

NOTE: The following questions also are relevant to PIPA and the hiring process. They deal with more sensitive and/or difficult issues that may require clarification through the formal inquiry process. For that reason, we have not included them in the current draft of the PIPA and the Hiring Process FAQs. Depending on the comments we receive on each of these questions, we may consider including them in a later version of the revised document (after redrafting them for plain language).

October 24, 2005

Q - What are the rules for testing applicants as part of the hiring process?

PIPA will apply to any form of testing that involves the collection, use or disclosure of personal information. This may include interview questions, psychological testing and medical testing.

The main limitation that PIPA imposes on pre-employment testing is one of reasonableness. PIPA specifically requires that, in meeting its responsibilities under PIPA, an organization must consider what a reasonable person would consider appropriate in the circumstances.

As s. 2 of PIPA recognizes, the evaluation of what is reasonable in any given case requires a balancing of the right of individuals to protect their personal information against the need of organizations to use an individual's personal information.

Reasonableness in the context of the collection and use of personal information incorporates both relevance and legitimate purpose. To establish reasonableness, the employer needs to be able to demonstrate a legitimate purpose related to the hiring decision and to show that the personal information acquired from the test is relevant to and reasonably required for that purpose.

The following comments are based on these general principles. It is important to note that many of the issues arising in the context of pre-employment testing are complex and that no relevant cases have yet been decided under PIPA. These comments are intended only to highlight the relevant issues that an employer should consider in designing and administering tests for screening prospective employees.

To the extent they involve collection or compilation of personal information, tests used in the hiring process should incorporate accurate methods of measuring attributes that are required for the job. A first step in selecting or designing an employment screening test is to assess what attributes a position requires and how those attributes can be accurately and meaningfully measured. Bearing in

mind the reasonableness test in PIPA, an employer should then measure and balance the sensitivity and amount of the personal information required for the test against the benefit expected from collecting and using that information in the hiring process.

The more sensitive the personal information elicited from a test, the more searching the inquiry into the reasons for the test should be. Medical testing to determine the health or fitness of an applicant to perform the duties of a position is an important example of potentially highly sensitive personal information being collected from an applicant during the hiring process. Even though a prospective employee must consent to any pre-employment medical test, issues beyond consent must be considered.

The sensitivity of the personal information collected and used in pre-employment medical testing requires careful consideration of whether the testing is appropriate and, if so, what form of testing is appropriate. It also requires careful consideration of how much information is reported to the employer and the need to protect the confidentiality of the information.

When an independent medical practitioner conducts or orders the medical tests and evaluates the test results, a key issue in terms of the protection of personal information is what information should be provided to the employer and in what form. This, in turn, is related to the standard of health or fitness the employer has established for acceptable ability to perform the job functions.

Although no cases regarding medical testing have yet been decided under PIPA, it may be useful for an employer to give consideration to the following proposition:

Pre-employment medical testing may only be reasonably required for employment purposes where the employer can demonstrate that the particular medical condition or, more generally, the acceptable standard of health or fitness, being tested for is related to a bona fide occupational requirement.

Case law in the area of employment and human rights suggests the following criteria in deciding whether an employer-imposed standard of health or fitness is reasonable:

1. Has the employer adopted the standard for a purpose rationally connected to the performance of the job?
2. Has the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that work-related purpose?
3. Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose? To show that the standard is reasonably

necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the applicant without imposing undue hardship on the employer.

Having established reasonable grounds for medical testing and the appropriate standard for evaluation, the employer should consider how the medical practitioner conducting the medical tests will report test results to the employer. The least invasive means of reporting is for the employer to develop a reporting form for the medical practitioner to complete. The form lists the factors to be tested or measured and the standard to be met for each factor.

In completing the form, the medical practitioner simply certifies whether the applicant has met the relevant standards, without reporting specific results or diagnosis. For example, in testing eyesight, the medical practitioner would test for relevant factors such as visual acuity, depth perception and peripheral vision and then would report whether the applicant meets the applicable standard for each of these factors. The practitioner would not, however, report the degree to which the applicant exceeded or fell short of the standard or report the specific medical condition that was the cause of any deficiency.

