

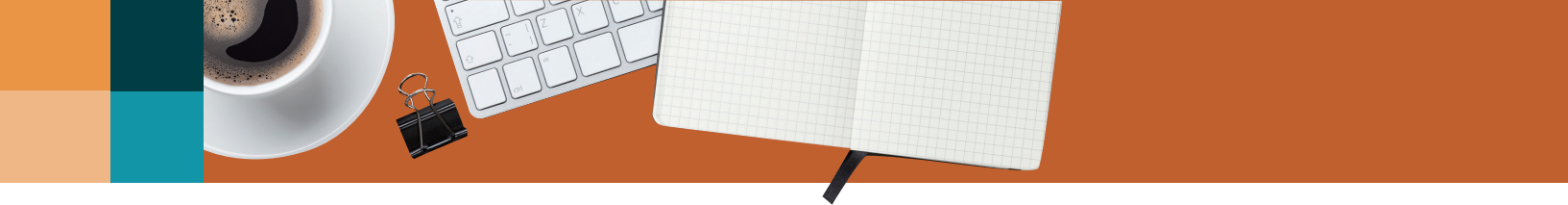


平等機會委員會  
EQUAL OPPORTUNITIES COMMISSION



# Equal Opportunities in Employment: **Good Management Practices**





## Foreword

Equal opportunity is one of the core values intrinsic to Hong Kong. It ensures that everyone is protected from discrimination in the public field of employment, education, and the provision of goods and services, and guarantees fair treatment. Hence, all of us can achieve a better future by virtue of his/her own ability and effort.

To date, four anti-discrimination ordinances have been enacted in Hong Kong, namely Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO), Family Status Discrimination Ordinance (FSDO) and Race Discrimination Ordinance (RDO). The Equal Opportunities Commission (EOC), an independent statutory body set up to implement these anti-discrimination ordinances, has always strived to build a society free from discrimination, embracing diversity, inclusiveness and equality of opportunity for all.

Employment is one of the major areas protected by the anti-discrimination ordinances, as work is an important part of our lives. In this connection, the EOC issued Code of Practice on Employment in respect of the four anti-discrimination ordinances respectively to increase the public's understanding of the law and provide guidance on the procedures and systems that can help to prevent discrimination and to deal with unlawful acts in employment.

Furthermore, the EOC also advocates enterprises to continuously improve their work environment so that they can go beyond compliance with legal requirements in the long run. To this end, the EOC has compiled a Good Management Practices booklet for employers and senior management. The booklet highlights management functions related to equal opportunities and provide employers, senior management and human resource professionals with key points and practical advice to prevent workplace discrimination. Examples are: the use of consistent selection criteria; dress and appearance codes; guidelines for application forms design; interviewing procedures; pre-employment medical examinations; genuine occupational requirements in relation to sex, disability and race; and the prevention of sexual harassment and racial harassment in the workplace.

The EOC strongly believes that an equitable, inclusive and diverse workplace can bring benefits to enterprises, such as inspiring innovation and creativity, strengthening employees' sense of belonging, enhancing corporate image and promoting the overall efficiency and productivity. We hope this booklet will assist employers and senior management in the formulation of relevant employment policies.



## Table of Contents

<b>Foreword</b> .....	2
<b>General Good Practices</b>	
1. The Use of Consistent Selection Criteria .....	4
2. Recruitment Advertisements .....	5
3. Guidelines for Application Forms Design .....	8
4. Interviewing Procedures .....	10
5. Pre-employment Medical Examinations .....	11
6. Pre-hiring and Post-hiring Procedures .....	14
7. Dress and Appearance Codes .....	16
<b>Specific Practices on Sex Discrimination</b>	
8. Sexual Harassment in the Workplace .....	18
9. Sex as a Genuine Occupational Qualification .....	19
<b>Specific Practices on Race Discrimination</b>	
10. What is Racial Harassment? .....	21
11. Race as a Genuine Occupational Qualification .....	22
<b>Specific Practices on Disability Discrimination</b>	
12. Absence of Disability as a Genuine Occupational Qualification .....	23
13. Reasonable Accommodation and Unjustifiable Hardship .....	25
<b>Related Resources</b> .....	27
<b>Useful Links and Contacts</b> .....	28



## (I) The Use of Consistent Selection Criteria

### *What are consistent selection criteria?*

Consistent Selection Criteria (CSC) are selection criteria that are applied consistently to applicants or employees in recruitment, promotion, transfer, training, dismissal or redundancy. They also apply to the setting of the terms and conditions of employment. These criteria and terms and conditions should be made known to employees or job applicants upon request.

### *Why is it important to have consistent selection criteria?*

It is important for employers to have CSC to avoid acting unlawfully. It is also a matter of good management practice. The application of CSC helps promote fairness and minimise unconscious bias. The Code of Practice on Employment under the four anti-discrimination ordinances, i.e. the Sex Discrimination Ordinance (SDO), the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance (FSDO) and the Race Discrimination Ordinance (RDO), recommend that employers use CSC to avoid discrimination on grounds of sex, marital status, pregnancy, disability, family status and race. It is in the employers' interests to do so.

### *How should consistent selection criteria be developed?*

Start by drawing up a list of job-related requirements and identifying the range of relevant and essential personal requirements under the headings of education, experience, knowledge, skills and abilities. During this process, try to ensure that the CSC are objective, clearly defined, and ranked in order of priority. They should be set out in such a way that they can be easily assessed.

To decide whether or not a certain personal requirement is relevant, the following may be considered:

**Education** – Is a formal educational qualification essential for the performance of the job, or could this be substituted by knowledge gained from

work experience? If qualification is essential, it is recommended that the minimum requirement should be specified.

**Experience** – Think about other related requirements such as knowledge and skills before deciding on the type and years of experience required. For example, is practical experience necessary or can it be acquired on the job in a relatively short period of time?

**Knowledge** – People may have a capacity to acquire knowledge quickly. For this reason, knowledge may be considered as an alternative to educational qualifications for some jobs.

**Skills/Abilities** – Think carefully about the required skills and abilities, and the extent to which they are important for the performance of the job. For example, if a requirement of “ability to drive” is not an essential criterion, it may unfairly exclude some people with a disability. On the other hand, if there is a genuine need for an applicant “to be able to travel”, or have an “ability to undertake site inspections”, these should be made clear.

Employers should guard against applying non-essential requirements or conditions for a job as this may result in unlawful indirect discrimination against candidates of a certain group with the attributes protected by the anti-discrimination ordinances. For example, language requirements for applicants should reflect job requirements and should commensurate with the satisfactory performance of the job. Otherwise, it may result in indirect racial discrimination.

Generally speaking, CSC should relate to education, experience, knowledge, skills and abilities which are relevant to the job. Where one of the CSC stipulates a particular sex, race or the absence of a disability, employers need to ensure that such a requirement can be claimed as a genuine occupational qualification under the SDO, the DDO or the RDO<sup>1</sup>. Employers should bear in mind that, under the DDO, it is necessary to allow for reasonable adjustments for job applicants or employees with disabilities to overcome any practical difficulties arising from the disability.





### *What comes next when consistent selection criteria are set?*

CSC should be made known to employees or job applicants upon request. They should be kept under periodic review and updated to reflect any changes in the nature of the job. It is good management practice that employers ensure that CSC are up-to-date and relevant.

## **(2) Recruitment Advertisements**

There are various ways of inviting job applications, one of which is by advertisement. As an advertisement is the first step to recruitment, it is important to get it right. Employers are advised to be alert to discriminatory biases which may be unlawful under the anti-discrimination ordinances, i.e. the Sex Discrimination Ordinance (SDO), the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance (FSDO) and the Race Discrimination Ordinance (RDO). It is recommended that employers should follow the recommendations on setting out consistent selection criteria, job descriptions and shortlisting<sup>2</sup>.

