

## You Raise the Issue

### KIM MELNYK

**Question:** *I am considering hiring a firm to implement a promotion assessment regime that would assess each candidate and provide insight into those who would excel in leadership positions. Can I require my employees applying for these positions partake in the assessment?*

There are a number of issues that you should consider before requiring employees to participate in psychological or behavioural assessments. While the following considerations will vary based on the particular workplace, collective agreement, or employment contract, they provide some general observations and cautions.



First, any kind of testing that requires an employee to disclose personal information may have implications under Alberta's privacy legislation. Private businesses or non-profit organizations are governed under the *Personal Information and Protection Act* ("PIPA").

PIPA governs the collection, use and disclosure of personal information. Personal information under PIPA includes subjective information such as opinions and views of the employee.

Personal information however, may also be considered "personal employee information" if an organization *reasonably* requires a piece of personal information from an employee or potential employee for the purposes of establishing, managing or terminating the employment or volunteer work relationship with the individual employee.

Employers will often not require the consent of individuals to collect, use or disclose "personal employee information". However, such collection, use or disclosure must be *reasonably* related to the purpose of establishing, managing or terminating employment. Further, notice must be given to the employees to advise them of the purpose for which information is being collected, used or disclosed.

Thus, employers must be cognizant of the possibility that certain behavioural tests and assessments may fall outside the range of what is considered "reasonable" under PIPA. An evaluation of what is reasonable under PIPA will be contextual. A greater onus will be placed on the employer to show that the information is required for a reasonable and legitimate purpose, when the information sought to be collected is highly sensitive.

If the collection, use or disclosure is unreasonable, then consent of the employee will be required. In order to ensure consent is not vitiated, an employer should implement best practices such as giving employees advance notice of the collection use, or disclosure, or obtaining fully informed, written consent by the employee after the employee has had the opportunity to properly withhold consent.

While privacy concerns are central, an employer should also consider that while it retains the authority to determine the ability and merit of applicants for positions, it does not have an unlimited authority to do so. The tools the employer utilizes must be reasonable, administered fairly, must meet basic standards of relevance to the particular job at hand and must be reliable in that it should not be too subjective. The employer should not put undue weight on any one particular factor and the employee should know how they are being evaluated and the factors being considered.

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If the employment relationship operates in the unionized context, the employer must also be cognizant of the implications of testing in relation to the provisions of the collective agreement. The collective agreement may already contain factors for consideration in promotion, such as seniority. The test must not approach enacting a fundamental change to the existing conditions of the employment relationship of those members in the bargaining unit, otherwise the employer will risk violating the collective agreement. ▲

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