In some cases, the employer can make a valid case for requiring reporting of more specific information, including medical diagnosis. For instance, testing for tuberculosis is generally accepted as appropriate in the health care field. Similarly it may be appropriate to test a prospective airline pilot for a specific degenerative eye condition.

Whether an independent or in-house medical practitioner conducts a medical test, the employer must establish appropriate restrictions regarding who will have access to the medical information and procedures for ensuring that the medical information is kept secure from unauthorized use, disclosure or destruction.

In managing the collection, use and disclosure of personal information collected by medical testing, the employer should also be mindful of an applicant's access rights under PIPA. An applicant has the right, subject to certain exceptions, to access his or her own medical information under the control of the employer as well as information about how the medical information has been used and to whom it has been disclosed.

Q - Is pre-employment drug or alcohol testing allowed?

Again, the reasonableness test applies. The issues raised are complex and the case law is developing. In many workplaces, collective agreements govern these issues. In general, the issues relating to pre-employment drug or alcohol testing are similar to those for medical testing discussed above.

The most important determinant of whether pre-employment drug or alcohol testing is reasonable is the safety sensitivity of the job or workplace. If an employer can demonstrate that a job or workplace is inherently safety sensitive and that alcohol or drug abuse by an employee would compromise workplace or public safety, it may be reasonable for the employer to use drug or alcohol testing as a screening tool when hiring employees.

As with medical testing, the consent of the employee to pre-employment drug or alcohol testing is essential and protecting the confidentiality of the test information remains critical.

Q - How does PIPA relate to the *Human Rights Code* in the hiring context?

The B.C. *Human Rights Code* (“Code”) prohibits an employer from refusing to hire a person because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person. This prohibition does not apply if the refusal is based on what is termed a *bona fide* occupational requirement.

Although what are commonly termed the “prohibited grounds” under the Code are related to the personal information of a job applicant, an allegation of improper discrimination on the basis of those grounds is not properly brought under PIPA. It is the role of the Human Rights Tribunal to determine if there has been a breach of the Code.

While the interpretation of what is a reasonable use of personal information under PIPA may draw on principles developed under the Code, the two statutes do not necessarily overlap. Employers must therefore consider the requirements of each in determining an appropriate course of action.

The Code does not prohibit the collection of personal information related to the traits set out in the Code. It does define what is an improper use of that information in the employment context. There are cases in which screening for those traits is both relevant and permissible under the Code for a particular position or organization.

For instance, because minors are prohibited by law from serving alcohol in a licensed facility, it would be permissible under both statutes to require a young person to provide proof that he or she is 19 years old or older before hiring that person as a server in a bar.

Q - What if an applicant volunteers personal information about his or her family members during the interview?

An applicant volunteering personal information during the hiring process may be considered to have consented to uses and disclosures of that information that are relevant for that purpose. However, an employer should always be cautious about using the personal information of a person other than the applicant without that person's consent, particularly if the information is not directly relevant to the hiring decision.

The best course of action when an applicant volunteers the personal information of family members during an interview is to disregard that information and not record it. This minimizes the possibility of the employer later being found to have discriminated against the applicant on the basis of marital or family status.

It is possible that information about an applicant's family members may be relevant to a decision to hire the applicant. However, the employer should consider whether it is advisable to first obtain the consent of the family member to collect, use or disclose their personal information. In this context, the employer can also refer to the PIPA Regulations which specify who can act for minors.

Q - What are the rules for collecting personal information to enroll a new employee and his or her family members in an insurance or benefit plan?

PIPA specifically provides that an individual is deemed to consent to the collection, use or disclosure of personal information for the purpose of his or her enrollment or coverage under an insurance, pension, benefit or similar plan, policy or contract if he or she is a beneficiary or has an interest as an insured under the plan, policy or contract, and is not the applicant for the plan, policy or contract.

This permits an employer to collect personal information from a new employee about members of his or her family for the purpose of their being enrolled in an insurance, pension or benefit plan. The reasonable person test would limit the collection of personal information of family members to that reasonably required for enrolment into the plan such as name, date of birth, family relationship and gender. The reasonable person test would also suggest that personal information collected by the employer in this manner and for this purpose be used for no other purpose without explicit consent of the family members.