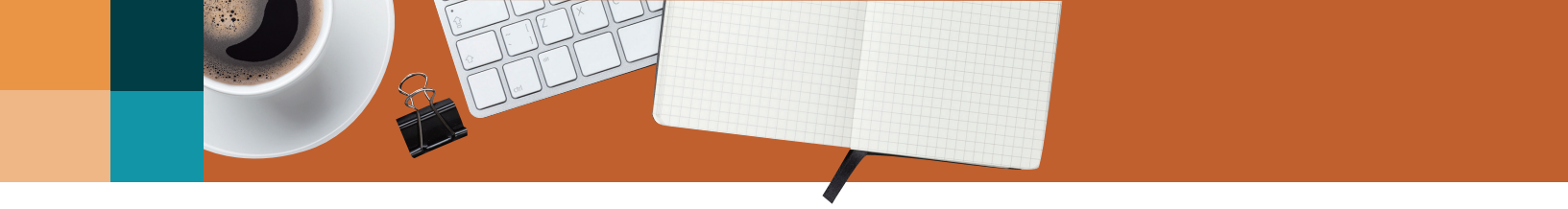
Under the anti-discrimination ordinances, any advertisement which indicates or might reasonably be understood to indicate an intention to discriminate is unlawful. This means the advertisement, when taken as a whole, must not indicate such an intention unless the job is one for which sex, absence of disability or race is a Genuine Occupational Qualification (GOQ) or unless one of the legal exceptions applies so that the discrimination would not be unlawful<sup>3</sup>.

### ***Discriminatory advertisements under the SDO***

An intention to discriminate may be attributed even without such obvious words as “male driver” or “female typist”, and can be inferred where single-sex words are used, for example, “waitress”, “salesman” or “stewardess”, unless the advertisement contains an indication to the contrary. For instance: “This post is open to both men and women”, or to pair words with the other sex equivalents, i.e. “waiter/waitress”, “saleswoman/salesman” or “steward/stewardess”. Where there are no feminine (or masculine) equivalents commonly in use, one alternative would be to use gender-neutral job titles, for example, “camera operator” instead of “cameraman”.

---

<sup>1</sup> Please also read “Sex as a Genuine Occupational Qualification”, “Race as a Genuine Occupational Qualification” and “Absence of Disability as a Genuine Occupational Qualification” in this publication.



Employers should also check that advertisements are available to both sexes. Therefore, an advertisement should not be published only in a magazine of which the target readers are men or women only, or be displayed in a place to which only one sex has access. Nor should any drawings, real life examples or portrayals of serving employees be shown in an advertisement in such a way as to give the impression that one sex, as opposed to the other, is sought or preferred by the employer.

If services of employment agents are needed, employers should ensure that the agents know that the vacancy is open to persons of either sex. Where vacancies are filled by promotion or transfer, they should be advertised to all eligible employees in such a way so as not to restrict applicants from either sex.

If vacancies are not advertised and recruitment is by word of mouth, employers must ensure that the recruitment exercise is as open as possible, particularly where the exercise relies solely on word of mouth of existing employees in a certain department of the company where the staff are all of one sex.

#### ***Discriminatory advertisements under the DDO***

Some wordings in a recruitment advertisements, such as “excellent health”, or “五官端正”<sup>4</sup> and “體健”<sup>5</sup>, which are commonly found in Chinese advertisements, may imply that people who have an illness or a disfigurement would be refused employment. In other words, persons with certain illnesses or disfigurement, which are disabilities as defined under the DDO, who read such advertisements might feel they would be excluded because they cannot meet the requirements of the job being advertised. Such advertisements would therefore, on the face of it, be unlawful.

In order to avoid any unnecessary misunderstanding or uncertainties, it is recommended that words which describe particular physical attributes are avoided. Instead, the advertisement should set out the duties of the job which would require, or otherwise indicate the reasons for requiring, those attributes. For example, rather than specifying the requirements of “體健” for the position of “delivery worker”, it would be far better and precise to

say that the job involves lifting heavy materials manually.

#### ***Discriminatory advertisements under the FSDO***

The FSDO makes it unlawful to advertise a job for people without family status. Family status means having responsibility for the care of an immediate family member. Employers are advised not to include statements indicating that only people without family responsibilities can apply, as this may indicate an intention to discriminate on the ground of family status.

#### ***Discriminatory advertisements under the RDO***

According to the RDO, it is unlawful to publish an advertisement indicating that only people of a certain race would be employed unless the job is one for which race is a GOQ.

Employers should fill vacancies by open application so that people from all racial groups have the opportunity to apply. Where vacancies are to be filled by promotion or transfer, publish the information to all eligible employees so that there is no restriction on applications from any racial groups.

Moreover, employers should use different advertising channels, such as newspapers, Labour Department’s job centres, employment agencies, professional journals and specialist magazines or publications, to let people from all racial groups know the information. Where the ability to read and write in a particular language is necessary for the satisfactory performance of a job, advertisement may specify the language requirement and may be published in that language. As English and Chinese are the two prevalent languages in Hong Kong, employers are encouraged to advertise in both English and Chinese media where reasonably practicable. Where the job requires only the ability to speak but not read or write Chinese, in addition to advertising in Chinese, employers are encouraged to consider advertising also in English where reasonably practicable. Employment agencies are also advised to provide their services in both Chinese and English where reasonably practicable.



### **Other considerations in a recruitment advertisement**

Employers are strongly advised not to request photographs and copies of ID cards at the application stage as this may indicate an intention to discriminate on the ground of sex, disability or race. It is, however, acceptable to ask ID card numbers from job applicants. Requests for photographs and copies of ID card can be made at the interview stage for identification purposes.

In addition, employers are advised to include statements such as "This post is equally open to persons with a disability" in a recruitment advertisement where absence of disability is not a GOQ for the job. Employers are also encouraged to include statements such as "the post is equally open to people from all racial groups" in advertisements, as this will send out a clear message that applicants from all racial groups are welcome.

### **Exceptions**

The law provides that publication of an advertisement which indicates, or might reasonably be understood as indicating, an intention to discriminate is not unlawful if, in fact, the intended act itself is not unlawful. For example, if being a man or a woman is a GOQ for the job in question, advertising for a person of a particular sex is not unlawful in such circumstances.

Furthermore, a publisher is not liable for the publication of a discriminatory advertisement if that publisher has relied on a statement from the advertiser to the effect that an exception applies and therefore the advertisement would not be unlawful. The publisher in such case must show not only that he or she relied on the statement from the advertiser before publishing the discriminatory advertisement, but that it was reasonable to rely on such statement.

### **Penalty**

The EOC may apply to the District Court for the imposition of a financial penalty on a person who has published or caused to be published a discriminatory advertisement. The penalty shall not exceed \$10,000 for the first occasion on which a penalty is imposed, and shall not exceed

\$30,000 for the second or subsequent occasion on which a penalty is imposed.

Any advertiser who knowingly or recklessly makes a statement to a publisher to the effect that an exception applies and therefore publication of the advertisement would not, in fact, be unlawful, commits a criminal offence if that statement is false or misleading in a material respect. Liability upon conviction may lead to a fine being imposed.

---

2 Please also read "The Use of Consistent Selection Criteria", "Pre-hiring and Post-hiring Procedures" and "Interviewing Procedures" in this publication.

3 Please also read "Sex as a Genuine Occupational Qualification", "Race as a Genuine Occupational Qualification" and "Absence of Disability as a Genuine Occupational Qualification" in this publication.

4 "五官端正" - This is a requirement commonly found in Chinese job advertisements which, in literal terms, refers to having five properly-formed facial organs. There is no exact equivalent term in English. Literal meaning aside, the term is often taken to imply a requirement of a face with no disfigurement and/or a 'nice' face although 'nice' is open to subjective interpretation.

5 "體健" - As with the term above, this is also commonly found in Chinese advertisements and, in literal terms, can be translated as either "健康" which means "healthy" or "good health", or "健碩" which means "strong" or "a strong physique". The interpretation of this term depends on the context in which the term is used. For example, if this requirement is found in an advertisement for a delivery worker whose main duty is to carry heavy objects, it can be taken to mean a strong physique.



### (3) Guidelines for Application Forms Design

Application forms are often used to expedite the selection and shortlisting processes. Questions on application forms can be unlawful if they ask about sex, marital status, pregnancy, race or disability and, if it can be shown that asking such questions constitutes less favourable treatment. Similarly, questions that relate to the family status of a person can also be unlawful. Family status means having responsibility for the care of an immediate family member.

Employers should avoid asking questions on the application form that might reasonably be perceived as indicating an intention to discriminate on the grounds set out in the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance and the Race Discrimination Ordinance, namely sex, marital status, pregnancy, disability, family status and race (the protected attributes).

#### *Why some questions are undesirable*

Questions which are irrelevant for the purpose of selection should not be included. From the applicant's point of view, an application form which asks for information on personal particulars may give the impression that the information will be used for selection purposes. Indeed, a form which asks for personal details may make it more difficult for an employer to select prospective employees in a non-discriminatory manner.

#### *Questions which should not be asked*

The questions to be included in an application form will depend on the grading and the nature of the job. Questions which suggest stereotyping, arouse suspicions of discrimination and seek irrelevant personal information should not be asked. Examples of such questions are those which deal with family, race of a person and his/her spouse, age of children, marital status, plans to have children and so on.

