

Legal Issues: Navigating the Interview Process and Avoiding a Legal Landmine

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“When did you graduate from high school?” “Do you have any children?” “Have you ever been arrested?” These questions all seem innocuous. However, the issue is who is asking the question, where are the questions being asked, and why. If these questions are asked during the interview process to a potential applicant, an employer may end up in legal hot water.

Employers typically ask questions designed to narrow the field of potential applicants—and so must be guided by the applicable federal and state laws that limit the types of questions that can be posed during the interview process. Applicants must also be mindful of potentially illegal questions. Identifying such questions and tactfully responding may mean the difference between getting a dream job or continuing the job search.

Most employers know not to ask applicants direct questions about race, religion, age, or other protected categories, but other illegal questions may not be as obvious. Employers are guided by federal and state laws that prohibit the invasion of an applicant's privacy and attempt to guarantee equal employment opportunities for individuals. Federal antidiscrimination laws prohibit an employer from eliminating an applicant based upon his or her race, color, sex/gender, age, national origin, religion, or disability. Most states have adopted their own antidiscrimination laws that protect the protected categories and may also protect additional individuals. Several states' anti-discrimination laws include sexual orientation as a protected class. Employers must also navigate laws and regulations that seek to limit their ability to pry into an individual's personal history.

Discrimination

Both federal and state laws forbid employers from discriminating against an applicant on the basis of a protected category. Employers are strictly prohibited from purposefully discriminating against an individual on the basis of his or her protected class and from engaging in practices that disproportionately limit employment opportunities that are not related to job requirements or business needs.
To remain compliant with applicable laws, an employer's hiring procedures must be job related and consistent with business necessity. Therefore, an employer must ensure all questions are related to an applicant's ability to perform the essential job functions.

Employers are permitted to ask questions based upon a bona fide occupational qualification. This means that employers are permitted to ask applicants if they have a valid driver's license, the ability to stand for periods of time, or a required degree, if such qualifications are necessary to perform a given job and are essential to the operation of the employer's business.

This exception is tied directly into the Americans With Disabilities Act (ADA). Under the ADA, an employer cannot eliminate an applicant if he or she can perform the essential functions of a position with or without a reasonable accommodation. An employer may not inquire about the possible accommodations needed by the applicant until after a job offer is made unless the applicant has an obvious disability that the employer reasonably believes would require an accommodation.

Employers and applicants should be aware that these protections apply before an applicant even walks into an interview. Many employers use outdated applications that include questions that are precluded under the anti-discrimination laws. For example, asking an applicant when he or she graduated from high school is illegal under the Age Discrimination in Employment Act because an employer can determine the applicant's age through the response given.

Employers are limited in the inquiries they can pose to applicants during an interview process and on an application form. For some legal and illegal questions that could be asked in an interview, see "Interview Questions" on page 8. While most employers and applicants can spot the obvious illegal question, it is the innocuous questions that may lead to uncomfortable moments and possible liability. It is imperative that employers and applicants, become familiar with legal and illegal questions in the application and interview process.
### Interview Questions

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<th>Inquiry Area</th>
<th>Illegal Questions</th>
<th>Legal Questions</th>
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| Age                  | • May not require an applicant’s age, date of birth, or for records to prove his/her age.  
• Year of graduation from high school.  
|                      | • An employer may ask whether an individual meets the minimum age requirements set by law. “Are you over the age of 18?” is an appropriate question.  |
| National Origin/Citizenship | • Are you a U.S. citizen?  
• Where were you/your parents born?  
• What is your “native tongue”?  
|                      | • Are you authorized to work in the United States?  |
| Race/Color           | • All questions regarding a person’s race/color will be deemed illegal under state and federal laws.  
|                      | None!  |
| Religion             | • Any question with regard to an applicant’s religious beliefs, denomination, or any questions that indicate religious customs or holidays observed.  
|                      | • After an individual is hired, an employer may inquire about religious accommodations.  |
| Marital/Family Status| • Are you married?  
• With whom do you live?  
• Do you plan to have a family?  
• What are your child-care arrangements?  
|                      | • Would you be willing to relocate if necessary?  
• Would you be able and willing to work overtime as necessary?  |
| Personal             | • How tall are you?  
• How much do you weigh?  
|                      | • Are you able to lift a 50-pound weight and carry it 100 yards, as that is part of the job?  |
| Disabilities         | • Do you have any disabilities?  
• Please complete the following medical history.  
• How’s your family’s health?  
|                      | • Are you able to perform the essential job functions?  
• Can you demonstrate how you would perform the following job-related functions?  |
| Arrest Record        | • Have you ever been arrested?  
|                      | • Have you ever been convicted of __________________?  |
| Military             | • If you’ve been in the military, were you honorably discharged?  
|                      | • In what branch of the Armed Forces did you serve?  
• What type of training or education did you receive in the military?  |

