INDEX

Α

Accommodation

- drug and alcohol testing, 138-139, 154
- •• key principle, 139
- • *Meiorin* test, 138-139
- ••• factors to be considered for undue hardship, 138
- positive result: accommodation in context of drug and alcohol testing, 154
- • undue hardship as onerous standard, 138
- medical and fitness testing, 75-76
- three-step test for determining whether standard or requirement being BFOR, 75-76
- ••• *Meiorin* test, 76

Alcohol testing, *see* Drug and alcohol testing

С

Conditional offer of employment

- education and professional or trade certification checks, 39
- introduction, xiv-xvi
- background checks to be conducted after offer accepted, xiv-xvi

- ••• credit check, xiv
- ••• education checks, xv
- ••• medical and fitness, drug and alcohol tests, xv
- • rationale for approach, xiv
- immigration, terrorism and industry-specific checks, 164
- sample background checking conditions, 203

Consent

- medical and fitness testing, 79-80
- • consent issues, 79-80
- ••• confidentiality, 80
- ••• consent to examination, 79-80
- ••• consent to release of information, 80
- police records check, 110-111, 113
- consent of applicant required, 110-111, 113
- privacy considerations, 186
- reference checking, 18, 22
- consent of applicant, obtaining, 18, 22
- ••• prior to contacting current employer, 22
- sample consent to background checks, 203

Court searches

- · court records
- • decisions vs court records, 175
- • executive summary, 175
- • jurisdictions, 177-181
- jurisdictions, 177-181
- ••• Alberta, 178
- ••• British Columbia, 178
- ••• federal, 178
- ••• Manitoba, 178
- ••• New Brunswick, 178-179
- ••• Newfoundland, 179
- ••• Nova Scotia, 179
- ••• Ontario, 179
- ••• Prince Edward Island, 179-180
- ••• Quebec, 180
- ••• Saskatchewan, 180
- ••• Northwest Territories, 180
- •• Nunavut, 180
- ••• Yukon, 180-181
- what to look for in search, 177
- employment cases where applicant is plaintiff or defendant, 177
- • statement of claim, 177
- why search court records, 176-177
- litigious employees, 176
- **CPIC records checks**, 107-108, *see also* **Police records checks**

Credit checks

• credit reporting statutes in Canada, 50-51

- principles applied by credit reporting agencies, 50-51
- executive summary, 47
- how to obtain credit history, 49-50
- human rights considerations, 55-56
- introduction, 47–48
- credit ratings, 47
- • credit reports, 47-48, 56
- privacy considerations in credit checking, 54-55
- "reasonableness" of credit checks, 54-55
- whether credit check warranted for particular job, 55
- provincial rules on credit reporting, 51–54
- Alberta, 51
- British Columbia, 51
- • Manitoba, 52
- Newfoundland and Labrador, 54
- Nova Scotia, 53-54
- • Ontario, 52-53
- Prince Edward Island, 54
- •• Quebec, 53
- Saskatchewan, 51-52
- sample consumer credit reports online, 56
- when to conduct credit check, 49
- why check person's credit, 48
- • CFO position, 48
- why not check person's credit, 49

Credit checks (cont'd)

• applicant's "right of access" to information collected, 49

D

Drug and alcohol testing

- defined, 136
- executive summary, 133
- future implications, 155
- case law, developing, 155
- introduction, 134
- human rights commission policies on pre-employment drug and alcohol testing, 142
- • Alberta, 145
- British Columbia, 145
- • Canada, 143-144
- cross-border trucking and bus operations, 152
- • Manitoba, 146
- • New Brunswick, 148
- Newfoundland and Labrador, 149
- • Northwest Territories, 150
- • Nunavut, 151
- • Ontario, 147
- Prince Edward Island, 148
- Québec, 147
- • Saskatchewan, 146
- •• Yukon, 150
- law on pre-employment drug and alcohol testing, 136-141
- accommodation, 138-139
- ••• key principle, 138-139
- ••• *Meiorin* test, 138