By the same token, questions on an application form should not suggest that the employer wishes to take into account any factors that

would discriminate on the ground of disability. As such, employers should not ask applicants to provide general medical information about themselves. Also, employers should not request information from persons with a disability which persons without a disability would not ordinarily be requested to provide.

The following are examples of questions for information, by no means exhaustive, which might suggest discrimination on the ground of the protected attributes:

- Photograph: requests for photographs
- Family, spouse, etc.: race; marital status; number and age of children; spouse's employment and salary
- Medical (for women only): pregnancy; intention to become pregnant; female ailments; gynaecological abnormalities; time off work owing to gynaecological problems
- Medical (for persons with a disability): health-related reasons hindering the performance of the job applied for; physical disability which precludes performance of certain kinds of work

#### *Questions which may be asked*

Questions about health conditions, in particular those that contain the listing out of specific disabilities in a form, should be avoided unless it is essential or specifically relevant to the job, and in that event, reasons for requiring the information should be specified in the job specification.

Likewise, questions should focus on the applicant's ability to perform the job. An employer could attach a job description to the application form with information about specific job functions. It will give necessary information to applicants with a disability to consider whether to request for any accommodation in order to perform the tasks. Furthermore, the standards set in assessing replies should be related to job requirements and not to assumptions about sex, pregnancy, marital status, family status, disabilities or race.

Where the work poses specific hazards for women because of exposure to radiation or chemicals which are known to have adverse effects on





pregnant women, employers should point this out in the form. However, employers should not use this as a discriminatory means to eliminate female candidates who declare they are pregnant or intend to have children.

It is recommended that questions on application forms should not suggest that the employer wishes to take into account any sex, disability and race related factors not relevant to the job which would lead to employment being declined, unless genuine occupation qualification, an exception set out in the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Race Discrimination Ordinance, applies<sup>6</sup>.

Sometimes, it is necessary to gather information from applicants for other purposes. For example, race - related information for purposes of making any special arrangement, with regard to dates or times coinciding with religious festivals or observance, or dietary needs or cultural norms. The purpose for requesting or using such information should be clearly stated. The information obtained for the above purposes should be detachable from the rest of the application form and should not be made known to members of selection panels before the interview. The information should be treated in strict confidence and should not be used for other purposes.

When collecting and using the said information, the Personal Data (Privacy) Ordinance should also be observed.

### *Questions which can help better selection*

Invaluable experience, skills and expertise can be gained through involvement in activities which are unpaid or voluntary. Application forms should provide applicants with the opportunities to outline these experiences. These aptitudes or personal qualities, which are undetected in a person's academic qualification or work experience, might be useful to the job.

### *Information for monitoring purposes*

Monitoring is an integral element of an equal opportunities policy and for this purpose, information regarding an applicant's sex, marital status, disability or race needs to be collected. This information enables the organisation to monitor employment trends, set recruitment targets, and assess the effectiveness of its own policy and procedures on recruitment and selection.

### *Review of application forms*

The design of application forms should be reviewed regularly to keep pace with any amendments of the law.

<sup>6</sup> Please also read "Sex as a Genuine Occupational Qualification", "Race as a Genuine Occupational Qualification" and "Absence of Disability as a Genuine Occupational Qualification" in this publication.



## (4) Interviewing Procedures

Interviews are commonly used in a selection process but they can be riddled with bias if not carried out properly. During an interview, the questions from interviewers reflect, to a large extent, the criteria upon which selection and rejection decisions are based. Accordingly, employers should make sure that interviews are conducted in a fair and consistent way and that there is no unlawful discrimination either in the process or in the outcome.

### *Interviewers*

Employers should ensure that people involved in shortlisting and interviewing are trained in non-discriminatory selection methods, and are familiar with the relevant legal provisions, including that it is unlawful to put pressure on or instruct others to discriminate. Interviewers should have an agreed understanding of the selection criteria and a general idea of the kind and level of information they need to obtain to satisfy the criteria. To avoid possible bias, interviews conducted by a panel are preferred to those by single interviewers.

Interviewers must be careful not to treat a person less favourably on the ground of sex, marital status, pregnancy, disability, family status or race. Family status means having responsibility for the care of an immediate family member. Reasonable accommodation should be provided during the interview process to job applicants with a disability, such as an accessible venue and usage of auxiliary aids or other assistance, e.g. allowing applicants with a hearing impairment to bring a sign interpreter. Employers should allow for flexibility in interview arrangements in case the requirement may discriminate indirectly against a certain racial group. For example, Jewish people who have to observe Sabbath Day may find it difficult to attend interviews on Saturdays. Candidates should be assessed solely on their qualifications, relevant knowledge, experience and personal qualities.

### *Questions which should not be asked*

Questions which tend to directly discriminate against men or women, persons of a certain marital status, pregnant women, persons with family status, persons with a disability or persons from a particular racial group should be avoided. Questions which indirectly discriminate against persons on the above grounds may amount to unlawful discrimination. Unconscious discrimination can result from general assumptions about the capabilities, characteristics and motivations of a particular group of persons. Likewise, employers' misinterpretation of some external manifestation of a disability may cause incorrect assumptions about the abilities of a person with the disability.

Questions arising from preconceptions about what are "men's jobs" or "women's jobs" and stereotypes of the kinds of work which are suitable for a particular sex, non-pregnant women, persons of a certain marital status, persons without a disability, persons without family status or persons from a particular racial group should be avoided. For example, it would be wrong to assume that men would be unwilling to work in an all-female environment, or that women would be more suitable for routine or detailed work as compared to jobs requiring policy decisions. It would also be wrong to assume that persons with any disability are unfit for security jobs, women with young children to care for cannot work long hours, or persons from certain racial groups can only be domestic workers or security guards.

Avoid asking candidates questions such as:

- Any plans of getting married?
- Any plans to have children?
- Do you have young children?
- How would you feel if you were the only woman (or man) in an all-male (or all-female) office?
- How would you feel if you were the only non-Chinese employee in office?
- How many days were you absent from work because of illness last year?
- Have you had a major illness in the last 5 years?



- Have you ever been hospitalised? If so, for what condition?

#### *Questions which may be asked*

Questions should relate to the requirements of the job, for example, about candidates' willingness to work long hours or the ability to communicate with people when marketing the company's products. Where it is necessary to assess whether personal circumstances will affect the ability to carry out the duties of the job (for example, business trips or shift work), the job requirements should be discussed objectively without detailed questions based on assumptions about marital status, pregnancy or family status. Furthermore, such questions should be asked of all candidates. Employers may ask applicants with a disability questions about the ability to perform specific job functions or the need for any special facilities to perform the functions of the job.

#### *Selection tests*

If selection tests are used, employers should ensure that they are directly related to job requirements and measure the candidates' actual or potential ability to do the job. Tests should be standardised, but may be modified flexibly according to the needs of applicants with a disability. Where the ability to speak, listen, read or write in a particular language is necessary for the satisfactory performance of a job, employers may require applicants to take the selection tests in that language. Otherwise, employers should provide the test in languages which are understandable by applicants where reasonably practicable.

The contents and standard of the tests should be reviewed regularly to ensure that they remain relevant and free from any possible bias.

#### *Personnel records*

Information necessary for personnel records can be collected after a job offer has been made. Such information includes data regarding the spouse, number of children or the applicant's medical history, which may be necessary for the purpose of arranging medical benefits, education allowances or to ascertain whom to notify in case of emergency.

## **(5) Pre-employment Medical Examinations**

Pre-employment medical examinations are commonly included by employers in the selection process of candidates for jobs and are usually conducted in the final stage of the recruitment process. Some employers ask for pre-employment medical examinations to be conducted as a matter of routine practice, without considering what the purpose behind such examinations is. Often an applicant who is found to be pregnant or to have a certain disability is not offered the job after the medical examination, regardless of whether the applicant is able to perform the job. This may be unlawful under the Sex Discrimination Ordinance (SDO) and/or the Disability Discrimination Ordinance (DDO).

#### *Can an employer insist on a pre-employment medical examination?*

Pre-employment medical examinations, in themselves, are not prohibited under the law. However, if the purpose of the examination is to discriminate against an applicant on the ground of disability, it may contravene the DDO. Furthermore, if the examination is used to screen out pregnant women, this may contravene the SDO. It is important that employers who insist on pre-employment medical examinations do so for the right reasons.