With respect to a new employee who is reluctant to enroll, PIPA allows an employer to collect, use and disclose employee personal information without consent, with prior notice to the employee, where it is reasonably required for the purpose of establishing or managing the employment relationship. This provision

could be applied in the case of compulsory enrolment in an insurance, pension or benefit plan. Again, the reasonable person test would constrain the nature of the personal information collected by the employer and limit its use for the purpose for which it was collected.

Where a third-party carrier is administering an insurance or benefit plan, the carrier generally collects the more sensitive personal information, such as medical history, required by the plan. In these cases, the personal information should not be disclosed to the employer. If the employer collects the personal information for the carrier, or if the employer administers its own plans, the personal information collected for the purpose of enrolling an employee or family member in the plan should not be used for any other purpose.

Q - What about collecting biometric or other personal information for security purposes?

An employee's biometric information, including the employee's voice or photo image, is the employee's personal information under PIPA. Therefore, any collection, use or disclosure of an employee's biometric information by an employer for identification or security purposes, including simply requiring an employee to provide a photograph for an ID badge, is governed by PIPA.

These comments are not intended to deal with ongoing electronic monitoring or video surveillance in the workplace. Nor are they intended to deal with other forms of collection of personal information of existing employees for security purposes, such as special security clearance to meet the requirements of a new customer or client of the organization. Those uses of an employee's personal information raise complex issues that are beyond the scope of this document, which is intended to focus on personal information collected at the time of hiring.

Under PIPA, every collection, use or disclosure is subject to the reasonable person test: an organization must consider what a reasonable person would consider appropriate in the circumstances. An employer collecting, using or disclosing personal information must be able to demonstrate a legitimate purpose for doing so and that the personal information is reasonably required to meet that purpose.

PIPA permits an organization to collect, use or disclose information without consent if the collection, use or disclosure is required or authorized by law. In all cases, collection of personal information for security purposes without consent would have to be specifically authorized by law and the collection, use or disclosure would be limited by both the law authorizing the collection and by the reasonable person test under PIPA.

PIPA also allows an employer to collect, use and disclose employee personal information without consent for the purpose of establishing or managing the employment relationship. With few exceptions, as provided under PIPA, the

employee would be entitled to prior notice of the collection, use or disclosure and the purpose for it. There may be circumstances in which an employer is able to justify collecting an employee's personal information for security purposes without consent, perhaps for conducting a background check on an applicant, but such circumstances would be exceptional.

In most cases, the collection of personal information for security purposes is with the consent of the new employee and this is a good practice. However, even when consent is sought and given, PIPA allows an organization to collect, use and disclose only such information that a reasonable person would consider appropriate in the circumstances. The employer should not require a new employee to consent to the collection of personal information for security purposes unless the purpose for requiring the personal information is reasonable and the personal information requested is reasonable for that purpose.

If a job requires enhanced security, the employer should clearly define the need for a higher level of security clearance both in terms of its purpose and the class of employees to which it applies. The nature of the personal information required for the security clearance should be made clear to the employee as well as how the information will be collected and retained. The employer should ensure that the information is accurate and should make provisions for safeguarding the personal information and for ensuring that it is not used for any other purpose.

The greater the degree of sensitivity of the personal information to be collected for security purposes, the greater the onus on the employer is likely to be to be able to demonstrate that the information is required for a valid and reasonable purpose, to limit the use of that information and to ensure that the personal information is securely stored and disposed of. For instance, the level of security clearance required for a position will determine the nature and extent of personal information the employer can reasonably collect for this purpose.

Generally, personal information that can be used only to verify the identity of an individual, such as a photograph on an ID card, is considered less sensitive and intrusive than personal information that can be used for other purposes, such as videotaping employees in the workplace. Another measure of the sensitivity of personal information is the degree of intrusiveness into the employee's personal privacy.

An employer should be aware that an employee has the right of access to his or her personal information under the control of the employer as well as information about how the personal information has been or is being used and to whom the personal information has been disclosed. An employee also has the right to request the correction of an error or omission in the employee's personal information under the control of the employer.