- ••• factors to be considered for undue hardship, 138
- undue hardship as onerous standard, 138
- additional decisions on preemployment drug and alcohol testing, 139–141
- bank's drug testing policy being *prima facie* discriminatory, 139
- ••• company's drug testing program being reasonably necessary, 139
- •••• motor vehicle coach company distinguished from other employers, 139-140
- policy struck down as company not showing undue hardship, 140
- employer's drug testing policy treating employees with positive test as disabled, 140
- background, 136
- labour arbitration decisions, 141
- ••• whether drug testing able to measure present impairment, 141
- leading case: *Entrop v. Imperial Oil Ltd.*, 136-138
- ••• flaws in pre-employment drug testing, 137-138
- ••• three-step process for determining whether policy violating OHRC, 136-137
- resources, additional, 155-156

Drug and alcohol testing (cont'd)

- what is pre-employment drug and alcohol testing, 136
- when to conduct pre-employment drug and alcohol testing, 153
- which employers should have pre-employment drug and alcohol testing policy, 152–154
- methods to be used for preemployment drug and alcohol testing, 153-154
- ••• alcohol, 153
- ••• drugs, 154
- positive result: accommodation in context of drug and alcohol testing, 154
- •• strategic considerations: reducing risk of human rights complaints and upholding policy, 154
- • what to consider, 152
- when applicant to undergo preemployment drug and alcohol testing, 152
- • who to be tested, 152-153
- ••• safety-sensitive positions, 152-153
- why conduct pre-employment drug and alcohol testing, 134-135
- legislative requirements regarding occupational health and safety, 134-135, 155
- ••• *Canada Labour Code*, Part II, 134
- ••• Ontario Occupational Health and Safety Act, 134

- recent and developing case law, 155
- reducing risk of criminal liability for occupational health and safety offences, 134-135
- ••• "criminal" workplace health and safety duty, 134-135
- ••• duty mandated by *Criminal Code* being more onerous, 134-135
- reducing risk of vicarious liability, 135
- safety, efficiency, absenteeism, 134

Ε

Education and professional or trade certification checks

- cases involving misrepresentation of education or professional qualifications, 32–36
- education fraud on résumés, 29-30
- executive summary, 29
- how to verify education or professional or trade certification, 41-43
- educational institutions, contacting, 41-42
- professional associations, contacting, 42
- trade certifications, confirming, 42-43
- introduction, 29
- privacy considerations, 43
- screening applicants out solely on basis of overqualification: cautionary note, 39-41, 44

Education and professional or trade certification checks (*cont'd*)

- • immigrants to Canada, 39-41
- ••• correlation between visible minority immigrant and overqualification status, 40
- strategic considerations, 43-44
- what to be verified, 37
- degrees or diplomas from colleges or universities, 37
- professional certifications or licences, 37
- trade certifications or qualifications, 37
- when to verify applicant's education or professional certification, 38-39
- advertising for hiring and upon receipt of job application or résumé, 38
- conditional offer of employment accepted, after, 39
- • job interview, during, 38
- whose education or professional qualifications to be verified, 31-32
- why verify applicant's education or professional certification, 30-31
- future costs, protecting against, 31
- negligence claims, reducing risk of, 30-31
- misrepresentation of educational achievements not uncommon, 30

• reputation of business and employee morale, 31

F

Fitness testing, *see* Medical and fitness testing

Н

Human rights considerations

- credit checks, 55-56
- discrimination, grounds of, 2-3
- drug and alcohol testing, 136-142
- immigration and terrorism checks, 167
- medical and fitness testing, 76-77, 85
- personal interview, 2-5
- psychometric testing, 64-66
- reference checking, 25-26

Immigration and terrorism security checks

- employer's obligation to check if applicant entitled to work in Canada, 160, 164-165
- Immigration and Refugee Protection Act (IRPA), 160
- executive summary, 159
- how to confirm entitlement to work in Canada, 161-163
- workers with social insurance number (SIN), 161
- ••• temporary work permit, 161

Immigration and terrorism security checks (*cont'd*)

- workers without social insurance number (SIN), 161–163
- introduction, 159-160
- privacy legislation, 160
- potential liability if immigration and terrorism security checks not obtained, 167
- human rights and privacy considerations, 167
- • immigration checks, 167
- terrorism checks, 167
- temporary foreign workers: special requirements, 163-164
- exemption from temporary work permit, 163-164
- HRSDC assessment of labour market, 163
- HRSDC confirmation requirement, 163
- ••• categories of exempt workers, 163
- terrorism checks, 165-167
- cross-industry legislative regime, 165-166
- how terrorism check performed, 166
- security legislation, 165-166
- • terrorism regulations, 166
- when employer required to check whether applicant permitted to work in Canada, 160, 164-165
- CHRC's guide to screening and selection, 164
- conditional offer of employment, 164

