



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Rule 28: Non-discrimination

What lawyers need to know about

Employment Within Law Firms

Spring 1995

Number 3

Introduction

This is the third in a series of bulletins provided by the Law Society of Upper Canada to assist lawyers in complying with Rule 28 of the Rules of Professional Conduct, and with the Ontario *Human Rights Code* and related legislation.

The purpose of this bulletin is to provide guidance to lawyers hiring new employees and to assist them in eliminating discriminatory practices. It is important to recognize that even a sole practitioner with one part-time clerical assistant has employment obligations under Rule 28. Law firms¹ of all sizes should review their employment practices, including recruitment, hiring, and terms and conditions of work, in light of the obligations imposed by Rule 28.

QuickFacts

- In 1994, many lawyers who responded to a consultation on Rule 28 indicated that they were not knowledgeable about human rights law, and in some cases, asserted the right to follow practices that violate the *Human Rights Code*.
- In 1991, the Law Society published a survey of lawyers called to the bar between 1975 and 1990. Seventy per cent of women respondents said they experienced sex discrimination in the course of their work as lawyers. (*Transitions in the Ontario Legal Profession*)
- Ten per cent of respondents to the same survey reported having personally experienced racial or ethnic discrimination in the course of their work as lawyers, and 17 per cent reported occurrences of racial or ethnic discrimination against others.

Tips on Avoiding Discrimination in Employment

Identify your firm's office policies, and the terms and conditions of employment for every job category.

If you already have a written office policy which sets out the rules and expectations of the workplace generally, and the terms and conditions of every job category, you will simply need to review them. If you do not have a written office policy, now is the time to commit your employment policies, terms and conditions to writing. Try to cover every predictable issue, such as disciplinary offences, sick leave, maternity leave, performance review, promotion and remuneration. Without written policies, a firm must respond to these issues as they arise, and ad-hoc decisions are often perceived as arbitrary and unfair.

Review terms and conditions of employment to identify discriminatory features.

Review any workplace policy that makes distinctions based on race, sex, creed, disability, or other grounds of discrimination covered by Rule 28 with great care. There is rarely an acceptable reason for such distinctions.

Consider the effect of seemingly "neutral" rules. Most rules are made with the present composition of the workplace in mind, and law firms do not at present reflect the working population of Ontario. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex, or of a particular creed, ethnicity, marital or family status, or on those who have (or develop) disabilities. For example, your office may have a written or unwritten dress code. It will be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches Rule 28, unless changing or eliminating the rule would cause undue hardship².

Rewrite terms and conditions of employment so that they focus on the essentials.

When you identify a workplace policy that is discriminatory on its face or in effect, consider whether you need it at all.

Prohibited grounds of discrimination

Rule 28 prohibits discrimination on any of the following grounds:

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| • race | • ancestry |
| • place of origin | • colour |
| • ethnic origin | • citizenship |
| • creed | • sex |
| • sexual orientation | • age |
| • record of offences | • marital status |
| • family status | • disability |

The Ontario *Human Rights Code* defines a number of the grounds of discrimination listed in Rule 28. For example, the types of offences at issue in respect of the term "record of offences" are limited to pardoned criminal offences and provincial offences. The definition of grounds of discrimination is discussed in Bulletin No. 1 in this series.

Most workplaces have policies that seemed like a good idea at the time they were created, but are no longer needed. If the policy does reflect a need, it may be possible to rewrite it, so that it relates more directly to that need. Finally, it is important to consider whether the policy must be applied in all situations.

As an example, consider a requirement that all lawyers or students in a firm have a driver's licence and the use of a car. This rule may make sense in a litigation firm, because of the need to travel to hearings, etc. However, the rule would effectively exclude a person who has or develops a disability that precludes him or her from driving.

In rewriting this rule, the firm would consider whether the majority of its business still involves hearings out of town. If this has changed, the travel requirement may be less essential. Even if the nature of the practice has not changed, this rule still requires revision to bring it in line with the essential requirement, which is ability to get to hearings, not access to a car. A rule that focusses on readiness and willingness to get to hearings would be less of a barrier to disabled persons who can undertake any necessary travel by other means. Finally, depending on the size of the firm and the nature of the work, it may not be necessary that all members of the firm be able to travel. In these circumstances, the rule should note that exceptions to this requirement will be considered, where an exception will not create undue hardship.

Plan to update your policies.

When you have revised your terms and conditions of employment, date the document and agree upon a date for the next review and revision. Ideally, terms and conditions should be reviewed at regular intervals, and whenever there are significant changes in the work or size of the firm, or in legislation that affects employment.

Leave room for individual assessment and accommodation responsibilities.

It is essential to have written basic policies. It is equally important to be prepared to assess the application of your policies in individual situations. A need for flexibility can arise when someone applies for employment, or with changes in the personal circumstances of existing members of the firm such as disability, change of creed, or change in family responsibilities. Rule 28 requires that the firm must reasonably accommodate individuals either temporarily or permanently for reasons linked to race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap. A range of appropriate accommodation measures may be considered.

An accommodation is considered reasonable unless it would cause undue hardship.

Create and implement an anti-harassment policy.

In addition to prohibiting discrimination, Rule 28 prohibits harassment³ on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap. Harassment by superiors, colleagues and co-workers is prohibited by Rule 28.

Create an anti-harassment policy, and ensure that everyone in the firm is familiar with the policy. Model policies dealing with sexual harassment can be obtained from the Law Society, and can be adapted for the purpose of Rule 28.

Establish a complaints procedure.

Decide in advance on a process for responding to questions and resolving complaints. The final answer on any issue should reflect the position of the firm as a whole. Large firms may wish to assign this responsibility to their managing partner or committee. Small firms will want at least one senior partner involved. Determine who in the firm should deal with questions or complaints about discrimination from clients, employees or applicants for employment. Make sure that all employees know the procedure and who is responsible at the first instance.

Further Information

Model policies on Rule 28 issues will be produced by the Law Society and made available to lawyers.

Further information about the application of Rule 28 or lawyers' ethical and professional obligations is available by contacting:

Professional Conduct
Stephen Traviss,
Senior Counsel
(416) 947-3349 or
1-800-668-7380

Practise Advisory Service
Patricia Rogerson,
Director
(416) 947-3369 or
1-800-668-7380

Footnotes

¹ The term "firm" will be used to refer to all the types of employment situations in which members of the Law Society may find themselves, including associations, partnerships, sole practice, corporate legal departments, government ministries and agencies, legal clinics, etc.

² The legal requirement of reasonable accommodation, and the point at which hardship resulting from accommodation can be considered "undue", are developing areas of human rights law. Another Bulletin in this series will provide an outline of the requirements in the context of Rule 28 obligations.

³ Harassment is defined in Bulletin No. 1 of this series.