. In practice, however, the process is inherently complex and multifaceted.

The process typically unfolds in three key steps:

1. **Recruitment:** this phase begins with the employer planning its hiring needs by creating job descriptions and specifying qualifications, setting the stage for transparency and consistency during the entire recruitment process.
2. **Selection:** job postings are released, resumes are screened, and interviews are conducted to identify candidates aligned with the employer’s culture, values, and long-term objectives.
3. **Implementation for work:** the employer enters this final phase once a candidate has been selected for recruitment. It involves finalizing paperwork, conducting

background checks, and ensuring the new employee's smooth transition into the organisation.

Each of these stages plays an integral role in the process of identifying, acquiring, and integrating qualified individuals into the workforce.

Drafting a Recruitment Policy

Crafting a sound recruitment policy involves considering the following key elements::

1. **Content:** a written policy that should cover the full recruitment process cycle, including the initial phase of issuing a vacancy, the application and selection process, moving to the candidate interview and drafting of the job offer. In addition, the policy should include a section on induction training, clearly establishing the timeline within which the training must be provided.
2. **Alignment with Company Goals:** the policy should align with the company's objectives, considering the skills, competencies and values that are crucial to the its workforce.
3. **User friendly:** make the policy industry-specific and user-friendly, using clear language, outlining steps, criteria, and timeframes, and providing accessible contact information for inquiries and assistance.
4. **Involve key stakeholders:** collaboration with HR and legal advisors ensures the policy is tailored to specific needs.
5. **Policy Updates:** ensure the policy is updated on an on-going basis to reflect any changes in the recruitment process as well as legislative developments.

Discrimination Risks

A key risk faced by employers during any recruitment process involves discrimination claims being made by applicants. The Employment and Industrial Relations Act (Chapter 452 of the laws of Malta) and the Equal Treatment in Employment Regulations (Subsidiary Legislation 452.95) (the "Regulations") prohibit any form of discrimination against any person on the grounds of religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin ("protected characteristics") in relation to conditions of access to employment, including the advertising opportunities for employment, selection criteria and recruitment conditions and in training.

The risk of an employer discriminating against job applicants exists throughout each stage of the recruitment process. As such, it is imperative that employers are aware of their legal obligations. Here are some key considerations:

1. **Recruitment Policy and Job Advertisements** – carefully drafting job advertisements to avoid falling under anti-discrimination legislation. For example, advertising for a 'dynamic and youthful person' or an 'attractive female' would be contrary to the age and sex anti-discriminatory provisions under the Regulations.

2. **Equal Opportunities** – ensure equal opportunities and non-discriminatory selection throughout the entire recruitment process.
3. **Interview Process:** review your interview practices to ensure compliance with anti-discrimination laws and use relevant, unbiased questions.
4. **Use of Social Media** – since information pertaining to a protected characteristic may be found on an applicant’s social media profile, employers should be aware of the risks of conducting searches on social media. This may very well constitute discrimination if the information is subsequently used to make hiring decisions.

Relevant Cases:

Over the years, various cases have provided insights regarding discrimination in the recruitment process. Some are outlined below:

5. **Centrum v Firma Feryn NV C-54/07** – the Court of Justice of European Union (CJEU) ruled that a discretionary advertisement was directly discriminatory even though there was no identifiable complainant. Such public statements may point to the existence of a recruitment policy which is directly discriminatory. It is then for the employer to prove that there was no breach of the principle of equal treatment.
6. **Keane v Investigo (EAT/0389/09)** – the UK Employment Appeals Tribunal (EAT) held that job applications should be bona fide, and genuine intent is crucial. The EAT ruled that, by being turned down for a job which she had no genuine intention of accepting (since she applied for more than 20 jobs), the candidate had not suffered any detriment or been treated unfavourably or put at a disadvantage.
7. **Meister v Speech Design Carrier Systems GmbH (C-415/10)** – the CJEU decided that EU discrimination law does not entitle an unsuccessful job applicant to detailed information about the recruitment process, such as the criteria and reasons for the selection of another candidate. However, the CJEU further stated that the employer's refusal to grant access to such information may be one of the factors for the court to consider when deciding whether there are sufficient facts from which to infer that discrimination occurred, and which therefore would shift the burden of proof on to the employer to disprove discrimination.

Positive Action

Under the Regulations, employers in Malta may apply an exception to take the protected characteristics into consideration when deciding whether to recruit or promote persons with a protected characteristic due to their under-representation in the workforce. This is referred to as ‘positive action’ and can involve treating one group more favourably to prepare them to specific work or encourage their participation.

Right of Action

A job applicant claiming to have been subjected to discriminatory treatment, has the right for action before the competent court of civil jurisdiction to order the defendant to desist from such unlawful act and, where applicable, for compensation for

damages suffered. This highlights the importance of implementing a sound and comprehensive recruitment policy.

Data Protection Implications

During the recruitment process, a considerable amount of personal data is collected. The collection and use of such personal data must be carried out in full compliance with the provisions set out in the General Data Protection Regulation (GDPR) and the Data Protection Act.

Some of the major issues that should be avoided include:

- i. The employer failing to provide candidates with a copy of the company's privacy policy.
- ii. Asking for a police conduct certificate when there is no legal obligation to do so. In brief, under the GDPR only entities that are required by law to seek such police conduct certificate (such as banks, financial institutions and subject persons) are permitted to process such personal data.
- iii. Keeping personal data indefinitely.
- iv. Processing personal data on the basis of consent in employment contexts can be problematic due to the inherent presumption of an imbalance of power. Therefore, it is often more appropriate to rely on other legal bases for processing, such as contractual necessity, compliance with legal obligations, and legitimate interests.

Permit to work

Compliance with immigration laws is crucial. Employers should verify that prospective employees have the necessary work and residence permits as required by law.

Conclusion

In conclusion, the recruitment process is a nuanced journey with legal implications at every turn. A well-crafted recruitment policy serves as a guide, navigating the complexities while fostering fairness and compliance with the law. Remember, in the realm of hiring, time invested in policy development is indeed time well spent.

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