

# Advantage Partnership Lawyers

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## EMPLOYMENT GUIDELINES



As an employer it is important to maintain an awareness of your employee's rights. Failing to do so could give rise to a claim against you and your business and could result in you having to pay out hefty compensation.

Under the Fair Work Act, employees are protected not only once they are employed, but right from the interview stage.

Therefore, at every stage of the employment process it is necessary to be mindful of Australian employment and anti-discrimination legislation and to cultivate a thorough awareness of how it affects you.

This leaflet sets out some basic tips, with the aim of assisting employers through the process of retaining an employee.

This leaflet is a guideline only and should not be relied on as a substitute for legal advice.

## SEEKING OUT AND ATTRACTING EMPLOYEES

The reputation of your company plays a significant role in whether or not you are able to attract quality candidates. Building your reputation and advertising positive traits about your company on your company's website is a good start.



Make sure that whatever information you publish about yourself is accurate and does not amount to a misrepresentation or misleading or deceptive conduct under the Competition and Consumer legislation.

### Where to look

- Seek out referrals from business contacts, colleagues or make enquiries with a recruitment agency.
- Examine social networking sites such as "LinkedIn".

Be wary of approaching potential employees and using appropriate language. You would not want to do anything that might give rise to a claim of harassment!

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## Advertising a Position

### **What to put:**

Putting a bit of thought and detail into an advertisement can help to attract quality applicants.

Listing key information about what the position involves will help to ensure clarity from the beginning. Details you should list include:

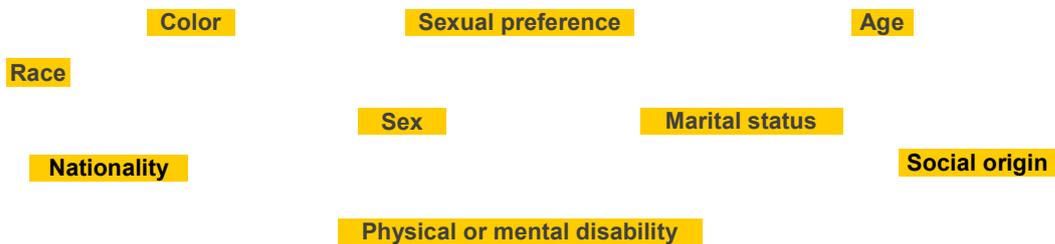
1. **Job title**
  - This should form a clear and simple headline for your advertisement
2. **Responsibilities**
  - List the primary and secondary responsibilities and key details about the role.
3. **Skills**
  - Include details of the basic skills required, together with any preferred skills
4. **Experience required**
  - Different positions require different degrees of experience. However, make sure that your specifications comply with Anti-Discrimination legislation (see below for more detail) and are reasonable in all circumstances.
5. **Preferred qualifications**
  - Again, make sure that what you specify is reasonable in all circumstances.
6. **Why apply**
  - List attractive qualities about your company together with details about your field of work. Do you have any particular area of expertise?
  - List benefits the successful candidate would receive including:
    - Financial Benefits, e.g. salary, holiday entitlements, academic assistance / tuition reimbursement.
    - Other benefits, e.g. training, social activities, opportunities to work overseas, flexible hours.

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**What not to put:**

**1. Discriminatory wording**

Under the Fair Work Act an employer may not discriminate against a potential candidate on the grounds of:



One of the areas employers tend to have the most difficulty in avoiding discriminatory wording relates to specifications of “age” It is understandable that certain jobs require specified levels of experience and similarly, that certain roles are more suited to persons of a particular age group.

Nevertheless, it is important to make sure that when advertising a position, you do not discriminate on the grounds of age alone and that any criteria concerning degrees and experience are *reasonable*.

In the case of *Van Den Heuvel v Commonwealth*<sup>1</sup> the Commissioner examined an application by Mr Van Den Heuvel against the Australian Defence Force (ADF). The complaint concerned an upper age limit that had been placed on an Aircraft Loadmaster position.

