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Guidelines on Interview and Employment Application Questions

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Scope—This research article will help the reader understand lawful and unlawful interview and application questions by providing a general framework around which an interview format may be structured. In turn, this information may be used to ensure that the company's employment application form asks for information from applicants in a lawful manner. The article ends with examples of acceptable and unacceptable inquiries for interviews and application forms.

Overview

Now more than ever, it is critical to conduct lawful employment interviews, as the cost for an employer to defend itself against a claim of discrimination can be several hundred thousand dollars.

The guiding principle behind any question to an applicant—whether the question is asked by the interviewer or appears on the application form—should be, "Can the employer demonstrate a job-related necessity for asking the question?" The intent behind the question, as well as how the information is used, is what the EEOC examines to determine if any discrimination has occurred.

Therefore, an applicant should only be asked questions that are *job-related*. Before asking the question, the interviewer should first determine whether this information is really necessary in order to judge the applicant's qualifications, level of skills and overall competence for the job in question.

Disparate Impact

The Equal Employment Opportunity Commission's **Compliance Manual**, **Discussion Letter** and **Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Exams** address the issue of interview questions that, if used in making a selection decision, have a discriminatory effect by screening out protected groups for the job in question.

Hiring managers should keep in mind that even "facially neutral" (i.e., those that do not appear to be discriminatory on their face but rather are discriminatory in their effect) job requirements relating to education, experience and physical characteristics may be considered unlawful when they screen out a disproportionately high percentage of candidates on the basis of protected status and are not justified by any business purpose.

This is referred to as the disparate impact theory of discrimination. The U.S. Supreme Court first described the disparate impact theory in 1971, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-2 (1971). The Court opined that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. ... [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

Thus, to avoid problems, employers should conduct ongoing reviews of *all* job criteria and interview questions to make sure they are job- and business-related.

Bona Fide Occupational Qualification

A bona fide occupational qualification (BFOQ) is a provision that permits discriminatory practices in employment if a person's "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C. §2000e-2(e)). To establish the defense of bona fide occupational qualification, the employer has the burden of proving that a particular class of employees (for example, males applying for jobs at Hooters) would be unable to perform the job safely or efficiently and that the bona fide occupational qualification is reasonably necessary to the operation of the business. Typically, it is difficult for most employers that are not religious organizations to invoke the BFOQ defense, as the parameters surrounding it are limited. Title VII does permit employers to hire and employ employees on the basis of religion if religion is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Religious organizations do not typically need to rely on this BFOQ defense, however, because the "religious organization" exception in Title VII permits them to prefer their co-religionists.

Pre-Employment Inquires

As a general rule, state and federal equal opportunity laws prohibit the use of pre-employment inquiries that disproportionately screen out members based on protected status when the questions are not justified by some business purpose. The EEOC and state agencies take the position that the information obtained through pre-employment inquiries should be aimed solely at determining qualifications without regard to criteria based on irrelevant, non-job-related factors.

The EEOC offers the following guidance to employers who wish to avoid racial discrimination in hiring and promotions. "Race or color should not be a factor or consideration in making employment decisions except in appropriate circumstances as set forth at Section 15-VI-C of the Compliance Manual section on Race and Color Discrimination. Reasons for selection decisions should be well supported and based on a person's qualifications for the position." Accordingly, inquiries that reveal information bearing no relationship to the qualifications for the job sought (e.g., year of graduation from high school, child care arrangements, country of origin, etc.) have been viewed as evidence of an employer's discriminatory intent.

Race

Clearly, unless the information is for a legitimate purpose (see information under "Application Forms" below and "Bona Fide Occupational Qualifications" above), pre-employment questions about race can suggest that race will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular racial groups are excluded from employment, the inquiries can constitute evidence of discrimination.

The same would hold true for inquires regarding an applicant's gender, religion or national origin. Some less obvious examples of unacceptable inquires are discussed below.