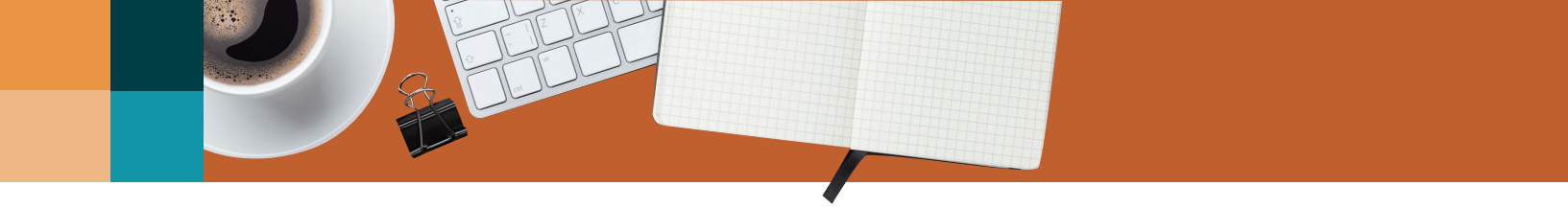
#### *Justifiable purposes for conducting pre-employment examinations*

An employer should only ask for a pre-employment medical examination for the purpose of:

- determining whether the applicant is able, with or without any adjustment, to perform the inherent requirements of the job; or
- checking whether the applicant has any infectious disease so that the employer may act reasonably in order to protect public health.

#### *Is the applicant able to perform the inherent requirements of the job?*

The DDO makes it unlawful to discriminate against



job applicants on the ground of disability. It is not unlawful, however, to reject an applicant who is unable to carry out the inherent requirements of the job concerned or, in order to carry out the inherent requirements of the job, requires some adjustments which would cause unjustifiable hardship to the employer.

If the purpose of the pre-employment medical examination is to assess whether a candidate is able, with or without any adjustment, to perform the inherent requirements of the job, the employer should ensure that the doctor or institution carrying out the examination is suitably qualified to make such assessment. For example, if it is an inherent requirement of the job to be intellectually and technically able to work on a computer, the doctor or institution carrying out the examination of an applicant with 'retinopathy of prematurity' (i.e. condition rendering the applicant legally blind although he or she is able to read if some equipment are provided) should be competent to assess whether the applicant can actually perform the requirement, with or without adjustment. In fact, the applicant in this example would be able to perform the inherent requirement of the job if provided with special magnifying and lighting equipment<sup>7</sup>.

### **Checking for infectious diseases to protect public health**

The DDO provides that it is not unlawful to reject an applicant who has an infectious disease, if it is reasonably necessary for the protection of public health. An employer may therefore be justified in requiring applicants to undergo a medical test to check for infectious diseases if it is consistent with business necessity. For example, a restaurant owner may require an applicant for the job of chef to undergo medical testing to check for certain infectious diseases. As the chef would be handling food which could, in turn, transmit certain infectious diseases to persons eating at the restaurant, the employer could reject the applicant who has tested to have such diseases in order to protect the public.

Although the common meaning of infectious diseases may include any disease which is communicable in nature, such as influenza, the definition of 'infectious diseases' under the DDO

is restricted to those diseases set out in the First Schedule to the Prevention and Control of Disease Ordinance (Cap. 599)<sup>8</sup>, and any communicable disease specified by the Director of Health.

For the purposes of this exception under the DDO, neither AIDS nor HIV infection are to be treated as infectious diseases. Pre-employment HIV testing is clearly unlawful in respect of most jobs.

Employers should bear in mind that even if an applicant is found to have an infectious disease, it does not mean that the employer may reject the applicant straight away. For some infectious diseases which can be cured or which can be rendered not communicable after proper medical treatment, such as tuberculosis, it may be reasonable for the employer to offer employment subject to recovery from the illness rather than to reject the applicant immediately.

### **The content of medical examinations**

Pre-employment medical examinations should not be conducted as a matter of course to determine who should be offered employment. An employer who insists on a pre-employment medical examination should identify the purpose of such examination and ensure that there is no intention to unlawfully discriminate. Medical examinations are normally justified only in limited cases, such as when the job involves working in a hazardous environment, requires a high standard of fitness, is required by law, or involves public health or safety.

The doctor conducting the examination should be informed of the purpose of the examination and the inherent requirements of the job concerned in order to conduct the most appropriate tests to determine whether the applicant is able to carry out those requirements. It is advisable that employers check with the doctors in advance about the purpose of the medical and occupational tests to be performed and their relevancy to the job in question.

Questions and/or tests about the applicants' general state of health may not be relevant to the ability of the applicant to perform the inherent requirements of the job. In such a case, such questions should not be asked nor should such tests be conducted. The health assessment





should be appropriate to the task requirement.

In particular, employers should think carefully before asking for chest x-ray examinations to be conducted. It is quite common for chest x-ray examinations to be conducted in pre-employment medical examinations to detect pulmonary tuberculosis. However, because of the possible damage to fetus, medical opinions suggest that pregnant women should avoid x-ray examinations unless it is necessary to do so in case of medical emergency. Employers who require applicants to undergo such x-ray examination may be liable for indirect discrimination against pregnant women under the SDO, unless they can justify the requirement.

### **Confidentiality regarding the clinical information**

The clinical information supplied by the applicant to the doctor or institution conducting the medical examination is confidential and should not be disclosed to the employer without the consent of the applicant. In any event, it is more appropriate that a report providing broad conclusions and employment implications be provided to the employer, with the prior consent of the applicant, rather than the full medical details of the applicant.

Often employers will request applicants to consent to full disclosure of general practitioner or other medical records at the pre-employment stage, as a matter of routine. Many applicants consent to this, as they feel refusal will jeopardize their job prospects. Such practice by employers should not be condoned. Disclosure of information is justified only in light of specific job requirements or for reasons of public health or safety.

### **After the medical examination**

If applicants are not offered the jobs after the medical examination, it is advisable that they be clearly informed of the reasons why. If they are rejected on medical grounds, employer should explain to them why they are considered unable to carry out the inherent requirements of the job, or why the adjustments at work which they would require because of their disabilities would impose unjustifiable hardship. If the medical ground for refusal of the job is a communicable disease, the applicant should be informed by the employer of the reasonable need to protect public health.

<sup>7</sup> Please also read "Absence of Disability as a Genuine Occupational Qualification" and "Reasonable Accommodation and Unjustifiable Hardship" in this publication.

<sup>8</sup> The following diseases are specified under the Schedule as infectious diseases: Acute poliomyelitis, Amoebic dysentery, Anthrax, Bacillary dysentery, Botulism, Chickenpox, Chikungunya fever, Cholera, Community-associated methicillin-resistant Staphylococcus aureus infection, Creutzfeldt-Jakob disease, Dengue fever, Diphtheria, Enterovirus 71 infection, Food poisoning, Haemophilus influenzae type b infection (invasive), Hantavirus infection, Invasive pneumococcal disease, Japanese encephalitis, Legionnaires' disease, Leprosy, Leptospirosis, Listeriosis, Malaria, Measles, (Meningococcal infection (invasive)), Middle East Respiratory Syndrome, Mumps, Novel influenza A infection, Paratyphoid fever, Plague, Psittacosis, Q fever, Rabies, Relapsing fever, Rubella and congenital rubella syndrome, Scarlet fever, Severe Acute Respiratory Syndrome, Shiga toxin-producing Escherichia coli infection, Smallpox, Streptococcus suis infection, Tetanus, Tuberculosis, Typhoid fever, Typhus and other rickettsial diseases, Viral haemorrhagic fever, Viral hepatitis, West Nile Virus Infection, Whooping cough, Yellow fever, Zika Virus Infection.



## **(6) Pre-hiring and Post-hiring Procedures**

### ***Pre-hiring procedures***

The aim of recruitment is to select the best person for the job. Care must be taken to guard against discrimination throughout the whole recruitment process.

### ***Job description***

Sex, pregnancy, marital status, family status, disability and race (protected attributes) biases can occur even before the selection is made. Drawing up a clear job description on the scope of work, duties and responsibilities of the job is important. Employers should not overstate the requirements and duties of a job as this may have an unfair impact on persons with the protected attributes and may result in indirect discrimination. Indirect discrimination is unlawful under the anti-discrimination ordinances, namely the Sex Discrimination Ordinance (SDO), the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance (FSDO) and the Race Discrimination Ordinance (RDO).

It is also important that a job description should not be so worded as to suggest or imply that only persons without a disability, person from a particular racial group, non-pregnant women, or persons of a particular sex, marital status or without family responsibilities can apply or perform a job.