- questions not to ask, 164-165
- where Canadian citizenship being qualification or requirement, 165
- when terrorism check to be done, 166
- who entitled to work in Canada, 160-161

Internet and social network searches

- internet searches, 171-172
- risks of discrimination, accuracy, fairness, 171-172
- search engine searches, 171
- social network searches, 172-173
- increased use of, 172
- privacy concerns, 172-173

Interview, see Personal Interview

Μ

Medical and fitness testing

- accommodation questions permitted, 77-78
- case examples, 85–97
- cases on pre-employment medical and medical testing, 86–97
- whether *bona fide* requirement, 85-86
- executive summary, 71
- • accommodation, 77-78
- introduction, 72
- law on pre-employment medical or fitness testing, 74–77
- historical evolution of law on discrimination, 74–76

Medical and fitness testing (cont'd)

- ••• direct vs. indirect discrimination, 74–76
- ••• three-step test for determining whether standard or requirement being BFOR, 75-76
- •••• *Meiorin* test, 76
- human rights commission policies on pre-employment medical and fitness testing, 76-77
- ••• principles applicable, 77
- methods to be used for preemployment medical or fitness testing, 79-80
- consent issues, 79-80
- ••• confidentiality, 80
- ••• consent to examination, 79-80
- ••• consent to release of information, 80
- qualified medical professional, 80
- process following receipt of results of pre-employment medical or fitness testing, 80-81
- applicant able to perform job duties with following accommodations, 81
- applicant able to perform job duties without accommodations, 80-81
- applicant not able to perform job duties with or without accommodations, 81
- ••• letter confirming inability, 81

- questions able to be asked during hiring process re accommodation, 77-78
- whether any accommodation required, 77-78
- ••• Spinal Muscular Atrophy condition, 78
- risks with pre-employment medical or fitness testing, 73-74
- strategic considerations: reducing risk of human rights complaints, 85
- consistency, 85
- technical expertise, limits of, 85
- what constitutes pre-employment medical or fitness testing, 72-73
- when to conduct pre-employment medical testing, 78-79
- where employer uncertain about accommodation requested, 81-85
- • Meiorin three-step test, 82-84
- ••• whether accommodation of applicant creating undue hardship, 84-85
- •••• accommodation measures, examples of, 84
- •••• factors considered, 83-84
- •• whether medical or fitness requirement having legitimate work-related purpose, 82-83
- ••• whether medical or fitness requirement rationally connected to job performance, 82-83
- • undue hardship, 84-85

Medical and fitness testing (cont'd)

- whether applicant having disability, 82
- ••• "disability" defined, 82
- why conduct pre-employment medical or fitness testing, 73

Meiorin test, 82-84, 85-86, 137-139, *see also* Medical and fitness testing and Drug and Alcohol testing

Ν

Negligent misrepresentation, see also Personal interview

- avoiding negligent misrepresentation, 8
- British Columbia, special note re, 8-9
- generally, 5
- law of negligent misrepresentation, 5–8
- detrimental reliance causing damages, 8
- duty of care based on special relationship, 6
- leading Canadian case, 5-6
- misrepresentation made negligently, 7
- reasonable reliance by employee, 7-8
- representation that is untrue, inaccurate or misleading, 6-7

0

Overview

• bad hire, cost of, xi

- conditional offers of employment, xiv-xvi
- background checks to be conducted after offer accepted, xv-xvi
- objective of book, xvi
- prevalence of background checks, xii-xiii
- résumé fraud and other misrepresentations, statistics on, xi
- trends in background checking, xiii-xiv
- escurity checks increasing, xiii
- why conducting background checking, xii

Ρ

Personal interview

- executive summary, 1
- human rights considerations, 2-5
- human rights commission policies, 4-5
- •• overqualification, note on, 5
- prohibited grounds of discrimination, 2-3
- questions during interview, 3-4
- ••• questions to avoid, 4
- introduction, 1-2
- legal risks in interview, 1-2
- means of background checking, 9–12
- background checking policy, explaining, 11
- ••• types of background checks, 11
- • background preparation, 9