Military Discharge

Military discharge inquiries are not illegal, but they are likely ill-advised. By making such inquiries, employers could subject themselves to possible disparate impact claims. The EEOC has stated that basing hiring decisions solely on military discharge status violates Title VII because discharge status has been found to adversely impact African-Americans, and it is not unequivocally tied to general business necessities. Questions relative to type of military discharge should be asked only when

the information sought is directly relevant to the job and should be accompanied by a statement to the effect that less than honorable discharges are not absolute bars to employment, depending on the nature of the job sought.

Note that inquiring about veteran status (i.e., "Are you a military veteran?") is not forbidden under law. The EEOC states in its 2006 **Discussion Letter**, "discrimination based upon veteran's status is not covered by federal EEO laws; however, state laws may prohibit such discrimination."

Educational Requirements

Certain educational requirements are obviously necessary for some jobs. However, if the educational requirement exceeds what is needed to successfully perform the job and if it disproportionately excludes certain racial groups, it may violate Title VII.

Arrest and Conviction Records

Using arrest or conviction records as an absolute bar to employment disproportionately excludes certain racial groups. Therefore, such records should not be used in this manner unless there is a business need for their use.

Whether there is a business need to exclude persons with conviction records from particular jobs depends on the nature of the job, the nature and seriousness of the offense, and the length of time since the conviction and/or incarceration.

Unlike a conviction, an arrest is not reliable evidence that an applicant has committed a crime. Thus, an exclusion based on an arrest record is only justified if it appears not only that the conduct is job-related and relatively recent but also that the applicant or employee actually engaged in the conduct for which he or she was arrested.

Application Forms

Employers should tread with caution when designing application forms. It is best to have company legal counsel review the form before distribution. As with interview questions, there are certain questions that should be avoided on application forms, such as religion, arrest record, year of graduation from high school or college, etc.

Race

A key issue is whether race can be asked on an application, as it is often legitimately needed for affirmative action purposes and/or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use separate forms or otherwise keep the information about an applicant's race separate from the application. In that way, the employer can capture the information it needs and can also ensure that it is not used in the selection decision. The same holds true for information about an applicant's gender.

Social Security Number

While not unlawful to do so, due to identity theft and general privacy concerns, employers generally should not request Social Security numbers on an employment application form because the application is often viewed by individuals who do not have a need to know this information. An employment application should request only information directly related to an applicant's ability to perform a specific job. As a general practice, employers should request SSN information only when absolutely necessary—for example, in conjunction with a background check, when completing a W-4 or when enrolling the employee in a benefits plan. This information should be requested separate from the employment application, and safeguards should be in place to protect and keep this information confidential. Employers should also implement procedures for safe disposal of this information once an employment decision has been made. Some states require security measures to be in place if applications asking for SSN information are transmitted over the Internet or sent by mail when not in a sealed envelope.

Conclusion

Employers and hiring managers should understand that although federal EEO laws do not specifically prohibit any pre-employment questions, the EEOC does look with "extreme disfavor" on questions about age, color, disability, national origin, race, religion, gender or veteran status. In addition, many state employment laws expressly forbid certain types of questions. Following is a representative list of unacceptable and acceptable questions. **Please note that this list is NOT all-inclusive.** "Helpful Resources" section that follows lists additional resources to which you may refer for more information.

Acceptable and Unacceptable Inquiries for Interviews and/or Applications

Topic	*Acceptable*	*Unacceptable*	*If Unacceptable, What Is the Reason?*
Attendance/reliability	What hours and days can you work?	How many children do you have?	Could be viewed as discriminatory toward females
Attendance/reliability	Are there specific times that you cannot work?	What religion are you?	Could be viewed as religious discrimination
Attendance/reliability	Do you have responsibilities other than work that will interfere with specific job requirements such as traveling?	What are your child care arrangements?	Could be viewed as discriminatory toward females
Attendance/reliability	Do you have a reliable method of getting to work?	Do you own a car?	Could be considered racial discrimination
Citizenship/ national origin	Are you legally eligible for employment in the United States?	What is your national origin? Where are your parents from?	Could be considered national origin discrimination