Job titles should be gender-neutral. If this is not possible, use both male/female title for the job, e.g. waiter/waitress or alternatively, put "male or female" in brackets after the job title.

### ***Consistent Selection Criteria***

Employers should use Consistent Selection Criteria (CSC) to avoid acting unlawfully in the selection process. Based on the job description, CSC set out the personal attributes, qualifications, skills and knowledge required for the effective performance of the job. CSC should be used to facilitate shortlisting and selection. It is important to make sure that the CSC are objective, clearly

defined and ranked in order of priority<sup>9</sup>.

### ***Advertisement***

Having a job description and CSC are helpful to employers in preparing a recruitment advertisement. In the advertisement, list out only the requirements for the performance of the job. For example, academic qualifications, years of experience and specified technical skill. A statement such as "The post is open to applicants of both sexes, persons from all racial groups and persons with a disability" helps send out a clear and positive message.

### ***Shortlisting***

Do the shortlisting of candidates on the basis of CSC. These objective yardsticks will help reduce possible biases based on the protected attributes. Very often, candidates are rejected merely because of certain false assumptions about their personal attributes. For example:

- The job requires a person with a caring disposition, and therefore only female candidates should be shortlisted;
- The job requires extensive travelling, and therefore a married woman or a woman with young children would not be suitable;
- The job location is remote and a person with mobility difficulty or a person with family responsibilities would not be able to commute long-distance; and
- Persons from certain racial groups are only suitable to do manual work, such as domestic helpers or security guards.

Staff responsible for recruitment should be alert to the danger of making generalisations about the aptitudes and abilities of men, women, pregnant women, persons with different marital status or family status, persons with a disability or persons from different racial groups. It is important that they adopt CSC in selecting candidates.

### ***Request for medical information***

The DDO does not prohibit employers from asking a person with a disability to undergo a medical examination. Medical information may be used



in assessing whether the person is suitable to perform the inherent requirements of the job. However, it may give rise to allegations of disability discrimination if a candidate with a disability is asked to undergo medical examination without valid justifications when others are not required to do so. Medical information should only be obtained if it is necessary to ascertain that the person is able to carry out the inherent requirements of the job or would require accommodation to do so.

Where an X-ray examination is included in a pre-employment medical check, the requirement that potential employees must undergo the X-ray examination in order to be considered for employment may constitute indirect discrimination against pregnant women under the SDO as they are unlikely to comply with the requirement in view of the risks involved.

### Tests

Selection tests should be directly related to the job requirements and be professionally designed to measure the abilities of the applicants. In addition, they should be modified flexibly according to the needs of applicants with a disability. Employers should also review the contents and standard of the tests on a regular basis to ensure that they are relevant to the job requirements.

### Final selection

The selection process is basically one of matching the individual candidate's qualifications and attributes against the job requirements. However, they may not match perfectly because certain candidates may exceed some of the requirements but may fall short of others. It is recommended that employers should balance the strengths and weaknesses of candidates and analyse their suitability based on facts rather than impressions or generalisations. This process will help reduce significantly conscious or unconscious prejudices.

### Post-hiring procedures

For the purpose of arranging medical benefits or education allowances, or in order to ascertain whom to notify in case of emergency, employers may collect personal data of the successful applicant, such as information regarding the spouse and number of children. This step should

be taken after an applicant has been hired so that there will be no misunderstanding about the employers' motives in asking such questions.

Employers may also request more detailed medical information from an employee after hiring in order to help the employee in the event of emergency. All medical information should be kept confidential and should not be released without the written consent of the employee.

Race related information may be sought for purposes of making any special arrangement, for example, with regard to dates or times coinciding with religious festivals or observance, or dietary needs or cultural norms. The purpose for requesting or using such information should be clearly stated. The information should be treated in strict confidence and should not be used for other purposes.

When collecting and using the said information, the Personal Data (Privacy) Ordinance should also be observed.

Employers are advised to retain records of interviews for at least 12 months, in order to be in a position to deal with any subsequent complaints of discrimination in the selection process. The management should ensure that all staff members involved in recruitment are fully aware of the company's policy on fair recruitment and selection. They should be trained accordingly to ensure non-discriminatory hiring practices.

---

<sup>9</sup> Please also read "The Use of Consistent Selection Criteria" in this publication.



## **(7) Dress and Appearance Codes**

### ***Are dress codes unlawful?***

It is unlawful under the existing anti-discrimination ordinances in Hong Kong to discriminate a person on grounds of sex, pregnancy, marital status, disability, family status or race (protected attributes). While nothing in the anti-discrimination ordinances explicitly states that dress and appearance codes are unlawful, the Equal Opportunities Commission advises employers to avoid imposing unnecessary dress and appearance codes as provisions in specific dress codes may inadvertently discriminate directly or indirectly.

Dress and appearance codes can be defined as covering both body adornment (clothes, hats and jewellery) as well as requirements on the body itself (hair, beard and tattoos).

Where employers deem it necessary to impose restrictions on their staff's dress and appearance, they should ensure that the requirements specified in the codes are not discriminatory.

### ***What should employers consider in setting dress and appearance codes?***

In developing and implementing dress and appearance codes for their staff, an employer should strike a balance between the requirements of the particular industry, client base, business needs, as well as the employees' personal freedom to present their own appearances, e.g. freedom to express religious, cultural, racial and ethnic identity. Consideration should also be given to the physical environment and weather conditions. Impact of the dress and appearance codes on employees because of their particular attributes should also be considered.

### ***Developing non-discriminatory dress and appearance codes***

Dress and appearance requirements which cannot be justified as necessary for the need of the job should not be imposed. If employers want to introduce or implement dress and appearance

codes, it is in their interest to include only those requirements which relate directly to the duties of the job and the nature and circumstances of the employment. For example, a requirement that staff should not wear certain types of clothing or jewellery for the sake of safety when operating machinery.

It is a good management practice to consult employees in the development of any dress and appearance codes or changing existing ones. Dress and appearance requirements which are not applied equally to both sexes, between persons with and without a disability, persons from different racial groups etc, may be discriminatory. As a result, work morale, efficiency, job satisfaction and productivity may suffer. That is why dress and appearance codes, if necessary, should be carefully imposed in order to avoid discrimination.

### ***How dress and appearance codes can be discriminatory?***

Under the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Race Discrimination Ordinance, it is unlawful to directly or indirectly discriminate against employees on grounds of sex, pregnancy, marital status, disability or race. For example, it may be discriminatory to require male staff to have short hair without imposing any hairstyle restrictions on female staff. Similarly, a requirement on clothing that only applies to female staff may amount to sex discrimination if there are no restrictions on clothing for male staff. A requirement that women wear skirts only may also indirectly discriminate against a disabled female staff member who wants to avoid exposing her prosthesis by wearing trousers. A person with skin disease on his forearm may find it embarrassing to wear a uniform with short sleeves. If an employer imposes a blanket ban on beards for all employees without justifiable reasons, it may indirectly discriminate against ethnic groups such as the Sikhs, who by their custom have to keep a beard.

### ***Points to note in developing and implementing dress and appearance codes***

- If dress and appearance codes are to be adopted, they should be applied to both sexes in an even-handed manner. Although separate rules may be





applied to the sexes, a common standard should be adopted in enforcing the rule and neither sex should be treated less favourably in enforcing the principle.

- In designing dress and appearance codes, employers should ensure that they are not biased by preconceptions and stereotypes of the kinds of dress and appearance of a particular group of persons. In particular, dress and appearance codes which confine a particular sex and race to a stereotyped look should be avoided.
- Requirements should be based on the duties of the job and the nature and circumstances of the employment. For example, if formal dress is a commonly adopted style to portray the desired image of the job-holders of a particular business, a requirement that staff of both sexes should wear "professional and presentable clothing" would be more appropriate than one which prescribes the particular types of clothing for the two sexes, such as "skirts" for women and "suits and ties" for men.
- The code should only prescribe a particular form of grooming if it qualifies as a necessary and reasonable requirement of the job and is justified by sound business reasons. For example, policies may differentiate between employees who have to deal regularly with the public in person and those who do not.
- The code should not discriminate between sexes when giving cash allowances. Employers should also be wary of appearing to be sexist by specifying that allowances given to female employees are for the purchase of cosmetics.
- The code should not subject persons of a particular protected attribute to any unfavourable treatment or detrimental effect.
- When employees' cultural or religious practices, such as those expressed in dress codes, conflict with an employer's policies or workplace requirements, it is recommended that the employer considers whether it is practicable to vary or adapt these requirements. Employers and employees should respect each others' culture and customs. There should be flexibility in the implementation of the dress and appearance codes to address factors such as climatic and

environmental changes as well as specific needs of employees.