Personal interview (cont'd)

- demeanour of applicant, observing, 10
- information on application form and résumé, confirming, 9-10
- ••• education, 10
- ••• gaps in information, clarify, 10
- ••• prior work experience, 10
- information to be disclosed in background check, asking for, 11-12
- • interviewers, training, 9
- notes of interview retained for appropriate time, 12
- • notes of interview, taking, 11
- standard set of interview questions, drafting, 9
- negligent misrepresentation, 5-9
- avoiding negligent misrepresentation, 8
- ••• British Columbia, special note re, 8-9
- enerally, 5
- law of negligent misrepresentation, 5–8
- ••• detrimental reliance causing damages, 8
- ••• duty of care based on special relationship, 6
- ••• leading Canadian case, Cognos Inc., 5-6
- ••• misrepresentation being negligently made, 7
- ••• reasonable reliance by employee, 7-8

• representation that was untrue, inaccurate or misleading, 6-7

Police records checks

- child abuse registry searches, 128-129
- Manitoba, 128
- •• Nova Scotia, 128-129
- executive summary, 101-102
- how to obtain police records check, process, 109-114
- applicant sent to police station, 111
- pros and cons of each process, 111-112
- third-party background checking, 109-111
- no vulnerable sector search by third-party, 109
- steps in process, 110-111
- vulnerable sector check, 112-114
- ••• human rights considerations, 114
- ••• verification process, 113
- ••• vulnerable persons defined, 112
- introduction, 102
- • "conviction", meaning of, 102
- criminal offences vs. provincial offences, 102
- jurisdictions where employers able to refuse to hire applicant because of criminal record, 117-118
- • where pardon, 118

Police records checks (cont'd)

- jurisdictions where employers required to show that criminal record related to job, 118–126
- four jurisdictions, 118-119
- ••• British Columbia, 118
- ••• Prince Edward Island, 119
- ••• Quebec, 118
- ••• Yukon, 118
- offences found to be related to particular jobs, 124–126
- • "relatedness", determining, 124–126
- ••• circumstances of conviction and particulars of offence, 125
- ••• elapse of time since conviction, 125
- ••• factors generally, 124
- ••• what individual doing since conviction, 125-126
- ••• whether criminal behaviour threatening safe conduct of business, 124-125
- ••• whether individual showing any tendencies to repeat criminal behaviour, 126
- tests used in legislation, 120-123
- levels of police records checks, 106-109
- criminal records check (CRC), 106-107
- •• information check (PIC), 107-108
- vulnerable sector search (PVSC), 108-109

- mental health apprehensions, 115-116
- provincial offences, records of, 127
- refusal to hire person because of charge, although found not guilty, 126-127
- Ontario Human Rights Commission only protecting those convicted and pardoned, 126
- risk of complaint if not hired where only charged, 127
- resources, additional, 129
- role of local police and RCMP in police records checks, 109-111
- provincial police forces, 109-111
- types of police records checks, 106-109
- police criminal records check (CRC), 106-107
- police information check (PIC), 107-108
- ••• limitations of CPIC check, 114-115
- police vulnerable sector search (PVSC), 108-109
- unionized environment, issues in, 127-128
- whether collective agreement providing protection, 127-128
- vulnerable sector check, 112-114
- ways to obtain information on person's police history, 104-105
- • asking person, 104-105
- police records check, 104-105

Police records checks (cont'd)

- when to obtain police records check, 105-106
- why check police records, 103–104
- • business reputation, 104
- legislative requirement to perform criminal records check, 103
- reducing risk of liability for negligence, 103
- reducing risk of vicarious liability, 103-104
- young offenders records check, 116-117

Privacy considerations

- best practices, 185-189
- access to information on job applicants, 189
- • collection, limiting, 186-187
- consent, 186
- openness, 189
- • purposes, identifying, 186
- retention of information on unsuccessful job applicants, 187-188, 189-190
- decision records, 189-190
- ••• retention period, 189-190
- • safeguards, 188-189
- use and disclosure, limiting, 187
- credit checks, 54-55
- privacy considerations in credit checking, 54-55
- "reasonableness" of credit checks, 54-55