Citizenship/ national origin	Have you ever worked under a different name?	What is your maiden name?	Could be considered national origin discrimination
National origin	None	What is your father's surname? What are the names of your relatives?	Not only are these irrelevant, but they could be considered national origin discrimination
Arrest and conviction	Have you ever been convicted of a felony? * Please see note below for additional guidance	Have you ever been arrested?	Could be considered racial discrimination
Disabilities	Can you perform the duties of the job you are applying for?	Do you have any disabilities?	Could be considered discrimination against disabled persons
Disabilities	None	Have you ever filed a workers' compensation claim?	Could be considered discrimination against disabled persons
Disabilities	None	Have you ever been injured on the job?	Could be considered discrimination against disabled persons
Emergency contact information	What is the name and address of the person to be notified in case of an emergency? (Request only after the individual has been employed.)	What is the name and address of the **relative** to be notified in case of an emergency?	Could be considered national origin discrimination and possibly could violate state antidiscrimination laws relative to sexual orientation
Credit record	None	Do you own your own home?	Irrelevant and could be considered racial discrimination
Credit record	Credit references may be used if in compliance with the Fair Credit Reporting Act of 1970 and the Consumer Credit Reporting Reform Act of 1996	Have your wages ever been garnished?	Irrelevant and could be considered racial discrimination
Credit record	None	Have you ever declared bankruptcy?	Irrelevant and could be considered racial discrimination
Military record	What type of education, training and work experience relevant to job did you receive while in the military?	What type of discharge did you receive?	Irrelevant and could be considered racial discrimination
Language	What languages do you speak and write fluently? (if the job requires additional languages)	What is your native language? How did you learn to read, write or speak a foreign language?	Could be considered national origin discrimination
Organizations	Inquiry into an applicant's membership in organizations that the applicant considers relevant to his or her ability to perform job	List all clubs, societies and lodges to which you belong.	Could be considered racial or national origin discrimination
Race or color	None	Complexion or color of skin.	Could be considered racial or national origin discrimination
Weight, height, eye color	Only if there is a bona fide occupational qualification		Could be considered racial or national origin discrimination

Religion	Only if there is a bona fide occupational qualification	What is your religious denomination, religious affiliations, church, parish, pastor? What religious holidays do you observe?	Could be considered religious discrimination
Gender	Only if there is a bona fide occupational qualification	Do you wish to be addressed as Mr.?, Mrs.?, Miss? or Ms.?	Could be considered gender discrimination.
Previous and current addresses		What was your previous address? How long did you reside there? How long have you lived at your current address? Do you own your own home?	Could be considered racial or national origin discrimination
Education	Do you have a high school diploma or equivalent? Do you have a university or college degree? (if relevant to job performance)	What year did you graduate from high school or college?	Could be considered age discrimination
*Note on arrest records: Using arrest or conviction records as an absolute bar to employment disproportionately excludes certain racial groups. Therefore, such records should not be used in this manner unless there is a business need for their use. Thus, an exclusion based on an arrest record is only justified if it appears not only that the conduct is job-related and relatively recent but also that the applicant or employee actually engaged in the conduct for which he or she was arrested. According to the EEOC, whether there is a business need to exclude persons with **conviction** records from particular jobs depends on the nature of the job, the nature and seriousness of the offense, and the length of time since the conviction and/or incarceration. In addition, some states bar the use of arrest records in employment decisions.			

Helpful Resources

Employer Guidelines for Recruiting in Compliance with Equal Opportunity Employment (Wildman Harrold, Attorneys and Counselors)

Informal EEOC Discussion Letters

Federal Laws Prohibiting Job Discrimination

Acknowledgement—This article was prepared for SHRM Online by the staff of the SHRM Knowledge Center. It is intended as information and is not a substitute for legal or other professional advice.

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