- Employees should be advised that they could seek advice from designated officers in the organisation if they have difficulty in complying with the codes.
- The codes should be reviewed periodically to take into account changes in the trends of appropriate dress and appearance codes at work for men and women.



## (8) Sexual Harassment in the Workplace

### *What is sexual harassment?*

Sexual harassment is any unwanted or uninvited sexual behaviour which a reasonable person regards as offensive, humiliating or intimidating. Unwelcome sexual advances or unwelcome requests for sexual favours are sexual harassment. Acts of sexual harassment may be done by any person to a man or a woman, and may be direct or indirect, physical or verbal. Here are some examples:

- unwelcome physical contact, such as hugging, kissing or touching
- staring or leering
- brushing up against the body
- intrusive questions of a sexual nature about one's private life
- sexually offensive gestures

Some acts of sexual harassment may amount to criminal offences, for example:

- obscene phone calls
- indecent exposure
- sexual assault

Sexual harassment also includes the creation of a sexually hostile or intimidating environment, for example:

- sexually suggestive comments or jokes
- sexually explicit pictures or posters
- insults or taunts based on sex
- wolf whistling

Sexual harassment interferes with a person's work performance, can cause stress and the loss of confidence, and sometimes forces people to leave their jobs.

### *Who can be sexually harassed?*

People of either sex and of any age can be sexually harassed. Sexual harassment often takes place when one person (or a group of persons) uses power inappropriately over another person (or a group of persons). However, it can also take place in situations where there is no relationship based on power, for example, among colleagues.

### *What is the responsibility of the employer?*

Employers are responsible for preventing sexual harassment in the workplace. This responsibility does not change irrespective of whether an employee works on a permanent, casual, full-time or part-time basis, or as a contract worker. Employers should also be aware that the person who harasses may be anyone that comes into contact with the employee such as a supervisor, a colleague, or a client.

Employers may also be liable for acts of sexual harassment committed by their employees in the course of employment, regardless of whether the acts were done with the employers' knowledge or approval. However, it is a defence for the employers to show that they have taken reasonably practicable steps to prevent employees from doing such acts, for example, by implementing a policy on sexual harassment in the workplace.

It is in the interests of both employers and employees to have a policy on handling and preventing sexual harassment in the workplace<sup>10</sup>. Employers should make clear to their staff that it is everybody's responsibility to recognise and take seriously the need to ensure that the workplace is free from sexual harassment and all staff should treat their colleagues with respect.

### *Dealing with complaints of sexual harassment*

There may be a formal and an informal way of dealing with complaints of sexual harassment. The two approaches are both valid and can be included in a sexual harassment policy. The approach to take will usually depend on the wish of the complainant. Employers need to set out clear procedures for both approaches and make the information available to all staff. This is particularly important in helping staff to understand the steps involved when making a



complaint of sexual harassment.

### **Confidentiality**

The principle of confidentiality should underpin any policy on sexual harassment. In short, this means that any information relating to a complaint of sexual harassment must only be given on a need-to-know basis. Employers need to ensure that managers understand this principle when dealing with complaints. By adopting such a principle, it gives assurance to the complainant or potential complainant that management appreciates the sensitive nature of sexual harassment and that the details of complaint will not be disclosed to other colleagues.

## **(9) Sex as a Genuine Occupational Qualification**

### ***Discrimination on the ground of sex is unlawful***

Men and women are entitled to equal consideration for jobs, irrespective of their sex. It is unlawful under the Sex Discrimination Ordinance (SDO), for employers to single out men only, or women only, for a job. They can only do so in exceptional circumstances where being a man or being a woman is a Genuine Occupational Qualification (GOQ) for a particular job.

### ***Exception where sex is a Genuine Occupational Qualification***

There are a few instances in which employers can claim sex as a GOQ for a job. Where a GOQ exists for a job, it applies also to consideration for promotion, transfer, or training for that job, but cannot be used to justify a dismissal.

### ***In what circumstances is sex a Genuine Occupational Qualification?***

The circumstances in which sex is a GOQ for a job are:

- The essential nature of the job requires a man or a woman because of physiology or for authenticity in dramatic performances or other entertainment. For example, in the modelling of clothes or playing the role of a particular sex in a film or in a play.
- The job requires a man or a woman to preserve decency or privacy. For example, the requirement of a male to work as an attendant in a men's changing room.
- The job is likely to involve the employee working or living in a domestic setting and has significant physical or social contact with the person living there. For example, domestic helpers or, companion to an elderly person.
- The nature of work or the location of the establishment requires the employee to live in premises provided by the employer and the only available premises do not provide both separate sleeping accommodation and sanitary facilities

<sup>10</sup> Guidelines on the setting up of such a policy are contained in the Code of Practice on Employment under the Sex Discrimination Ordinance published by the EOC.



for either sex. For example, working on a small boat or at a remote site.

- The employment establishment is a single-sex establishment or in a single-sex part of an establishment where people receive special care, supervision or attention; and the essential character of that establishment or the part of it requires a person of the same sex to do the job. For example, a male warden in a male prison or a female attendant working in a section of a hospital for female patients only.
- The holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and such services are most effectively performed by one sex. For example, a female counsellor at a shelter home for battered women or a female social worker at a girls' home.
- The job needs to be held by a man (or a woman) because it is likely to involve the performance of duties outside Hong Kong in a place where the customs or laws do not permit a woman (or a man) to effectively perform such duties. For example, a sales manager who is required to negotiate business deals in a country where the customs would forbid the involvement of a woman.
- The job is one of two to be held by a married couple. For example, where a married couple is employed as foster parents at a children's home.

Where sex is a GOQ for a job, it is not unlawful for employers to discriminate on the ground of sex in relation to whom they offer employment or to whom they offer promotion, transfer or training in respect of that job.

### ***Is Genuine Occupational Qualification an automatic exception?***

No, GOQ is not an automatic exception for sex discrimination. In each case it will be necessary for the employer, who claims GOQ as an exception or defence, to show that GOQ applies to the particular job in question.

Furthermore, GOQ cannot be relied on as an exception for a job which involves a number of duties (some of which may otherwise form

the basis for sex being a GOQ) if, at the time of filling a vacancy for the job, the employer already has employees of the opposite sex to the applicant, who are capable of performing those duties which would require the job holder to be of a particular sex, and it would be reasonable for such employees to carry out such duties, and the number of such other employees is sufficient so as not to cause undue inconvenience for the employer.

For example, there is a vacancy for a sales assistant in women's section of a department store where all existing sales assistants are females. The employer refuses to consider appointing a male as the job involves taking body measurements and assisting customers in fitting, and considers that the job must be held by a female to preserve decency or privacy as within the meaning of the GOQ exception. However, the employer's refusal may be unlawful. He or she may not rely on the GOQ exception if there are other female assistants who work in the store and who can help taking body measurements or assisting customers on occasions where it is necessary.

It is recommended that a job for which a GOQ was used in the past should always be re-examined if the post becomes vacant to see whether the GOQ still applies. Circumstances may well have changed and the GOQ may no longer be inapplicable.





## (10) What is Racial Harassment?

Harassment on the ground of race (including one's race, colour, descent, national origin or ethnic origin) occurs in the following situations under the Race Discrimination Ordinance (RDO):

### (a) Unwelcome conduct harassment

Person A engages in unwelcome conduct (which may include an oral or a written statement) towards Person B on the ground of Person B's race or Person B's near relative's race, and any reasonable person would have anticipated that person B would be offended, humiliated or intimidated. Even if there is no intention or motive to offend, humiliate or intimidate, there is liability for racial harassment. Examples of racial harassment may include racist jokes, banter, ridicule or taunts, racially derogatory remarks or insults.

### (b) Hostile environment harassment

Person A engages, on the ground of Person B's race or Person B's near relative's race, in conduct alone or together with other persons that create a hostile environment for Person B. Examples of racially hostile environment may include racially offensive pictures or posters, and racially hostile code of behaviour in a workplace.

### *Preventing harassment on the ground of race*

Employees and workers of all racial groups are entitled to be free from harassment on the ground of race. Employers must ensure that the working environment is one in which the racial identity of all employees is respected. An absence of complaints about racial harassment does not necessarily mean an absence of racial harassment. It may mean that the recipients of racial harassment think that there is no point in complaining because nothing will be done about it, or because it will be trivialized or the complainant will be subjected to ridicule, or because they fear reprisals.