The Commissioner took the view that the age restriction was not based on the inherent requirements of the job and the ADF was required pay the applicant compensation and issue him with an apology.

It is therefore important to take note that, while the Anti-Discrimination Act does not make it totally unlawful to discriminate on the grounds of age, such activity is only acceptable in certain circumstances.

<sup>1</sup> [Department of Defence] [2000] AusHRC 8 (1 May 2000)

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So, the message to take from this is that you need to be prudent when drafting your advertisement.

According to the anti-discrimination board, a certain degree of caution is required when using the following words:

- Junior
- Senior
- Mature

Junior and senior may be acceptable when indicating the level of the position within your company's hierarchy, but not as a means of designating a particular age group. Similarly the word "mature" should be qualified by expressions such as "mature approach" and should not be used to signify an older person.

When specifying the number of years of experience you require, make sure that this specification is reasonable in all circumstances.

## SELECTING THE RIGHT CANDIDATE

### Reading a CV

Read CVs carefully. You may be able to extract clues from the writing style of the candidate. Have they made any basic spelling errors or typos?



### Conducting an Interview



The interview stage enables you to determine whether a potential candidate is as impressive in person as they are on paper.

Handy interview tips include:

- Allow enough time.
- Be friendly.
- Have questions prepared.
- If you don't feel as though you've had a full answer to your question, rephrase it.
- Listen to the answers thoroughly before asking follow up questions.
- Take notes of what is said to make later comparisons between candidates.
- Reserve your judgment for the end of the interview.

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The Anti-Discrimination laws apply to the interview stage. Make sure that the questions you ask could not be misinterpreted as discriminatory.

Remember also that your decision regarding whether or not you hire the applicant should not be based on any of the discriminatory criteria listed above (e.g. age, religion, sexual orientation), nor should it be capable of being interpreted in that way. Therefore, avoid asking questions that might be deemed too personal if it could result in any suggestion by the interviewee that you made your decision based on that personal trait.

## **Reference Checking**

Let applicants know that you will be conducting a reference check before you do it. This may help to ensure honest answers at the interview stage.



If the reference provided is a company, attempt to liaise with a direct manager or supervisor rather than HR personnel.

Avoid asking discriminatory questions. Anti-discrimination laws apply to every stage of the recruitment process.

## **BEFORE ISSUING A CONTRACT**

### **Things to consider once you have selected a candidate**



#### ***Job Description***

A clear cut job description is essential for a number of reasons. First, it ensures clarity from the beginning. It promotes a mutual understanding between the employer and the employee of what the job involves. It also gives the employee an idea of what is expected of his or her role.

Secondly, a job description provides a basis by which to measure the employee's performance. If an employee fails to carry out his or her duties, an employer may rely on the job description when alleging misconduct by the employee.

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## **Further considerations**

### **1. Award**

A job description may be used to determine whether or not an employee falls within a particular award. In the case of *Hehir v Schweitzer Engineering Laboratories Pty Ltd*<sup>2</sup>, the Commissioner noted the following:

*“To determine whether an employee is employed in a classification in the Modern Award, it is necessary to apply the “principal purpose” test. The “principal purpose” test can be addressed by determining what was the most important intention of the employer in requiring the functions of the position to be carried out by the employee. In answering such a question, it is appropriate to examine the job description, the nature of the work performed and any relevant circumstances surrounding the performance of the duties by the employee.”*

### **2. Redundancy**

Another reason for implementing a clear cut job description lies in the area of redundancy law, where job descriptions will often be a main consideration. If you make an employee redundant, yet advertise a similar position, the redundant employee may make an application against you under s 389 of the Fair Work Act alleging unfair dismissal rather than genuine redundancy. If this happens, the job description will come under scrutiny by the court. In the case of *Gillian Brooks v The Gowrie (WA) Inc*<sup>3</sup>, Fair Work Australia determined an application of this kind by looking at two job descriptions. In this instance, it was found that the jobs were sufficiently different not to allow the application.



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<sup>2</sup> [2011] FWA 3763

<sup>3</sup> [2010] FWA 1471

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