- whether credit check warranted for particular job, 55
- education and professional certification checks, 43
- federally-regulated employers, 183
- • PIPEDA, 183
- introduction, 183
- provincially-regulated employers, 184-185
- British Columbia, Alberta, Québec and Territories, 184
- • Manitoba, 184-185
- • Ontario, 184-185
- ••• Personal Health Information Act (PHIPA), 185
- Saskatchewan, New Brunswick, Nova Scotia, P.E.I. and Newfoundland, 184-185
- retention of records used to make decision, 187-190
- retention of information on unsuccessful job applicants, 187-188
- special rules, 189-190
- ••• PIPEDA principle, 189-190
- ••• provincial legislation, 190
- Professional or trade certification checks, *see* Education and professional or trade certification checks

Psychometric testing

- choice of psychometric tests, 62-63
- administration of test considered, 63
- • cost, 63

Psychometric testing (cont'd)

- determining skills or traits to be measured, 62-63
- tests intended to measure relevant skills or traits, 63
- criticisms of psychometric tests, 67-68
- Ontario Law Reform Commission report, 67-68
- • reliability of test, 68
- defined, 60
- executive summary, 59
- further information, 69
- introduction, 59-60
- law on psychometric testing, 64–67
- • adverse impact, 64-66
- ••• questions having negative affect, 64-66
- • whether culturally biased, 65
- ••• whether identifying mental disorders, 65
- employer conduct after discovering employee's psychological profile, 66-67
- ••• intentional infliction of mental suffering, 66-67
- human rights obligations, 64-66
- ••• adverse impact, 64-66
- ••• job relatedness, 64
- practice tips, 68-69
- • confidentiality, 69
- consistency, 68
- psychometric testing being only part of hiring process, 68
- types of, 61

- behavioural, 61
- cognitive or intelligence, 61
- personality, 61
- ••• RCMP Police Aptitude Battery (RPAB), 61
- when to conduct, 62
- conditional offer of employment accepted, after, 62
- explanation of what testing involving, 62
- why conduct, 60
- additional information obtained about applicant, 60
- • better performance, 60
- employee retention and cost savings, 60

R

Reference checking

- consequences of not checking references, 16-17
- • business cost, 16
- legal liability, 16-17
- employment verification checks, note on, 23-24
- executive summary, 15
- human rights considerations, 25-26
- • generally, 25-26
- ••• information not permitted to gather, 25-26
- • new Canadians, 26
- introduction, 15-16
- letters of reference, 24
- problems with reliability of reference checks, 18

Reference checking (cont'd)

- steps to take before contacting referee, 18–22
- consent of applicant, obtaining, 18-19, 22
- ••• prior to contacting current employer, 22
- consistency, ensuring, 20-21
- ••• example of inconsistent treatment, 21
- cross-section of referees, contacting, 19
- industry standard for executive search: 5 years and 3 jobs, 21
- information not to be given to referee, 22
- job requirements, understanding, 20
- list of questions, preparing, 21
- names of referees from all past employers, obtaining, 19
- negative information about applicant, confirming, 21
- referee having sufficient experience with applicant, ensuring, 19
- referees not named by applicant, identifying, 19-20
- who conducting reference check, 20
- ••• human resources professionals, 20
- ••• third-party screening firms, 20
- theory of reference checks, 16
- ways of obtaining references, 17-18
- • online questionnaire, 17

- when speaking with referee, 22–23
- suggestions for obtaining helpful important information, 22-23

Reference letters, *see* Reference checking

S

Sample background checking policy and procedure

- assessment of results, 200
- background checking procedure, 195–200
- confidentiality, 200
- documentation retention, 201
- introduction, 193
- privacy policy, 201
- which checks being performed, 194
- who performing checks, 194-195
- why performing background checking, 193
- Social network searches, *see* Internet and social network searches

Т

Terrorism checks, 165-166, 167, *see also* **Immigration and terrorism security checks**

U

Undue hardship

• drug and alcohol testing, 137-138

Undue hardship (cont'd)

- undue hardship as onerous standard, 138
- medical and fitness training, 73-74
- • whether accommodation of applicant creating undue hardship, 81, 83, 84-85
- ••• accommodation measures, examples of, 84
- ••• factors considered, 83-84