RDO provides that anything done by an employee

in the course of employment is treated as done by the employer as well under the RDO. This is so even if the employer did not know or did not approve of what the employee has done, unless the employer has taken reasonably practicable steps to prevent discrimination and harassment from happening. Employees may also personally liable for any racial discrimination or harassment in employment.

It is therefore in the interest of both employers and employees to have a policy on preventing and handling racial harassment at work<sup>11</sup>. Employers should make clear to the employees and workers that they have a duty and responsibility towards creating a discrimination and harassment free working environment.

### *Handling complaints of racial harassment*

It is recommended that employers:

- Ensure that employees who have in good faith taken action under the RDO do not receive less favourable treatment than other employees, for example, by being sidelined for training or promotion, disciplined or dismissed.
- Designate an internal grievance procedure or an officer to deal with complaints concerning discrimination and harassment on the ground of race or victimization within the organization. These procedures should be communicated to all staff and be reviewed from time to time.
- Advise employees to use the internal grievance procedures, where appropriate, but without prejudice to the individual's right to apply to the EOC or the court.
- Deal with all complaints of discrimination and harassment on the ground of race or victimization seriously, effectively and promptly. It should not be assumed that they are made by those who are over-sensitive. Confidentiality should be observed and the rights of both the complainant and respondent respected.
- Handle disciplinary procedures uniformly without reference to race.
- Keep records of notes on grievances and disciplinary matters for not less than 24 months.



### **Confidentiality**

The principle of confidentiality should be observed in any policy on racial harassment. This means that any information relating to a complaint of racial harassment will only be disclosed on a need-to-know basis. Employers need to ensure that managers understand this principle when handling complaints. The observance of principle of confidentiality gives assurance to the complainant that management appreciates the sensitive nature of racial harassment and that the details of complaint will not be disclosed to any third party.

## **(11) Race as a Genuine Occupational Qualification**

### ***Discrimination on the ground of race is unlawful***

Employees and workers are entitled to work free from discrimination and harassment on the ground of race under the Race Discrimination Ordinance (RDO). Employers should not discriminate or harass any of their employees and workers on the ground of one's race (including race, colour, descent, national origin or ethnic origin) and are required to take reasonably practical steps to prevent such discrimination or harassment from happening.

The race of a person does not affect his or her ability to do a job, so long as he or she possesses the relevant qualifications, skills and personal qualities required by the job. Employers must not assume that people belonging to certain racial groups are not suitable for employment.

By making recruitment decisions on the basis of consistent selection criteria, the employer's interest is served because each individual is assessed according to his or her capabilities to carry out a given job and will not be judged by irrelevant considerations, such as race<sup>12</sup>. Employers should ensure that employees handling applications and conducting interviews are trained not to assume that people belonging to certain racial groups are not suitable for employment or to use race as a ground for determining who should be offered employment.

### ***Exception where race is a genuine occupational qualification (S11, RDO)***

Except for situations specified under Section 11 of the RDO, i.e. where the race of the employee is a Genuine Occupational Qualification (GOQ) for the job, race may not be a ground for refusing employment for job applicants and offering opportunities to employees in promotion, transfer, or training.

<sup>11</sup> Guidelines on the setting up of such a policy are contained in the Code of Practice on Employment under the Race Discrimination Ordinance published by the EOC.



### *In what circumstances is race a GOQ for a job?*

- The job involves participation in a dramatic performance or other entertainment in a capacity for which a person of a particular racial group is required for reason of authenticity.
- The job involves participation as an artist's or photographic model in the production of a work of art, visual images or sequences of visual images for which a person of a particular racial group is required for reason of authenticity.
- The job involves working in a place where food or drink is provided to and consumed by the public in a particular setting for which in that job, a person of that racial group is required for reasons of authenticity.
- The holder of the job provides persons of a particular racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group.
- The job involves providing persons of a particular racial group with personal services of such nature or in such circumstances as to require familiarity with the language, culture and customs of and sensitivity to the needs of that racial group, and those services can most effectively be provided by a person of that racial group.

### *Is GOQ an automatic exception?*

NO, GOQ is not an automatic exception for race discrimination. In each case it will be necessary for the employer who claims GOQ to show that GOQ does apply to the particular job in question and the court will then examine the claim strictly.

For example, the situation in point no. 4 above was held by the Court of Appeal in England as not to apply to managerial and administrative jobs because the job holders did not provide personal services and did not have direct contact with service recipients of particular racial group.

## **(12) Absence of Disability as a Genuine Occupational Qualification**

### *Discrimination on the ground of disability is unlawful*

People are entitled to equal consideration for jobs regardless of whether or not they have a disability. The Disability Discrimination Ordinance (DDO) provides that discrimination on the ground of disability is unlawful. Under the DDO, employers are not allowed to discriminate against persons with a disability, in respect of a particular job, except in the following circumstances:

- (a) where absence of a disability is a Genuine Occupational Qualification (GOQ) of the job;
- (b) where the person with the disability would be unable to carry out the inherent requirements of the job.

### *Exception where absence of a disability is a GOQ*

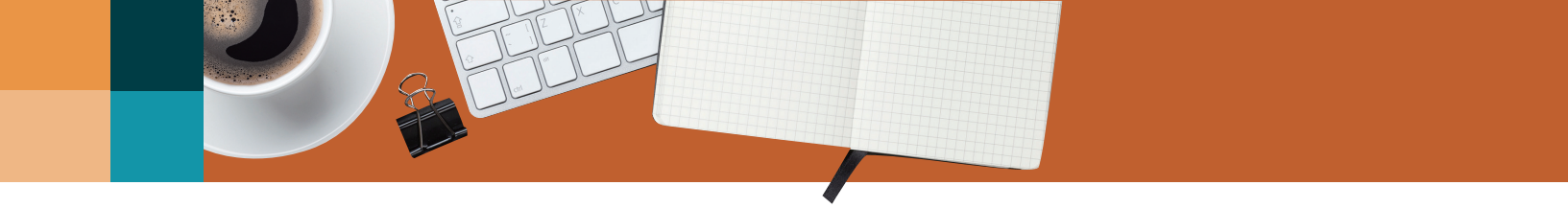
Given the general rule that discrimination on the ground of disability in employment is not allowed, the DDO recognises that, for certain jobs, absence of a disability is a GOQ. In respect of such jobs it is not unlawful for the employer to discriminate against persons with the disability as regards to whom they offer employment, promotion, transfer or training.

### *In what circumstances is absence of a disability a GOQ?*

The DDO prescribes two situations where being a person without a disability is a GOQ for a job:

- (a) The essential nature of the job requires a person without a disability for reasons of physiology or authenticity in dramatic performances. For example, the requirement of a person who is not a wheelchair user may usually constitute a GOQ for a job as a fashion model. Similarly, a woman with severe visual impairment may be refused a job as an actress to play the role of someone who has no visual impairment.
- (b) The nature or location of the establishment is such that the employee has to live in premises provided by the employer but the available premises do not have facilities for persons with the disability in question. However, before the

<sup>12</sup> Please also read "The Use of Consistent Selection Criteria" in this publication for further information on the subject.



employer could claim this as a defence for not offering the job to a person with the disability, he or she should first consider whether alterations to the premises could be made to render them suitable for that person. He or she should carry out such alterations and offer the job to that person unless the alterations would impose an unjustifiable hardship<sup>13</sup> on the employer. On the other hand, the prospective employee may offer to make the alterations and undertake to restore the premises to the original condition on leaving the premises. In such circumstances, the employer cannot claim absence of the disability as a GOQ on the ground of no suitable premises being available.

#### ***Exception where a person is unable to carry out the inherent requirements of jobs***

An employer is not obliged to employ or continue to employ a person with a disability who cannot do the job. The DDO provides that discrimination against a person with a disability in recruitment or dismissal would not be unlawful if the person, because of his or her disability,

- would not be able to carry out the inherent requirements of a job, or
- would, in order to carry out the inherent requirements of the job, require some adjustments at work which would cause unjustifiable hardship.

Before concluding that a person with a disability would be unable to carry out the inherent requirements of a particular job, the employer should consider whether the conclusion would be different if some reasonable accommodation was provided to the person. If so, the employer should provide such accommodation, unless this would result in an unjustifiable hardship<sup>14</sup>. In the latter case the employer would not be required to employ or retain the person.

#### ***What needs to be considered in determining if a person can carry out the inherent requirements of a job?***

In determining whether or not a person with a disability can carry out the inherent requirements of a job, an employer is required to take into

account:

- (a) the person's past training, qualifications and experience relevant to the particular employment;
- (b) in the case of a serving employee, his/her work performance; and
- (c) other relevant factors.