### Privacy Concerns

Another area where employers can run into issues is privacy. Employers are permitted to, and do, check into an applicant's background during the hiring process. However, an
employer's ability to pry into an applicant's background is not unlimited and the employer must abide by all applicable laws and regulations.

The federal Fair Credit Reporting Act (FCRA) provides standards for applicant screening. Under the FCRA, if an employer uses an outside consumer reporting agency to conduct a background check it must abide by set rules and regulations. The FCRA states that certain information cannot be disclosed in a consumer report. This information includes civil suits and records of arrest after seven years, and accounts placed for collection after seven years.

The FCRA also mandates that prior to obtaining a consumer report, an employer must get written authorization from the applicant. If the employer intends to eliminate a candidate based upon the information in the report, it must give the applicant a copy of the report and an explanation of his or her rights under the FCRA, which includes the right to dispute the accuracy or completeness of the information in the report. However, the FCRA limits only apply if an employer uses an outside consumer reporting agency. If an employer conducts its background check internally, it is not bound by the FCRA limitations.

**Other Interview Questions**

Employers and applicants must also be mindful of seemingly innocuous questions. Many employers ask applicants questions such as "Where do you see yourself in five years?", "Who are the five people you would like to eat dinner with?", "Do you drink?", "Do you smoke?", or "What are your strongest traits?" These questions provide employers with an insight into an applicant's background, their expected future, and their potential as an employee, but there are some concerns.

Most of the above questions are not prohibited by any state or federal laws. An employer is free to ask an applicant "What are your strongest traits?" Where an employer may run into issues is with a follow-up question. For example, while the "strongest traits" question is relatively harmless, if an applicant responds with "My religious convictions," it can lead to potential issues. How the employer responds in this situation is important. If an employer is presented with such a scenario, he or she should move on to the next question and not ask any follow-up questions that indicate any protected information. Applicants must also be cautious when responding to outwardly innocent questions. Applicants do not want to offend an interviewer with a response or open the door for potential inappropriate questions during the interview process. This is why it is crucial for both applicants and employers to be aware of the applicable laws.

**Recommendations**

Employers should develop an application process that ensures that all of its inquiries comply with applicable laws. Employers must ensure that all applicants are asked the same or similar questions, and should train its interviewers thoroughly regarding the interview process. Many employers allow young employees to conduct initial interviews
during the application process. While this may put an applicant at ease, it may also expose the employer to potential dangers if the interviewer is not properly trained.

It is imperative for applicants to be aware of what is not an appropriate question during an interview. Career services professionals should provide students with information on what types of questions pose problems and tactful responses to such questions. While an applicant may not want to negatively impact their chances of landing a dream job, he or she should be aware it is acceptable to inform an employer they are uncomfortable discussing a certain topic if it falls within a protected category.

Additionally, with the increase in the use of social networks (Facebook, Twitter, LinkedIn, and so forth) applicants must ensure they do not post anything on these sites that would impact their ability to obtain employment. A funny photo at a fraternity party may seem like a good idea at 2 a.m., but it may not look as funny to an employer that wants to hire the future leaders of its company.

While the interview process may be a stressful endeavor for both the applicant and the employer, it does not have to result in liability or uncomfortable experiences. By learning what to do, and more importantly what not to do, such situations can be avoided.

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