Hence, an employer should not assume that persons with a particular disability will not be able to do a certain type of jobs. In other words, the exception of inability to carry out the inherent requirements of a job is not automatic in respect of a particular disability. In each case it will be necessary for the employer who claims this exception to show that, having considered all the factors mentioned above, the person with the disability would not be able to carry out the inherent requirements of the job. Alternatively, the employer has to show that, in order to carry out the inherent requirements of the job, the person would require accommodation which would result in unjustifiable hardship.

---

<sup>13</sup> Please also read "Reasonable Accommodation and Unjustifiable Hardship" in this publication.

<sup>14</sup> Ditto.





## **(13) Reasonable Accommodation and Unjustifiable Hardship**

### ***What is reasonable accommodation?***

Reasonable accommodation is an important element in the Disability Discrimination Ordinance (DDO) for non-discrimination in employment. It refers to any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy equal employment opportunity.

### ***Why is reasonable accommodation important for non-discrimination?***

Many people with a disability can perform jobs without any need for accommodation. But there are others who are excluded from jobs which they are capable of doing simply because of unnecessary barriers in the workplace.

Some people with a disability face physical barriers that make it difficult for them to move around in a workplace or to use certain equipment at work. Some are limited by the way people communicate with each other. Others are not given equal opportunity because of rigid work schedules which do not allow flexibility for people with special needs. Some barriers exist in people's minds such as unfounded fears, stereotypes and misconceptions about job performance, safety, costs or acceptance by co-workers.

For this reason, the DDO imposes reasonable accommodation as a means of overcoming such unnecessary barriers that restrict employment opportunities for people with a disability.

### ***When should reasonable accommodation be provided?***

An employer should provide reasonable accommodation to a job applicant or an employee with a disability, unless the job in question requires absence of disability as a Genuine Occupational Qualification (GOQ). An employer is not obliged to employ a person with a disability if the latter cannot perform the inherent requirements<sup>15</sup> of the job. However, the employer should not draw such a conclusion unless he or she has duly considered

reasonable accommodation.

### ***Some examples of reasonable accommodation***

Reasonable accommodation may be made at any stage of employment including the recruitment stage. Here are some examples of adjustments which can be made to enable people with a disability to perform the inherent requirements of a job.

- During the recruitment and selection stage, adopt appropriate measures to maintain parity among applicants with or without a disability. For example, the manner of oral tests may be modified to allow hearing-impaired applicants to have hearing aids or visually-impaired applicants to take an oral test rather than a written test.
- Modify work premises to make them more accessible to applicants or employees with a disability, including installing such fixtures as may be necessary. For example, steps in a walkway may be changed to a ramp to facilitate wheelchair users.
- Change job designs, work schedules or other work practices to meet the special needs of employees with a disability. For example, regular sick leave is granted for an employee with a mental illness to attend outpatient clinics for regular medication.
- Offer an alternative post to an employee who has sustained a disability during employment. For example, if an employee whose job requires driving loses his or her sight, reassignment to a vacant position that does not require driving would be a reasonable accommodation.
- Provide or modify equipment to enable employees with a disability to perform certain tasks. For example, a machine which is designed for right-hand users might not be usable by employees who have lost their right hands. If the machine was modified to suit a left-hand user the employees, after suitable training, would be able to use it and hence could continue with their employment.
- Employers should keep themselves informed of advancements in technology which can assist employees with a disability to perform their



duties.

- Provide training and other assistance to employees with a disability. Using the example of the employees who have lost their right hands, training them up for operating the modified machine would also be a reasonable accommodation.

***Must the employer always provide accommodation to an employee with a disability?***

No, where the provision of accommodation imposes an unjustifiable hardship on the employer, the employer is not obliged to provide it. The DDO provides exemptions for employers in this respect.

***What constitutes unjustifiable hardship on the employer?***

All the relevant circumstances in each case should be assessed and taken into account to determine what constitutes unjustifiable hardship under the DDO. Such circumstances include:

- the reasonableness of any accommodation sought. This includes considerations of the nature and cost of the accommodation. For example, an employer generally would not be required to provide personal items such as spectacles. However, the employer might be required to provide a person with visual impairment with special glasses for using a particular computer monitor.
- the nature of the benefit or detriment to all persons concerned. For example, a ramp to accommodate an employee using a wheelchair would also benefit customers who are wheelchair users or parents carrying baby trolleys. This should be taken into account in considering the extent of unjustifiable hardship on the employer.
- On the other hand, if an employee with a particular illness requested the thermostat in the workplace be raised to a certain level to accommodate his or her disability, and this level would make it uncomfortably hot for other employees, the employer might raise unjustifiable hardship as a defence for not providing the requested accommodation. However, the employer should

consider if alternative ways of accommodation exist which would not cause an unjustifiable hardship.

- the effect of the disability of a person concerned. Only those adjustments which the person needs are required; assumptions should not be made about the needs of a person with a disability. For example, a person with hearing impairment who has hearing aids and who can lip-read might be able to communicate with colleagues without difficulty. The employer would not need to employ someone who knows sign language to facilitate communication.
- the financial circumstances of and the estimated amount of expenditure required to be made by the employer claiming unjustifiable hardship. For example, a small company might find it too costly to provide an interpreter to enable a hearing-impaired employee to participate in weekly staff meetings, but a large organisation might find it affordable.

***Who has the burden of proof?***

Where the employer claims unjustifiable hardship as a defence for not providing reasonable accommodation to a person with a disability, the burden of proof is with the employer.

---

<sup>15</sup> Please also read "Absence of Disability as a Genuine Occupational Qualification" in this publication.



## Related Resources

### Equal Opportunities Commission

- Code of Practice on Employment under the Sex Discrimination Ordinance
- Code of Practice on Employment under the Disability Discrimination Ordinance
- Family Status Discrimination Ordinance Code of Practice on Employment
- Race Discrimination Ordinance Code of Practice on Employment

<http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=cops>

### Constitutional and Mainland Affairs Bureau

- Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation

[http://www.cmab.gov.hk/en/issues/code\\_of\\_practice.htm](http://www.cmab.gov.hk/en/issues/code_of_practice.htm)

### Labour Department

- A Concise Guide to the Employment Ordinance  
[http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/EO\\_guide\\_full.pdf](http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/EO_guide_full.pdf)
- Guide to Good People Management Practices  
<http://www.labour.gov.hk/eng/public/wcp/practice.pdf>
- Practical Guidelines for Employers on Eliminating Age Discrimination in Employment  
<http://www.labour.gov.hk/eng/plan/pdf/eade/Employers/PracticalGuidelines.pdf>
- Promote Employment of Mature Persons - Friendly Employment Practices for Mature Persons  
[http://www.labour.gov.hk/eng/public/wcp/promote\\_employment\\_of\\_mature\\_persons.pdf](http://www.labour.gov.hk/eng/public/wcp/promote_employment_of_mature_persons.pdf)
- Friendly Employment Practices for Mature Persons and Families  
[http://www.labour.gov.hk/eng/public/Friendly\\_Employment\\_Practices\\_for\\_Mature\\_Persons\\_and\\_Families\\_ENG.pdf](http://www.labour.gov.hk/eng/public/Friendly_Employment_Practices_for_Mature_Persons_and_Families_ENG.pdf)



## Useful Links and Contacts

### Equal Opportunities Commission

Tel: (852) 2511 8211

Fax: (852) 2511 8142

E-mail: [eoc@eoc.org.hk](mailto:eoc@eoc.org.hk)

Website: [www.eoc.org.hk](http://www.eoc.org.hk)

Address: 16/F, 41 Heung Yip Road, Wong Chuk Hang, Hong Kong

### Constitutional and Mainland Affairs Bureau

Tel: (852) 2810 3205

Fax: (852) 2523 0565

E-mail: [gisou@cmab.gov.hk](mailto:gisou@cmab.gov.hk)

Website: [www.cmab.gov.hk](http://www.cmab.gov.hk)

Address: 13/F, East Wing, Central Government Offices, 2 Tim Mei Avenue, Tamar, Hong Kong

### Labour Department

Enquiry Hotline: (852) 2717 1771 (the hotline is handled by “1823”)

#### Workplace Consultation Promotion Division

Tel: (852) 2121 8690

Fax: (852) 2121 8695

Website: [www.labour.gov.hk](http://www.labour.gov.hk)

Address: 5/F, Mong Kok Government Offices, 30 Luen Wan Street, Mong Kok, Kowloon